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8
9 SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN

10 SAVE THE PLASTIC BAG COALITION, an
11 unincorporated association,

12 Petitioner,

13 v.

14 COUNTY OF MARIN, a political subdivision of
15 the State of California; MARIN COUNTY
16 DEPARTMENT OF AGRICULTURE,
17 WIEGHTS AND MEASURES, an agency of the
18 County of Marin, and DOES 1-100, inclusive,

19 Respondents.

Case No.: CV 1100996

MEMORANDUM OF POINTS &
AUTHORITIES IN OPPOSITION TO
PETITION FOR WRIT OF MANDATE AND
COMPLAINT FOR DECLARATORY RELIEF

Hearing Date: September 13, 2011
Time: 9:00 A.M.
Department: L
Judge: Honorable Lynn Duryee

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1 I. INTRODUCTION AND SUMMARY OF ARGUMENT

2 The County of Marin ("County") believes it is safe to say that for at least the last decade
3 almost no one - not even the Petitioner in this case, the "Save the Plastic Bag Coalition"
4 (hereinafter referred to simply as "petitioner") - would deny that severely limiting the use of
5 single-use plastic shopping bags would be good for the environment of our planet. As the
6 author of an article in *TIME* magazine about the attorney/head of petitioner put it nearly three
7 (3) years ago:

8 "In the pantheon of lost causes, defending the plastic grocery bag would
9 seem to be right up there with smoking on planes or the murder of puppies. The
10 ubiquitous thin white bag has moved squarely beyond eyesore into the realm of
11 public nuisance, a symbol of waste and excess and the incremental destruction
12 of nature."

13 (Luscombe, *TIME*: "The Patron Saint of Plastic Bags," July 27, 2008.) Indeed, "(t)hroughout
14 the world, many governments have banned or imposed per-bag fees on plastic bags. (fn.) A
15 domino effect has occurred, as jurisdictions looking to impose a ban or fee of single-use bags
16 now have 'ample precedent.'" (Comment, *Confessions of a Shopaholic: An Analysis of the
17 Movement to Minimize Single-Use Shopping Bags from the Waste Stream and a Proposal for
18 State Implementation in Louisiana*, 23 *Tulane Environmental Law Journal* 493, 501 (2010)).¹

19 However, it is equally true that almost no one would deny that severely limiting the use
20 of single-use plastic bags would not have an overall environmentally beneficial effect if single-
21 use plastic bags were merely replaced by single-use paper bags as opposed to reusable bags.
22 The County agrees with petitioner's primary argument herein that in several respects, the
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27 ¹ In case the Court is interested in understanding the history of the worldwide efforts to control the use
28 of single-use bags - especially those of the plastic variety - in a somewhat more organized fashion than
the raw "administrative record" herein, the County has filed five (5) recent law review articles on the
subject as part of our non-California authorities.

1 negative environmental impacts from the production, use and disposal of single-use paper
2 bags are as bad, if not worse, than the impacts from single-use plastic bags. (See generally,
3 *Confessions*, supra., 23 Tul.Envtl.L.J 493 at 500: "It is no longer a question of paper versus
4 plastic, but rather how single-use bags as a whole can be reduced from our waste stream.")
5

6 But it is also true, especially for jurisdictions within a marine environment and/or with
7 extensive aquatic resources, that plastic bags are an especially environmentally damaging
8 product in several unique ways. (Comment: *Main Ingredient in "Marine Soup:" Eliminating*
9 *Plastic Bag Pollution Through Consumer Disincentive*, 40 California Western International Law
10 Journal, 291, 293: "(a)round the world, from areas like Cape Cod to the Bay of Biscay, plastics
11 make up nearly ninety percent of the pollution found on beaches or in the sea. (fn). The
12 Ocean Conservancy International Coastal Cleanup picked up 1,377,141 plastic bags in 2008
13 alone. (fn). These bags were the second most common form of litter on 6,485 beaches,
14 comprising twelve percent of the pollution (fn) collected in 100 countries. (fn)."
15

