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8 **SAVE THE PLASTIC BAG COALITION**

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF MARIN

12 SAVE THE PLASTIC BAG COALITION,) Case No. CIV 1100996
13 an unincorporated association,)
14) Assigned to Judge M. Lynn Duryee
15) Dept. L
16)
17)
18) **PETITIONER'S OPENING BRIEF IN**
19) **SUPPORT OF PETITION FOR WRIT OF**
20) **MANDATE UNDER CEQA AND**
21) **DECLARATORY JUDGMENT;**
22) **DECLARATION OF PETER M. GRANDE;**
23) **DECLARATION OF STEPHEN L.**
24) **JOSEPH**
25)
26) [Supporting Requests for Judicial Notice filed
27) herewith]
28)
29)
30) Hearing date: September 13, 2011
31) Time: 9:00 a.m.
32) Department: L
33)
34)
35)

18 Respondents.

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1 **I. INTRODUCTION**

2 Ordinance No. 3553 (the “Ordinance”) was adopted by Marin County (the “County”) on
3 January 25, 2011. (AR tab E at 1-5.)¹ Effective January 1, 2012, the Ordinance bans plastic
4 bags at virtually all retail stores in unincorporated areas of the County. It allows such stores to
5 provide paper bags to customers for a fee of not less than 5 cents.

6 Prior to adoption of the Ordinance, Petitioner filed objections (the “Objections”). (AR
7 tab F.) A copy of the Objections is attached as Exhibit A hereto and incorporated herein by
8 reference. All of the CEQA objections therein are based on environmental grounds. Petitioner
9 urges this Court to review the Objections as they contain detailed arguments and scientific
10 evidence supporting Petitioner’s case, which are too lengthy to be fully restated in this brief.
11 Petitioner made a fair argument that the Ordinance might result in significant negative
12 environmental impacts as a result of increased numbers of paper and reusable bags and
13 demanded that the County prepare an EIR.

14 The County did not prepare an EIR or even an Initial Study. Instead, the County relied
15 on CEQA categorical exemptions. (AR tab E at 6.) As we show, the County was not entitled to
16 rely on such exemptions as the justification for not preparing an EIR.

17 Petitioner filed a Verified Petition For Writ Of Mandate to annul the Ordinance. The
18 First Cause of Action alleges violation of CEQA. The Second Cause of Action alleges that the
19 Ordinance is preempted by AB 2449 (Pub. Res. Code §§42250-42257).

20 In July 2011, the California Supreme Court issued its opinion in *Save The Plastic Bag*
21 *Coalition v. City of Manhattan Beach*. (Cal. Supreme Court, No. S180720, decision issued July
22 14, 2011.) This case is directly impacted by the opinion in the Manhattan Beach case. The
23 opinion is discussed in Section III of this brief. Based on the Manhattan Beach decision, Marin
24 County was required to prepare an EIR.

25
26
27
28 ¹ Exhibits identified by “Doc #” in the Objections are identified by the same “tab #” in the
Administrative Record. E.g., Doc # 25 in the Objections is AR tab # 25.

1 **II. STATEMENT OF FACTS**

2 **A. The Petitioner**

3 As stated in the attached Declaration of Peter M. Grande, Petitioner is an unincorporated
4 association of plastic bag manufacturers and other citizens that was formed in June 2008. Its
5 purposes are to respond to environmental misinformation about plastic bags and ensure that the
6 environmental impacts of banning plastic bags are made known to decision-makers and the
7 public in the public interest. Petitioner contends that there is insufficient justification for
8 banning plastic bags based on environmental facts. Petitioner seeks to promote and enforce the
9 informational purposes of CEQA in this action.

10 Further verified allegations regarding standing are contained in the Petition for Writ of
11 Mandate ¶15 to ¶51 and the Grande declaration.

12 **B. The Passage Of The Ordinance And Petitioner’s Objections**

13 On December 14, 2010, the County Board of Supervisors (the “Board”) held its first
14 reading of the draft Ordinance. On December 28, 2010, in accordance with Pub. Res. Code
15 §21177(a) and (b), Petitioner timely asserted and submitted the attached Objections. On January
16 25, 2011, the Board held a meeting and public hearing.

17 In its oral comments before the Board, Petitioner reasserted the attached Objections. On
18 January 25, 2011, following the conclusion of the public hearing, the Board adopted the
19 Ordinance banning plastic bags and requiring that stores charge at least a 5 cents for paper bags,
20 effective January 1, 2012. (AR tab E at 1-5.)

21 **C. The County Did Not Prepare An Initial Study Or EIR And Relied On**
22 **Categorical Exemptions Instead**

23 The County admits that *paper* bags have *worse* environmental impacts than plastic bags.
24 Section 1 of the Ordinance states as follows:

25 WHEREAS, the use of single-use paper bags result in greater
26 (GHG) emissions, atmospheric acidification, water consumption,
27 and ozone production than single use plastic bags.

