COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

SAVE THE PLASTIC BAG COALITION, an unincorporated association, Plaintiff and Appellant, v. COUNTY OF MARIN, et al., a political subdivision of the State of California, Defendants and Appellants	No. A133868 Marin County Superior Court No. CV 1100996

RESPONDENT'S BRIEF

Appeal from Judgment of the
Superior Court of California, County of Marin
(Honorable Lynn Duryee, Presiding)

PATRICK K. FAULKNER, County Counsel
David L. Zaltsman, Deputy (SBN 113053)
3501 Civic Center Drive, Room 275
San Rafael, CA 94903
Tel.: 415/473-6117; Fax: 415/473-3796
Attorneys for the County of Marin
Defendants and Appellants.

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

I, DAVID L. ZALTSMAN, declare and say:

I am the attorney at the Office of the Marin County Counsel representing the within Defendant and Respondent COUNTY OF MARIN, et al.

I know of no entity or person that must be listed as an interested entity or person in this matter under Rule 8.208(d)(1) or Rule 8.208(d)(2).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 15th day of March, 2012.

PATRICK K. FAULKNER, County Counsel

By: _____

David L. Zaltsman, Deputy County Counsel
Attorneys for Defendants and Respondents
County of Marin

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Contrary to appellant's assertions in this proceeding, this is not a case about a county adopting an ordinance to "ban plastic bags." Instead it is about an ordinance designed to increase the use of reusable bags. As will be discussed in more detail herein, after years of study and analysis, the County of Marin (sometimes referred to simply as "County" or "Marin"), determined that the best way to achieve this goal - at least initially in the first phase - was to ban single-use plastic bags and place a fee on paper single-use bags. In this way it was believed that a significant overall reduction in the use of both of these types of single-use bags could be achieved. And given this, the County further determined that the ordinance would constitute an action by a regulatory agency for the protection of natural resources and the environment generally. This, in turn, allowed the County to determine that the ordinance was "categorically exempt" from review under the California Environmental Quality Act ("CEQA") and two (2) of its implementing regulations.

Appellant, as it has done in virtually every jurisdiction in California which has considered any type of regulation adversely affecting the economic interests of its members, has insisted that a full Environmental Impact Report ("EIR") be prepared and certified prior to adopting the regulation. However, as will be explained in this brief, appellant continues to fundamentally misconstrue how CEQA is implemented. Where, as here, there is substantial evidence that a "project" comes within a "categorical exemption," no further CEQA analysis is required unless appellant produces substantial evidence to support an exception to the exemption.

Similarly, appellant continues to also fundamentally misconstrue the California Supreme Court's opinion in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155. ("*Manhattan Beach*"). That case addressed a very different "project;" namely a regulation banning plastic bags, but not placing any restriction or fee on the continued distribution of paper single-use bags. *Manhattan Beach* also involved a very different CEQA process; namely an "initial study" followed by a "negative declaration." And the quotation that appellant continuously cites to support its argument is not even dicta. Instead it is the Supreme Court's paraphrasing appellant's position. (See 52 Cal.4th at 175, fn. 10: "*According to plaintiff,* the movement to ban plastic bags is a broad one, active at levels of government where a appropriately comprehensive environmental review will be required." Emphasis added.)

In reality, the *Manhattan Beach* opinion strongly supports the County's position herein by holding that appellant's "evidence" - namely global life cycle analyses of paper versus plastic bags - are of no relevance to relatively small changes in the global use of paper versus plastic bags enacted by ordinances or regulations such as Marin's. But more importantly in this case, with the project including disincentives to paper bag use, there is no evidence that there would be any increase in single-use bag distribution. This is especially true when considered in conjunction with a massive decrease in plastic bag use.

II. ISSUES PRESENTED ON APPEAL

The issue in this case is whether a Marin County ordinance prohibiting the distribution of certain single-use plastic bags, and placing a five (5) cent fee on the distribution of certain single-use

paper bags, at certain "stores" within the unincorporated area of Marin County is "categorically exempt" from review under the California Environmental Quality Act ("CEQA;" Public Resources Code section 21000 et. Seq.) as an action taken by a regulatory agency for the protection of the environment. (See generally, *Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 472 [129 Cal.Rptr.2d 344]).

There are three (3) potential sub issues presented in any "categorical exemption" case. The first is whether the "project" - in this case the ordinance - is within the "scope" of the cited categorical exemptions. Since this involves a question of statutory or regulatory interpretation, it is a question of law. (*Fairbank v. City of Mill Valley* (1999) 25 Cal.App.4th 1243, 1251 [89 Cal.Rptr.2d 233]).

The second sub issue is whether the agency's factual determination that the project fits within one of the classes of activities listed in the CEQA Guidelines as categorically exempt is supportable. This is subject to the deferential substantial evidence test. (*Committee to Save the Hollywood Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1187, [74 Cal.Rptr.3d 665]).

Finally, the primary issue in this case is whether the appellant presented substantial evidence to support a "fair argument" that the ordinance should be subject to an "exception" to the categorical exemption due to unusual significant effects or cumulative impacts. (See generally, 1 Kostka & Zischke, *Practice Under the California Environmental Quality Act* (2nd ed. 2010), section 5.127 at pages 297 -300 (rel. 1/11); hereafter Kostka & Zischke).

