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8 **SAVE THE PLASTIC BAG COALITION**

9  
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 FOR THE COUNTY OF SANTA CRUZ

12 **SAVE THE PLASTIC BAG COALITION,** ) Case No. **CV 174811**  
13 an unincorporated association, )  
14 ) **CEQA CASE**  
15 ) **VERIFIED PETITION FOR WRIT OF**  
16 ) **MANDATE UNDER THE CALIFORNIA**  
17 ) **ENVIRONMENTAL QUALITY ACT;**  
18 ) **COMPLAINT FOR INVALIDATION OF**  
19 ) **ORDINANCE BASED ON RETAIL FOOD**  
20 ) **CODE PREEMPTION AND**  
21 ) **UNCONSTITUTIONAL VAGUENESS;**  
22 ) **REQUEST FOR DECLARATORY AND**  
23 ) **INJUNCTIVE RELIEF**  
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Petitioner, **SAVE THE PLASTIC BAG COALITION**, alleges as follows:

**PARTIES AND JURISDICTION**

1. Petitioner **SAVE THE PLASTIC BAG COALITION** is an unincorporated association.
2. Respondent **CITY OF SANTA CRUZ** (the "City") is a municipal corporation.
3. Respondent **CITY OF SANTA CRUZ PUBLIC WORKS DEPARTMENT** ("PWD") is a department and agency of the City.
4. Petitioner seeks a judgment and writ of mandate to set aside, void, annul, and repeal City of Santa Cruz Ordinance No. 2012-08 (the "Ordinance"). The Ordinance bans

1 plastic carryout bags ("plastic bag") at "retail establishments" and "retail stores" (as defined in  
2 the Ordinance). The Ordinance requires that consumers pay a 10-cent fee for each paper  
3 carryout bag ("paper bag") in the first year that the Ordinance is in effect, but not thereafter. A  
4 true and correct copy of the Ordinance is attached hereto as Exhibit A and incorporated herein  
5 by reference.

6 5. The Ordinance was finally adopted by the City Council on July 24, 2012.

7 6. The Ordinance takes effect on April 10, 2013.

8 7. The First Cause of Action herein alleges violation of the California  
9 Environmental Quality Act ("CEQA").

10 8. The Ordinance is a "project" that is subject to CEQA.

11 9. PWD is the lead agency for the project, responsible for compliance with CEQA,  
12 including but not limited to preparation of an Environmental Impact Report ("EIR").

13 10. PWD is also responsible for enforcement of the Ordinance.

14 11. PWD is a real party in interest.

15 12. PWD and the City violated CEQA by refusing and failing to complete and  
16 certify an EIR prior to adopting the Ordinance.

17 13. Said refusal and failure to prepare an EIR violates the California Supreme  
18 Court's express ruling that "appropriately comprehensive environmental review will be  
19 required" before plastic bag bans may be adopted in cities such as the City of Santa Cruz. (*Save*  
20 *The Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 174, n.10.)

21 14. Petitioner is ignorant of true names and capacities of DOES named herein as  
22 DOES 1-100, inclusive, and therefore sues said Respondents by such fictitious names.  
23 Petitioner will amend this Petition and Complaint to allege their true names and capacities when  
24 ascertained.

25 15. Petitioner is informed and believes and thereon alleges that some or all of these  
26 fictitiously named Respondents were, and continue to be, responsible in some manner for the  
27 acts or omissions alleged herein.

28 16. Petitioner is informed and believes that at all times relevant to the allegations

1 herein, each Respondent, including the DOE Respondents, were the employees, agents, or  
2 partners of each of the other Respondents, and were at all times acting within the purpose and  
3 scope of their agency or partnership, or at the direction of the other Respondents.

4 17. This Court has jurisdiction over the matters alleged in this Petition pursuant to  
5 Code Civ. Proc. § 1085, and/or § 1094.5, and Pub. Res. Code § 21167.

6 18. Venue is proper in this Court under Code Civ. Proc. §§ 393 and 394(a).

7 19. This action is timely filed within 30 days of the later of (i) approval of the  
8 Ordinance or (ii) filing of any CEQA Notice of Determination following approval of the  
9 project. (Pub. Res. Code § 21167(d).)

10 20. Petitioner complied with Pub. Res. Code § 21167.5 by mailing to all  
11 Respondents a written notice of the commencement of this action, identifying the project.

#### 12 STANDING

13 21. At all times relevant to the allegations herein and at present, Petitioner's  
14 members have included Crown Poly, Inc. ("Crown Poly") and Grand Packaging, Inc. (doing  
15 business and referred to herein as "Command Packaging"), which are California corporations in  
16 good standing.

17 22. Said corporations and other members of Petitioner market, sell, distribute, and  
18 supply plastic bags and plastic reusable bags to retail stores, food facilities (as defined by  
19 California Health and Safety Code § 113789 ) in the City of Santa Cruz, including bags that are  
20 banned by the Ordinance.

21 23. Petitioner was formed in 2008 and exists for the purpose of responding to  
22 environmental misinformation about plastic bags and ensuring that the environmental impacts  
23 of banning plastic bags are made known to decision-makers and the public. Petitioner maintains  
24 a website at [www.savetheplasticbag.com](http://www.savetheplasticbag.com).

25 24. Petitioner seeks to promote and enforce the informational purposes of CEQA in  
26 this action, as set forth in CEQA Guidelines § 15002. Ascertaining the true facts about the  
27 environmental impacts of projects and disclosing those true facts to decision-makers and the  
28 public are within the zone of interests that CEQA is intended to preserve and protect.



1 proposed project "COULD NOT have a significant effect on the environment, and a  
2 NEGATIVE DECLARATION will be prepared." (Uppercase in original.)

3 35. On April 16, 2012, the Administrator of Environmental Quality issued a  
4 Negative Declaration. A true and correct copy thereof is attached hereto as Exhibit B and  
5 incorporated herein by reference.

6 36. The Negative Declaration states in part that the (proposed) Ordinance would  
7 "require retail establishments to impose a 10-cent charge for each single-use paper carryout bag  
8 provided to customers at the point of sale." The assumption in the Negative Declaration is that  
9 the 10-cent fee would be permanent.

10 37. The Negative Declaration states that based on the Initial Study, the project would  
11 have "no or less-than-significant impacts on the environment."

12 38. On May 21, 2012, Petitioner timely sent and submitted to PWD "Comments On  
13 And CEQA Objections To City of Santa Cruz Proposed Plastic Bag Ban" (referred to  
14 hereinafter as the "Objections.") True and correct copies of the Objections are attached hereto  
15 as Exhibit C and incorporated herein by reference. Petitioner also submitted therewith 142  
16 documents in support of the Objections.

17 39. In the Objections and in an e-mail dated July 9, 2012, Petitioner made a "fair  
18 argument" that the Ordinance may have a significant negative effect on the environment. A true  
19 and correct copy of the July 9, 2012 e-mail is attached hereto as Exhibit E and incorporated  
20 herein by reference.

21 40. In the Objections and the July 9, 2012 e-mail, Petitioner demanded that the City  
22 and PWD prepare and certify an EIR before adopting the Ordinance.

23 41. No EIR was prepared by the City or PWD.

24 42. In an e-mail sent to the City on June 21, 2012 and in the July 9, 2012 e-mail,  
25 Petitioner also objected to the Ordinance based on California Retail Food Code preemption. A  
26 true and correct copy of the June 21, 2012 e-mail is attached hereto as Exhibit D and  
27 incorporated herein by reference.

28 43. In the e-mail sent to the City on July 9, 2012, Petitioner also objected to the

1 definition of a “reusable bag.”

2 44. All of the objections and evidence cited herein are part of the administrative  
3 record.

4 45. Each and every objection asserted in Exhibits C, D, and E are hereby reasserted  
5 in support of the causes of actions herein. All said objections are incorporated herein by  
6 reference as if fully alleged in this pleading.

7 **THE CITY AND PWD REFUSED AND FAILED TO**  
8 **COMPLY WITH THE SUPREME COURT’S DECISION**  
9 **IN THE MANHATTAN BEACH CASE**

10 46. The California Supreme Court ruled in July 2011 that for cities and counties  
11 larger than the City of Manhattan Beach, “appropriately comprehensive environmental review  
12 “will be required” before plastic bags may be banned and that such projects “should not be  
13 allowed to escape review.” (*Manhattan Beach, supra*, 52 Cal.4th at 174, n.10.)

14 47. The population of the City of Manhattan Beach is 33,852. The population of the  
15 City of Santa Cruz is 59,946.

16 48. In addition, approximately six million visitors and tourists visit the City of Santa  
17 Cruz every year.

18 49. Based on the decision of the Supreme Court in *Manhattan Beach*, the City and  
19 PWD was required to prepare an EIR before adopting the Ordinance.

20 **FIRST CAUSE OF ACTION**  
21 **AGAINST ALL RESPONDENTS**  
22 **(VIOLATION OF CEQA:**  
23 **FAILURE TO PREPARE AND CERTIFY AN EIR)**

24 50. Petitioner realleges and incorporates herein every allegation made above.

25 51. The Ordinance is a “project” subject to CEQA as the “whole of [the] action...has  
26 a potential for resulting in either a direct physical change in the environment, or a reasonably  
27 foreseeable indirect physical change in the environment.” (Pub. Res. Code § 21080(c), (d), §  
28 21151; CEQA Guidelines § 15378(a); *Manhattan Beach, supra*, 52 Cal.4th at 171, n.7.)

52. Prior to approval of the Ordinance, Petitioner made a “fair argument” that the  
Ordinance may have a significant negative effect on the environment, which triggers the

1 requirement to prepare an EIR.

2 53. Prior to approval of the Ordinance, Petitioner also asserted other CEQA  
3 objections in Exhibits C and E which are reasserted herein.

4 54. The refusal and failure to prepare and certify an EIR prior to adopting the  
5 Ordinance was a prejudicial abuse of discretion in that PWD and the City did not proceed in the  
6 manner required by CEQA.

7 55. In addition, the Ordinance as finally adopted states that stores are only required  
8 to charge the 10-cent paper bag fee during the first year of implementation of the Ordinance.  
9 Thereafter, the City Council "shall review the charge amount every year from the date of  
10 adoption, to judge its effectiveness." Therefore, the Initial Study and Negative Declaration are  
11 invalid as they are based on the assumption that the 10-cent fee requirement is permanent.

12 56. As of the date of final approval of the Ordinance, there will be no minimum fee  
13 for paper bags. Consequently, there will be a substantial increase in paper bag usage after the  
14 first year which will cause significant negative environmental impacts. This further supports  
15 Petitioner's fair argument.

16 57. For the foregoing reasons, the Ordinance is void and invalid under CEQA.

17 58. The environment will suffer irreparable harm if enforcement of the Ordinance is  
18 not enjoined by a preliminary injunction during the pendency of this action.

19 59. Petitioner is entitled to attorney's fees if the Court grants the relief requested in  
20 this First Cause of Action, as (i) this litigation is intended to result in enforcement of an  
21 important public right affecting the public interest; (ii) a significant benefit will be conferred on  
22 the general public or a large class of persons; and (iii) the necessity and financial burden of  
23 private enforcement are such as to make an award of attorney's fees appropriate. (Code Civ.  
24 Proc. §1021.5.)

25 **SECOND CAUSE OF ACTION**  
26 **AGAINST ALL RESPONDENTS**  
27 **(RETAIL FOOD CODE PREEMPTION)**

28 60. Petitioner realleges and incorporates herein every allegation made above.

61. The State of California regulates carryout bags in the California Retail Food

1 Code, which is part of the California Health and Safety Code. (California Health and Safety  
2 Code Div. 104, Part 7.)

3 62. Health and Safety Code § 113705 states as follows:

4 **Legislative Intent To Preempt Local Standards**

5 The Legislature finds and declares that the public health interest requires  
6 that there be uniform statewide health and sanitation standards for retail  
7 food facilities to assure the people of this state that the food will be pure,  
8 safe, and unadulterated. Except as provided in Section 113709, it is the  
9 intent of the Legislature to occupy the whole field of health and  
10 sanitation standards for retail food facilities, and the standards set forth  
11 in this part and regulations adopted pursuant to this part shall be  
12 exclusive of all local health and sanitation standards relating to retail  
13 food facilities.

14 63. Health and Safety Code § 113709 states as follows:

15 **Authority To Establish Local Requirements**

16 This part does not prohibit a local governing body from adopting an  
17 evaluation or grading system for food facilities, from prohibiting any  
18 type of food facility, from adopting an employee health certification  
19 program, from regulating the provision of consumer toilet and  
20 handwashing facilities, or from adopting requirements for the public  
21 safety regulating the type of vending and the time, place, and manner of  
22 vending from vehicles upon a street pursuant to its authority under  
23 subdivision (b) of section 22455 of the Vehicle Code.

24 64. California Health and Safety Code § 113789 defines "food facility" as follows:

25 (a) "Food facility" means an operation that stores, prepares, packages,  
26 serves, vends, or otherwise provides food for human consumption at the  
27 retail level, including, but not limited to, the following:

28 (1) An operation where food is consumed on or off the premises,  
regardless of whether there is a charge for the food.

(2) Any place used in conjunction with the operations described in this  
subdivision, including, but not limited to, storage facilities for food-  
related utensils, equipment, and materials.

(b) "Food facility" includes permanent and nonpermanent food facilities,  
including, but not limited to, the following:

(1) Public and private school cafeterias.



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- (2) Restricted food service facilities.
- (3) Licensed health care facilities.
- (4) Commissaries.
- (5) Mobile food facilities.
- (6) Mobile support units.
- (7) Temporary food facilities.
- (8) Vending machines.
- (9) Certified farmers' markets, for purposes of permitting and enforcement pursuant to Section 114370.
- (10) Farm stands, for purposes of permitting and enforcement pursuant to Section 114375.

[§ 113789(c) contains exclusions from the above definition.]

65. Health and Safety Code § 113914 defines "single-use" articles as including single-use "carry-out utensils" and "bags" and "wrappers." The words "carry-out" and "bags" leave no room for doubt that local bans and fees on carryout bags are preempted.

66. "Carryout-out utensils" (the term used in § 113914) includes any "container used in the storage, preparation, transportation, dispensing, sale, or service of food." (Health and Safety Code § 113934.) A bag is a container.

67. Health and Safety Code § 114081 states: "Single-use articles [including carryout bags] shall not be reused."

68. Health and Safety Code § 114130.2 states: "Materials that are used to make single-use articles [including bags] shall not allow the migration of deleterious substances or impart colors, odors, or tastes to food, and shall be safe and clean."

69. Based on the foregoing, the Retail Food Code regulates the "material" from which carryout bags are made (plastic or paper) and bans reusable bags at "food facilities."

70. The Legislative Analysis of SB 144 (which became the Retail Food Code) includes a section entitled "Uniformity and Consistency" which states as follows:

1 **UNIFORMITY AND CONSISTENCY**

- 2 • Consolidates food safety requirements in CURFFL articles 9-20 in order to  
3 ensure uniformity in interpretation and application of law.  
4 • Clarifies the enforcement actions that local health officials should take relative to  
5 temporary food facilities and activities.  
6 • Provides clear, uniform requirements for outdoor food service.  
7 • Requires food labeling that is in conformance with California’s Sherman Food,  
8 Drug, and Cosmetic Law.  
9 • Contains provisions that will clarify and expand the requirements pertaining to  
10 equipment, utensils, and linens used in retail food service operations.