28 Section 1 of the Ordinance also states that all types of bags, plastic, paper, and reusable, have
“severe environmental impacts.” Despite these admissions, the County did not prepare an Initial

1 Study or an EIR prior to adopting the Ordinance. Instead, the County relied on CEQA
2 categorical exemptions and a single sentence assertion in its exemption notice that the
3 Ordinance would be good for the environment. (AR tab E at 6.)

4 **D. Petitioner Made A Fair Argument Regarding The Negative Environmental**
5 **Impacts Of Paper And Reusable Bags**

6 At pages 11 to 34 of the Objections, Petitioner made a fair argument that the Ordinance
7 will or might result in significant negative environmental impacts as a result of a switch by
8 consumers to paper bags and reusable bags. Petitioner cited substantial and extensive scientific
9 evidence, including but not limited to the Franklin (AR tab #20), Scottish (AR tab #21),
10 Boustead (AR tab #22), and ULS Reports (AR tab #23).

11 For example, the Scottish Report found that the life cycle of paper bags results in:

- 12 • 3.3 times more emissions of greenhouse gases than plastic bags;
- 13 • 1.1 times more consumption of nonrenewable primary energy than plastic bags;
- 14 • 4.0 times more consumption of water than plastic bags;
- 15 • 1.9 times more acid rain than plastic bags;
- 16 • 1.3 times more negative air quality than plastic bags;
- 17 • 14.0 times more water body eutrophication than plastic bags; and
- 18 • 2.7 times more solid waste production than plastic bags.

19 The Scottish Report also includes the following finding:

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

26 Based on the four reports, Petitioner demanded that the County complete and certify an
27 EIR prior to adopting the Ordinance or any ordinance banning plastic bags. The County did not
28 respond in any way to Petitioner’s Objections or any of the evidence that Petitioner presented.

29 **E. The County’s Paper Bag Fee is Lower Than Fees In Jurisdictions That Have**
30 **Completed EIRs**

31 Los Angeles County (“LA County”), the City of San Jose, and the City of Santa Monica
32 have banned plastic bags. Prior to adopting their ordinances, they completed EIRs. The EIRs

1 included analyses of the minimum amount of a paper bag fee that would be required to offset
2 the environmental impacts of an increased number of paper bags. Based on the EIRs, they have
3 required in their ordinances that stores charge the following minimum fees for paper bags:

- 4 • LA County: **10 cents** (AR tab #91)
- 5 • Santa Monica: **10 cents** (Santa Monica Mun. Code §5.45.030)
- 6 • San Jose: **10 cents** initially, increasing to **25 cents** in 2014 (AR tab #72)

7 In contrast, Marin County’s Ordinance, which was adopted without an EIR or even an Initial
8 Study, requires only a **5-cent** minimum fee for paper bags.

9 **III. THE MANHATTAN BEACH CASE**

10 In July 2008, the City of Manhattan Beach passed an ordinance banning plastic bags
11 without preparing an EIR. The City prepared an Initial Study finding that there would be no
12 significant negative environmental impact as the city was small. Petitioner objected and
13 demanded that the city prepare an EIR on the ground that a shift to paper bags would have a
14 significant negative impact on the environment. **It is important to note that when Manhattan**
15 **Beach passed its ban in July 2008 only San Francisco and Malibu had banned plastic bags.**

16 The Supreme Court ruled as follows:

- 17 A. The Save The Plastic Bag Coalition has legal standing to file CEQA actions. (Slip
18 Op. at 9-17.)
- 19 B. The City of Manhattan Beach was too small to have been required to prepare an
20 EIR. The population is only 33,852. “There are only two supermarkets, three (and
21 two future) drug stores, and one Target store known to be high volume users of
22 plastic shopping bags in the City which would be affected by the ban.” (Slip Op. at
23 3-4.)
- 24 C. The court stated: “[T]he analysis would be different for a ban on plastic bags by a
25 larger governmental body, which might precipitate a significant increase in paper
26 bag consumption.” (Slip Op. at 22.)
- 27 D. The court stated:
- 28

1 While cumulative impacts should not be allowed to escape review
2 when they arise from a series of small-scale projects, that prospect
3 does not appear in this case. *[That is, as of July 2008.]* According to
4 plaintiff, the movement to ban plastic bags is a broad one, active at
levels of government where an appropriately comprehensive
environmental review will be required.”

5 (*Manhattan Beach*, Slip Op. at 23, n.10.)

6 In summary, EIRs are required for plastic bag bans by (i) “larger” cities and counties
7 and (ii) small cities and counties based on the cumulative impacts.