16
17 It would therefore seem like a reasonable legislative, regulatory and political choice for a
18 county like Marin, in deciding how to phase out the use of single-use bags without creating the
19 havoc in the marketplace that a ban on all single-use bags would cause, to ban plastic bags
20 while imposing a fee on paper bags to discourage people from simply switching from plastic to
21 paper, and instead start using reusable bags. So that is indeed what Marin County, via
22 ordinance, did after years of studying the problem and potential solutions. (See Section II,
23 infra.) And this "solution" seems undeniably to be a "regulation" to "assure the maintenance,
24 restoration, enhancement, or protection of the environment....," that also would not have a
25 "reasonable probability (of having) a significant effect on the environment due to unusual
26 circumstances."
27
28

1 Yet petitioner herein continues in its single minded quest to attempt to force every
2 California jurisdiction, no matter how small or well meaning, to prepare full scale environmental
3 impact reports before significantly regulating single-use plastic bag distribution. In so doing,
4 however, petitioner not only fundamentally misconstrues the California Environmental Quality
5 Act and its implementing regulations, but also blatantly attempts to "spin" the recent directly on
6 point California Supreme Court case via its own wishful thinking.
7

8 II. STATEMENT OF FACTS AND THE CASE

9 For over five (5) years, a subcommittee of the Marin County Board of Supervisors,
10 supported by staff from various regulatory as well as legal departments, worked to develop an
11 ordinance and policy framework to address single-use bag waste. (See e.g. 1 AR Tab A at
12 pages 4-8.)² This effort included ongoing outreach and consultation with business, industry,
13 grocers, other retailers and environmental organizations. By working cooperatively, these local
14 and regional groups arrived at a mutually agreed strategy for an ordinance and enforcement.
15 Pursuant to the direction of the Board of Supervisors on achieving local and state mandated
16 waste reduction goals, the first major meeting to highlight the local problem of plastic bag litter
17 was convened with the assistance of the staff of the countywide solid waste joint powers
18 authority at the zero waste workshop on April 18, 2006. (Id.)
19
20
21

22 Both the Marin County Hazardous and Solid Waste Joint Powers Authority, as well as
23 the Board of Supervisors, in implementing and attempting to exceed state law requirements,
24 passed resolutions adopting a goal of 80% landfill diversion by 2012 and a zero waste goal by
25

26
27 ² The "Administrative Record" (AR) in this matter consists of two (2) volumes. Volume 1 is the staff
28 reports and various background materials presented to the Board of Supervisors which contain 5 tabs,
A-E as well as petitioners' objections at Tab F. Volume 2 contains tabs 1-97 which represent the 97
documents petitioner sent to the County as part of its "objections." Therefore references to the AR will
be by volume, tab and page number.

1 2025 in 2006 and 2007 respectively.³ On April 25, 2007, the local Solid Waste Joint Powers
2 Authority AB 939 Task Force cited plastic bags as a major solid waste issue in Marin. It
3 reported that plastic bags had no recycling markets, took 500 years to decompose, and posed
4 a hazard to the environment. (Id.) Then, on May 15, 2007, the Marin County Board of
5 Supervisors received a status report about the plastic bag eradication efforts then underway
6 through work with county departments, the Marin County Green Business Program, the Solid
7 Waste Joint Powers Authority, the Redwood Landfill and industry waste haulers. (1 AR Tab A
8 at page 52-72).
9

10
11 Between 2007 and 2010, the County convened meetings with stakeholders to formulate an
12 effective strategy to address the costly, widespread and wasteful use of single-use bags. Then
13 in the fall of 2009 the County convened the Marin Bag Working Group to begin the process of
14 drafting an ordinance. The numerous groups participating in this endeavor are listed at 1 AR
15 Tab A at pages 5 and 6. This working group met seven times between December 2009 and
16 June 2010 to reach a consensus.
17

18 During this same timeframe the County was looking actively at the "law" related to the
19 environmental review requirements for single-use bag regulations pursuant to the California
20 Environmental Quality Act, ("CEQA"). This effort was all the more important given the
21 numerous lawsuits and objections being filed by a group known as the "Save the Plastic Bag
22 Coalition" throughout California. (For an overview of these efforts by petitioner herein around
23
24

25
26 ³ See *Valley Vista Services, Inc. v. City of Monterey Park* (2004) 118 Cal.App.4th 881, 886: "By 1998,
27 landfills throughout the state were nearly filled, and we were figuratively awash in our own trash. To
28 meet this crisis, the Legislature passed the Waste Management Act. Its goals were to reduce, recycle
and reuse solid waste to the extent possible. Local agencies such as cities which were responsible for
waste disposal within their boundaries were obliged enact comprehensive waste management plans
that would eventually divert half their trash from landfills. (Citation)."