III. STATEMENT OF FACTS AND THE CASE

As we explained in our brief to the trial court herein, the County of Marin believes it is safe to say that for at least the last

decade almost no one - not even the appellant in this case, the "Save the Plastic Bag Coalition"- would deny that severely limiting the use of single-use plastic shopping bags would be good for the environment of our planet. As the author of an article in *TIME* magazine about the attorney/head of appellant put it over three (3) years ago:

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

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

However, it is equally true that almost no one would deny appellant's primary point that severely limiting the use of single-use plastic bags would not have an overall environmentally beneficial effect if single-use plastic bags were merely replaced by single-use

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[1] In case the Court is interested in understanding the history of the worldwide efforts to control the use of single-use bags - especially those of the plastic variety - in a somewhat more organized fashion than the raw "administrative record" herein, the County filed five (5) recent law review articles on the subject as part of our non-California authorities in the trial court. Those authorities are now part of the record before this Court.

paper bags as opposed to reusable bags. As also noted in the trial court, the County agrees with appellant's primary argument herein that in several respects, the negative environmental impacts from the production, use and disposal of single-use paper bags are as bad, if not worse, than the impacts from single-use plastic bags. (See generally, *Confessions*, supra., 23 Tul.Envtl.L.J 493 at 500: "It is no longer a question of paper versus plastic, but rather how single-use bags as a whole can be reduced from our waste stream.")

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

It would therefore seem like a reasonable legislative, regulatory and political choice for a county like Marin, in deciding how to phase out the use of both types of single-use bags without creating the havoc in the marketplace that a ban on all single-use bags would cause, to <u>ban</u> plastic bags while imposing a <u>fee</u> on paper bags to discourage people from simply switching from plastic to paper, and instead start using reusable bags. So that is indeed what Marin County, via ordinance, did after years of studying the

problem and potential solutions. And this "solution" seems undeniably to be a "regulation" to "assure the maintenance, restoration, enhancement, or protection of the environment...," that also would not have a "reasonable probability (of having) a significant effect on the environment due to unusual circumstances."

This regulation was the result of over five (5) years of work by a subcommittee of the Marin County Board of Supervisors, supported by staff from various regulatory as well as legal departments. (See e.g. 1 AR Tab A at pages 4-8. The ordinance itself is reproduced at 1 AR Tab E at pages 1-5, followed by the "Notice of Exemption" at page 6)[2] This effort included ongoing outreach and consultation with business, industry, grocers, other retailers and environmental organizations. By working cooperatively, these local and regional groups arrived at a mutually agreed strategy for an ordinance and enforcement. Pursuant to the direction of the Board of Supervisors on achieving local and state mandated waste reduction goals, the first major meeting to highlight the local problem of plastic bag litter was convened with the assistance of the staff of the countywide solid waste joint powers authority at the zero waste work shop on April 18, 2006. (Id.)

Both the Marin County Hazardous and Solid Waste Joint Powers Authority, as well as the Board of Supervisors, in implementing and attempting to exceed state law requirements,

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[2] The "Administrative Record" (AR) in this matter consisted of two (2) volumes. Volume 1 is the staff 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." The Clerk of the Superior Court transmitted these to this Court. Therefore, as in the Superior Court, references to the AR will be by volume, tab and page number.

passed resolutions adopting a goal of 80% landfill diversion by 2012 and a zero waste goal by 2025 in 2006 and 2007 respectively.[3] On April 25, 2007, the local Solid Waste Joint Powers Authority AB 939 Task Force cited plastic bags as a major solid waste issue in Marin. It reported that plastic bags had no recycling markets, took 500 years to decompose, and posed a hazard to the environment. (Id.) Then, on May 15, 2007, the Marin County Board of Supervisors received a status report about the plastic bag eradication efforts then underway through work with county departments, the Marin County Green Business Program, the Solid Waste Joint Powers Authority, the Redwood Landfill and industry waste haulers. (1 AR Tab A at pages 52-72).

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

During this same timeframe, the County was looking actively at the "law" related to the environmental review requirements for

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[3] See *Valley Vista Services, Inc. v. City of Monterey Park* (2004) 118 Cal.App.4th 881, 886: "By 1998, landfills throughout the state were nearly filled, and we were figuratively awash in our own trash. To 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 to enact comprehensive waste management plans that would eventually divert half their trash from landfills. (Citation)."

single-use bag regulations pursuant to the California Environmental Quality Act, ("CEQA"). This effort was all the more important given the numerous lawsuits and objections being filed by appellant throughout California. (For an overview of these efforts by appellant herein around the state, see appellants' website at *savetheplasticbag.com* at the "litigation" tab, or the discussion in "*A Sea Change to Change the Sea: Stopping the Spread of the Pacific Garbage Patch with Small-Scale Environmental Legislation*, 51 William and Mary Law Review 1959, 1983-1985, (2010)). At the time of the development of Marin County's ordinance, the only thorough written analysis by a court was the trial court opinion in *Coalition to Support Plastic Bag Recycling v. City of Oakland* which is reproduced at 1 AR Tab E at pages 18-30. And although the County was of the opinion that the Alameda County trial court opinion was not entirely correct – a position we believe is buttressed by the recent Supreme Court opinion in *Manhattan Beach* - overall it appeared to address the CEQA issue in a persuasive way.

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

same two categorical exemptions at issue in this matter; CEQA Guidelines sections 15307 and 15308.[4]

However, as the court noted, there are "exceptions" to the categorical exemptions codified at CEQA Guideline section 15300.2(c). "The City cannot rely on a categorical exemption for a project where there is a 'reasonable possibility' that the activity will have a significant effect on the environment due to 'unusual circumstances.'" (Id.) The court then concluded "(a) shift in consumer use from one environmentally damaging product to another constitutes an 'unusual circumstance' of an activity that would otherwise be exempt from review under CEQA as activity undertaken to protect the environment. (citation)." Most importantly, the court found it was "self evident" that a consumer desiring a plastic single-use carry out bag would take an alternative single-use bag in its place if no restriction was placed on the more "environmentally damaging" alternative.[5]

In light of this analysis, but more importantly because the County's true goal is to enhance the environment by moving the public away from all types of single-use bags in favor of reusable bags, Marin County decided that its ordinance must also restrict the distribution of single-use paper bags. And in researching the effects of other statutes, ordinances and regulations around the world, it was determined that even a fairly small fee was sufficient to significantly reduce paper bag use when combined with a plastic bag ban. (See especially 1 AR Tab B at p. 12-18 which is part of the

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

[5] 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.