11 71. In *California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, the  
12 California Supreme Court stated:

13 The remainder of the statutory scheme demonstrates by way of example  
14 the precise scope of exclusive state regulation, comprehensively  
15 detailing standards for...food display and service (*id.*, §§ 114060-  
16 114083),...the design and sanitizing of food preparation areas and  
17 utensils (*id.*, §§ 114095-114185.5)....

18 (*California Grocers, supra*, 52 Cal.4th at 189, emphasis added.)

19 72. The fact that the Ordinance has an environmental purpose is irrelevant. The only  
20 relevant consideration is “whether the *effect* of the local ordinance is in fact to regulate in the  
21 very field the state has reserved to itself.” (*California Grocers, supra*, 52 Cal.4th at 190, italics  
22 added.)

23 73. On May 15, 2012, the Santa Barbara Superior Court ruled that the Retail Food  
24 Code preempts cities and counties from banning plastic carryout bags and creating  
25 specifications for paper bags at “food facilities” (as defined by § 113789). *Save The Plastic Bag*  
26 *v. City of Carpinteria*, Santa Barbara Superior Court, Case No. 1385674. A true and correct  
27 copy of the tentative ruling is attached hereto as Exhibit F and incorporated herein by reference.  
28 The tentative ruling was adopted by the court without change.

74. The City of Santa Cruz Ordinance exempts “restaurants” from the Ordinance.  
The Ordinance defines “restaurants” as follows:

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Restaurants, defined as an establishment whose principal business is the sale of prepared food for consumption either on or off premises, are not covered under this Ordinance.

75. In the July 9, 2012 e-mail, Petitioner stated as follows:

The draft ordinance states: "Restaurants, defined as an establishment whose principal business is the sale of prepared food for consumption either on or off premises, are not covered under this ordinance." Without waiving any objections, we object as this definition is too restrictive to comply with the Retail Food Code which applies to all "food facilities." Since the Santa Barbara Superior Court's ruling in [our] favor on this issue, the Cities of Carpinteria and Solana Beach will be adopting the following definition: " 'Restaurant' means any person or establishment doing business within the City of \_\_\_\_\_ that provides prepared food or beverages for consumption on or off its premises such as a restaurant, café, bakery, grocery or convenience store food counter or delicatessen, or catering truck vehicle." Without waiving any other objections, this definition would be acceptable.

76. The definition of "restaurants" in the Ordinance is narrower than the definition of "food facilities" in § 113789. Therefore, the Ordinance is preempted and invalid as it bans plastic bags at some "food facilities" that are not included in the definition of "restaurants" in the Ordinance, including but not limited to bakeries and grocery or convenience store food counters or delicatessens. Therefore, the Ordinance intrudes into an area that the State of California has reserved to itself and is invalid.

77. For the reasons stated below, it is in the public interest for all "food facilities" to be exempt from the Ordinance.

78. Food facilities, including grocery or convenience store food counters or delicatessens, prepare and sell freshly cooked foods that may contain extremely hot liquid, grease, oil, sauce, or soup. Oil is heated in fryers to 375 degrees or more. Hot soup and other foods may be served at 180 degrees or more.

79. Plastic is obviously safer than paper for transporting such foods.

80. Plastic bags are waterproof and greaseproof. Paper bags are not.

81. When liquids spill inside a paper bag, the bag can break. That does not happen to a plastic bag.

1           82.    Carryout bags from food facilities are often transported or opened in moving  
2 vehicles, so safe and secure packaging is essential. The impact on a young child of hot liquid or  
3 hot oil seeping or spilling from a paper bag onto his or her lap or legs could be disastrous.

4           83.    The Burn Center at the University of Florida states:

5                   Examples of hot liquids that can cause burns include hot water, coffee,  
6                   grease and hot soup.

7           84.    The Burn Center at Saint Francis Memorial Hospital in San Francisco states as  
8 follows on its website:

9                   Hot liquids can cause life threatening burn injuries and are the leading  
10                   cause of burn injuries in children under the age of 4 years. The experts in  
11                   burn treatment at Saint Francis Memorial Hospital's Bothin Burn Center  
                  want you to know:

12                   Coffee, tea, soup and hot tap water can be hot enough to cause serious  
13                   burn injury....

14                   60-70% of all pediatric patients seen in the Bothin Burn Center have a  
15                   scald injury.

16           85.    The lady who sued in the McDonald's hot coffee case was burned so severely  
17 that her doctors thought that she would die. The movie about the hot coffee case shows horrific  
18 photographs of her injuries. (<http://hotcoffeethemovie.com/>.) Her cotton sweatpants absorbed  
19 the coffee and held it against her skin, burning her thighs, buttocks, and groin. She suffered  
20 third-degree burns on 6% of her skin and lesser burns over 16%. She remained in the hospital  
21 for eight days while she underwent skin grafting. During this period, she lost 20 pounds (nearly  
22 20% of her body weight), reducing her down to 83 pounds. Two years of medical treatment  
23 followed.

24           86.    From 1982 to 1992, McDonald's received more than 700 reports of people  
25 burned by its coffee.

26           87.    In another incident, a lady was severely burned by hot soup that she was  
27 removing from a carryout bags. incident is related in the following news story. A true and  
28 correct copy of the article relating this incident, including a photograph of the extensive burn

1 injury, is attached hereto as Exhibit G and incorporated herein by reference.

2 88. A food facility owner has the legal right and duty and the moral responsibility to  
3 take all reasonable steps to prevent such injuries. It is for the food facility owner, not a  
4 government entity, to decide whether a plastic or paper bag is the safest for its food. Denying  
5 food facility owners what they believe to be the safest option for transporting a particular type  
6 of food could have disastrous consequences.

7 89. The Ordinance states that its purpose is to increase the use of reusable bags. This  
8 is a major health risk as the bag may have been used to carry dirty items that could contaminate  
9 food and cause severe illness. Many reusable bags contain dangerous viruses and bacteria, as  
10 evidenced by a report of Oregon public health officials, a true and correct copy of which is  
11 attached hereto as Exhibit H and incorporated herein by reference.

12 90. The California Restaurant Association has expressed serious concerns and has  
13 objected to the banning of plastic bags and the use of reusable bags at food facilities. It has  
14 stated as follows regarding the Ordinance:

15 Encouraging customers to bring dirty reusable bags in restaurants for use  
16 places public health and safety at risk. Let the supervisors know this is a  
17 risk restaurants shouldn't have to take. Other jurisdictions have  
18 recognized that reusable bags pose a food safety risk in a prepared food  
environment and have exempted restaurants from their respective  
ordinances.

19 (<http://tinyurl.com/6n4nvqb>)

20 91. Petitioner's members that manufacture or supply plastic bags for food facilities  
21 in the City of Santa Cruz, including but not limited to Command Packaging, will suffer  
22 irreparable damage if their products are banned. They have no adequate remedy at law to obtain  
23 compensation for such losses, as the City is immune from liability for compensatory damages  
24 for adopting an invalid ordinance.

25 92. Petitioner is entitled to attorney's fees if the Court grants the relief requested in  
26 this Second Cause of Action, as (i) this litigation is intended to result in enforcement of an  
27 important public right affecting the public interest; (ii) a significant benefit will be conferred on  
28 the general public or a large class of persons; and (iii) the necessity and financial burden of

1 private enforcement are such as to make an award of attorney's fees appropriate. (Code Civ.  
2 Proc. §1021.5.)

3 **THIRD CAUSE OF ACTION**  
4 **AGAINST ALL RESPONDENTS**  
5 **(FOURTEENTH AMENDMENT TO THE**  
6 **U.S. CONSTITUTION - VOID FOR VAGUENESS)**

7 93. Petitioner realleges and incorporates herein every allegation made above.

8 94. The Ordinance is a penal statute. It provides that a violation shall constitute an  
9 infraction and imposes fines.

10 95. The Ordinance defines a "reusable bag" as follows:

11 "Reusable bag" means any bag with handles that is specifically designed  
12 and manufactured for multiple reuse and meets all of the following  
13 requirements: (1) has a minimum lifetime of 125 uses, which for  
14 purposes of this subsection, means the capability of carrying a minimum  
15 of 22 pounds 125 times over a distance of at least 175 feet; (2) has a  
16 minimum volume of 15 liters; (3) is machine washable; (4) does not  
17 contain lead, cadmium, or any other heavy metal in toxic amounts; (5)  
18 has printed on the bag, or on a tag that is permanently affixed to the bag,  
19 the name of the manufacturer, the location (country) where the bag was  
20 manufactured, a statement that the bag does not contain lead, cadmium,  
21 or any other heavy metal in toxic amounts, and the percentage of  
22 postconsumer recycled material used, if any; and (6) if made of plastic, is  
23 a minimum of at least 2.25 mils thick.

24 96. The term "machine washable" is vague and ambiguous. A reusable bag made of  
25 polyethylene, polypropylene, non-woven polypropylene or canvas can be placed in a washing  
26 machine and washed, but the bag will be destroyed and unusable thereafter. It is impossible to  
27 ascertain whether the term "machine washable" would disqualify reusable bags made of such  
28 materials. A retailer may be guilty of an infraction for providing a reusable bag that is not  
"machine washable" based on the reasonable belief that the bag is "machine washable."

97. In its July 9, 2012 e-mail (Exhibit E), Petitioner objected to the definition of a  
"reusable bag" in the draft Ordinance, stating as follows:

The reusable bag definition in the draft ordinance requires that reusable  
bags be "machine washable." That is too restrictive. It would eliminate  
most reusable bags. The standard adopted in all other jurisdictions that  
have adopted the long form definition is that the bag must be capable of  
being cleaned or disinfected, regardless of machine washability. It is

absurd that the City of Santa Cruz County is proposing a different reusable bag definition than the one adopted by Santa Cruz County. Santa Cruz County has adopted the short form definition, which is the same as the City of San Jose's definition. The County ordinance defines a reusable bag as follows: " 'Reusable bag' means any bag with handles that is specifically designed and manufactured for multiple reuse, and is either 1) made of cloth or other washable woven fabric, or 2) made of durable material that is at least 2.25 mils thick. A "reusable bag" may be made of recyclable plastic such as high density polyethylene (HDPE), low density polyethylene (LDPE), or polypropylene." Without waiving any other objections, we object to a different definition than the one adopted by Santa Cruz County.

98. Legislation "may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." (*Musser v. Utah*, 333 U.S. 95, 97 (1948).) "Men of common intelligence cannot be required to guess at the meaning of [an] enactment." (*Winters v. New York*, 333 U.S. 507, 515-16 (1948).) "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson* (1983) 461 U.S. 352, 357.

99. The Ordinance fails to give fair notice of the acts to be avoided and fails to give adequate safeguards to guide law enforcement in order to avoid abusive and arbitrary practices. The Ordinance is therefore void for vagueness on its face under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

100. Based on the foregoing allegations, the Ordinance is invalid.

101. Petitioner is entitled to attorney's fees if the Court grants the relief requested in this Third Cause of Action, as (i) this litigation is intended to result in enforcement of an important public right affecting the public interest; (ii) a significant benefit will be conferred on the general public or a large class of persons; and (iii) the necessity and financial burden of private enforcement are such as to make an award of attorney's fees appropriate. (Code Civ. Proc. §1021.5.)

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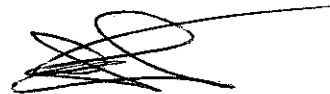
**PRAYER FOR RELIEF**

WHEREFORE, Petitioner prays for all of the following:

- A. Under the First Cause of Action, a judgment declaring that the Ordinance is invalid as the Initial Study and Negative Declaration are invalid and no EIR was prepared.
- B. Under the First Cause of Action, a peremptory writ of mandate directing the City to repeal the Ordinance, in accordance with Pub. Res. Code § 21168.9.
- C. Under the Second Cause of Action, a judgment declaring that the Ordinance is invalid as it is preempted and prohibited by the California Retail Food Code.
- D. Under the Second Cause of Action, an order directing the City to repeal the Ordinance.
- E. Under the Third Cause of Action, a judgment declaring that the Ordinance is invalid as it is unconstitutionally vague.
- F. Under the Third Cause of Action, an order directing the City to repeal the Ordinance.
- G. A preliminary injunction suspending the Ordinance and prohibiting all Respondents from implementing and enforcing the Ordinance during this litigation.
- H. Costs of this action.
- I. Attorney's fees pursuant to Code Civ. Proc. §1021.5.
- J. Such other or further relief as the Court may deem just and proper.

DATED: August 2, 2012

**STEPHEN L. JOSEPH**



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Attorney for Petitioner  
SAVE THE PLASTIC BAG COALITION



VERIFICATION

I, Stephen L. Joseph, declare:

1. I am an attorney at law, duly admitted and licensed to practice in the State of California.
2. I am the attorney of record for Petitioner, SAVE THE PLASTIC BAG COALITION, in the above-entitled matter.
3. Petitioner was formed on June 3, 2008.
4. At all times since June 3, 2008, I have been sole counsel and manager of Petitioner. In those capacities, I have been involved in and have been aware of all actions taken by Petitioner since that time.
5. I am authorized by Petitioner to make this verification for and on its behalf.
6. I have read the VERIFIED PETITION FOR WRIT OF MANDATE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT; COMPLAINT FOR INVALIDATION OF ORDINANCE BASED ON RETAIL FOOD CODE PREEMPTION AND UNCONSTITUTIONAL VAGUENESS; REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF and know its contents.
7. The matters stated therein are true of my own knowledge, except as to those matters that are stated on information and belief, and as to those matters I believe them to be true.
8. If called upon as a witness to this proceeding, I would and could competently testify thereto under oath.

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

Executed on August 2, 2012 at San Francisco, California.



STEPHEN L. JOSEPH

# **EXHIBIT A**

Ordinance

ORDINANCE NO. 2012-08

AN ORDINANCE OF THE CITY OF SANTA CRUZ  
ADDING CHAPTER 6.49 TO THE CITY OF SANTA CRUZ MUNICIPAL CODE TO  
REDUCE SINGLE-USE PLASTIC AND PAPER CARRY OUT BAGS

BE IT ORDAINED by the City Council of the City of Santa Cruz as follows:

Section 1: That Chapter 6.49 is hereby added to the City of Santa Cruz Municipal Code Title 6, Health and Sanitation, to read as follows:

Chapter 6.49

CITY OF SANTA CRUZ BAG REDUCTION ORDINANCE

Sections:

- 6.49.010 Purpose and findings
- 6.49.015 Definitions
- 6.49.020 Ban on plastic carry out bags and charge for other single-use carry out bags
- 6.49.025 Implementation
- 6.49.030 Exemptions Allowing Single-use Bags
- 6.49.035 Enforcement
- 6.49.040 Severability
- 6.49.045 Effective date

6.49.010 Purpose and findings

A. It is the intent of the City of Santa Cruz, in enacting Chapter 6.49 to eliminate the common use of plastic single-use carry out bags, to encourage the use of reusable bags by consumers and retailers, and to reduce the consumption of single-use bags in general. Paper versus plastic is not the issue addressed by this ordinance. Rather, it is to encourage City of Santa Cruz residents and visitors to the City of Santa Cruz to avoid single-use bags altogether in favor of reusable bags when purchasing goods.

B. Whereas the City of Santa Cruz has an obligation to protect the environment, the economy and public health, and the City of Santa Cruz has a 75% waste reduction goal, which is to be reached by waste reduction, reuse, recycling, and composting, the City of Santa Cruz does find the following:

1. The California Department of Resources Recycling and Recovery (CalRecycle) estimates that Californians use nearly 20 billion single-use plastic bags per year and discard over one hundred plastic bags per second. Further the EPA estimates that only 5% of the plastic bags in California and nationwide are currently recycled.