8 **IV. THE CHANGED SITUATION IN 2011**

9 At pages 34-36 of the Objections, Petitioner pointed out that the following bans had
10 been adopted:

- 11 • The City and County of San Francisco adopted a plastic bag ban in 2007.
- 12 • Los Angeles County (“LA County”) adopted a plastic bag ban on November 16,
13 2010 and prepared and certified an EIR. (AR tab #91.) (In the *Manhattan Beach*
14 opinion which was as of July 2008, this was referred to a “possible” future ban. Slip
15 Op. at 23.)
- 16 • The City of San Jose adopted a plastic bag ban on December 14, 2010 and prepared
17 and certified an EIR. (Doc #72.)
- 18 • The City of Santa Monica adopted a plastic bag ban on January 25, 2011 and
19 prepared and certified an EIR. (This was the same day as the adoption of the Marin
20 County ordinance and was mentioned in the Objections as a “proposed” ban.)

21 The County acknowledged the above bans. (AR tab #83 at p. 6.) Petitioner contends that
22 based on these bans, the cumulative impacts of a shift to paper bags have reached critical mass.

23 **V. THE LOS ANGELES COUNTY EIR**

24 LA County prepared an EIR. AR tab #86 is a summary of the EIR.²

25 CEQA Guidelines §15065(a)(3) states that a lead agency shall find that a project may
26

27 ² At page 39 of the Objections, Petitioner stated: “The Los Angeles County EIR is at: [URL]. It
28 is not provided herewith as it is too large to send via e-mail. However, STPB requests that it be
made part of the administrative record.” The EIR and the Statement of Overriding
Considerations are at http://dpw.lacounty.gov/epd/aboutthebag/ordinance_govt.cfm.

1 have a significant effect on the environment when “the project has the potential to achieve
2 short-term environmental goals to the disadvantage of long-term environmental goals.”
3 Accordingly, LA County adopted a goal-oriented threshold of significance based on the
4 following objectives:

- 5 • Inconsistency with laws and regulations in managing GHG emissions.
- 6 • Inconsistency with the goal to reduce greenhouse gas emissions to 1990 levels by
7 2020, as required by AB 32.

8 (LA County EIR at 3-3.14-15, attached hereto as Exhibit B.)

9 Based on the foregoing threshold of significance, the LA County EIR determined that
10 even a 10-cent fee on paper bags and promoting and distributing reusable bags would not
11 ensure that there would be no significant negative environmental impacts caused by a shift from
12 plastic to paper. The LA County EIR contains a section entitled “Significant Unavoidable
13 Adverse Impacts That Cannot Be Mitigated To Below The Level Of Significance” which states:

14 Based on a conservative analysis, the County has determined that
15 cumulative indirect [greenhouse gas] emissions resulting from
16 implementation of the recommended ordinances will have the
17 potential to result in significant unavoidable impacts even with
18 implementation of [a paper bag fee and promotion and distribution
19 of reusable bags], which will be expected to reduce significant
20 adverse impacts to GHG emissions to the maximum extent feasible.

19 (LA County EIR at IV-1-5, attached hereto as Exhibit C.)

20 As banning plastic bags, imposing a fee on paper bags, and promoting and distributing
21 reusable bags would not avoid significant negative environmental impacts, the LA County
22 Board of Supervisors on November 16, 2010 adopted a “Statement of Overriding
23 Considerations” to enable adoption of its ordinance notwithstanding the findings in the EIR.

24 In addition, the Los Angeles County EIR determined that each and every polypropylene
25 and cotton reusable bag distributed in Los Angeles County must be used at least 104 times
26 before delivering environmental benefits compared to plastic bags. The environmental impact
27 of reusable bags is not even mentioned in the Agricultural Commissioner’s letter.

28

1 **VI. ARGUMENT**

2 The standard of review is whether the agency has abused its discretion. “Abuse of
3 discretion” exists if the agency failed to proceed in a manner required by law, or if its decision
4 was not supported by “substantial evidence” in the record. (Pub. Res. Code §21168.5.)

5 **A. The Ordinance is a Project Under CEQA**

6 The Ordinance is a “project” subject to CEQA as the “whole of [the] action...has a
7 potential for resulting in either a direct physical change in the environment, or a reasonably
8 foreseeable indirect physical change in the environment.” (Pub. Res. Code §21080(c), (d),
9 §21151; CEQA Guidelines (14 Cal Code. Regs.) (hereinafter “Guidelines”) §15378(a);
10 *Manhattan Beach*, Slip Op. at 17, n.7.)

11 **B. Petitioner Has Standing**

12 Petitioner has standing. (*Manhattan Beach*, Slip Op. at 9-17.)

13 **C. Petitioner Made A “Fair Argument”**

14 Petitioner made a fair argument in the Objections that banning plastic bags in Marin
15 County may have significant *cumulative* negative impacts on the environment as a result in the
16 increase in the number of paper bags, especially after taking into account bans in other places.
17 (The cumulative impacts discussion is at pages 34-36 of the Objections.) Therefore, the County
18 was required to prepare an EIR before the proposed ordinance could be adopted. (Pub. Res.
19 Code §21080(c), (d), §21151; Guidelines §15378(a).)