"Master Environmental Assessment on Single-Use and Reusable Bags" prepared for a group called Green Cities California in March of 2010.)

Therefore, with the paper bag fee as part of the ordinance, the "unusual circumstances" concern the Oakland trial court had could be avoided.

Despite the fact that this regulation was adopted by ordinance for which no formal public hearing was required by law, appellant was actively involved in submitting "objections" and "evidence" at the various public hearings that were indeed held on the ordinance pursuant to CEQA. (See e.g. 1 AR Tab D at p. 58 as well as Tab F). However, appellant's "evidence" - as in the *Manhattan Beach* case - consisted almost exclusively of generic studies that concluded that "...the 'life cycle' of paper bags, including their manufacture, transport, and disposal has a greater environmental impact than the 'life cycle' of plastic bags." (52 Cal.4th at 162; see 2 AR 20 for the 1990 Franklin Associates, Ltd. Study; 2 AR 21 for the 2005 Scottish government report; 2 AR 22 for the 2007 Boustead Consulting & Associates Ltd. Report; 2 AR 23 and 26 for the Use Less Stuff (ULS) Report; and 2 AR 24 for the Ecobilan/Carrefour Report which, however, was an un translated report in French). Indeed many of appellant's ninety-seven (97) submissions actually supported banning plastic bags including editorials from major newspapers. (See e.g. 2 AR 3 and 4).

In its opening brief, after spending over four (4) pages discussing these "life cycle" studies, appellant makes much of the EIR that was prepared for Los Angeles County's proposed ban on plastic bags. (AB at 9-10). However, other than appellant's two (2) page "press release" allegedly summarizing that EIR, (2AR 86), the

only "evidence" appellant submitted was a single page from the initial study (2 AR 73) and a hyperlink to a web site containing the entire EIR and related documents. (Appellant cites a different hyperlink in footnote 2 at page 9 of its opening brief to this Court. Future references to appellant's opening brief shall be to "AB" followed by the page number). No actual excerpts from the relevant reports was submitted, nor even direct quotations from the actual documents.

In addition, appellant was aware of and commented on the two (2) specific CEQA categorical exemptions that the County relied upon in this matter. (See 1 AR Tab D at p. 58 and Tab F at pp. 36-38).

IV. STANDARD OF REVIEW

This ordinance involves a legislative as opposed to a quasi-judicial action where no hearing is required and no evidence is required to be taken. (See *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 172, fn.1).

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

"'"Substantial evidence is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though

other conclusions might also be reached."'" [Citation.] '"In determining whether substantial evidence supports a finding, the court may not reconsider or reevaluate the evidence presented to the administrative agency. [Citation.] All conflicts in the evidence and any reasonable doubts must be resolved in favor of the agency's findings and decision. [Citation.] [¶] In applying that standard, rather than the less deferential independent judgment test, 'the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision.'" [Citations.] (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 522-523.)

More specifically, since this case involves the application of a "categorical exemption" and appellant's primary claim that it provided substantial evidence that an "exception" to the categorical exemption applied, there are the three (3) sub-issues, discussed in the "issues presented on appeal" section of this brief, each with a different standard of review.

Finally, an appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: The appellate court reviews the agency's action, not the trial court's decision; in that sense appellate review is de novo. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, supra,* 40 Cal.4th at 427.)

V. ARGUMENT

A. The County Properly Implemented CEQA in this Matter.

One of the major problems with appellant's opening brief is that it misstates certain basic CEQA principles. Therefore before

addressing the specific points in appellant's opening brief, the County believes it would be helpful to briefly address the general CEQA principles at issue in a "categorical exemption case." (See generally, *Magan v. County of Kings, supra,* 105 Cal.App.4th at 473-474.

It is the state policy in California that "the long-term protection of the environment ... shall be the guiding criterion in public decisions." (Pub. Resources Code, § 21001, subd. (d); *Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified School Dist.* (1992) 9 Cal.App.4th 464, 467 [11 Cal.Rptr.2d 792].) In order to implement this policy CEQA and the guidelines issued by the State Resources Agency (Cal. Code Regs., tit. 14, § 15000 et seq.,) have established a three-tiered process to ensure that public agencies inform their decisions with environmental considerations.

The first tier is jurisdictional, requiring that an agency conduct a "preliminary review" in order to determine whether CEQA applies to a proposed activity. (Guidelines, §§ 15060, 15061.) Activities which are not "projects" as defined by section 15378 are not subject to CEQA review. (Guidelines, § 15061, subd. (b)(1).) Furthermore, the Legislature has determined that ministerial projects are exempt from CEQA review, as are certain other projects, such as those of an emergency nature, even though adverse effects might result. (Pub. Resources Code, § 21080, subd. (b)(1), (2); Guidelines, §§ 15061, subd. (b)(2), 15260.)

In addition, the Guidelines set forth a list of exempt categories or classes of projects which have been determined by the Resources Agency not to have a significant effect on the environment. (Pub. Resources Code, § 21084, subd. (a); Guidelines, §§ 15061, subd. (b)(2), 15300 et seq.)

As in this case, if the agency finds the project is exempt from CEQA under any of the stated exemptions, no further environmental review is necessary. The agency may -but is not required to- prepare and file a notice of exemption, citing the relevant section of the Guidelines and including a brief "statement of reasons to support the finding." (Guidelines, §§ 15061, subd. (d), 15062, subd. (a)(3).)

Only if the project does not fall within any exemption does the agency proceed with the second tier and conduct an initial study. (Guidelines, § 15063.) If the initial study reveals that the project will not have a significant environmental effect, the agency must prepare a negative declaration, briefly describing the reasons supporting that determination. (Guidelines, §§ 15063, subd. (b)(2), 15070.) Otherwise, the third step in the process is to prepare a full environmental impact report (EIR) on the proposed project. (Guidelines, §§ 15063, subd. (b)(1), 15080; Pub. Resources Code, §§ 21100, 21151.)