2. According to Save Our Shores, a Santa Cruz-based marine conservation non-profit that conducts beach, river, and inland cleanups in the coastal regions of Santa Cruz, San Mateo, and Monterey County, in the period from June 2007 to March 2010, it conducted 395 cleanups where volunteers removed a total of 19,080 plastic bags. Unchecked, this material would have likely entered the marine environment of the Monterey Bay National Marine Sanctuary.

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3. Plastic bags returned to supermarkets may be recycled into plastic lumber; however, a very low percentage of bags are actually returned. The CalRecycle 2009 *Statewide Recycling Rate for Plastic Carryout Bags* report indicates that of the 52,765 tons of regulated bags purchased statewide, only 1,520 tons were collected for recycling, a recycling rate of about 3%.
4. The City of Santa Cruz currently has a plastic bag recycling component to both the residential curbside and commercial recycling programs.
5. At the City of Santa Cruz Resource Recovery Facility (COSCRRF), where most refuse and recycling materials are processed, plastic film, which includes carry out and all other types of plastic films, has a recycling rate of about 5%. By contrast, the mixed paper stream, which includes Kraft paper, the other single-use bag source is around 65%.
6. Out of a daily work crew of 26 at the COSCRRF, five staff members are tasked with removing plastic film from the different recycling sort lines. Much of this plastic material is improperly prepared for recycling and results in contamination on the paper and cardboard lines. This contamination, if not removed, results in a much lower material price for the paper and cardboard when sold.
7. Improperly prepared plastic bags create equipment problems at the COSCRRF. Loose bags wrap around the bearings and shafts of the material separator. The equipment must be stopped and the bags removed before they cause permanent damage. This results in slower production times for the sorting crew, as well as increased processing and repair costs.
8. In 2010, the COSCRRF marketed 64 tons of recovered plastic film for revenues of \$4,930 or about \$77 per ton. The direct staff costs at the COSCRRF of recovering the properly prepared plastic film and removing the contaminated plastic film is estimated at \$433 per day. With 208 sorting days per year, the estimated cost to the City to recover those 64 tons of plastic film about \$90,000 or in other words the City lost \$1,330 per ton recovered. The markets for recovered plastic film are not reliable, and at times the City's material broker cannot find a buyer for processed plastic film.
9. Lightweight materials placed in the trash for disposal can become windblown at the COSCRRF. This requires one person each day to pick up litter for approximately 2 hours. This collected litter is primarily single-use bags. Unchecked, this material would likely enter the marine environment of the Monterey Bay National Marine Sanctuary, given the fact the COSCRRF, on Highway 1, is only 3,900 feet from Sanctuary Waters.
10. Compostable plastic carry out bags, as currently manufactured, do not solve the problems of wildlife damage, litter, or resource use addressed by this ordinance. Compostable carry out bags are designed to remain intact until placed in a professional compost facility with a high heat level, so they do not degrade quickly as litter or in a marine environment. Production of compostable bags consumes nearly as much fossil fuel as non-compostable bags. Mixing compostable bags with regular plastic bags prevents recycling or composting either of them. Therefore there is no exemption in this ordinance for compostable carry out bags.

## ORDINANCE NO. 2012-08

11. Reusable bags are readily available from numerous sources and vendors. Many grocery and other retail establishments throughout the City of Santa Cruz already offer reusable bags for sale at a price as low as 99 cents.

12. Even though paper bags are recycled at a much higher rate within the City of Santa Cruz than plastic bags, the purpose of this ordinance is to reduce all single-use bags. For this reason, a charge on paper bags is indicated as an incentive to reduce their use and encourage reusable bags.

13. Paper bags that contain a minimum of 40 percent post-consumer recycled content have fewer negative impacts on the environment than virgin paper bags. Paper shopping bags with 40% post consumer recycled content are easily available, and such bags are in wide use by City of Santa Cruz merchants.

14. State law currently prohibits local jurisdictions from placing charges on single-use carry out plastic bags. Therefore several California cities have adopted or are pursuing a ban on single-use plastic carry out bags as the most effective remaining means to eliminate the impacts these plastic bags cause. State law does not prohibit jurisdictions from placing charges on paper bags.

### 6.49.015 Definitions

A. For the purposes of this Chapter, the following definitions apply:

1. "Carry out bags" means bags provided by retailers to customers at the point of sale to hold customers' purchases. "Carry out bags" do not include bags used to contain loose items prior to checkout, such as meat, produce and bulk goods, and do not include prepackaged products.
2. "Plastic bag" or "plastic carry out bag" means a single-use carry out bag of any size that is provided at point of sale to customers by a retail establishment. Plastic bags include both compostable and non-compostable carry out bags.
3. "Single-use paper bag" means a carry out bag provided by a retail establishment at the point of sale that is made from paper and is not a reusable bag.
4. "Reusable bag" means any bag with handles that is specifically designed and manufactured for multiple reuse and meets all of the following requirements: (1) has a minimum lifetime of 125 uses, which for purposes of this subsection, means the capability of carrying a minimum of 22 pounds 125 times over a distance of at least 175 feet; (2) has a minimum volume of 15 liters; (3) is machine washable; (4) does not contain lead, cadmium, or any other heavy metal in toxic amounts; (5) has printed on the bag, or on a tag that is permanently affixed to the bag, the name of the manufacturer, the location (country) where the bag was manufactured, a statement that the bag does not contain lead, cadmium, or any other heavy metal in toxic amounts, and the percentage of postconsumer recycled material used, if any; and (6) if made of plastic, is a minimum of at least 2.25 mils thick.

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5. "Retail establishment" or "retail store" means all sales outlets, stores, shops, vehicles or other places of business located within the City of Santa Cruz which operate primarily to sell or convey goods, directly to the ultimate consumer. Restaurants, defined as an establishment whose principal business is the sale of prepared food for consumption either on or off premises, are not covered under this ordinance.

6. "Exempted uses" means those point-of-purchase or delivery sales, which have received a special exemption, through the Public Works Director or the Director's designee, allowing single-use bags.

6.49.020 Ban on plastic bags and charge for single-use carry out bags

A. No retail establishment shall provide plastic carry out bags to customers at the point of sale, except as permitted in this Chapter.

B. No City of Santa Cruz contractors, special events promoters, or their vendors, while performing under contract or permit shall provide plastic carry out bags to customers at the point of sale.

C. Single-use paper carry out bags provided to customers shall contain a minimum of 40 percent post consumer recycled paper fiber, and must be recyclable in the City of Santa Cruz's curbside recycling program.

D. Retail establishments shall charge, during the first year of implementation of this ordinance, a 10-cent charge for each single-use paper carry out bag provided to customers at the point of sale. The City Council shall review the charge amount every year from the date of adoption, to judge its effectiveness.

E. The charge imposed pursuant to this section shall not be charged to customers participating in the California Special Supplemental Food Program for Women, Infants, and Children, the State Department of Social Services Food Stamp program, or other government-subsidized purchase programs for low-income residents.

F. The ban on single-use plastic bags and the charge on single-use paper bags does not apply to plastic or paper bags used to protect produce, meat, or otherwise used to protect items as they are put into a carryout bag at checkout. Other examples include: paper bags to protect bottles, plastic bags around ice cream or other wet items, paper bags used to weigh candy, paper pharmacy bags or paper bags to protect greeting cards.

G. Retail establishments are strongly encouraged to make reusable bags available for sale to customers at a reasonable price.

H. Retail establishments shall indicate on the customer transaction receipt the number of paper carry out bags provided, and the total amount charged.

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6.49.025 Implementation

- A. Sixty days before this ordinance becomes operative, the City of Santa Cruz shall mail or deliver a copy of it to every retail establishment within the City of Santa Cruz.
- B. The City of Santa Cruz will distribute to each store an initial placard designed to inform shoppers of the City of Santa Cruz policy for carry out bags.
- C. The City of Santa Cruz Finance Department shall provide a copy of this ordinance to every new retail establishment that applies for a business license in the City of Santa Cruz.

6.49.030 Exemptions Allowing Single-use Bags

- A. The Public Works Director or the Director's designee, may exempt a retail establishment from the requirement set forth in Section 6.49.020(a) of this chapter for a one-year period upon the retail establishment showing, in writing, that this chapter would create an undue hardship or practical difficulty not generally applicable to other persons in similar circumstances. The Public Works Director or the Director's designee shall put the decision to grant or deny a one-year exemption in writing, and the director's or director's designee's decision shall be final.
- B. An exemption application shall include all information necessary for the Public Works Director or the Director's designee to make a decision, including but not limited to documentation showing factual support for the claimed exemption. The Director or the Director's designee may require the applicant to provide additional information.
- C. The Public Works Director or the Director's designee may approve the exemption application in whole or in part, with or without conditions.

6.49.035 Enforcement and Notice of Violation

- A. Violations of this chapter may be enforced in accordance with Chapter 4.14 of this code.
- B. The Public Works Director or the Director's designee, shall be responsible for enforcing this chapter and shall have authority to issue citations for violations. The Public Works Director or the Director's designee is authorized to establish regulations or administrative procedures to obtain compliance with this chapter.
- C. Anyone violating or failing to comply with any of the requirements of this chapter shall be guilty of an infraction.
- D. The City of Santa Cruz attorney may seek legal, injunctive, or any other relief to enforce the provisions of this chapter.
- E. The remedies and penalties provided in this chapter are cumulative and not exclusive of one another.
- F. The City of Santa Cruz, in accordance with applicable law, may inspect any vendor's premises to verify compliance.

ORDINANCE NO. 2012-08

G. Violation of this Chapter is hereby declared to be a public nuisance. In addition to any other remedies or penalties which may be available, any violation described in the preceding paragraph shall be subject to abatement by the City, as well as any other remedies that may be permitted by law for public nuisances, and may be enforced by an injunction issued by the Superior Court in a civil action, based upon a showing by the City that said violation exists.

H. Remedies under this Section are cumulative.

6.49.040 Severability

If any word, phrase, sentence, part, section, subsection, or other portion of this Chapter, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The City of Santa Cruz hereby declares that it would have adopted this ordinance, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases had been declared invalid or unconstitutional.

6.49.045 Effective Date

This Ordinance shall be in force and take effect thirty (30) days after final adoption; however Section 6.49.020 of this ordinance shall not be operative until April 10, 2013, on which day it shall be implemented in its entirety.

PASSED FOR PUBLICATION this 10<sup>th</sup> day of July, 2012, by the following vote:

AYES: Councilmembers Madrigal, Beiers, Coonerty, Terrazas, Vice Mayor Bryant; Mayor Lane.

NOES: None.

ABSENT: Councilmember Robinson.

DISQUALIFIED: None.

ATTEST:   
City Clerk Administrator

APPROVED:   
Mayor



ORDINANCE NO. 2012-08

PASSED FOR FINAL ADOPTION this 24<sup>th</sup> day of July, 2012, by the following vote:

AYES: Councilmembers Robinson, Coonerty, Vice Mayor Bryant; Mayor Lane.

NOES: None.

ABSENT: Councilmembers Madrigal, Beiers and Terrazas.

DISQUALIFIED: None.

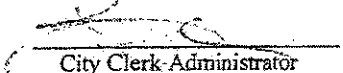
APPROVED: \_\_\_\_\_

  
Mayor

ATTEST: \_\_\_\_\_

  
City Clerk Administrator

This is to certify that the above  
and foregoing document is the  
original of Ordinance No. 2012-08  
and that it has been published or  
posted in accordance with the  
Charter of the City of Santa Cruz

  
City Clerk Administrator

# **EXHIBIT B**

Negative Declaration

## NEGATIVE DECLARATION

The Administrator of Environmental Quality of the City of Santa Cruz has prepared this Negative Declaration for the following described project:

**PROJECT:** City of Santa Cruz Single-Use Bag Reduction Ordinance

**PROJECT LOCATION:** City of Santa Cruz

**APPLICANT:** City of Santa Cruz

**PROJECT DESCRIPTION:** The project consists of an ordinance to add Chapter 6.49 to the City of Santa Cruz Municipal Code to reduce single-use plastic and paper bags, commonly referred to as "carryout" bags. As stated in the draft ordinance, the intent is to eliminate the common use of plastic single-use carryout bags, to encourage the use of reusable bags by consumers and retailers, and to reduce the consumption of single-use bags in general. The project would ban the use of single use plastic carryout bags by any retail establishment (with specified exceptions, including restaurants), require that all paper carryout bags have a minimum of 40% post-consumer recycled content, require retail establishments to impose a 10-cent charge for each single-use paper carryout bag provided to customers at the point of sale, and encourage retail establishments to make reusable bags available for sale to customers at a reasonable price.

**FINDINGS:** The City of Santa Cruz Public Works Department has reviewed the proposed project and has determined, based on the attached Initial Study, that the project will have no or less-than-significant impacts on the environment. Consequently, adoption of a Negative Declaration is appropriate. An Environmental Impact Report is not required pursuant to the *California Environmental Quality Act of 1970 (CEQA)*. This environmental review process was conducted and the attached Initial Study was prepared in accordance with the State *CEQA Guidelines* and the local City of Santa Cruz *CEQA Guidelines and Procedures*.

**BASIS OF FINDINGS:** The Initial Study finds that all direct and potentially indirect impacts that could be caused by the project are less than significant.

By:  Director

Date: 4/16/12

# **EXHIBIT C**

Petitioner's objections  
dated May 21, 2012

# **SAVE THE PLASTIC BAG COALITION**

## **COMMENTS ON AND CEQA OBJECTIONS TO CITY OF SANTA CRUZ PROPOSED PLASTIC BAG BAN**

### **NOTICE OF INTENT TO LITIGATE**

May 21, 2012

Presented by:  
Stephen L. Joseph, counsel  
Phone: (415) 577-6660  
Fax: (415) 869-5380  
E-mail: [savetheplasticbag@earthlink.net](mailto:savetheplasticbag@earthlink.net)  
Website: [www.savetheplasticbag.com](http://www.savetheplasticbag.com)

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# **INTRODUCTION**

## INTRODUCTION

Save The Plastic Bag Coalition ("STPB") was formed in 2008. STPB's membership includes (but is not limited to) companies and individuals engaged in the manufacture, distribution, and marketing of plastic carryout bags and polyethylene reusable bags. Our membership includes Command Packaging and Crown Poly. They manufacture plastic carryout bags and polyethylene reusable bags that are marketed, sold, and distributed in the City of Santa Cruz, including but not limited to plastic carryout bags provided to consumers by supermarkets, grocery stores, and other retail stores.

STPB and its counsel, Stephen Joseph, are not, and have never been, connected with or financed by the American Chemistry Council or Progressive Bag Affiliates, or any other plastic industry organization in any way. STPB is and always has been totally independent.

Stephen Joseph has been an anti-litter and anti-graffiti activist in San Francisco. In 2000, he sued the city to get the graffiti cleaned off parking signs. No money was requested in the lawsuit. In response to the lawsuit, the city cleaned the graffiti off some 20,000 parking signs.

Following the lawsuit, Stephen Joseph and a colleague proposed the creation of a "Green Patrol" to clean parts of the San Francisco, which they proposed to Mayor Willie Brown and the Department of Public Works. The Green Patrol program was launched in 2001. (See photo Doc #113.) Stephen Joseph and his colleague were by commended by the Board of Supervisors. (Doc #112.) The city eventually eliminated the program, apparently for funding reasons, despite the fact that it was extremely successful.