20 Pub. Res. Code §21080(c)(1) and Guidelines §15061(b)(3) is known as the “Common
21 Sense Exemption.” Guidelines §15061(b)(3) states as follows:

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

24 In *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, the Court of Appeal
25 confirmed that all legitimate disputes must be settled in favor of preparing an EIR:

26 If legitimate questions can be raised about whether the project might
27 have a significant impact and there is any dispute about the
28 possibility of such an impact, the agency cannot find with certainty
that a project is exempt.

(*Id.* at 117.)

1 In *Mejia v. City of Los Angeles (California Home Development, LLC)* (2005) 130
2 Cal.App.4th 322, the Court of Appeal stated that “deference to the agency’s determination is
3 not appropriate and its decision not to require an EIR can be upheld only when there is no
4 credible evidence to the contrary.” (*Id.* at 333.)

5 Guidelines §15065(a)(2) states that a lead agency “shall” require an EIR where there is
6 substantial evidence that “[t]he project has the potential to achieve short-term environmental
7 goals to the disadvantage of long-term environmental goals.” That is certainly the case here
8 where the negative environmental impacts of paper and reusable bags could exceed the positive
9 environmental impacts of banning plastic bags.

10 **One of the County’s goals in adopting the ordinance is to “reduce the amount of**
11 **GHG (greenhouse gas) emissions expended in producing single-use bags.” (AR tab #83 at**
12 **p.2.) The LA County EIR confirms that Marin County will fail to achieve that goal.**

13 The County must conduct an EIR if the impacts are “cumulatively considerable.”
14 (Guidelines §15065(3).) Guidelines §15355(b) states that “[c]umulative impacts can result from
15 individually minor but collectively significant projects taking place over a period of time.”

16 Applying the same significance criteria as LA County, and in light of the cumulative
17 impact of the Ordinance, Petitioner has demonstrated that the likely switch to paper bags by a
18 large number of consumers will have a significant negative impact on the environment. The
19 Supreme Court confirmed that “a significant increase in paper bag consumption” triggers the
20 requirement of an EIR. (*Manhattan Beach*, Slip Op. at 22.)

21 **D. The County Cannot Rely On CEQA Categorical Exemptions**

22 If the County believed that it was justified in not preparing an EIR, it was required to
23 conduct an Initial Study before adopting the Ordinance. (Pub. Res. Code §21080(c).) It did not
24 do so. This is an elementary requirement that the County completely ignored. An Initial Study
25 is necessary to determine whether an EIR is required. **Failure to conduct an Initial Study**
26 **constitutes a per se violation of CEQA.** (Guidelines §15063(a): “[T]he Lead Agency *shall*
27 conduct an Initial Study to determine if the project may have a significant effect on the
28 environment.”)

1 The County relied on two CEQA categorical exemptions: Guidelines §15307 and
2 §15308. (AR tab E at 6.) **Both §15307 and §15308 state that they only apply “where the**
3 **regulatory process involves procedures for protection of the environment.” There are no such**
4 **regulatory procedures in this case that provide for protection of the environment. Zero!**
5 **Therefore the County absolutely cannot rely on §15307 and §15308.**

6 Further, Guidelines §15300.2 states as follows:

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

9 When the Oakland adopted an ordinance banning plastic bags, it relied on a categorical
10 exemption. The ordinance was challenged and the Superior Court ruled as follows: (Doc #46.)

11 The City cannot rely on a categorical exemption for a project where
12 there is a “reasonable possibility” that the activity will have a
13 significant effect on the environment due to “unusual
14 circumstances.” (CEQA Guidelines § 15300.2(c).) The City’s
15 determination whether the Ordinance will have a significant effect
16 on the environment is reviewed under the fair argument standard.
[Citation omitted.] The question is whether “on the basis of the
while record, there was no substantial evidence that there would be a
significant [environmental] effect.” [Citation omitted.]

17 A shift in consumer use from one environmentally damaging
18 product to another constitutes an “unusual circumstance” of an
19 activity that would otherwise be exempt from review under CEQA
20 as activity undertaken to protect the environment. (See, e.g., *Magan*
21 *v. County of Kings* (2002) 105 Cal.App 4th 468, 474.) The court also
22 finds that substantial evidence in the record supports at least a fair
argument that single-use paper bags are more environmentally
damaging than single-use plastic bags.”

23 (*Coalition To Support Plastic Bag Recycling v. City of Oakland, Alameda Superior Court, Case*
24 *No. RG07-339097.*)

25 In *Davidon Homes, supra*, the Court of Appeal ruled as follows:

26 In categorical exemption cases, where the agency establishes that the
27 project is within an exempt class, the burden shifts to the party
28 challenging the exemption to show that the project is not exempt
because it falls within one of the exceptions listed in Guidelines
section 15300.2. The most commonly raised exception is
subdivision (c) of section 15300.2, which provides that an activity

1 which would otherwise be categorically exempt is not exempt if
2 there are “unusual circumstances” which create a “reasonable
3 possibility” that the activity will have a significant effect on the
4 environment. A challenger must therefore produce substantial
5 evidence showing a reasonable possibility of adverse environmental
6 impact sufficient to remove the project from the categorically
7 exempt class....