Most importantly to this case a "categorical exemption," including the two at issue in this proceeding, is based on a finding by the Resources Agency that a class or category of projects does not have a significant effect on the environment. (Pub. Resources Code, §§ 21083, 21084; Guidelines, § 15354.) Thus an agency's finding that a particular proposed project comes within one of the exempt classes necessarily includes an implied finding that the project has no significant effect on the environment. (*Association for Protection etc. Values v. City of Ukiah,* 2 Cal.App.4th 720, 732 [3 Cal.Rptr.2d 488]). On review, an agency's categorical exemption determination will be affirmed if supported by substantial evidence that the project fell within the exempt category of projects. (*Dehne v.*

County of Santa Clara, (1981) 115 Cal.App.3d 827, 842 [171 Cal.Rptr. 753]).

In categorical exemption cases, where the agency establishes that the project is within an exempt class, the burden shifts to the party 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 which would otherwise be categorically exempt is not exempt if there are "unusual circumstances" which create a "reasonable possibility" that the activity will have a significant effect on the environment. A challenger must therefore produce substantial evidence showing a reasonable possibility of adverse environmental impact sufficient to remove the project from the categorically exempt class. (*Ukiah,* supra, 2 Cal.App.4th at p. 728.)

(*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 112-113 [62 Cal.Rptr.2d 612]).

B. Substantial Evidence In the Record Supports the County's Factual Determination That the Ordinance Will "Assure the Maintenance, Restoration, Enhancement, or Protection of the Environment" as Required for the Guideline section 15308 Exemption.

As far as the County can ascertain, at no point has appellant attempted to argue that a regulation limiting the distribution of single-use paper and plastic bags, and encouraging the use of re-usable bags would not constitute an action to help "assure the maintenance, restoration, enhancement, or protection of the environment." Appellant does, of course, argue that plastic bags are not as pernicious as most people and entities make them out to be, as well as that paper bags are worse than plastic bags in several

environmental respects. Appellant also argues that re-usable bags are not the panacea that these same people and entities argue they are.

But appellant's only substantive argument in this matter seems to be that Marin's ordinance "...may make the environment worse, not better" by greatly increasing paper bag use. (AB at p. 25; emphasis added). However, just to be clear, the County notes that the record herein clearly establishes that reducing the use and disposal of single-use bags would be beneficial for the environment. (See, for example, the studies and reports included in 1 AR Tabs A-C).

C. The Supreme Court's Opinion in *Manhattan Beach* Does Not Control the Outcome of this Case in Appellant's Favor. Indeed, the Opposite is True.

Appellant's first argument is that the California Supreme Court's recent opinion in *Manhattan Beach* requires this Court to find that Marin County was not allowed to employ the claimed categorical exemptions, but must prepare an EIR.

There are at least four (4) fatal fallacies with appellant's argument in this regard. First, the *Manhattan Beach* case involved an entirely different CEQA process; namely an "initial study" followed by a "negative declaration." The *Manhattan Beach* opinion did not address the use of categorical exemptions in any way, except to note the city could have pursued that approach had it not instead decided to go ahead with an initial study. (52 Cal.4th at 171, fn. 8). And, of course, a decision is only authority for a point passed on by the Court and directly involved in the case. (*Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977, 985 [44 Cal.Rptr.2d 93]).

Second, the *Manhattan Beach* case dealt with an entirely different ordinance, and therefore entirely different facts. The Manhattan Beach ordinance, while banning plastic bags, did not take any action with respect to limiting the use of single-use paper bags as Marin County's ordinance does.

Third, as noted in the introduction to this brief, the quotation that appellant continuously employs in its efforts to require EIR's is not even dictum. Instead it was the Supreme Court's paraphrasing of appellant's position:

> "According to 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."

(52 Cal.4th at 175, fn.10).

And fourth, even if this statement were indeed a "holding" (or dictum) of the Court, all it says is that "appropriately" comprehensive environmental review will be required. Once again, the Court said nothing to even infer this meant EIR's for all future ordinances or other regulations banning plastic bags irrespective of the size of the jurisdiction or the restrictions placed on paper bags. Nor is there even any inference that categorical exemptions would never be appropriate especially in the very different factual scenario where single-use paper bags are also restricted.

Appellant does correctly quote one statement of the Supreme Court: "...(t)he analysis would be different for a ban on plastic bags by a larger governmental body, which might precipitate a <u>significant increase in paper bag consumption</u>." (57 Cal.4th at 174; emphasis added). And as the County has argued throughout these proceedings, this indeed is the key legitimate issue in this case:

whether appellant submitted any substantial evidence that Marin County's ordinance might "precipitate a significant increase in paper bag consumption." This issue will be squarely addressed in section V. G. of this brief.

Instead what the Supreme Court did say was that based upon the record before it –which is very similar if not identical to the record in this matter including the size of the jurisdiction involved- that "...common sense leads us to the conclusion that the environmental impacts discernible from the 'life cycle' of plastic and paper bags are not significantly implicated by a plastic bag ban in Manhattan Beach." (52 Cal.4th at 175). And this was without any restriction on the continued use of paper bags.

In coming to this conclusion, the Court noted that "common sense" in the CEQA domain is equally appropriate in exemption cases, even those invoking the "common sense" exemption where the public agency has the burden of producing evidence. (Id., citing *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 380, 388, [60 Cal.Rptr.3d 247]).

D. For the Purposes of this Appeal, the County Concedes This Action was Timely Filed; Plaintiff has Standing; and The Ordinance is a "Project" Under CEQA.

E. Categorical Exemptions *May* Apply to "Plastic Bag Bans" Depending Upon the Facts and Circumstances

Appellant's next argument is that "(i)f the County believed it was justified in not preparing an EIR, it was initially required to conduct an Initial Study to support its determination and give notice to the public of its intent to adopt a Negative Declaration."