1 the state see petitioners' website at savetheplasticbag.org at the "litigation" tab, or the
2 discussion in "A Sea Change to Change the Sea: Stopping the Spread of the Pacific Garbage
3 Patch with Small-Scale Environmental Legislation, 51 William and Mary Law Review 1959,
4 1983-1985, (2010)). At the time of the development of Marin County's ordinance, the only
5 thorough written analysis by a court was the trial court opinion in *Coalition to Support Plastic*
6 *Bag Recycling v. City of Oakland* which is reproduced at 1 AR Tab E at pages 18-30. And
7 although the County was of the opinion that the Alameda County trial court opinion was not
8 entirely correct – a position we believe is buttressed by the recent Supreme Court opinion in
9 *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) __ Cal.4th __ - overall it
10 appeared to address the CEQA issue in a persuasive way.⁴

13 In relevant part - namely the part dealing with the two "categorical exemptions" from CEQA
14 that are also at issue in this matter - the trial court in the *Oakland* case found that there was
15 ample evidence that Oakland's ordinance, which banned plastic bags but placed no fee or
16 other restriction on the distribution of single-use paper bags, was "undertaken to assure the
17 'maintenance, restoration, or enhancement of a natural resource or the environment.'" (1AR
18 Tab E at pages 27-28). Therefore the ordinance was indeed categorically exempt from CEQA
19 under the same two categorical exemptions at issue in this matter; CEQA Guidelines sections
20 15307 and 15308.⁵

23 However, as the court noted, there are "exceptions" to the categorical exemptions codified
24 at CEQA Guideline section 15300.2(c). "The City cannot rely on a categorical exemption for a
25

26
27 ⁴ Since this Supreme Court opinion was issued on July 14, 2011 and may not yet be in the advance
28 sheets, we have attached a copy of the slip opinion to this brief as Exhibit "A."

⁵ "Guidelines" refers to the guidelines implementing CEQA which are contained in Title 14, California
Code of Regulations section 15000 et seq.

1 project where there is a 'reasonable possibility' that the activity will have a significant effect on
2 the environment due to 'unusual circumstances.'" (Id.) The court then concluded "(a) shift in
3 consumer use from one environmentally damaging product to another constitutes an 'unusual
4 circumstance' of an activity that would otherwise be exempt from review under CEQA as
5 activity undertaken to protect the environment. (citation)." Most importantly, the court found it
6 was "self evident" that a consumer desiring a plastic single-use carry out bag would take an
7 alternative single-use bag in its place if no restriction was placed on the more "environmentally
8 damaging" alternative.⁶

9
10
11 In light of this analysis, but more importantly because the County's true goal is to
12 enhance the environment by moving the public away from all types of single-use bags in favor
13 of reusable bags, Marin County decided that its ordinance must also restrict the distribution of
14 single-use paper bags. And in researching the effects of other statutes, ordinances and
15 regulations around the world, it was determined that even a fairly minimal fee was sufficient to
16 significantly reduce paper bag use when combined with a plastic bag ban.

17
18 Therefore, with the paper bag fee added in, the "unusual circumstances" concern the Oakland
19 trial court had could be avoided.

20 21 **III. STANDARD OF REVIEW**

22 Petitioner fails to even address the standard of review. However, it is very important in
23 this matter since this ordinance involves a legislative as opposed to a quasi-judicial action
24 where no hearing is required and no evidence is required to be taken. (See *Friends of Sierra*
25 *Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 172, fn.1).

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27
28 ⁶ The County concedes for the purposes of this matter that compostable plastic bags are not an option
at the current time. Therefore the only other "single-use" option is recycled paper bags as defined in
the Marin County ordinance. (See *infra*.)

1 The appropriate standard of review was set forth by the California Supreme Court in
2 *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40
3 Cal.4th 412, 426-427: "In reviewing an agency's compliance with CEQA in the course of its
4 legislative or quasi-legislative actions, the courts' inquiry 'shall extend only to whether there
5 was a prejudicial abuse of discretion.' [Citation.] Such an abuse is established 'if the agency
6 has not proceeded in a manner required by law or if the determination or decision is not
7 supported by substantial evidence.' [Citations.]