In *Save the Plastic Bag v. City of Manhattan Beach* (2011), the California Supreme Court in a unanimous decision granted STPB standing to legally challenge plastic bag bans. The court stated: (<http://www.courtinfo.ca.gov/opinions/documents/S180720.PDF>)

Corporate purposes are not necessarily antithetical to the public interest.... Corporations [may] have particular expertise and thus may have an enhanced understanding of the public interests at stake.

STPB believes and contends that some environmental groups seeking to have plastic bags banned have used environmental myths, misinformation, exaggerations, and false statistics, and selective photography to promote their goal. Such groups are often driven by ideological motives excessive "green" zeal, rather than the facts.

The *Times of London* has stated in an editorial: (<http://tinyurl.com/7l67ere>)

There is a danger that the green herd, in pursuit of a good cause, stumbles into misguided campaigns.

Analysis without facts is guesswork. Sloppy analysis of bad science is worse. Poor interpretation of good science wastes time



and impedes the fight against obnoxious behavior. There is no place for bad science, or weak analysis, in the search for credible answers to difficult questions.... Many of those who have demonized plastic bags have enlisted scientific study to their cause. By exaggerating a grain of truth into a larger falsehood they spread misinformation, and abuse the trust of their unwitting audiences.

David Laist, a senior policy analyst with the U.S. Marine Mammal Commission, has publicly stated as follows: (<http://tinyurl.com/2fdu3b2>)

In their eagerness to make their case [against plastic bags], some of the environmental groups make up claims that are not really supportable.

STPB was created to respond to environmental misinformation and get the true facts out to decision-makers and the public. STPB will continue to fight for environmental truth.

#### **INCORPORATION OF STPB'S OBJECTIONS TO THE COUNTY'S INITIAL STUDY AND ORDINANCE**

**To the extent that the city relies on the County's Initial Study and ordinance, STPB incorporates herein by reference all objections submitted to the County and hereby reasserts those objections as objections to the City of Santa Cruz Initial Study, proposed Negative Declaration, and proposed ordinance. The objections to the County's Initial Study and ordinance are Docs ## 138-140 submitted herewith.**

#### **SUPPORTING DOCUMENTS**

STPB requests that all the supporting documents that have been submitted by STPB on a CD sent via Federal Express to Bob Nelson at the City of Santa Cruz Public Works Department be made part of the administrative record. They are numbered CSC 1, CSC 2, etc. They are referred to herein as Doc #1, Doc #2, etc. A list of the exhibits is appended to this document. STPB further requests that all documents and webpages for which hyperlinks are included herein be made part of the administrative record.

## **GENERAL COMMENTS**

## THERE IS NO "GREAT PACIFIC GARBAGE PATCH"

- The so-called "Great Pacific Garbage Patch," which is alleged to be twice the size of Texas, does not exist. Click on the following link to read our paper on the subject: <http://tinyurl.com/837xod9>. (Doc #87.)
- We challenge anyone to provide us with a photograph of the "Great Pacific Garbage Patch." Check Google Images and you will find none.
- Heal the Bay now acknowledges that the term is "misleading."
- Miriam Goldstein, the chief scientist on the Scripps expedition that went to the Pacific to survey marine debris, says the allegations about the patch are hugely exaggerated. She is frustrated with environmentalists who spread misinformation on the subject (and presumably legislators and government officials who believe them without question). She says: "Misinformation on this issue is rampant." (<http://tinyurl.com/837xod9> Docs ## 9, 10.)
- Dr. Marcus Eriksen of the Algalita Marine Research Foundation, sailed a vessel from Long Beach to Hawaii to find the patch. After 24 hours of trawling over 50 miles, the amount of plastic that he found was about the size of the palm of a hand. He now admits: "*There is no island of plastic trash.*" (Doc #81.) Click on the following link to view the video of his 24-hour trawl: [http://www.youtube.com/watch?v=3d3\\_fLsjC8U](http://www.youtube.com/watch?v=3d3_fLsjC8U)
- In 2011, Oregon State University issued a press release based on the work of one of its scientists that was in no way financed or connected with the plastic industry. She said "the highest concentrations ever reported by scientists produces a patch that is a small fraction of the state of Texas, not twice the size." (<http://tinyurl.com/837xod9> Docs ## 15, 16.)
- Any plastic debris in the Pacific Ocean will soon be overwhelmed by the gigantic amount of debris from the tsunami in Japan. (Doc #98.)
- The Sea Education Association has surveyed plastic debris in the Atlantic Ocean for the past 22 years. They found no overall change in the amount of plastic from 1986 to 2008. Karen Lavender, an oceanographer at the Sea Education Association said: "I expected to see the line go right up. It took us a good year to decide no, we have not seen an increase, no matter how you slice it." Each half-hour trawl in the area where the concentration was the highest typically turned up just 20 tiny pieces, equivalent to about 0.3 grams in all. A U.S. nickel weighs 5 grams. ("Mystery of the Missing Ocean Plastic": <http://news.discovery.com/earth/plastic-oceans-atlantic.html> Docs ## 65, 66.)
- *Almost all of the plastic debris found in the Pacific Ocean is hard plastic.*



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## JUNK-n-Gyre



**THE UNIMPRESSIVE RESULTS OF DR. ERIKSEN'S 24-HOUR 50-MILE TRAWL  
THROUGH THE "GREAT PACIFIC GARBAGE PATCH"  
BY THE ALGALITA MARINE RESEARCH FOUNDATION.**

**THAT IS ABOUT THE DISTANCE FROM SAN FRANCISCO TO SAN JOSE.**

**THE IMAGE INCLUDES DEAD FISH CAUGHT UP IN THE TRAWL.**

**THE AMOUNT OF PLASTIC FOUND WOULD FILL THE PALM OF A HAND.**

**THERE WERE NO PLASTIC BAGS!**

[http://www.youtube.com/watch?v=3d3\\_fLsjC8U](http://www.youtube.com/watch?v=3d3_fLsjC8U)

**THE ALLEGATION THAT 100,000 MARINE MAMMALS AND A  
MILLION SEABIRDS ARE KILLED EACH YEAR BY PLASTIC BAGS  
IS BASED ON A TYPOGRAPHICAL ERROR AND IS UNTRUE**

- The allegation that 100,000 marine mammals and a million seabirds are killed every year by plastic bags is a myth. The U.S. and Australian Governments say that the figures are false. Click on the following link to read our paper on the subject:  
<http://tinyurl.com/837xod9> (Doc #87.)
- In 2008, the Times of London published an article entitled "*Series of blunders turned the plastic bag into global villain*" states in part as follows: (<http://tinyurl.com/7l67ere> Doc #6.)

The central claim of campaigners is that the bags kill more than 100,000 marine mammals and one million seabirds every year. However, this figure is based on a misinterpretation of a 1987 Canadian study in Newfoundland, which found that, between 1981 and 1984, more than 100,000 marine mammals, including birds, were killed by discarded nets. The Canadian study did not mention plastic bags.

Fifteen years later in 2002, when the Australian Government commissioned a report into the effects of plastic bags, its authors misquoted the Newfoundland study, mistakenly attributing the deaths to "plastic bags".

The figure was latched on to by conservationists as proof that the bags were killers. For four years the "typo" remained uncorrected. It was only in 2006 that the authors altered the report, replacing "plastic bags" with "plastic debris". But they admitted: "The actual numbers of animals killed annually by plastic bag litter is nearly impossible to determine."

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

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

David Santillo, a marine biologist at Greenpeace, told The Times that bad science was undermining the Government's case for banning the bags. "It's very unlikely that many animals are killed by plastic bags," he said. "The evidence shows just the opposite."

- The U.S. National Oceanic and Atmospheric Administration ("NOAA") states as follows: (Docs ## 11-13)

Question: Is it true that 100,000 marine mammals and/or sea turtles die each year due to marine debris/plastics/plastic bags?

Answer: We were able to find no information to support this statement. An erroneous statement attributing these figures to plastic bags was published in a 2002 report published by the Australian Government; it was corrected in 2006.

Question: Is it true that marine debris kills a million seabirds each year?

Answer: This statement is currently unknown. We are so far unable to find a scientific reference for this figure. The closest we have found is "214,500 to 763,000 seabirds are killed annually incidental to driftnet fishing by Japanese fishermen in the North Pacific Ocean (US Department of Commerce, 1981)" from Laist, 1987. This refers to active fishing gear bycatch and not marine debris; it also predates the high seas driftnet ban adopted by the United Nations General Assembly in 1992.

- Environmental groups show the same picture of a turtle with a blue bag in its mouth, over and over again and try to provoke an emotional response from audiences. (<http://www.savetheplasticbag.com/ReadContent612.aspx>.) Nobody knows if the photograph is real or who took the photograph. They produce a handful of other photographs taken over the past 30 years. The evidence of a massive number of deaths on an annual basis just isn't there.
- While turtles and whales eat lots of things that they shouldn't, you can't ban all of those items. The overwhelming majority of deaths are caused by discarded fishing lines and nets and you can't ban those.

**SURVEY OF 152 BIRD ENTANGLEMENTS**  
**OFF THE U.S. WEST COAST**  
**FROM 2001 TO 2005**

**THIS IS WHAT IS KILLING MARINE LIFE, NOT PLASTIC BAGS**

<http://www.farallones.org/volunteer/documents/PSGPoster.pdf>  
(Doc #29)

**SEE ALSO DOC #137**

**PLASTIC RETAIL BAGS ARE A TINY PERCENTAGE  
OF ALL LITTER IN THE CITY OF SANTA CRUZ**

- According to the May 2007 City of San Francisco Litter Survey Report (at page 29), which was completed before the existing ban took effect, plastic non-retail bags were 1.9% of total large litter and plastic retail bags were only 0.6% of total large litter. (<http://www.sfenvironment.org/downloads/library/rolitterstudy12june07final.pdf>) (Doc #78)
- According to the City of San Francisco Streets Litter Re-Audit 2009 (Doc #79 at page 42):

Plastic bags including retail sacks and zipper bags represented 2.4% of total large litter (108 items out of 4,488).
- There is no reason why the City of Santa Cruz should have a greater percentage of plastic bags in its litter stream than San Francisco.
- You cannot ban your way out of a litter problem. That is a false solution. You have to pick it up.



### PLASTIC BAGS COST TAXPAYERS VERY LITTLE

- According to Californians Against Waste, Californians pay up to \$200 per household each year to clean up litter and waste associated with single-use bags. This finding is wrong and absurd.
- According to the U.S. Census, there are 12.1 million households in California. (Doc #89.) 12.1 multiplied by 200 is approximately \$2.4 billion. Is that the amount that public agencies in California spend cleaning up plastic bags? Absolutely not. In fact, the Los Angeles County EIR states: "Public agencies in California spend more than \$375 million each year for litter prevention, cleanup, and disposal." (Los Angeles County EIR at page I-4.)
- Let us assume that plastic bags are 3% of all litter in San Francisco. We can apply the following calculation to determine the cost per household:

$$\frac{\$375 \text{ million} \times 3\%}{12.1 \text{ million households}}$$

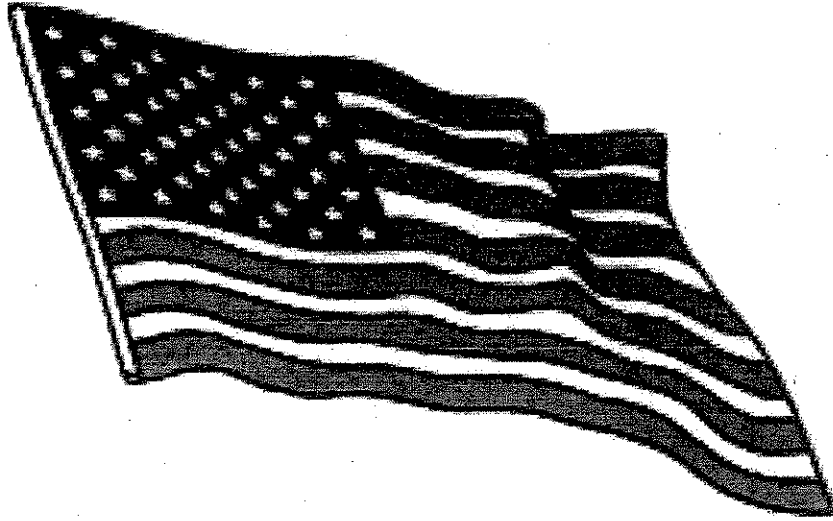
- The Los Angeles County EIR found that no more than \$4 million would be saved by banning plastic bags. Los Angeles County has 3.1 million households. That is a mere 93 cents per household per year. Not \$200!
- Waste management companies complain that plastic bag clog machinery. In the City of Santa Cruz, plastic bags should never be placed in recycling bins. If they are properly placed in trash bins, they go to the landfill without machine processing. The city should make sure the public knows that plastic bags go in trashcans, not recycling bins, except at stores where plastic bag recycling bins are installed.

**PLASTIC BAGS HAVE NO  
SIGNIFICANT IMPACT ON LANDFILLS**

- Some people say that plastic bags “clog up” landfills. Landfills are the contents of everyone’s trashcans plus other non-recyclables. Plastic bags do not “clog up” landfills any more than they clog up trashcans. Look inside your own trashcan. Plastic bags are low volume and light. A mere 0.4% (that is four-tenths of one percent) of the solid waste stream consists of plastic grocery and merchandise bags. (<http://tinyurl.com/6rbgfz3> Doc #90.)
- People say that plastic bags last a thousand years in a landfill. That is an environmental benefit, as the Los Angeles County EIR and all other plastic bag ban EIRs acknowledge. Plastic sequesters and locks in the CO<sub>2</sub>. Sequestration of CO<sub>2</sub> is a major goal. Organic material including paper decomposes and emits methane, a greenhouse gas with 21 to 25 times the climate changing impact of CO<sub>2</sub>. (Doc #91.)