8 In the case of the common sense exemption, however, the agency’s
9 exemption determination is not supported by an implied finding by
10 the Resources Agency that the project will not have a significant
11 environmental impact. Without the benefit of such an implied
12 finding, the agency must itself provide the support for its decision
13 before the burden shifts to the challenger. Imposing the burden on
14 members of the public in the first instance to prove a possibility for
15 substantial adverse environmental impact would frustrate CEQA’s
16 fundamental purpose of ensuring that government officials “make
17 decisions with environmental consequences in mind.” (*Bozung v.*
18 *Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283.)

19 An agency's obligation to produce substantial evidence supporting
20 its exemption decision is all the more important where the record
21 shows, as it does here, that opponents of the project have raised
22 arguments regarding possible significant environmental impacts....
23 Moreover, the showing required of a party challenging an exemption
24 under Guidelines section 15061, subdivision (b)(3) is slight, since
25 that exemption requires the agency to be certain that there is no
26 possibility the project may cause significant environmental impacts.
27 If legitimate questions can be raised about whether the project might
28 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.

(54 Cal.App. 4th at 115-117.)

21 Marin County produced no evidence and made no findings in support of a categorical
22 exemption. But even if it had done so, Petitioner made a “fair argument” to the contrary which
23 means that a categorical exemption would be unavailable to the County.

24 Presumably, the County would rely on its 5-cent fee on paper bags as a basis for arguing
25 that there is no possibility that its Ordinance would have a significant impact on the
26 environment and it could rely on a categorical exemption. At pages 3-4 of a letter dated
27 December 7, 2010 to the Board of Supervisors, the Agricultural Commissioner cites the
28 example of Washington, D.C. which has had a 5-cent fee on plastic and paper bags since

1 January 1, 2010 and states as follows:

2 It is still too early to document reductions with certainty but early
3 information from multiple sources indicates that the fee may have
4 shifted as many as two-thirds of District shoppers off single-use
5 bags onto reusable bags. The staff report for the County of Los
6 Angeles' recent single-use bag ordinance cited a significant 86
7 percent decrease in bags issued per month in Washington, D.C. The
8 District of Columbia Office of Tax and Revenue estimated that
9 affected establishments issued about 3.3 million bags in January
10 2010, down from the estimated 22.5 million bags issued per month
11 in 2009. As reported by CNNMoney.com on October 5, 2010, large
12 grocers like Giant, Safeway and Harris Teeter have reported that bag
13 use by their customers has fallen by 60%. Confirming this
14 downward trend, the annual Alice Ferguson Foundation reported a
15 50% decrease in the number of plastic bags found during its annual
16 Anacostia River watershed cleanup.

17 That is the totality of what the letter says about the paper bag fee issue. Further, the letter says
18 nothing about the negative environmental impacts of reusable bags.

19 As pointed out at pages 20-21 of the attached Objections, the Agricultural
20 Commissioner's letter fails to mention that the DC Government and retailers instituted a
21 massive reusable bag giveaway program. (AR tab #80.) A huge number of free reusable bags
22 given to DC shoppers as follows: (AR tabs ##58-63.)

- 23 • Giant Food stores gave away 250,000 reusable bags.
- 24 • CVS pharmacies in association with the DC Government gave away 112,000
25 reusable bags.
- 26 • Safeway stores gave away 10,000 reusable bags.
- 27 • Target stores give a 5-cent discount for each reusable bag that customers provide.
- 28 • Section 6(b) of the DC law states that part of the fee collected by stores shall be
remitted to the city and used for "Providing reusable carryout bags to District
residents, with priority distribution to seniors and low-income residents." (AR tab
#84.) ***Marin County does not have a similar program!***

29 According to the U.S. Census, the number of households in DC is 248,338. (AR tab
30 #57.) That means that on average, every DC household received 1.5 free reusable bags in 2010.

31 That explains the upsurge in the number of reusable bags. When the reusable bags given away
32 in 2010 become dirty and worn, they will be discarded. At that point, the majority of consumers

1 may prefer to pay the 5-cent fee rather than purchase more expensive reusable bags, although
2 the city will keep buying bags to give to seniors and low-income residents.

3 Further, the DC regulations provide that stores may credit customers 5 cents for every
4 reusable bag that a customer brings to the store to carry his or her goods. (AR tab #80.) If they
5 do give such credits, stores may keep 2 cents out of every five cents they charge for plastic or
6 paper bags. **The Marin County ordinance does not include a reusable bag credit program.**

7 For the foregoing reasons, the DC experience does *not* establish that a 5-cent fee on
8 paper bags in Marin County means that it is *certain* that there is *no possibility* that there *may* be
9 a significant negative impact on the environment.

10 **E. Based On The Manhattan Beach decision, Marin County Was Required to**
11 **Prepare An EIR**

12 If every city or county could rely on a categorical exemption to avoid preparing an EIR
13 prior to banning plastic bags, then the Supreme Court would have said so. It did not. On the
14 contrary, the Supreme Court confirmed EIRs must be done by some cities and counties prior to
15 banning plastic bags. There is no blanket exemption.