As noted previously, this, of course, is simply wrong. Guideline section 15063(a) dealing with initial studies only applies if "Preliminary Review" (section 15060) reveals that the activity is subject to CEQA at all, and the "Review for Exemption" (section 15061) concludes that the activity is not exempt from CEQA. As will be discussed, in this matter the County appropriately concluded that the ordinance was exempt pursuant to Guidelines sections 15307 and 15308.

F. The County's Ordinance Constitutes an Action Taken By a Regulatory Agency to Assure the Restoration, Enhancement and Protection of the Environment.

Appellant's next argument is that the County's ordinance was not within the "reasonable scope of the (exemptions) language" because the County was not acting as a regulatory agency pursuant to "pre-existing" state law or local ordinance.

i. Appellant has not exhausted its administrative Remedies with respect to this argument.

Before addressing the merits of this argument, the County contends appellant did not exhaust its administrative remedies by ever making this argument to the County in its "objections" (1 AR Tab F) or otherwise.

As stated recently in *Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830, 853-854 [112 Cal.Rptr.3d 354]: "Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action." [Citation.] Subdivision (a) of CEQA section 21177 sets forth the exhaustion requirement ... That requirement is satisfied if "the alleged grounds for noncompliance with [CEQA] were presented ... by any person during the public comment period provided by [CEQA] or prior to the close of the

public hearing on the project before the issuance of the notice of determination." (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 791-792 [39 Cal.Rptr.3d 189], fn. & italics omitted.) [¶] 'The purpose of the rule of exhaustion of administrative remedies is to provide an administrative agency with the opportunity to decide matters in its area of expertise prior to judicial review. [Citation.] The decision making body "'is entitled to learn the contentions of interested parties before litigation is instituted.'" (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 384 [110 Cal.Rptr.2d 579].)

The *Hines* case also involved a categorical exemption under CEQA. Therefore the court recognized that "[a]s a general rule, the exhaustion requirement does not apply when the administrative procedure did not provide for a public hearing or other opportunity for members of the public to raise objections before project approval. ([§ 21177, subd. (e)])." (2 Kostka & Zischke, *supra*, § 23.105, p. 1248 (rel. 3/09).) This may often be the case with respect to a public agency finding that a project was *exempt* from CEQA, as was the case here. As Kostka and Zischke explain: "[A] public agency may find that a project is exempt from CEQA, and thus file a notice of exemption, *without holding a hearing or otherwise giving members of the public an opportunity to comment ... When no opportunity to express objections to a claimed exemption is provided by the agency, the exhaustion requirement does not apply.* [Citations.]" (Ibid., italics added, citing *City of Pasadena v. State of California* (1993) 14 Cal.App.4th 810 [17 Cal.Rptr.2d 766]; *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1210 [6 Cal.Rptr.2d 477] [exhaustion requirement applies only when CEQA provides public comment period or there is

public agency hearing before notice of agency determination is filed]; *Endangered Habitats League, Inc. v. State Water Resources Control Bd.* (1997) 63 Cal.App.4th 227 [73 Cal.Rptr.2d 388] [exhaustion not required because county gave no notice and provided no opportunity to be heard orally or in writing before approving the project design].)

But as was also the case in *Hines*, in this case there was ample notice and hearings before the County ultimately adopted the ordinance that the County considered this "project" to be exempt under Guidelines sections 15307 and 15308. (See 1 AR Tabs A-D). Indeed, as noted earlier, appellant submitted argument on precisely this issue. Therefore the exhaustion requirement of Public Resources Code section 21177 is triggered and the exception of subdivision (e) does not apply.

Most importantly, the petitioner in a CEQA judicial challenge bears the burden of showing that all the issues –both legal and factual- were first raised at the administrative level. (*Porterville Citizens for Responsible Hillside Development v City of Porterville* (2007) 157 Cal.App.4th 885, 909-910 [69 Cal.Rptr.3d 105].) Appellant herein has not even attempted to do this.

ii. If This Court Elects to Address Appellant's Argument, It is Without Merit

Appellant's substantive argument is that the categorical exemptions at issue herein are based upon a "three-level hierarchy" between legislative, regulatory and ministerial actions. However, appellant cites no authority for this novel and odd theory attempting to distinguish between "regulatory" and "legislative" actions.

In reality, categorical exemptions –like all of CEQA- are based upon a two level hierarchy; ministerial versus discretionary. As noted previously, ministerial actions of public agencies are never

subject to CEQA; only discretionary actions of public agencies are subject to CEQA. (Section 15060(c)).

The County readily concedes that the ordinance at issue in this matter involved the "...exercise of discretionary powers by a public agency." (Section 15060(c)(1).) However, although ordinances are always "legislative" in character, they oftentimes also constitute "regulations." For authority in this regard this Court need only look to Article 11, Section 7 of the California Constitution: "A county or city may make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws." Indeed ordinances are by definition regulations. See Black's Law Dictionary (7th ed.): an ordinance is "(a)n authoritative law or decree; esp. a municipal regulation."

Appellant next argues that "(t)he purpose of the regulatory exemption is to avoid the need for regulatory agencies to *repeat* environmental review that has *already* been done at the legislative level." (AB at 24; emphasis in original). But, once again, appellant cites absolutely no authority for this claim.

And appellant is wrong with respect to its discussion of *Magan v. County of Kings* as being based upon not requiring Kings County to "repeat" environmental review that had already been performed. In fact the opposite is true and *Magan* is directly supportive of Marin County's action herein. (AB at p. 24).