**PLASTIC BAGS ARE NOT MADE FROM OIL**

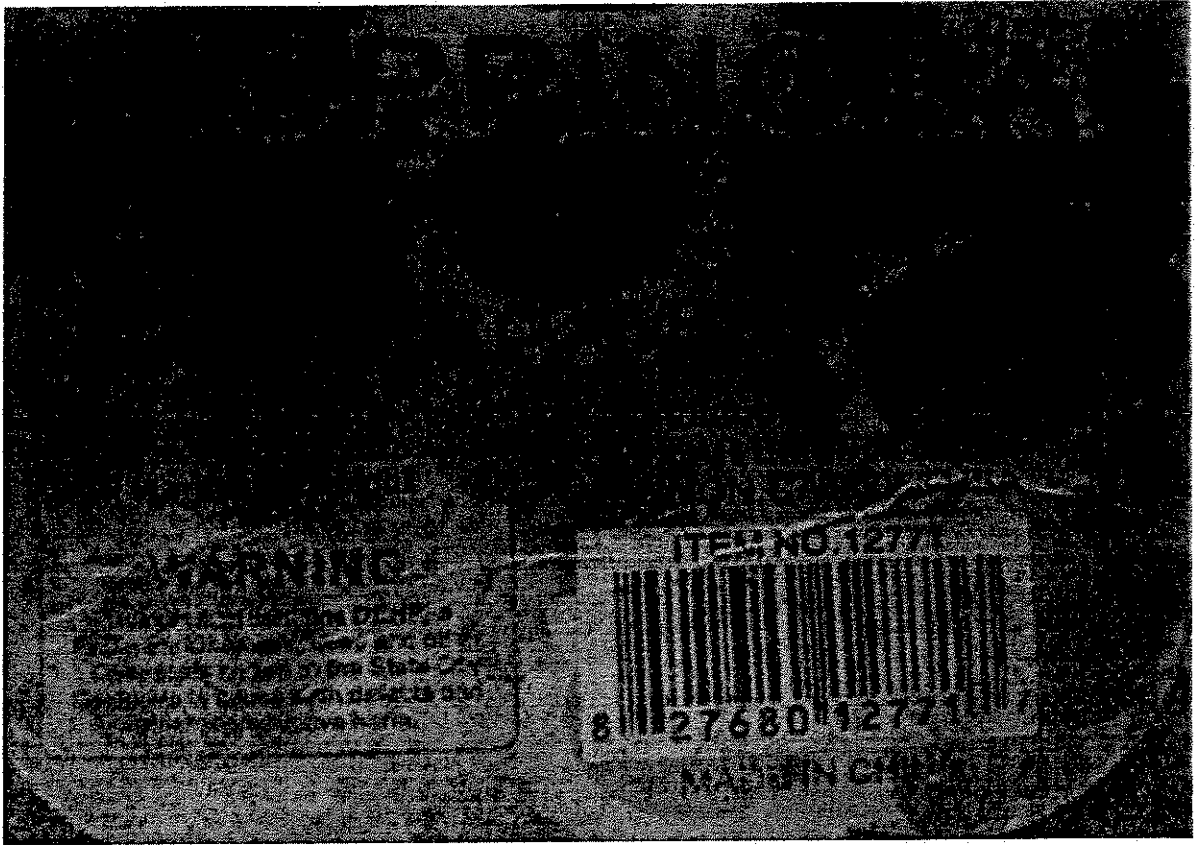
- There is a claim repeated over and over again on the Internet that plastic bags are made of oil and that 12 million barrels of oil are used annually in the United States to make the plastic bags that Americans use.
- The allegation is not true.
- 85% of plastic bags used in the United States are made in the United States. Plastic bags are made out of polyethylene. In the United States, ethylene is made of ethane, which is extracted from domestic natural gas. As a result, 85% of plastic bags used in the United States are not made out of oil.
- The ethane must be removed from the natural gas anyway to lower the BTU value of the natural gas to an acceptable level. Ethane burns too hot to be allowed to remain in high levels in natural gas that is delivered to homes and businesses for fuel. There is nothing else that the ethane can be used for except to make ethylene. If ethane is not used to make plastic, it will have to be burned off, resulting in greenhouse gas emissions.
- Using the ethane to make plastic does not in any way reduce the amount of fuel available for transportation or power generation or increase our energy imports.
- If we were to abolish plastic bags, it would have **zero impact** on our dependence on foreign oil.



APPROXIMATELY 85% OF PLASTIC CARRYOUT BAGS  
THAT ARE USED IN THE UNITED STATES  
ARE MADE IN THE UNITED STATES,  
INCLUDING AT FACTORIES HERE IN CALIFORNIA.

THOUSANDS OF FAMILIES ARE DEPENDENT ON THESE JOBS.

THE VAST MAJORITY OF REUSABLE BAGS ARE IMPORTED.



**THIS IS A LABEL FROM AN IMPORTED REUSABLE BAG  
THAT IS SOLD IN SAN FRANCISCO.**

**THE LABEL STATES:**

**WARNING**

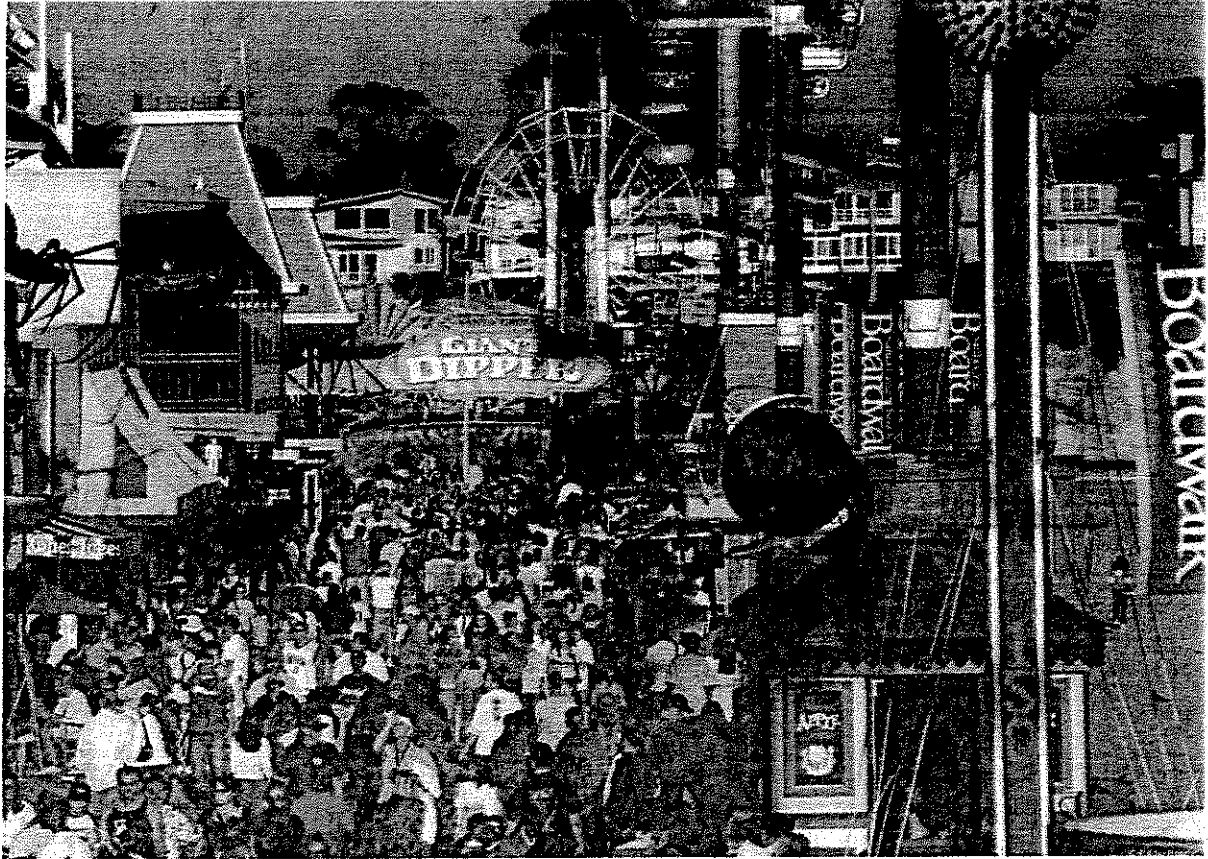
**THIS PRODUCT CONTAINS DEHP, A PHTHALATE CHEMICAL, LEAD, AND  
OTHER CHEMICALS KNOWN TO THE STATE OF CALIFORNIA TO CAUSE  
BIRTH DEFECTS AND OTHER REPRODUCTIVE HARM.**

**THERE ARE MAJOR TOXICITY ISSUES WITH IMPORTED REUSABLE BAGS.**

**THERE ARE NO TOXICITY ISSUES WITH PLASTIC CARRYOUT BAGS.**

**THE PROPOSED ORDINANCE IS DAMAGING AND  
ABSURD IN A CITY THAT DEPENDS ON TOURISM**

- The City of Santa Cruz hosts millions of visitors per year. (Docs ## 1-4.)
- A City of Santa Cruz documents states: "Per current projections, over the next 20 years, the City will experience a greater number of employees commuting from outside Santa Cruz to work. In addition, an estimated six million visitors come to Santa Cruz every year." (Doc # 4.)
- This massive injection of tourist dollars directly supports local hotels, restaurants, shops, attractions, and cultural institutions. It also indirectly bolsters practically every segment of the city's economy and has a broad positive influence on government finances.
- The city proposes to penalize tourists for not bringing reusable bags with them from out-of-town and not carrying them around with them as they tour the city.
- Reusable bags (except polyethylene reusable bags) are not recyclable. To the extent that visitors buy reusable bags, they are like to use them once or just a few times before they leave. The city will be flooded with discarded non-recyclable reusable bags left by tourists.
- The impact on stores in Santa Cruz would be immense. The proposed 10-cent fee is a tax on shopping. It is bound to negatively affect business. It is also certain to annoy and cause resentment among tourists who will naturally expect free bags for their purchases.



**WELCOME TO THE CITY OF SANTA CRUZ**

**SHOULD WE EXPECT ALL THESE TOURISTS TO  
BRING ALONG AND CARRY AROUND REUSABLE BAGS?**

**IF TOURISTS BUY THEM, WILL THEY DISCARD  
THEM AFTER JUST ONE OR TWO USES?**

**TOURISTS ARE MORE LIKELY TO BUY PAPER BAGS, WHICH ARE FAR MORE  
DAMAGING TO THE ENVIRONMENT THAN PLASTIC BAGS.**

**TOURISTS WILL REACT NEGATIVELY.**

**THE CITY HAS NOT STUDIED THESE AND OTHER ISSUES.**

**STPB'S FAIR ARGUMENT THAT THE  
ORDINANCE MAY RESULT IN  
SIGNIFICANT NEGATIVE  
ENVIRONMENTAL IMPACTS**

**A SWITCH TO PAPER AND COMPOSTABLE BAGS CAUSED BY BANNING  
PLASTIC BAGS MAY HAVE A SIGNIFICANT NEGATIVE NET  
IMPACT ON THE ENVIRONMENT**

In June 2008, Heal the Bay stated: (Doc. #18.)

As the most ubiquitous alternative to plastic, paper bags are themselves fraught with environmental impacts. The production of paper bags contributes to natural resource depletion, greenhouse gas emissions and additional waterborne wastes from the pulping and paper making process.

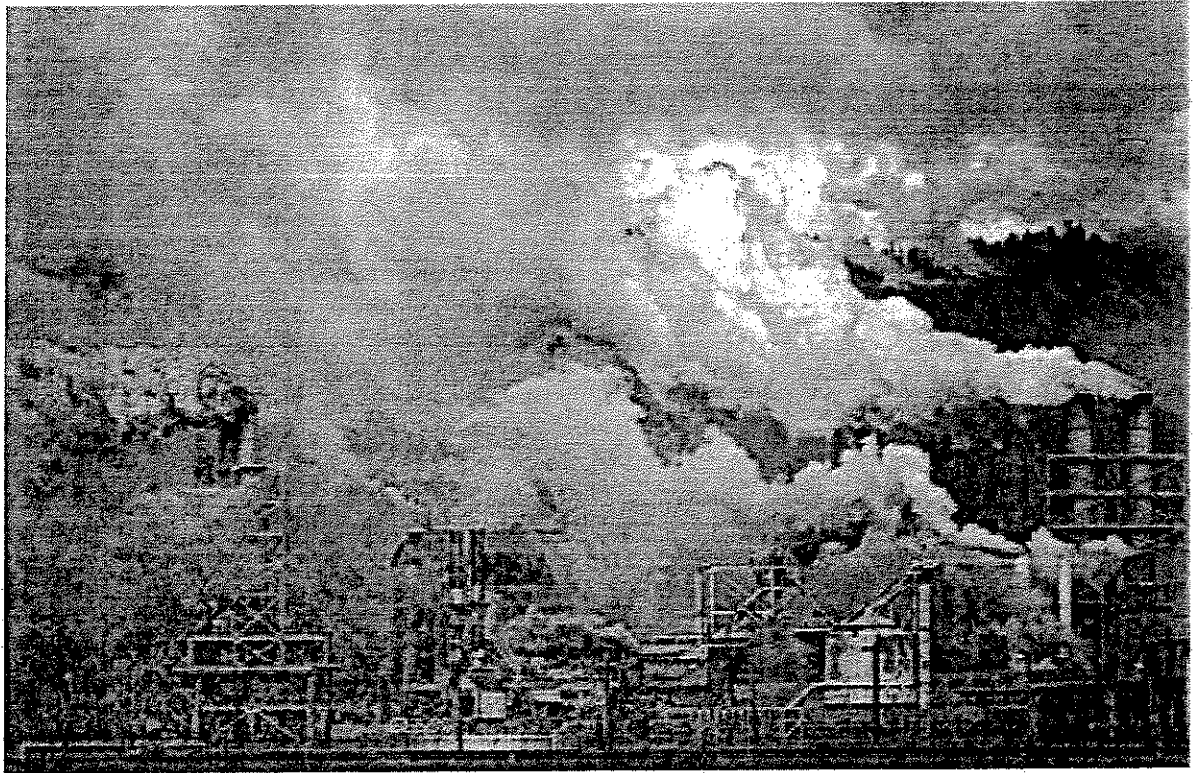
In December 2009, Heal the Bay stated: (Doc. #19.)

While paper bags are less likely to become persistent marine debris when disposed in the environment, serious negative environmental impacts occur during the production of these bags. The production of paper bags made from virgin materials contributes to deforestation, greenhouse gas emissions, and additional waterborne wastes.

In 2008, the President of Heal the Bay, Dr. Mark Gold, stated as follows to the Manhattan Beach City Council: (Doc #94.)

Well, right now, um in the version that you have, it includes all plastic bags, including bioplastics. And this is a key part of what happens in Oakland and San Francisco. Um, which is – those bans did not include bioplastics, which is a *huge mistake*. And so by not doing the CEQA analysis specifically on what the environmental impacts were of not banning that, and moving towards bioplastics with the many problems that they cause, that was a major shortcoming.





*The Weyerhaeuser pulp and paper mill, Longview, Washington State*

STPB hereby submits five life cycle assessments that constitute substantial evidence that paper bags and reusable bags are *significantly more* damaging to the environment than plastic bags.

### **THE 1990 FRANKLIN REPORT**

[Doc #20.]

The Franklin Report is a life cycle assessment of plastic bags and paper carryout bags used in the United States. It shows that plastic bags are substantially better for the environment than paper carryout bags for the following reasons: (see Conclusions section of report):

- The energy requirements for plastic bags are between 20% and 40% less than for paper carryout bags at zero percent recycling of both kinds of bags. Assuming paper carryout bags carry 50% more than plastic bags, the plastic bag continues to require 23% less energy than paper bags even at 100% recycling.
- Plastic bags contribute between 74% and 80% less solid waste than paper carryout bags at zero percent recycling. Plastic bags continue to contribute less solid waste than paper carryout bags at all recycling rates.
- Atmospheric emissions for plastic bags are between 63% and 73% less than for paper carryout bags at zero percent recycling. Plastic bags continue to contribute less atmospheric emissions than paper carryout bags at all recycling rates.
- At a zero percent recycling rate, plastic bags contribute over 90% less waterborne wastes than paper carryout bags. This percentage actually increases as the recycling rate increases. The landfill volume occupied by plastic bags is 70% to 80% less than the volume occupied by paper carryout bags based on 10,000 uses.

### **THE 2005 SCOTTISH REPORT**

[Doc #21.]

The Scottish Report was issued by the Scottish Government. It is an environmental impact assessment of the effects of a proposed plastic bag levy in Scotland. The report (at page 22) takes into account the fact that a paper carryout bag holds more than a plastic bag and makes appropriate adjustments. The report includes the following findings:

- Page vi: "If only plastic bags were to be levied..., then studies and experience elsewhere suggest that there would be some shift in bag usage to paper bags (which have worse environmental impacts)."
- Page 31: "[A] paper bag has a more adverse impact than a plastic bag for most of the environmental issues considered. Areas where paper bags score particularly badly include water consumption, atmospheric acidification (which can have effects on human health, sensitive ecosystems, forest decline and acidification of lakes) and eutrophication of water bodies (which can lead to growth of algae and depletion of

oxygen).”