16 Based on the Supreme Court’s decision, Marin County was required to prepare an EIR if
17 **either or both** of the following are true:

- 18 • Marin County is sufficiently “larger” than the City of Manhattan Beach such that its
19 plastic bag ban may have a significant negative environmental impact as a result of
20 the increased number of paper bags (Slip Op. at 22);
- 21 • There has been a “series of small-scale projects” such that “the cumulative impacts
22 should not be allowed to escape review. (Slip Op. at 23, n.10.)

23 According to the U.S. Census Bureau, the population of Marin County, including all of
24 its cities and towns, was 252,409 in 2010. That makes it 7.5 times larger than Manhattan Beach.
25 Although the Ordinance only applies to the unincorporated areas of the County, the Agricultural
26 Commissioner’s letter to the Board of Supervisors (AR tab #83) states as follows:

27 Page 2: The County of Marin has approximately 50 retail
28 establishments within its jurisdiction and 440 in the incorporated
cities and towns of Marin for a total of 490 retail stores. The Marin
County Hazardous and Solid Waste Joint Powers

1 Authority...estimates that Marin residents use upwards of 138
2 million bags annually that end up in Marin's landfill or the waste
stream.

3 Page 8: It appears that a city working group will work to modify the
4 County's ordinance for adoption in most or all cities....

5 Page 8-9: [O]utreach is expected to be focused on...Encouraging all
6 cities and towns in Marin to pass the model statewide ordinance,
7 effective January 1, 2012. The cities of San Rafael and Mill Valley
8 are seriously considering passage of the model ordinance and
entering into a Memorandum of Understanding (MOU) with our
Weights and Measures Department for enforcement.

9 Page 9: There are 490 retail business establishments qualified for
10 plastic bag inspection and enforcement procedures on a countywide
basis.

11 It is submitted that Marin County is sufficiently large that an EIR is required. Further, as
12 the County acknowledged, there has been a cumulative build-up of other cities and counties that
13 have banned plastic bags, including neighboring San Francisco. (AR tab #83 at p. 6.) This case
14 satisfies the criteria in the *Manhattan Beach* opinion.

15 **F. The CEQA Action Was Timely Filed**

16 This action was timely filed within 30 days of the Ordinance. (Pub. Res. Code §21167.)

17 **G. The Ordinance Is Preempted By AB 2449**

18 In 2006, the Legislature passed AB 2449. (Pub. Res. Code §§42250-57.) The
19 Legislature declared its legislative intent therein as follows:

20 It is the intent of the Legislature, in enacting Chapter 5.1 (commencing
21 with section 42250) Part 3 of Division 30 of the Public Resources Code,
22 to encourage the use of reusable bags by consumers and retailers and to
reduce the consumption of single-use bags.

23 The Governor's signing statement includes the following language:

24 I am signing Assembly Bill 2449 that implements a statewide plastic bag
recycling program.

25 While this bill may not go as far as some local environmental groups and
26 cities may have hoped, this program will make progress to reduce
27 plastics in our environment. This measure requires every retail
28 establishment that provides its customers plastic bags to have an in store
plastic bag recycling program, a public awareness program promoting
bag recycling, post recycling requirements, record keeping and penalties.

1 ***Because this is a statewide program the bill precludes locals from***
2 ***implementing more stringent local requirements.*** The bill sunsets in six
3 years and this will allow locals time to develop additional programs or
4 the legislature to consider a more far reaching solution. (Emphasis
5 added.)

6 (AR tab #92, <http://www.scribd.com/doc/1814000/5/SIGNING-MESSAGES>, formerly at
7 http://gov.ca.gov/pdf/press/ab_2449_sign.pdf.) The complete legislative history of AB 2449 is
8 contained in the Requests for Judicial Notice filed herewith.

9 AB 2449 sunsets and expires on January 1, 2013 (Pub. Res. Code §42257), one year
10 after the Ordinance takes effect on January 1, 2012.

11 In fact, the County ***admits*** that a statewide scheme would invalidate the Ordinance.
12 Ordinance §5.46.040 states as follows:

13 **RECOGNITION OF STATEWIDE IMPORTANCE.** The County of
14 Marin recognizes carry-out bag regulation as a matter of statewide
15 interest and concern and is best applied uniformly throughout the state.
16 In the absence of statewide regulation the County of Marin believes it is
17 in the best interest of the County of Marin to regulate carryout-bags.

18 The problem for Marin County is carryout bags ***are*** regulated statewide by AB 2449.

19 If plastic bags are banned locally, stores in those localities will not be subject to AB
20 2449 and the statewide scheme will be defeated. We can see this from two examples.