In *Magan* it is true that various state and federal regulations allowed the land application of certain types of sewage sludge, although there was absolutely no discussion of what –if any- "environmental review" preceded these regulations. Instead the Kings County Board of Supervisors felt there were still "numerous unanswered questions about the safety, environmental effect, and

propriety of land applying Sewage Sludge, even when applied in accordance with those federal and state regulations." (105 Cal.App.4th at 470-471). The Board therefore phased out the allowance of certain types of sewage sludge land application by ordinance and found the ordinance exempt from CEQA under guideline section 15308 as an action for the protection of the environment. (Id. at 472).

The same is true in Marin County with respect to single-use bags. The State of California, for example, has taken various steps to try to stop the scourge of single-use plastic bag pollution. For example, Public Resources Code section 42250 et seq. establishes an "At-Store Recycling Program" for plastic bags with the intent "...to encourage the use of reusable bags by consumers and retailers and to reduce the consumption of single-use bags." (See section 1 of Stats. 2006, Chapter 845).

However, Marin County, like numerous other cities and counties, determined that these efforts were not adequately reducing the number single-use bags making their way into the general waste stream. Therefore, as in *Magan*, the Marin Board of Supervisors elected to phase out the future distribution of these bags in favor of re-usable bags.

G. Petitioner Has Not Met Its Burden of Demonstrating Substantial Evidence In The Record Of A Reasonable Possibility of Adverse Environmental Impacts Sufficient to Remove the Ordinance From the Class 8 Categorical Exemption Even Under the "Fair Argument" Standard.

Appellant's next argument is that "the categorical exemptions are inapplicable as there are 'unusual circumstances' in this case." (AB at 25). As noted previously, the County believes this is the sole

legitimate issue in this case. As appellant notes, CEQA Guideline section 15300.2(c) states:

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

Appellant then baldly states: "(p)laintiff produced substantial evidence that paper and reusable bags may cause significant environmental impacts. The ordinance may make the environment worse, not better." (AB at 25.) Yet the only potential significant environmental impact appellant apparently alleges is "greenhouse gas emissions." (AB at 26). And once again, appellant's only authority is a Guideline section dealing with analysis in initial studies (section 15064.4) which would only apply if the project is not statutorily or categorically exempt.

Appellant then argues that "(t)he applicable standard for determining whether Plaintiff has demonstrated 'unusual circumstances' is the 'fair argument' standard, which is the same standard as the 'common sense' exemption." Appellant cites *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th, 249, at pages 264-267 as authority for this proposition. The County has scoured the cited portion of *Banker's Hill* and can find no support for appellant's claim.

However, appellant's error in this regard may not be critical since the County –for the purposes of this appeal- concedes that the actual "fair argument" standard does indeed apply to this Court's review of whether the significant effects exception applies to remove the ordinance from the ambit of the categorical exemption. This is because in an abundance of caution, the County only adopted this

ordinance based upon a Notice of Exemption because of its determination that appellant did not even meet this fairly easy burden. (See e.g. Kostka & Zischke, supra, section 5.127, p. 300 rel. 1/11): " ...given the uncertainty regarding the standard of review that is applied to claimed exceptions to the categorical exemptions, agencies should evaluate whether there is any substantial evidence to support a claim that an exception applies.")

The Court in *Hines, supra,* 186 Cal.App.4th at 855-856 recently restated the fair argument versus substantial evidence standard debate as follows:

> There is a split of authority on the appropriate standard of judicial review of a question of fact when the issue is whether a project that would otherwise be found categorically exempt is subject to one of three general exceptions (significant impacts due to unusual circumstances, significant cumulative impacts, and impacts on a uniquely sensitive environment) to the categorical exemptions set forth in Regulations section 15300.2, subdivisions (a) through (c). (1 Kostka & Zischke, *supra*, § 5.127, p. 297; *San Lorenzo Valley CARE*, *supra*, 139 Cal.App.4th at p. 1390; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1259 [89 Cal.Rptr.2d 233].) "Some courts have relied on cases involving review of a negative declaration, holding that a finding of categorical exemption cannot be sustained if there is a 'fair argument' based on substantial evidence that the project will have significant environmental impacts, even where the agency is presented with substantial evidence to the contrary. [Citation.] Other courts apply an ordinary substantial evidence test ... , deferring to the express or implied findings of the local agency that has found a categorical exemption applicable. [Citations.]" (*Fairbank v. City of Mill Valley*, at pp. 1259-1260; accord, *San Lorenzo Valley CARE*, at p. 1390; see 1 Kostka & Zischke, § 5.127, pp. 297-299 (rel. 2/09).)

As in *Hines*, in this case even applying the deferential "fair argument standard," there is no substantial evidence in this record that this ordinance would have a significant effect on the environment due to unusual circumstances or that the cumulative impact of successive projects of the same type in the same place, over time is significant. (See Regs., § 15300.2, subds. (b) & (c).)

It is important to remember that "'significant effect on the environment' means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project [,] including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. ..." (Regs. § 15382; emphasis added.) "Moreover, for the exception to apply, there must be substantial evidence of qualifying environmental impacts. Under the rule generally applicable to CEQA issues, 'substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.' (§ 21080, subd. (e)(1); see also [Regs.], § 15384, subd. (b).) 'Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, [or] evidence that is clearly inaccurate or erroneous ... '

(*Hines, supra,* 186 Cal.App.4th at 856-857.)

As noted earlier, in this case, appellant's only "evidence" consisted of several generic "life cycle" reports about plastic versus paper bags, and appellant's summary interpretation of an EIR prepared by Los Angeles County on its own behalf as well as its eighty-eight (88) cities. There was absolutely no evidence or expert opinion submitted about whether Marin's particular ordinance – including the fee on paper bags- would have any environmental impact, much less result in "...a significant increase in paper bag

consumption" (*Manhattan Beach,* supra, 52 Cal.4th at 174), or greenhouse gas emissions.