- Page 31: “Paper bags are anywhere between six to ten times heavier than lightweight plastic carrier bags and, as such, require more transport and its associated costs. They would also take up more room in a landfill if they were not recycled.”
- Page 23: After taking into account that paper bags hold more than plastic bags, paper bags still result in:
  - 1.1 times more consumption of nonrenewable primary energy than plastic bags.
  - 4.0 times more consumption of water than plastic bags.
  - 3.3 times more emissions of greenhouse gases than plastic bags.
  - 1.9 times more acid rain (atmospheric acidification) than plastic bags.
  - 1.3 times more negative air quality (ground level ozone formation) than plastic bags.
  - 14.0 times more water body eutrophication than plastic bags.
  - 2.7 times more solid waste production than plastic bags.

### **THE 2007 BOUSTEAD REPORT**

[Doc #22.]

The Boustead Report is an extremely thorough and detailed life cycle assessment of the environmental impacts of plastic bags, compostable bags, and paper carryout bags in the United States. It is packed with data. It studied the types of plastic bags, compostable bags, and paper carryout bags commonly used in the United States. It takes into account that a paper carryout bag holds more than a plastic bag and applies an adjustment factor. It studied paper bags with 30% post consumer recycled content.

The Boustead Report was commissioned by Progressive Bag Affiliates, a plastic bag industry organization. It was peer reviewed by an independent third party, a Professor of Chemical Engineering at North Carolina State University. (Boustead report at pages 4, 63-64.) He is an expert on life cycle analysis with extensive experience in the field. He commented that the Boustead Report “provides both a sound technical descriptions (sic) of the grocery bag products and the processes of life cycle use.... Whatever the goals of the policy makers, these need to be far more explicit that general environmental improvement, since the life cycle story is consistent in favor of recyclable plastic bags.” (Boustead Report at page 63.)

The professor reviewed every single one of the figures in the report and disagreed with some of them. The Boustead report was amended to the extent that the Boustead report author agreed with the professor’s comments. For example, the figure “103” for electricity in Table 9B

was corrected to "154." (Boustead Report at pages 64 and 19.)

The Boustead Report (at page 4) includes the following findings based on carrying capacity equivalent to 1000 paper bags:

**BOUSTEAD REPORT  
IMPACT SUMMARY OF VARIOUS BAG TYPES  
(Carrying Capacity Equivalent to 1000 Paper Bags)**

	<b>Paper (30% Recycled Fiber)</b>	<b>Polyethylene</b>
Total Energy Used (MJ)	2622	763
Fossil Fuel Use (kg)	23.2	14.9
Municipal Solid Waste (kg)	33.9	7.0
Greenhouse Gas Emissions (CO <sub>2</sub> Equiv. Tons)	0.08	0.04
Fresh Water Usage (Gal)	1004	58

The Boustead Report analyzes paper bags with 30% post consumer recycled content. The city's proposed ordinance requires that paper bags have 40% post-consumer recycled content. An additional 10% of recycled content would not result in a 10% improvement in environmental impacts. (Obviously, a paper bag with 100% post consumer recycled content would not have zero negative environmental impacts.) But even if an extra 10% of recycled content decreased all environmental impacts of paper bags by 10%, paper bags are still far worse than plastic bags in every environmental category. For example, instead of consuming 2622 megajoules of total energy, 1000 paper bags would consume 2360 megajoules. Plastic bags with the same carrying capacity consume only 763 megajoules.

## **THE MARCH 2008 ULS REPORT**

[Doc #23.]

This report addresses the impact of San Francisco's ordinance banning plastic bags at large stores. San Francisco defines acceptable paper carryout bags as containing "no old growth fiber...100% recyclable... contains a minimum of 40% post-consumer recycled content." San Francisco Environment Code, Chapter 17, §1702(j). The report at pages 3-4 contains the following findings:

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

The report at page 5 concludes as follows:

Legislation designed to reduce environmental impacts and litter by outlawing grocery bags based on the material from which they are produced will not deliver the intended results. While some litter reduction might take place, it would be outweighed by the disadvantages that would subsequently occur (increased solid waste and greenhouse gas emissions) [from paper bags]. Ironically, reducing the use of traditional plastic bags would not even reduce the reliance on fossil fuels, as paper and biodegradable plastic bags consume at least as much non-renewable energy during their full life cycle.

## **THE 2011 BRITISH GOVERNMENT REPORT**

[Doc #95.]

[http://www.environment-agency.gov.uk/static/documents/Research/Carrier\\_Bags\\_final\\_18-02-11.pdf](http://www.environment-agency.gov.uk/static/documents/Research/Carrier_Bags_final_18-02-11.pdf)

In February 2011, the United Kingdom Government's Environment Agency published a life cycle assessment of plastic, paper, and reusable bags. Doc #96 is a summary of the British Report.

The British Report found that:

- The environmental impact of all types of carrier bag is dominated by resource use and production stages. Transport, secondary packaging and end-of-life management generally have a minimal influence on their performance. (Exec. Summary)
- "Recycling or composting generally produce only a small reduction in global warming potential and abiotic depletion." (Exec summary)
- 40.3% of plastic bags are reused as bin liners. (Study at p. 30)
- "Reuse as bin liners produces greater benefits than recycling bags." (Exec summary)
- "When each bag was compared with no primary reuse (i.e. no reuse as a carrier bag), the conventional HDPE bag had the lowest environmental impacts of in eight of the nine impact categories, because it was the lightest bag considered." The study did not consider litter impacts. (Study at 56.)
- The table and chart on the following pages summarize the conclusions of the study regarding global warming impacts. (Exec summary)

Note: Conventional plastic bag carryout bags are referred to in the British Report HDPE bags. Plastic carryout bags used in the USA are made from the same materials as HDPE bags used in Britain. (Doc #99.)

**BRITISH GOVERNMENT REPORT**

**(Exec summary)**

**NUMBER OF TIMES THAT ALTERNATIVE BAGS HAVE TO BE USED  
TO PRODUCE LESS GLOBAL WARMING THAN PLASTIC BAGS**

**Plastic bag = 1**

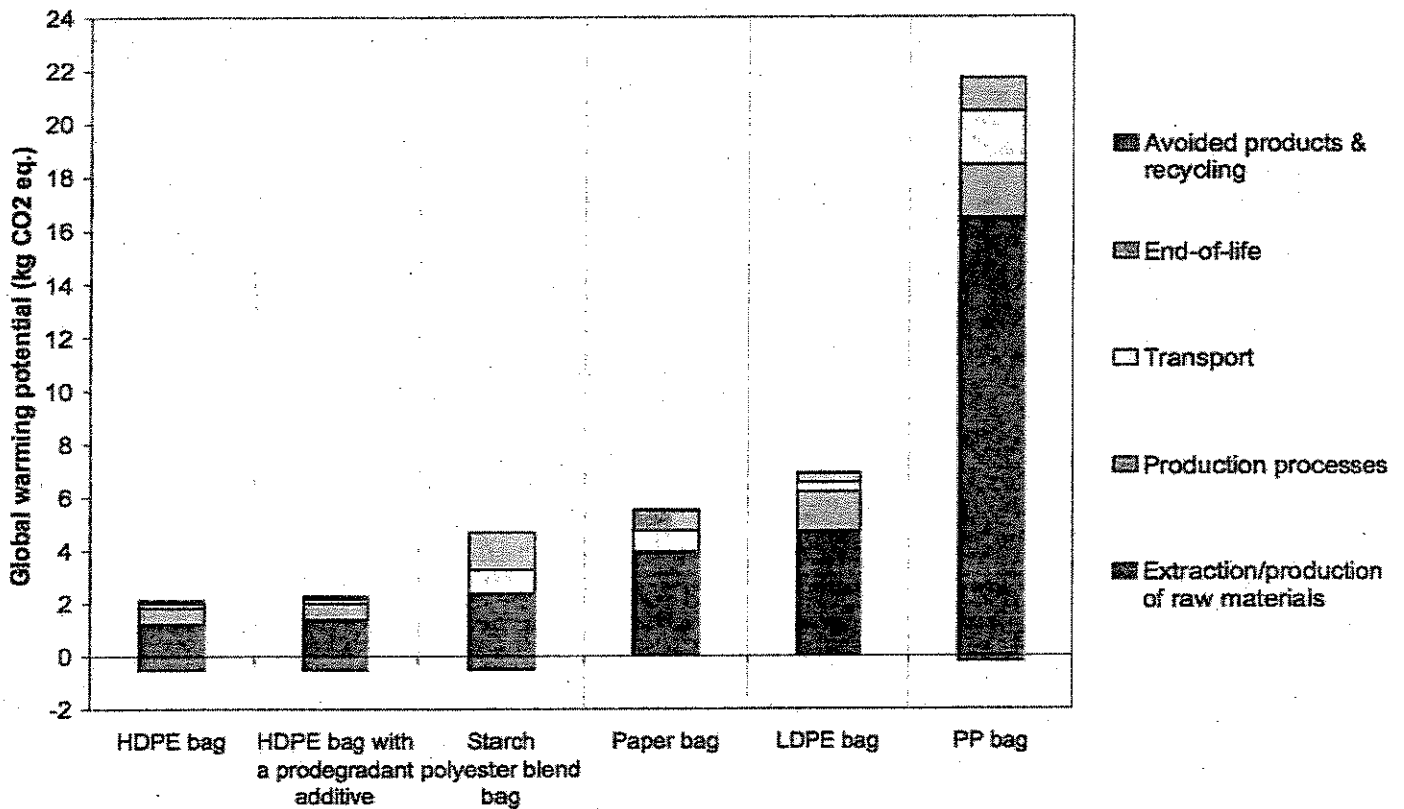
Type of carrier	HDPE bag (No secondary reuse)	HDPE bag (40.3% reused as bin liners)	HDPE bag (100% reused as bin liners)	HDPE bag (Used 3 times)
Paper bag	3	4	7	9
LDPE bag	4	5	9	12
Non-woven PP bag	11	14	26	33
Cotton bag	131	173	327	393

Based on the above table, if a consumer uses a cotton bag only 130 times and then discard it, more global warming will have been created than if 130 conventional plastic carryout bags had been used. If a consumer has two cotton reusable bags and discards one of them without reusing it, the other would have to be used 262 times.

**BRITISH GOVERNMENT REPORT**

(Page 33)

*“The cotton carrier bag is not shown in [the following table], because its [global warming potential] is more than ten times that of any other carrier bag.”* (British LCA at 33)



The above chart shows that the most important factor in determining the degree to which a bag produces global warming is the material from which the bag is made. Clearly, the best material is HDPE.



### VOLUME EQUALIZATION

The Franklin, Scottish, Boustead, ULS, and British Reports take into account the fact that paper bags hold more than plastic bags. The Scottish Report (at page 23) states that the calculations are "normalized against the volume of shopping carried." The Boustead report (at page 4) shows the impact of bag types based on "carrying capacity equivalent to 1,000 paper bags." The ratio in the Boustead report (see page 7) is 1,500 plastic bags = 1,000 paper bags. The ULS report is based on the Scottish (Carrefour/Ecobilan) and Boustead reports. (See also British Report at 17.) All of the reports show *based on equivalent carrying capacity*, that paper bags have much worse environmental impacts than plastic bags.



These paper bags were doubled-bagged by a store cashier at the Trader Joe's on Bay Street in San Francisco. The photograph was taken by Stephen Joseph. He has observed Trader Joe's routinely double-bagging paper bags at the store, even for light loads. The manager told him that the reason is that paper bag handles are weak and break. Notice also that the bags are only half-filled. Bags are loaded based on weight, not volume. Many people cannot carry more than 10 to 15 lbs per bag.

Once double-bagging and half-filling of paper bags are taken into account, the environmental impacts of a shift to paper bags are even worse than the findings in the studies.

## **THE LOS ANGELES COUNTY EIR**

In November 2009, after completing an Initial Study pursuant to CEQA, Los Angeles County determined that banning plastic bags could have significant negative environmental impacts on the environment. (Doc #73.)

After completing an EIR, Los Angeles County Board of Supervisors adopted an ordinance on November 16, 2010 banning plastic carryout bags and imposing a 10-cent fee on paper carryout bags. (Ordinance is Doc #91.) The Los Angeles County EIR is at: <http://ladpw.org/epd/PlasticBags/PDF/finalEIR.pdf>. (Doc #127. The Findings of Facts and Statement of Overriding Considerations is Doc #93.)

The Los Angeles County EIR adopted the findings of the Ecobilan Report and the Scottish Report. The Los Angeles County EIR states that the Ecobilan Report was used as the basis for the findings regarding paper bags and polyethylene reusable bags "because it is relatively recent; contains relatively sophisticated modeling and data processing techniques; considers a wide range of environmental indicators; considers paper, plastic, and reusable bags; was critically reviewed by the French Environment and Energy Management Agency; and contains detailed emission data for individual pollutants." (Los Angeles County EIR at 3.1-15.) The Scottish Report is based entirely on the Ecobilan Report. (Los Angeles County EIR at 4-8, 4-47.) The Ecobilan table of the relative impacts of plastic and paper bags is at page 23 of the Scottish Report. As mentioned above, those reports determined that even after taking into account that paper bags hold more than plastic bags, the life cycle of paper bags result in:

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

Based on the Ecobilan and Scottish Reports, Los Angeles County decided to impose a 10-cent fee on paper bags because a straight switch from plastic to paper bags could not be environmentally justified.

The Los Angeles County EIR determined that a 10-cent fee on paper bags and promoting and distributing reusable bags would not be sufficient to prevent significant negative environmental impacts caused by a shift from plastic to paper. The EIR states:

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

(Los Angeles County EIR at IV-1. Los Angeles County applied a method for determining applicable significance thresholds. (Los Angeles County EIR at 3.3-14 to 15.)

The Los Angeles County EIR determined that every polypropylene and cotton reusable bag distributed in the County must be used at least 104 times before delivering environmental benefits compared to plastic carryout bags. (Table at Los Angeles County EIR at 12-21 and repeated in text throughout Los Angeles County EIR.)

The Los Angeles County EIR determined that a reusable bag made from polyethylene must be used at least three times before delivering an environmental benefit compared to a plastic carryout bag. (Los Angeles County EIR at 4-49 to 50, 12-52 to 53.) This is far better than the 104 times that polypropylene or cotton reusable bags must be used to deliver environmental benefits.

As banning plastic bags, imposing a fee on paper bags, and promoting and distributing reusable bags would not avoid significant negative environmental impacts, the Los Angeles County Board of Supervisors adopted a "Statement of Overriding Considerations" finding that the alleged benefits of the ordinance outweighed the significant negative environmental impacts of the ordinance. (Los Angeles County EIR at IV-1.)

The principal alleged benefit identified by Los Angeles County in its Statement of Overriding Considerations is assisting in reducing litter cleanup costs by \$4 million throughout the County. (Los Angeles County EIR at IX-3.) Los Angeles County declined to explain how this figure was calculated, despite the fact that STPB pointed out that the same areas would still have to be cleared as plastic bags are only a fraction of total litter.

STPB contended that the "North Pacific Garbage Patch" does not exist and that there is no island of plastic trash. Los Angeles County EIR states that it does not claim that North Pacific Gyre has a visible patch or "island" of plastic debris. (Los Angeles County EIR at 13-37.)