8
9 "Substantial evidence is defined as "enough relevant information and
10 reasonable inferences from this information that a fair argument can be made to support a
11 conclusion, even though other conclusions might also be reached."" [Citation.] "In
12 determining whether substantial evidence supports a finding, the court may not reconsider or
13 reevaluate the evidence presented to the administrative agency. [Citation.] All conflicts in the
14 evidence and any reasonable doubts must be resolved in favor of the agency's findings and
15 decision. [Citation.] [¶] In applying that standard, rather than the less deferential independent
16 judgment test, 'the reviewing court must resolve reasonable doubts in favor of the
17 administrative findings and decision.'" [Citations.] (*Citizens for Responsible Equitable
18 Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 522-523.)

22 IV. ARGUMENT

24 A. Petitioner Fundamentally Misconstrues and Misstates How CEQA is Implemented and Cites Case Law that is Inapplicable to Categorical Exemptions.

25 Before discussing the issues in this matter, it is important to explain what this case is
26 not about. Many of petitioner's arguments simply have no application to the actual CEQA
27 procedure employed by the County in developing this ordinance.
28

1 First, at page 8 of their opening brief, petitioner states in bold, underlined, italics that
2 “(f)ailure to conduct an Initial Study constitutes a per se violation of CEQA,” citing CEQA
3 Guideline 15063(a). This, of course, is completely wrong. Guideline section 15063(a) dealing
4 with initial studies only applies if “Preliminary Review” (section 15060) reveals that the activity
5 is subject to CEQA at all, and the “Review for Exemption” (section 15061) concludes that the
6 activity is not exempt from CEQA. As will be discussed, in this matter the County appropriately
7 concluded that the ordinance was exempt pursuant to Guidelines sections 15307 and 15308.

8
9 Similarly at pages 7 and 9-10 of their brief, petitioner quotes extensively from the case
10 of *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115-117. However, most of
11 the quotes relate to the so-called “common sense exemption” from CEQA as opposed to the
12 specific, adopted categorical exemptions such as those employed by Marin County in this
13 matter. The procedure and resulting burdens of proof are completely different with these two
14 different types of exemptions. County did not rely on the “common sense exemption.”
15 Therefore we were under no duty to produce evidence in the record except that the “project is
16 within an exempt class,” at which point “the burden shifts to the party challenging the
17 exemption to show that the project is not exempt because it falls within one of the
18 exceptions....” (Id.)⁷

19
20
21 Finally, petitioner argues at length that County should be forced to do an initial study,
22 and presumably an environmental impact report as opposed to a negative declaration, on the
23 basis of the “cumulative impacts” of other plastic bag regulations elsewhere in California. (See
24 petitioner’s brief at page 7). But once again petitioner is relying on the wrong type of
25 cumulative impact analysis. Petitioner is citing the general cumulative impact definition for
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1 negative declarations and environmental impact reports, as opposed to the "much narrower"
2 cumulative impact exception to a categorical exemption determination. (See generally, 1
3 *Practice Under the California Environmental Quality Act*, (2nd ed. Cal. CEB) section 5.73.
4 Compare CEQA Regulation 15355(b) with the relevant provision which is 15300.2(b)
5 discussed therein).
6

7 With that background we can now discuss the actual issues in this case which are as
8 follows:

- 9 1. Whether the County established that the ordinance is within the "exempt
10 class" of an action taken by a regulatory agency to enhance or protect the
11 environment. (The Class 8 exemption of CEQA Guideline 15308).
- 12 2. Whether petitioner produced substantial evidence showing a reasonable
13 possibility of an adverse environmental impact sufficient to remove the project
14 from the categorically exempt class.
- 15 3. The effect of the recent California Supreme court opinion in *Save the Plastic
16 Bag Coalition v. City of Manhattan Beach*.
- 17 4. Whether the ordinance is preempted by Public Resources Code sections
18 42250-57. ("AB 2449").

19 **B. The County Demonstrated that the Ordinance Fell Within the Exempt Category of
20 Projects to Enhance and Protect the Environment.**

21 The case of *Magan v. County of Kings* (2002) 105 Cal.App.4th 468 is almost identical to
22 petitioner's challenge in this matter. In *Magan*, the County adopted an ordinance regulating
23 the land application of sewage sludge in the county. As in this case, the Kings County Board
24 of Supervisors determined that the ordinance was categorically exempt from review under
25 (CEQA) as an action taken by a regulatory agency for the protection of the environment,
26
27

28 ⁷ As will be argued infra, however, in light of the Supreme Courts' opinion in *Manhattan Beach* we
believe the ordinance is indeed subject to the "common sense exemption."