21 First example: Under AB 2449, stores that provide plastic bags to customers must install
22 plastic bag collection bins for the purpose of recycling plastic bags.³ Pub. Res. Code §42252(b).
23 Any member of the public may use those bins to deposit any discarded plastic bags. If stores in
24 the County are prohibited from handing out plastic bags, then all such stores would be
25 permitted to remove their plastic bag recycling bins. Such bins are used to collect and recycle
26 all types of plastic bags, including bags that are not prohibited under the Ordinance, including
27 but not limited to retail bags, produce bags, newspaper bags, and dry cleaning bags. There
28 would be no way to recycle such bags as they are not accepted in curbside recycling programs

³ AB 2449 applies to “stores.” (Pub. Res. Code §42251.) A “store” is defined as a supermarket or large retail store “that provides plastic carryout bags to its customers.” (Pub. Res. Code §42250(e).) The definition of “stores” in the Marin County Ordinance includes retail establishments that are defined as “stores” in AB 2449.

1 in the County. The statewide statutory scheme of AB 2449 would be defeated.

2 Second example: AB 2449 states that “[t]he operator of the store ***shall*** make reusable
3 bags available to customers within the store, which may be purchased and used in lieu of using
4 a plastic carryout bag or ***paper*** bag.” (Pub. Res. Code §42252(e).) If plastic bags are banned by
5 local ordinances, such stores will not be ***required*** to make reusable bags available to customers
6 in lieu of ***paper*** bags. That is because only stores that provide plastic bags are required by AB
7 2449 to also provide reusable bags. (Pub. Res. Code §42250(e).) Therefore, the declared
8 legislative intent of AB 2449 “to encourage the use of reusable bags by consumers and retailers
9 and to reduce the consumption of single-use bags,” ***including paper bags***, would be defeated.
10 (Providing reusable bags would obviously reduce the number of paper bags.) Although an
11 ordinance banning plastic bags may require such stores to make reusable bags available in lieu
12 of paper bags, there is no guarantee that a city or county will include such a requirement in an
13 ordinance. In fact, the Marin County ordinance contains no such requirement. It merely states
14 that stores ***“may”*** provide reusable bags. (Ordinance §5.46.020(b)(2).)

15 Based on the foregoing, if cities and counties may enact plastic bag bans that take effect
16 before AB 2449 sunsets on January 1, 2013, the comprehensive and integrated statewide
17 plastics recycling and reusable bag scheme of AB 2449 would be defeated.

18 **VII. CONCLUSION**

19 This Court is requested to enter a judgment that the Ordinance is null and void *ab initio*
20 and to issue a Writ of Mandate ordering the County to repeal the Ordinance.

21
22 DATED: July 26, 2011

STEPHEN L. JOSEPH

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Attorney for Petitioner
SAVE THE PLASTIC BAG COALITION

DECLARATION OF PETER GRANDE

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- I, Peter Grande, declare as follows:
1. I know all of the facts herein of my own personal knowledge, and if called upon as a witness to this proceeding, I would and could competently testify thereto under oath.
 2. I make this declaration in support of “Petitioner’s Opening Brief In Support Of Petition For Writ Of Mandate Under CEQA And Declaratory Judgment.”
 3. I have always been a U.S. citizen.
 4. I was at all times mentioned herein over the age of 18 years.
 5. Since 1989, I have been at all times the Chief Executive Officer (CEO) of Grand Packaging, Inc., a California corporation in good standing, doing business as Command Packaging (hereinafter “Command Packaging”).
 6. Petitioner SAVE THE PLASTIC BAG COALITION (“Petitioner”) was formed on June 3, 2008.
 7. Petitioner is an unincorporated membership association.
 8. Petitioner is a non-profit organization.
 9. Petitioner was formed for the purpose of responding to myths, misinformation, and exaggerations about the environmental impacts of plastic, paper, and reusable bags and telling decision-makers and the public the environmental truth about plastic and paper bags.
 10. Command Packaging has been a member of Petitioner coalition at all times since Petitioner was formed.
 11. In my individual capacity, I have been a member of Petitioner coalition at all times since Petitioner was formed.
 12. Petitioner has at all times been managed by a Steering Committee which has a Chairman.
 13. I have been the Chairman and a member of Petitioner’s Steering Committee at all times since Petitioner was formed.
 14. I am authorized to make all of the statements herein on behalf of Petitioner.