There are many deficiencies in the Los Angeles County EIR, including sweeping and inaccurate statements designed to justify a plastic bag ban. (STPB objected to those deficiencies and continues to assert those objections.) Nevertheless, Los Angeles County was unable to avoid acknowledging that the ordinance will have significant negative environmental impacts.

***The Los Angeles County EIR is substantial evidence that the City of Santa Cruz's proposed ordinance may result in significant negative environmental impacts.***

## **PEOPLE NEED PLASTIC BAGS AND THEY WILL BUY THEM IN ANOTHER FORM**

When assessing the impact of a plastic bag ban, it is essential to take into account the fact that the public needs plastic bags for many purposes. While plastic carryout bags are often referred to as "single-use," they are in fact one of the most reused items that exist. One survey shows that 92% of households reuse "single-use" plastic bags. (Doc # 142.) They are reused as bin-liners, for used diapers, to gather dog waste, and many other purposes. If plastic carryout bags are banned, people will buy other types of plastic bags instead.

In 2003, the Government of Ireland imposed a fee on plastic bags. This is an article from the *Irish Examiner* published almost a year after the plastic bag fee was imposed: (Doc #28)

### **Shoppers still bagging plastic sales**

SHOPPERS are still buying plenty of plastic, despite the introduction of a bag levy last March.

Retailers have noticed substantial increases in the sales of bin bags, nappy [diaper] bags and pedal bin-liners since the levy was introduced.

The number of plastic bags issued has fallen by 95% and has meant that consumers no longer have limitless supplies of plastic bags for household use. This has led to a 77% increase in sales of foot-pedal bin-liners in Tesco.

Sales of nappy [diaper] bags have jumped by 84% in Superquinn and by 25% in Super Valu and Centra stores. Swing binliner sales have increased by 75%.

"There has been an obvious increase in sales of kitchen bin-liners and nappy [diaper] bags, where people would have previously reused carrier bags. We are looking at options for degradable bin-liners and similar products so that the impact on the environment is minimised," said Super Valu-Centra trading director James Wilson.

He said the plastic bag levy in general had reduced the amount of plastic going to landfill and has had a "hugely positive impact" in general.

Super Valu and Centra stores have also reported that sales of "bags for life" the reuseable plastic shopping bags which were available before the levy have increased by 600-700%.

The plastic bag levy has led to a boom for Killeen, a bin bag company based in Drogheda, Co Louth. It produces 19 different

types of bin bags and is now employing workers on double shifts to meet the demand.

“We’ve experienced a growth in sales of 300-400%. It’s been phenomenal. You can trace it back to last March when the bag levy came in,” Killeen business manager Ken Wall said.

The increase in plastic sales has not alarmed environmental groups.

“It’s the exception to the rule. You only have to look at our streets to see the difference the bag levy has made. There’s no plastic bags stuck in trees or fences anymore,” said Friends of the Environment spokesman Tony Lowes.

A Department of the Environment spokesman said that 7.2m had been raised for the first six months.

#### **In the bag**

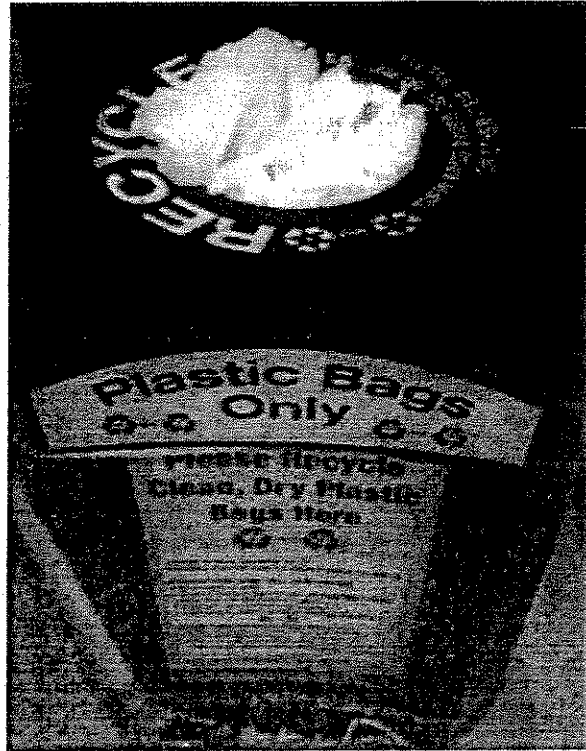
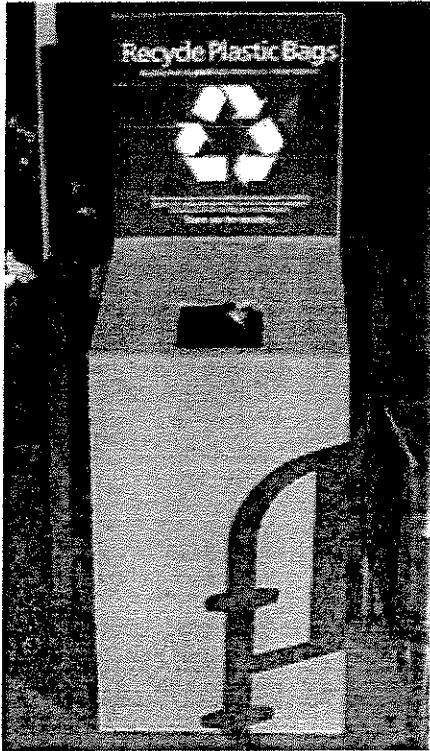
77% - increase in pedal bin liner sales (Tesco)

84% - increase in nappy [diaper] bag sales (Superquinn)

13.5% - increase in bin bag sales (Superquinn)

25% - Increase in sales of Nappy [diaper] Bags. (Super Value/Centra)

75% - Increase in sales of Swing Bin Liners (Super Value/Centra)



Clean plastic bags are readily recyclable by being deposited in plastic bag recycling bins at supermarkets and large drug stores. All kinds of plastic bags are deposited in the bins, including dry cleaning bags, newspaper bags, and produce bags.

There are many active buyers for recycled plastic bags deposited in the bins, including Trex, AERT, and Hilex. (Docs ## 50-54.)

**A SWITCH TO REUSABLE BAGS MAY HAVE A SIGNIFICANT  
NEGATIVE NET IMPACT ON THE ENVIRONMENT AS A  
RESULT OF LIFE CYCLE IMPACTS OF REUSABLE BAGS**

Every manufactured product creates negative environmental impacts during its life cycle. Reusable bags are no exception. However, as reusable bags are considered a “green” alternative, their environmental impacts are often overlooked. A switch to reusable bags may well be significantly worse for the environment than the status quo.

The city must make a determination of how many uses of each of the major kinds of reusable bag it would take to offset the greater negative environmental impacts of reusable bags. STPB objects to the failure to do so. For example, a cotton reusable bag used just once and then discarded and disposed of in a landfill may have much worse impacts on the environment than a plastic bag used just once and disposed of in a landfill.

The fact that a bag can be used hundreds of times does not mean that it will be used hundreds of times.

The Wall Street Journal published an article entitled “An Inconvenient Bag.” (Doc #31.) The article states in part as follows:

It's manufactured in China, shipped thousands of miles overseas, made with plastic and could take years to decompose. It's also the hot “green” giveaway of the moment: the reusable shopping bag....

But well-meaning companies and consumers are finding that shopping bags, like biofuels, are another area where it's complicated to go green. “If you don't reuse them, you're actually worse off by taking one of them,” says Bob Lilienfeld, author of the Use Less Stuff Report, an online newsletter about waste prevention. And because many of the bags are made from heavier material, they're also likely to sit longer in landfills than their thinner, disposable cousins, according to Ned Thomas, who heads the department of material science and engineering at Massachusetts Institute of Technology....

Finding a truly green bag is challenging. Plastic totes may be more eco-friendly to manufacture than ones made from cotton or canvas, which can require large amounts of water and energy to produce and may contain harsh chemical dyes. Paper bags, meanwhile, require the destruction of millions of trees and are made in factories that contribute to air and water pollution.

Many of the cheap, reusable bags that retailers favor are produced in Chinese factories and made from nonwoven polypropylene, a form of plastic that requires about 28 times as much energy to produce as the plastic used in standard disposable bags and eight

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times as much as a paper sack, according to Mr. Sterling, of Natural Capitalism Solutions.

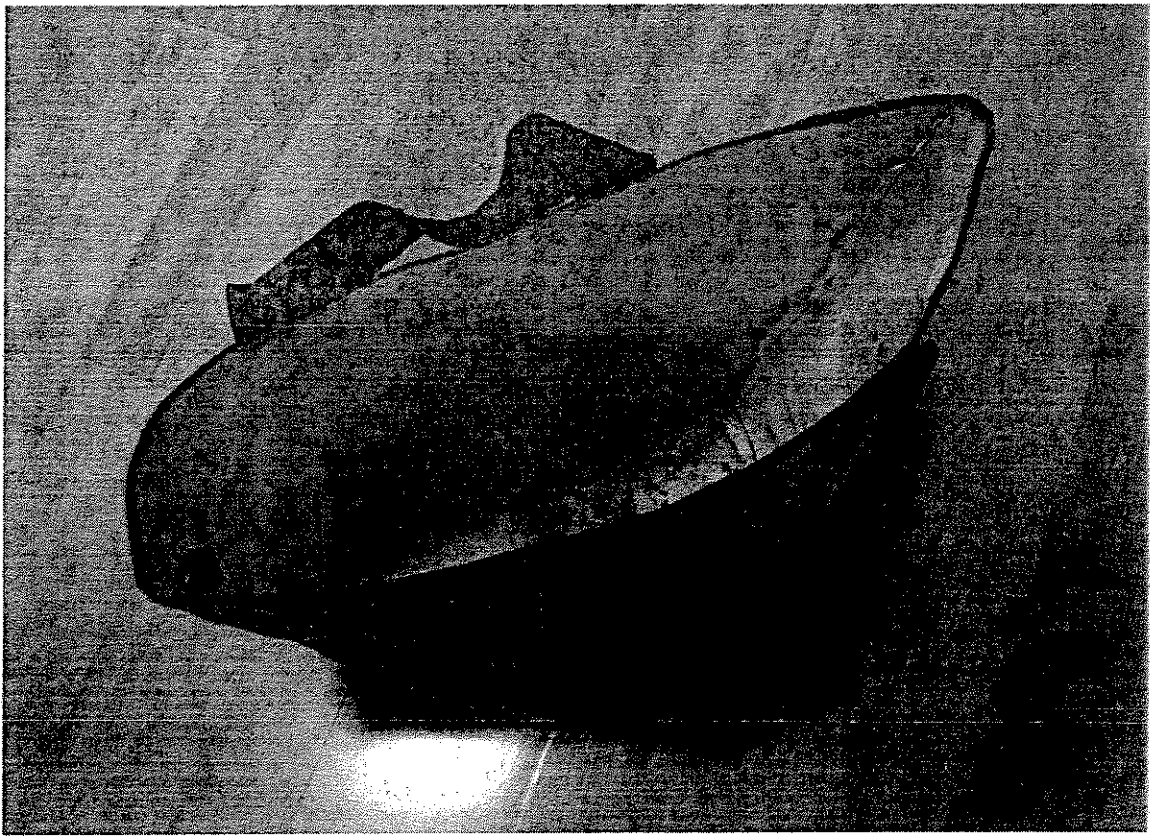
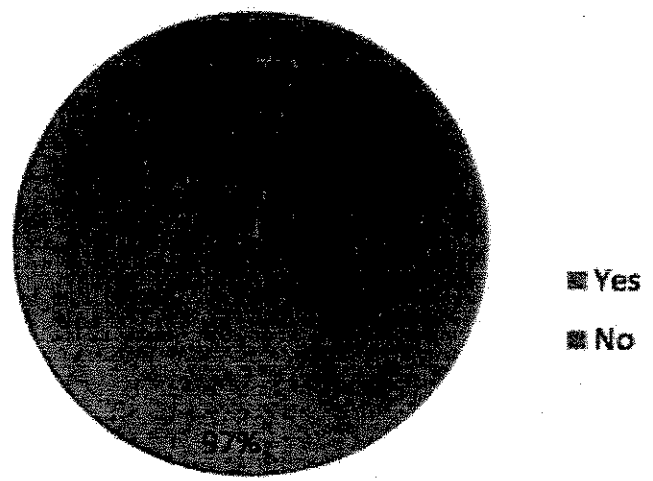
Some, such as the ones sold in Gristedes stores in New York that are printed with the slogan "I used to be a plastic bag," are misleading. Those bags are also made in China from nonwoven polypropylene and have no recycled content.

STPB objects to the assumption that reusable bags will be used a sufficient number of times on average to offset any greater negative life cycle impacts. The city must assume a reasonable worst-case scenario. People *may* use reusable bags an average of on two times before discarding them. It depends on the price a consumer has paid for the bag, how dirty the bag has become, how easy it is to clean, how many other reusable bags the consumer owns, and other factors.

The overwhelming majority of consumers do not clean their reusable bags and would prefer to replace them. The University of Arizona asked consumers how often they wash their reusable bags. (Doc #33.) This is important, because as the University of Arizona study shows, reusable bags quickly accumulate dirt and dangerous bacteria if not washed. The result is shown in the following graphic in the University of Arizona study showing that 97% of consumers do not regularly wash reusable bags:



**Figure 7. Cleaned on a Regular Basis?**



*An unwashed Trader Joes' reusable bags: a health hazard*

It would be *disastrous* from a public health standpoint to encourage consumers to reuse reusable bags if they do not wash them.

Consumers will be more likely to buy a new reusable bag than wash a reusable bag. This will lead to an overproliferation of reusable bags resulting in a very low reuse rate. This is precisely what has happened in Australia. An article on the situation in Australia states as follows:

The biggest backer of reusable bags accuses supermarkets of profiteering from their sales.

They were meant to save us from the plague of plastic bags. But reusable "green" bags are being oversold and creating a new proliferation problem, according to Ian Kiernan, who helped devise the environmental anti-plastic campaign.

Coles and Woolworths are profiteering from the popularity of so-called eco-friendly bags, the Clean Up Australia Day founder said. He accused the supermarket chains, which together have sold almost 20 million reusable bags, of "trading off the green potential" of the now ubiquitous products rather than encouraging shoppers to cut consumption.

"They haven't partnered with the community, which they should have done to get it to change behaviour instead of just shovelling [the bags] out the door as quick as they can, selling them like a string of sausages."

Australia's growing mountain of green bags, many of which end up in landfill, is causing concern. While consumption of disposable plastic bags has plummeted, we now have more reusable bags than are good for us, some environmentalists say.

"It's swallowing up resources, it's overconsumption. It was designed for people to keep reusing them, but people forget to take them to the supermarket and either buy another one or take a plastic bag," Mr. Kiernan said. "But if we do away with them, the use of plastic bags is going to increase. I still think the green bag is a good thing, but they are not delivering the full benefit they could."

Green bags, which sell in supermarkets for up to \$2.99, are typically made from non-woven polypropylene, a non-biodegradable byproduct of oil refining.

The bags, introduced in Australia in 2002, have spawned a stand-alone industry, including cooler bags, wine-bottle holders and

pocket-sized fold-outs.

Leading retailers, such as Target and Bunnings Warehouse, now sell them in place of disposable plastic bags. Stocks have been buoyed further by companies giving away bags as promotional tools.

“There is a proliferation issue that we need to start addressing,” said Planet Ark campaigns manager Brad Gray.

“We've got a lot of people who are using them really regularly and using them the way they should, and we've also got a number of people who buy green bags regularly and don't use them on an ongoing basis.