In light of this, the County believes that the recent opinion by Division Four of this Court in *Berkeley Hillside Preservation v. City of Berkeley* (2012) ____ Cal.App.4th ——, filed February 15, 2012, as modified, March 7, 2012, is also not relevant to this case. In *Berkeley Hills* the Court "streamlined" the "two step approach" of requiring both a finding of "significant effect on the environment" as well as "unusual circumstances" for the exception to a categorical exemption of Guideline section 15300.2(c) to apply. Instead the Court held that "...the unusual circumstances exception applies whenever there is substantial evidence of a fair argument of a significant environmental impact...." (See "Order Denying Rehearing and Modifying Opinion" filed March 7, 2012.)

But in *Berkeley Hillside* there was an expert engineer's report that this particular project could lead to serious environmental impacts. (Slip opn. at p. 18-19). In this case there is no evidence that Marin's particular ordinance will cause any negative environmental impacts. Only speculation based upon generic life cycle studies, and appellant's assumption that the paper bag fee will not be effective in limiting paper bag use.

So in the end analysis, the County believes a key issue in this case is whether a five (5) cent charge on single-use paper bags will be a sufficient disincentive to consumers such that single-use plastic bags will not simply be replaced by single-use paper bags, and instead consumers will - at least to a large degree - be convinced to use reusable bags. And as even appellant is forced to admit, the record herein contains several examples of regulations where even a small charge greatly influenced consumer behavior. The most

recent and relevant is the experience in Washington, D.C. where a plastic bag ban combined with a five (5) cent fee on paper bags resulted in a 50-60 per cent reduction in all single-use bags. (See e.g. 1 AR Tab D at page 20 and id. at pages 12-18 which is the "Master Environmental Assessment on Single-Use and Reusable Bags" prepared in March of 2010.)

Appellant attempts to get around these facts by claiming that Washington, D.C. engaged in other "outreach" programs to encourage the use of reusable bags. But appellant fails to mention that Marin County has also implemented many of these same outreach and education programs. (See e.g. 1 AR Tab A at pages 6-9).

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

H. The Five (5) Cent Paper Bag Fee is Part of the "Project Design" of the Ordinance, Not a "Mitigation Measure" Added to a Plastic Bag Ban.

Appellant's next argument is that "(i)n determining whether the County may rely on categorical exemptions, the 5-cent fee on paper bags may not be taken into account." (AB at p. 28). Appellant bases its argument on case law that stands for the proposition that neither an applicant nor a lead agency may add "mitigation measures" to a project to attempt to bring it within an exemption.

Instead mitigation measures must be evaluated through the negative declaration or EIR process. (See *Azuza Land Reclamation Co. v. Main San Gabriel Basin Watermaster,* supra, 52 Cal.App.4th 1165, 1200 [61 Cal.Rptr.2d 447]; and *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1107-1108) [23 CalRptr.3d 321].

i. Appellant has not exhausted its administrative remedies with respect to this argument.

So far as the County can ascertain, appellant never raised this argument until its reply brief in the superior court. Therefore, for all the reasons discussed previously in section V.F.i of this brief, this Court should not entertain this argument.

ii. If this Court Elects to Address Appellant's Argument, It is Without Merit.

As just noted, both the *Azusa* and *Salmon Protection* cases stand for the proposition that a lead agency cannot rely upon "mitigation measures" added to a "project" to bring it within the ambit of a categorical exemption. Apparently appellant would have this Court believe Marin County's "project" was simply to ban plastic bags, and therefore the County added the paper bag fee to avoid any environmental impact that might result from a straight switch by all consumers from plastic to single-use paper bags.

However, this is simply not true as we explained earlier. Marin County's "project" is, and always has been, an effort to wean consumers off of both types of single-use bags. Therefore the paper bag fee was "...*part of* the project design – it was never a *proposed* mitigation measure." (*Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1353).

I. There is No Substantial Evidence that this Project - Or Any Aspect Thereof - May Cause a Significant Negative Effect on the Environment.

Appellant's next argument is that pursuant to Guideline section 15063(b)(1) the County was required to prepare an EIR if any aspect of the project, either individually or cumulatively, may cause a effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial. However, as in prior instances, appellant's cited authority only applies if an "initial study" reveals such a significant effect. Here, again, there was no initial study since the review for exemption found the project to be exempt. And, more importantly as discussed at length previously, there is no evidence of a significant effect to take the project out of its exempt status and compel an initial study.

The County is not sure how to respond to appellant's citation of a federal case under the National Environmental Quality Act ("NEPA"), except to say appellant makes no effort to explain how it is relevant to the CEQA procedure used in this case. The *Catron County* case involved the question of whether the procedural requirements of the federal Endangered Species Act ("ESA") could displace the procedural requirements of NEPA. The court held they did not. (*Catron County Board of Commissioners v. U.S. Fish and Wildlife Service* 75 F.3d 1429 (10th Cir. 1996).)

J. The Ordinance is not a "Countywide Project;" and Even if It Was, Appellant has Still Not Produced Substantial Evidence of an Environmental Impact.

Appellant next argues that the County's ordinance must be treated as a "countywide project under CEQA." (AB at 30). Once again, however, appellant's authority applies only to the review

undertaken as part of an "initial study." (Guidelines sections 15065(a)(3) and (b). For the purposes of a categorical exemption – as discussed previously- the relevant issue is whether appellant produced substantial evidence to support a fair argument that "...the cumulative impact of successive projects of the same type in the same place, over time is significant." (Guideline section 15300.2(b).) Appellant simply has not done this.

Appellant claims that the County should be required to prepare an EIR for the entire county, including the cities, based on its "plan" that all parts of the county will be covered by the same "plastic bag ban." The County, however, has no authority to legislate for the cities within the County. (See Cal. Const. Art. 11, section 7: A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Emphasis added.) Whether the cities within Marin County decide to enact similar ordinances is completely within the discretion of separate elected city and town councils.

But more fundamentally, even if the County could legislate for the cities –or convince the cities to adopt identical ordinances- there is no evidence that the result would be a "...significant increase in paper bag consumption." (*Manhattan Beach,* supra, 52 Cal.4th at 174).