1 (Magan, supra, at 470), and that determination was challenged by an industry member
2 purporting to use environmental protection law to support its business. (Id.)

3 After discussing the relevant CEQA exemption principles discussed earlier, the court
4 went on to discuss the specifics which are also determinative of this matter:
5

6 The Guidelines include a list of classes of projects that have been
7 determined not to have a significant effect on the environment and which are
8 therefore categorically exempt from the provisions of CEQA. (See Guidelines,
9 § 15300.) In this case, the ordinance was found to be exempt under section
10 15308 of the Guidelines, which states: "Class 8 consists of actions taken by
11 regulatory agencies, as authorized by state or local ordinance, to assure the
12 maintenance, restoration, enhancement, or protection of the environment where
13 the regulatory process involves procedures for protection of the environment.
14 Construction activities and relaxation of standards allowing environmental
15 degradation are not included in this exemption."

16 As in this case:

17 Appellant maintains there is no substantial evidence in the record
18 demonstrating that the County considered whether the ordinance could have a
19 significant effect on the environment. However, the County's finding that the
20 ordinance comes within the class 8 categorical exemption under section 15308 of
21 the Guidelines necessarily includes an implied finding that the ordinance would
22 have no significant effect on the environment. (See *Association of Protection etc.*
23 *Values v. City of Ukiah* (1991) 1 Cal.App.4th 720, 731-732 [3 Cal.Rptr.2d 488].)
24 In creating a list of projects categorically exempt from the provisions of CEQA,
25 the Secretary of the State Resources Agency made an express finding that the
26 listed classes of projects do not have a significant effect on the environment. (*Id.*
27 at pp. 727; see also § 21084, subd. (a).)

28 And also as in this case:

29 Contrary to appellant's assertions, the County was not required to conduct
30 an environmental analysis under CEQA after determining the ordinance to be
31 categorically exempt. Once the agency determines that the project falls within
32 the exemption class, no additional environmental analysis is required. (See
33 *Apartment Assn. of Greater Los Angeles v. City of Los Angeles, supra*, 90
34 Cal.App.4th at p. 1172 [agency not required to conduct initial study before
35 declaring project exempt from CEQA review]; *Association for Protection etc.*
36 *Values v. City of Ukiah, supra*, 2 Cal.App.4th at p. 726 [once determination is
37 made project is categorically exempt, project may be implemented without any
38 CEQA compliance whatsoever].) As a result, the County only has the burden to
39 demonstrate substantial evidence that the ordinance fell within the exempt
40 category of projects. (See *Davidon Homes v. City of San Jose, supra*, 54
41 Cal.App.4th at p. 115; *Dehne v. County of Santa Clara* (1981) 115 Cal.App.3d
42 827 [171 Cal.Rptr. 753].) This, the County has done.

43 The same is true in this case. County's notice of exemption (1 A.R. Tab E at page 6,) states that the ordinance is intended to maintain, restore and enhance natural resources

1 and the environment generally based upon substantial evidence that it will reduce the
2 County's contribution of oil-based plastic waste as well as paper waste to the landfills;
3 reduce oil consumption and greenhouse gas emissions in general; reduce the amount
4 of plastic and paper litter in the environment; and reduce degradation of the marine
5 environment and harm to marine wildlife. (Id). And the record - as well as common
6 knowledge - is replete with evidence of the environmental damage caused by both
7 plastic as well as paper bags. Indeed much of petitioner's "evidence" simply argues that
8 plastic bags are not as bad as paper single-use bags, which no one really disputes.
9

10
11 Therefore, County has met its burden of demonstrating substantial evidence that
12 the ordinance fell within the Class 8 Categorical Exemption under section 15308 of the
13 Guidelines.
14

15 **C. Petitioner Has Not Met Its Burden of Demonstrating Substantial Evidence In The**
16 **Record Of A Reasonable Possibility of Adverse Environmental Impacts Sufficient**
17 **to Remove the Ordinance From the Class 8 Categorical Exemption.**