- 1 15. In my capacity as Chairman of Petitioner, I have kept myself informed of all major
2 developments in the anti-plastic bag campaign.
- 3 16. I believe that anti-plastic bag activists have created and disseminated myths,
4 misinformation, and exaggerations about the environmental impacts of plastic bags.
- 5 17. I believe that anti-plastic bag activists have suppressed information about the
6 environmental impacts of paper and reusable bags.
- 7 18. Petitioner has a genuine and continuing interest and commitment to the subject matter of
8 ascertaining and publicizing the true facts about the environmental impacts of plastic,
9 paper, and reusable bags.
- 10 19. Since July 11, 2008, Petitioner has maintained an environmental information website at
11 www.savetheplasticbag.com for the purpose of advising decision makers and the public
12 about the true environmental impacts of plastic, paper, and reusable bags.
- 13 20. There is no advertising on the website and no products are sold on the website.
- 14 21. Petitioner's membership includes, but is not limited to, companies that manufacture,
15 market, sell, supply, or distribute plastic carryout bags in Marin County. Such members
16 include Command Packaging and Crown Poly, Inc. Such members would be
17 commercially impacted by the Marin County ordinance banning plastic carryout bags.
- 18 22. Petitioner's membership includes, but is not limited to, companies that manufacture,
19 market, sell, supply, or distribute reusable carryout bags in Marin County. Such
20 members include Command Packaging.
- 21 23. Petitioner is not alleging any actual or potential commercial damage as part of its CEQA
22 claim in this case. Its CEQA claim is based entirely on actual or potential environmental
23 impacts.
- 24 24. Petitioner seeks to promote and enforce the informational purposes of CEQA in this
25 action by demanding an EIR.
- 26 25. Petitioner believes and contends that significant, avoidable damage to the environment
27 would be caused by a shift from plastic bags to paper or reusable bags.
- 28 26. By filing this action and requesting a writ of mandate, Petitioner is endeavoring to have

1 the true facts of the environmental impact of plastic, paper, and reusable bags disclosed
2 in an EIR for the benefit of the Marin County Board of Supervisors and citizens of
3 Marin County.

4 27. Petitioner believes and contends that disclosing the environmental truth about plastic,
5 paper, and reusable bags to the Marin County Board of Supervisors and citizens of
6 Marin County is in the public interest.

7 28. Petitioner believes and contends that disseminating environmental myths and
8 misinformation to the public is contrary to the public interest.

9 29. The question in this action is one of public right and the object of this action is to
10 enforce a public duty in the public interest.

11 30. Petitioner and Petitioner's members are interested as citizens in having the public laws
12 including CEQA executed and the public duties and purposes in CEQA enforced.

13 31. This action is based solely and exclusively on the need to obtain environmental
14 information based on substantial evidence in the form of an EIR on this matter of
15 significant public concern in order to promote and enforce the goals of CEQA and the
16 public duties of government officials charged with implementing it.

17 32. Petitioner consists of and is representing citizens beneficially interested in this action
18 who would find it difficult or impossible to act on their own. No citizen who does not
19 have the financial support of business interests could reasonably be expected to incur the
20 substantial and heavy cost of litigating against Respondents to enforce CEQA. That is
21 due to the fact that the environmental damage caused by increased paper bag usage is
22 general, widespread and universal rather than focused on particular persons or locations.
23 Such damage harms everyone.

24 33. There is a genuine and substantial public controversy about the environmental impacts
25 of plastic bags and paper bags in which Petitioner is fully and continuously engaged.
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I declare under penalty of perjury under the laws of the State of California that I have read the forgoing, that the foregoing is true and correct, and that I would be competent to so testify.

Executed on June 28, 2011 at Los Angeles, California.

PETER M. GRANDE

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DECLARATION OF STEPHEN L. JOSEPH

I, Stephen L. Joseph, declare as follows:

1. I know all of the facts herein of my own personal knowledge, and if called upon as a witness to this proceeding, I would and could competently testify thereto under oath.
2. I am an attorney admitted to practice in the State of California.
3. At all times mentioned herein, I was and am counsel for Petitioner Save The Plastic Bag Coalition.
4. Exhibit A attached hereto is a true and correct copy of Tab F of the Administrative Record in this case. It is the objections that I sent to Marin County on behalf of Petitioner on December 28, 2010.
5. Exhibit B attached hereto is a true and correct copy of pages from the “Ordinances To Ban Plastic Carryout Bags In Los Angeles County: Final Environmental Impact Report” which I downloaded from http://dpw.lacounty.gov/epd/aboutthebag/ordinance_govt.cfm.
6. Exhibit C attached hereto is a true and correct copy of pages from the “Ordinances To Ban Plastic Carryout Bags In Los Angeles County: Final Environmental Impact Report” which I downloaded from http://dpw.lacounty.gov/epd/aboutthebag/ordinance_govt.cfm.

I declare under penalty of perjury under the laws of the State of California that I have read the forgoing, that the foregoing is true and correct, and that I would be competent to so testify.

Executed on July 26, 2011 at San Francisco, California.



STEPHEN L. JOSEPH

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am over the age of 18 and not a party to the within action. My business address is 350 Bay Street, Suite 100-328, San Francisco, CA 94133.

On July 26, 2011, I deposited a copy of PETITIONER’S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE UNDER CEQA AND DECLARATORY JUDGMENT; DECLARATION OF PETER M. GRANDE; DECLARATION OF STEPHEN L. JOSEPH in a sealed envelope with postage fully prepaid in the United States Mail at San Francisco, California. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing stated herein. The envelope was addressed as follows:

Patrick K. Faulkner
COUNTY COUNSEL
David L. Zaltsman, Deputy
3501 Civic Center Drive, #275
San Rafael, CA 94903

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on July 26, 2011 at San Francisco, California.