San Franciscans for Reasonable Growth v. City and County of San Francisco (1984) 151 Cal.App.3d 61; [198 Cal.Rptr. 634], involved a cumulative impact analysis within an EIR and within the same jurisdiction. The correct citation for a categorical exemption matter would again be *Hines v. California Coastal Commission, supra,* 186 Cal.App.4th at 857-858: "'When there is no substantial evidence of any individual potentially significant effect by a project

under review, the lead agency may reasonably conclude the effects of the project will not be cumulatively considerable, and it need not require an EIR on that basis. [Citation]."

K. Written Findings of Fact and Time Limits Do Not Apply to Categorical Exemption Decisions

Appellant's next two (2) arguments are that "written findings of fact must be made in support of categorical exemptions," and that the County did not "assert the exemptions until it was too late." As already discussed herein, appellant is wrong on both counts. See generally 1 Kostka & Zischke, *supra,* sections 5.114-5.116 at page 285-288.1; rel. 1/11: no required procedure and no findings required by statute or the CEQA Guidelines for exemption determinations.

Appellant's citation to *Davidon Homes v. City of San Jose,* supra, 54 Cal.App.4th at 116-117 involved not a categorical exemption, but the so called "common sense exemption" which requires a more rigorous process. In any event, as already discussed, appellant was well aware of the specific categorical exemptions the County was relying upon long before the ordinance was ultimately adopted and the Notice of Exemption posted.

L. The Courts Cannot Rewrite CEQA to Appellant's Wishes

Finally, appellant spends the final six (6) pages of its opening brief arguing that "the County and its citizens need an EIR" apparently to allow appellant to "...help to correct the myths, misinformation, exaggerations, spin, and selective photography that the County and others have been disseminating about plastic bags." (AB at p. 33). Appellant then recites some of this alleged "misinformation" for this Court's benefit.

Appellant cites absolutely no legal authority in this section of its brief, so the County will not respond in detail to these "allegations" except to note that appellant in its final footnote (fn. 11 at p. 38), concedes that the only real issue in this case is whether "the ordinance may result in significant environmental impacts as a result of increased numbers of paper and reusable bags."

As the County has noted throughout this brief, there is substantial evidence to support the County's determination that a plastic bag ban combined with a fee on paper bags will result in a decrease in both types of single-use bags. And appellant has presented absolutely no evidence to directly refute the County's evidence.

Appellant's "theme" throughout its brief seems to be that it disagrees with the legislature's determination that exemption determinations can be made without the "public process" normally employed in Negative Declarations and EIR's. That however, is a matter appellant needs to take up with the legislature.

VI. CONCLUSION

Marin County's ordinance to ban distribution of plastic single-use bags and regulate via fee paper single-use bags, is clearly an action taken to protect the environment and thus exempt from CEQA review pursuant to CEQA Guideline sections 15307 and 15308. Appellant has not presented evidence of a significant impact due to "unusual circumstances" or "cumulative impacts" pursuant to CEQA Guideline section 15300.2 (b) or (c). This latter conclusion has been further strengthened by the California Supreme Court's conclusion that petitioner's "evidence" has no relevance to small projects such as County's and that impact analysis should focus on the local

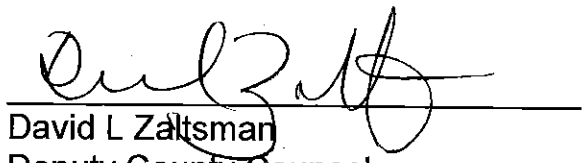
environment and not speculate about "global" impacts except in projects involving truly large amounts of the products in question.

The judgment of the superior court denying appellant's petition for a writ of mandate must be affirmed.

Dated: March 15, 2012.

Respectfully submitted,

PATRICK K. FAULKNER
Marin County Counsel



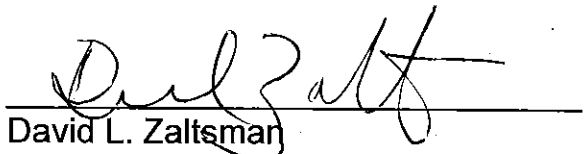
David L Zaltsman
Deputy County Counsel

CERTIFICATION OF WORD COUNT

I, David L. Zaltsman, counsel for Respondent in this matter hereby certify that the attached Respondent's Brief contains a total of 8,941 words. This brief was produced on Microsoft Word processing program.

Dated: March 15, 2012.

PATRICK K. FAULKNER
Marin County Counsel



David L. Zaltsman
Deputy County Counsel

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I, the undersigned, under penalty of perjury declare:

That I am a citizen of the U.S.A. over the age of 18 years and not a party to the within entitled action; my business address is 3501 Civic Center Dr., Suite 275, San Rafael, CA 94903.

I am familiar with the processing of correspondence for mailing with the U.S. Postal Service for County of Marin. On the date set forth below, I served the **Respondent's Brief** on the interested parties in said action by placing envelopes as addressed on the attached page hereto in a U.S. Mail Box in San Rafael, CA with postage paid thereon.

I DECLARE UNDER PENALTY OF PERJURY that the foregoing is true and correct and that this declaration was executed this 16th day of March, 2012, at San Rafael, California.

_____

L. CASSIDY

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Office of the Attorney General
1300 "I" Street
Sacramento, CA 95814-2919

Rachel Zellner Vida, Esq.
3307 Seabright Ave.
Davis, CA 95616

Attorneys for Appellant:
Stephen L. Joseph, Esq.
350 Bay Street, Suite 100-328
San Francisco, CA 94133

Via Inter-Office Mail:
Judge Lynn Duryee
Superior Court of California
3501 Civic Center Drive, Hall of Justice
San Rafael, CA 94903

Via Inter-Office Mail:
Marin County Courts - Appellate Desk
3501 Civic Center Drive, Hall of Justice
San Rafael, CA 94903