18 This brings us to the core issue in the case; whether petitioner has shown substantial
19 evidence that there are "unusual circumstances" or local "cumulative impacts" create a
20 "reasonable possibility" that the activity will have a significant effect on the environment. As
21 discussed in the statement of the case, supra, this was the issue that caused the Alameda
22 County trial court to ultimately find that Oakland's ordinance was not exempt. (See also 1 AR
23 Tab E at pages 28-29.)
24

25 However, Oakland's ordinance, while prohibiting the distribution of single-use plastic bags,
26 placed no restrictions on the distribution of single-use paper bags. Therefore, the court
27 determined consumers would simply "shift use from one environmentally damaging product to
28 another," which the court concluded was an "unusual circumstance" of an activity that would

1 otherwise be exempt from review under CEQA as an activity undertaken to protect the
2 environment. (Id. citing *Magan v. County of Kings*, supra, at 474)⁸

3 But that conclusion, in turn, was based upon the court's determination that it was "self-
4 evident" that a consumer desiring a plastic single-use bag would accept a different type of
5 single-use bag instead of shifting to a reusable bag.⁹
6

7 So the key issue in this case - assuming one accepts the Alameda County court's analysis-
8 is whether a 5 cent charge on single-use paper bags will be a sufficient disincentive to
9 consumers such that single-use plastic bags will not simply be replaced by single-use paper
10 bags, and instead consumers will - at least to a large degree - be convinced to use reusable
11 bags. And as even petitioner is forced to admit, the record herein contains several examples
12 of regulations where even a small charge greatly influenced consumer behavior. The most
13 recent and relevant is the experience in Washington, D.C. where a plastic bag ban combined
14 with a five (5) cent fee on paper bags resulted in a 50-60 per cent reduction in all single-use
15 bags. (See e.g. 1 AR Tab D at page 20 and id. at pages 12-18 which is the "Master
16 Environmental Assessment on Single-Use and Reusable Bags prepared in March of 2010.
17
18

19 Petitioner attempts to get around these facts by claiming that Washington, D.C. engaged in
20 other "outreach" programs to encourage the use of reusable bags. But petitioner fails to
21 mention that County has also implemented many of these same outreach and education
22 programs. (See e.g. 1 AR Tab A at pages 6-9).
23
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27 ⁸ As stated previously, County is not relying on the availability of compostable plastic bags, is
attempting to encourage a shift to reusable bags.

28 ⁹ County does question whether the fact that a trial court finds something to be "self-evident" is indeed
evidence of that "fact" unless, of course, it rises to the level of judicial notice as being completely free
from possible dispute.

1 In addition, petitioner recites that some other very large jurisdictions that prepared
2 environmental impact reports for their bag ordinances adopted larger fees than five (5) cents.
3 But nowhere does petitioner cite any evidence that these larger fees are needed to create a
4 shift in consumer behavior sufficient to create a net decrease in the use of single-use bags.
5 Instead those jurisdictions were implementing specific "mitigation" issues only required in
6 environmental impact reports.
7

8 Similarly petitioner argues that County should be required to engage in full scale CEQA
9 review of its ordinance because of the "cumulative impacts" of these same remote, larger
10 jurisdictions. But as we explained earlier, this argument relies upon a definition of "cumulative
11 impacts" that does not apply to categorical exemptions under CEQA.
12

13 For cumulative impacts to remove an otherwise exempt project from its exempt status,
14 those cumulative impacts must be "...of the same type in the same place...." (CEQA
15 Guideline section 15300.2(b).) Therefore the "projects" listed by petitioner at page 5 of their
16 brief involving similar ordinances in other parts of California are not relevant to any cumulative
17 impact analysis of Marin County's ordinance which only covers the unincorporated portions of
18 Marin County.
19

20 **D. The Recent California Supreme Court Opinion in *Save the Plastic Bag Coalition v.***
21 ***City of Manhattan Beach* Supports Marin County's Position by REJECTING the**
22 **Evidence Relied Upon by Petitioner (As Well as the Oakland Trial Court) and by**
23 **Requiring That Courts Focus on "Common Sense" in the Context of the LOCAL**
24 **Environment.**

25 As discussed earlier, the Alameda County trial court decision was the only relevant
26 "authority" Marin County had in developing its single-use bag ordinance at issue in this matter.
27 In that case the trial court accepted as relevant and persuasive evidence certain generic
28 studies of "life cycle" impacts associated with plastic versus paper bags; namely the so-called

1 "Scottish Report" and the "ULS" Report. (See 1 AR Tab E at pages 25-27 and 29). These are
2 the exact same reports petitioner herein employed in its challenge to the ordinance at issue in
3 the *Manhattan Beach* case. (Slip opinion at page 5). And they are the same exact reports
4 petitioner has relied upon herein in attacking Marin County's ordinance. (Petnr's brief at page
5 3).

7 The Supreme Court first noted that, in general, CEQA limits review of impacts to "the
8 physical conditions which exist within the area which will be affected by a proposed project...."
9 (Public Resources Code section 21060.5). (Slip opinion at 19). And although there may be
10 some exceptions to this general rule, they clearly would not apply to Manhattan Beach's
11 ordinance given the small size of its jurisdiction and the difficulty of predicting those indirect
12 impacts. (Id at 19-21). Most importantly, as the Court concluded:

14 "....this case serves as a cautionary example of overreliance on generic
15 studies of 'life cycle' impacts associated with a particular product. Such studies,
16 when properly conducted, may well be a useful guide for the decisionmaker
17 when a project entails substantial production or consumption of the product.
18 When, however, increased use of the product is an indirect and uncertain
19 consequence, and especially when the scale of the project is such that the
20 increase is plainly insignificant, the product 'life cycle' must be kept in proper
21 perspective and not allowed to swamp the evaluation of actual impacts
22 attributable to the project at hand."

23 The same is obviously true with respect to Marin County's ordinance. These life cycle
24 studies do not provide relevant evidence that this ordinance will have a significant effect on the
25 environment due to "unusual circumstances" pursuant to CEQA Guideline 15300.2(c). As
26 petitioner concedes, unincorporated Marin County is actually smaller than the city of
27 Manhattan Beach and has significantly less commercial enterprise. The fact that some of the
28 cities in Marin County may be studying similar ordinances is not relevant since petitioner cites
no evidence that any of them have actually taken concrete steps to initiate that process. And

1 speculation that cumulative impacts will occur simply because other projects may be approved
2 in the same area is insufficient to trigger the exception to a categorical exemption pursuant to
3 CEQA Guideline 15300.2(b). (See generally 1 *Practice Under the California Environmental*
4 *Quality Act*, supra, section 5.74, citing *Hines v. California Coastal Commission* (2010) 186
5 Cal.App.4th 830, 857.)

7 **E. The Ordinance is Not Preempted by Public Resources Code Sections 42250-57.**

8 Petitioner's final argument –which they have not made in any of their prior judicial
9 challenges- is that the ordinance is preempted by the "At-Store Recycling Program" codified at
10 Public Resources code sections 42250-57. Yet, once again, petitioner cites no authority to
11 support its argument except a Governor's signing message which is clearly irrelevant.
12 (*American Financial Services v. City of Oakland* (2005) 34 Cal.4th 1239, 1264.) Therefore this
13 claim should be deemed waived. (*Magan v. County of Kings*, supra, at 477 fn. 4).

14
15 In any event, Public Resources Code section 42254 expressly states the Legislature's
16 intent as to preemption. And nothing in that section even impliedly prohibits local bans on
17 single-use plastic bag distribution.
18

19 **V. CONCLUSION**

20 County's ordinance to ban distribution of plastic single-use bags and regulate via fee
21 paper single-use bags, is clearly an action taken to protect the environment and thus exempt
22 from CEQA review pursuant to CEQA Guideline section 15308. Petitioner has not presented
23 evidence of a significant impact due to "unusual circumstances" or "cumulative impacts"
24 pursuant to CEQA Guideline section 15300.2 (b) or (c). This latter conclusion has been further
25 strengthened by the California Supreme Court's conclusion that petitioner's "evidence" has no
26 relevance to small projects such as County's and that impact analysis should focus on the
27
28


1 local environment and not speculate about "global" impacts except in projects involving truly
2 large amounts of the products in question.

3 Petitioner's petition/complaint should be denied.

4 DATE: August 17, 2011.

5 Respectfully Submitted,

6 PATRICK K. FAULKNER
7 COUNTY COUNSEL

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11 DAVID L. ZALTSMAN
12 Deputy County Counsel
13 Attorneys for Defendant, County of Marin

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