“It has become a bit of a false environmental economy and a concern. They are made out of plastic, so you don't want a lot of them strewn over the world. But if they are used properly, over and over again, they have a good environmental benefit.”

Mr. Gray said governments should follow South Australia's ban on disposable plastic bags, introduced last May, to encourage reuse of more eco-friendly alternatives.

Coles sold more than 10 million reusable bags in the past 12 months, a 40 per cent increase on the previous year, partly because of the South Australian ban. Woolworths sold 8.82 million reusable bags last financial year, up almost 65 per cent on 2007-08.

Woolworths spokeswoman Clare Buchanan admitted it makes “a very small profit” on reusable bags. But Woolworths had worked hard to encourage customers to reduce consumption, including the provision of recycling bins in stores, she said.

Coles donated more than \$315,000 to Landcare from green bag sales in the past year, spokesman Jim Cooper said.

A report last year by the Sustainable Packaging Alliance, commissioned by Woolworths, found reusable bags have a lower environmental toll than single-use bags, but only when used 104 times - or once a week over two years. The impact on global warming of a reusable polypropylene bag used only 52 times is worse than a standard plastic shopping bag.

Anecdotal reports suggest many reusable bags are not meeting their environmental potential. Online forums include comments from users who have thrown away surplus green bags, used them

as rubbish bin liners or given them to charity stores.

Smartbag sells about 5 million reusable bags a year, particularly for use as promotional tools, said director Chris Ballenden. "People are ending up with more of these, but is that worse or better than someone buying a shirt in an expensive paper bag and throwing it in the bin? I think, in general, there's an overconsumption in the West of every product, not just our bags.

"If people continue to collect 15 of them, they're going to continue to be made. If you're concerned about them, keep the one or two you use and stop accepting them."

The switch to green bags helped cut consumption of disposable plastic bags from about 5.9 billion in 2002 to 3.9 billion in 2007. But a report by consumer watchdog Choice, released last May, said many polypropylene bags ended in landfill.

Professor Michael Polonsky, who specialises in environmental marketing at Deakin University, said: "Whether we actually use green bags or not is actually irrelevant; we feel we're making a difference. But if they're not being used and not being recycled, you're creating more harm by using them.

See also television news report on the same subject at:

<http://video.au.msn.com/watch/video/green-bags/xglhja0>, which is hereby submitted into the administrative record in its entirety. (Doc #64.)

Note that the population of South Australia is about 1,640,700. (Doc #40.) Coles and Woolworths sold 18.82 million reusable bags in a year. That is 11.4 bags for every man, woman and child. That would mean about 20 reusable bags purchased per household in just one year and that is reusable bags purchased from just two store chains! There is nothing sustainable about an overproliferation of reusable bags as is happening in Australia.

The Los Angeles County EIR determined that each and every single polypropylene and cotton reusable bag distributed in a city or county must be used at least 104 times before delivering environmental benefits compared to a single plastic carryout bag. (Table at EIR at 12-21 and repeated in text throughout EIR.) Reusable bags are the worst environmental alternative if they are discarded after one or only a few uses.

Based on the foregoing, a multiplier of two would be the highest reasonable worst-case scenario number for reusable bag usage. STPB objects to any higher multiplier than two being used for the purpose of determining the *possible* significant environmental impacts of the proposed ordinance. The city has not studied this issue at all and the basis for its assumption that a shift to reusable bags would be better for the environment than the status quo has not been disclosed. If a reusable bag can be used 100 times, that does not mean that it *will* be used 100

times. This issue must to be addressed in an EIR and STPB objects to the failure to do so.

Further, plastic reusable bags are readily recyclable by depositing them in plastic bag recycling bins located at all AB 2449 stores statewide. (Pub. Res. Code §42250-57.) However, there is no recycling infrastructure for any other kind of reusable bag. Non-polyethylene reusable bags must be disposed of in landfills, including cotton, jute, polypropylene, and PET bags.

**THE NEW OREGON PUBLIC DISEASE OUTBREAK REPORT**  
**IS CONCLUSIVE EVIDENCE THAT REUSABLE BAGS**  
**CARRY VIRUSES AND CAN SPREAD ILLNESS**

Doc # 141 is a public disease outbreak report by officials of the Public Health Division and the Department of Health and Human Services, Washington County, Oregon. Nine members of a soccer team, girls aged 13-14 and adults, became sick from touching a polypropylene reusable grocery bag or consuming its packaged food contents. Seven of them experienced vomiting, four had diarrhea. Symptoms ranged from one to seven days. The officials identified at least five presumptive secondary infections among household members.

All of the people who became ill had consumed cookies that were in sealed packages. The packaged cookies had been stored in a reusable open-top grocery bag made from polypropylene. Not all of the people who became ill touched the reusable bag, but they all touched the packaging of the cookies which had been in contact with the inside of the reusable bag. All three stool specimens collected from ill persons were positive for norovirus genotype GII.2. Viral sequences from the three stool specimens were identical and a 98% match to a GII.2 reference sequence. Two of ten swabs taken from the reusable bag two weeks later were positive for the same norovirus genotype. The report concludes:

**The data indicate that virus aerosolized within the hotel bathroom settled upon the grocery bag and its contents, and it was touching the bag and consumption of its contents that led to the outbreak. Touching the bag could not be analyzed separately from consumption of food items from within the bag. Consumption of food from the grocery bag was strongly associated with illness, as was handling the grocery bag. The nature of the contaminated foods—a bag of chips, grapes, and a package of cookies—facilitated transmission. Fingers contaminated with norovirus have been shown to sequentially transfer virus to up to 7 clean surfaces, and environmental contamination with transmission via fomites has been documented. Incidentally, this also illustrates one of the less obvious hazards of reusable grocery bags.**

As reusable bags are used more often, this type of incident will become more frequent, and may happen in the City of Santa Cruz. The city is encouraging people to bring their own reusable bags. Supermarket and other store baggers put their hands in these bags and may spread viruses and bacteria from one reusable bag to many others. This is a serious public health hazard.

**A SWITCH TO REUSABLE BAGS MAY HAVE A SIGNIFICANT  
NEGATIVE NET IMPACT ON THE ENVIRONMENT  
AS A RESULT OF HEAVY METALS IN REUSABLE BAGS**

Los Angeles County has been handing out reusable bags to the public. We had two of those bags tested. The results are provided herewith. Both bags tested positive for heavy metals. One of the bags contained more than 100 parts per million of lead. (Docs #35, #36.) We are also providing photographs of the tested bags. (Docs #37-39.) This is a serious environmental and health concern. However, our testing turned out to be the tip of the iceberg. The Tampa Tribune has reusable bags tested. (Docs #41, #42.) The newspaper reports as follows: (Doc #42.)

Grocery chain Winn-Dixie sells a reusable grocery bag with two sturdy handles, pictures of cute baby faces and enough toxic lead to alarm health experts.

The bag contains enough lead that Hillsborough County could consider the bag hazardous if thrown out with household trash, according to independent laboratory tests commissioned by The Tampa Tribune.

It's not just Winn-Dixie.

Tribune tests also showed some Publix reusable bags had lead levels that exceed federal limits for paint and exceeded rules coming soon for children's toys. Though the bags comply with other limits, Publix, in a cautionary move, asked its bag suppliers to lower lead content in bags. That decision came after officials were told the results of the Tribune tests.

Winn-Dixie officials said they have an "opportunity to improve" after Tribune tests showed bags exceeded federal limits for paint. This presents a dilemma for shoppers who avoid paper or plastic for environmental reasons. Lead is linked to learning disabilities in children and fertility problems in adults. The answer for shoppers appears to be: Not all bags are created equal, the lab tests showed.

The more elaborate the illustrations on the bags, the more likely they contained toxins. Yellow and green paint on bags is a common carrier of lead.

"For me, personally, I would balk at buying these types of bags," said Hugh Rodrigues, owner of Thornton Laboratories, which tested 13 bags for the Tribune. "I'd choose paper bags."

Those can be recycled easily, he said.

The Tampa Tribune purchased two-dozen reusable bags from the

largest grocery companies in the Bay area this fall and paid for two rounds of tests at Thornton Laboratories in Tampa, which regularly tests food and chemicals for industrial clients, and has tested children's jewelry for the Tribune.

Some health advocates say there is no safe level for lead, calling it a toxin at any level.

Florida has no clear regulation focused on lead in bags, so lab officials and health advocates point to a conflicting series of government rules regarding consumer products.

Currently, the U.S. Consumer Product Safety Commission allows 300 parts per million of lead in children's products. In August, that level will fall to 100. And any paint on consumer products can contain no more than 90 parts per million.

The packaging industry is pushing for a limit of 100 parts per million, and it helped enact laws in 19 states to limit lead. Florida has not signed on, said Patty Dillon, a spokeswoman for the Toxics in Packaging Clearinghouse.

In the first round of tests, the Baby Faces bag from Winn-Dixie showed the highest levels of lead, 121 parts per million, and showed 117 in the second.

A bag from Publix with a University of South Florida theme approached the 100 parts per million threshold, with a level of 87 parts per million in the first tests, and showed 194 parts per million in a second test -- the highest result of any bag in Tribune tests.

The differences between the two tests likely came from different production runs at the manufacturer, Rodrigues said.

The lead appears to be in a form that is not easily extracted or leached, Rodrigues said. It is not in a form that would rub off on food simply by touching the bag, like wet paint, he said, but over time, bags wear down and paint can flake off and threads can fray, releasing the lead.

Environmental Protection Agency rules require that any product with a lead content higher than 100 parts per million should technically undergo further testing before landfills accept them for disposal, he said.

Publix officials stress that their bags are not toys or paint, and thus comply with current federal rules. But after reviewing the Tribune

test results last week, Publix officials said they took action.

“We have already contacted the supplier of this bag and asked them to look at reducing the lead content, even though it is within government safety standards,” said spokeswoman Shannon Patten.

“We would never knowingly carry something in our stores that wasn't in compliance with government regulations, and we work hard every day to bring safe, high-quality products to our customers.”

Publix will refund the purchase price of bags to any concerned shopper, she said. Winn-Dixie also said it would refund the cost of a bag. Lead in bags may have emerged as the surprise issue of the year for grocers and consumers.

Shoppers have been switching to reusable totes, avoiding plastic bags to help the environment and lessen the nation's dependence on oil used to make the plastic. Some states want to ban inexpensive plastic bags or impose a tax to discourage their use. Reusable bags seemed the natural solution.

Fitting the Reduce, Reuse, Recycle mantra, reusable bags have become popular, even fashionable, with elaborate designs, holiday themes and sports team logos. Publix has sold 13 million reusable bags, saving an estimated 1 million plastic bags a day.

However, this summer, an independent group tested bags from the upscale Wegmans grocery company and found some contained lead at 799 parts per million, well beyond levels that health officials consider problematic.

Wegmans commissioned its own tests, which also found lead, and immediately stopped selling two styles of bags, one with a green pea design and one with a holiday illustration. (No other designs were affected.) Wegmans posted signs in stores telling customers the bags were safe to use, but should be returned to the store before disposal.

“Lead is a neurotoxin, a carcinogen and affects children's IQ,” said Judy Braiman of Rochesterians Against the Misuse of Pesticides, the first outside group to test Wegmans bags. “It's ironic that everyone is really trying to be good for the environment, and then these bags have lead all over the place.”

Winn-Dixie officials reviewed the Tribune results and said they were confident their bags were “safe to use and reuse as intended.”



That said, the Tribune test "suggests there is an opportunity to improve this solution as it pertains to disposal of these bags, and ensure the ongoing benefits to our customers and the communities we serve."

For those hoping to help the environment, perhaps a more important issue is what to do with bags when they wear out. Among rules for disposal, bags fall into a gray area.

The rules are clear with things such as tube televisions and paint. They are considered hazardous waste, and residents must bring them to the government for special handling.

But there are no requirements for bags, said James Ransom, a spokesman for Hillsborough County's solid waste program.

But Ransom said the basic chemical content of these bags tested by the Tribune would require special handling under Hillsborough County rules, and he advises consumers who know about issues with their bags to handle them differently than general household trash.

Florida has come a long way from the days when local governments dug holes, dumped trash and set it on fire, said Richard Tedder, a program administrator for the state Department of Environmental Protection. He said he thinks the bags would be fine in landfills, especially the more modern dumps with liners to prevent groundwater contamination.

However, Rodrigues, Braiman and Dillon said there is a multiplying effect of millions of Americans buying reusable bags and tossing them out over time.

All this presents problems for shoppers.

Reusable bags don't list lead as an ingredient in the material. All the bags tested by the Tribune were made in China. A tag on the USF bag from Publix says to hand wash separately and line dry.

Shoppers could try using the home lead tests sold in stores, but those are primarily designed for testing paint on hard surfaces such as walls or toys.

The bags tested by the Tribune with the highest lead levels tended to have the most elaborate designs or illustrations that covered the entire surface.

By contrast, a nylon bag sold by Target with almost no illustrations had almost undetectable levels of lead. Also, the simplest bags from Sweetbay, Walmart and Publix contained little lead.

For shoppers, the best advice might be: If you're concerned about your bags, take them back to the store.

As a result of the Tampa Tribune article, U.S. Senator Charles Schumer (D-NY) asked for a federal investigation into the problem. (Doc #43.) In his press release he stated as follows: (Doc #43.)

U.S. Senator Charles E. Schumer today called on the Food and Drug Administration (FDA), the Environmental Protection Agency (EPA) and Consumer Product Safety Commission (CPSC) to investigate and ban reusable shopping bags that contain higher than acceptable levels of lead. Many of these popular bags are manufactured in China and sold to grocery stores, who then sell them to customers. Schumer, Vice Chairman of the Joint Economic Committee, noted that while there may be no immediate danger to human health, food products come into direct contact with these bags and long-term exposure can pose serious health and environmental risks. Schumer, who has a long record fighting to make products imported from China safe for consumers and children, is asking federal agencies to investigate and ban any reusable bags sold to grocery stores and retailers that are found to have high levels of lead in them.

The problem came to light this past September when Wegmans, a supermarket chain with stores in New York and four other states, pulled a number of their reusable shopping bags that were manufactured in China after a consumer group found that they contained higher than acceptable levels of lead that could affect public health. Since that time, several other reports have shown higher than acceptable levels of lead in reusable shopping bags sold at chain supermarkets in other states like Publix and Winn-Dixie, as well as drug stores across the country.

....

Several recent reports show that a significant number of reusable shopping bags contained over 100 parts per million (PPM) in heavy metals. In some cases, bags contained as many as 5 times the allowable limits. The paint on lead-filled bags has the ability to peel and flake off, coming into direct contact with exposed groceries, like fruits and vegetables. Exposure to high levels of lead can damage the nervous and immune systems and impair

kidney function over time. When disposed of in landfills, these bags can leak toxins into the soil and water and have the potential to create even more environmental problems.

In September, Wegmans Food Markets Inc. announced that it would be replacing 725,000 reusable shopping bags in its stores in New York, Pennsylvania, New Jersey, Virginia and Maryland. The announcement came on the heels of a report by the Empire State Consumer Project that found that the green bags contained lead at 799 parts per million – more than double the amount allowed in children’s products by the CPSC. Currently, the CPSC allows lead in children’s products at up to 300 parts per million; next year, the limit will drop to 100 parts per million.

California Assembly Member Kevin de Leon (D-Los Angeles), submitted a letter on November 15, 2010 requesting the Los Angeles County Board of Supervisors delay its vote on banning plastic bags because of the recent revelations about potentially toxic levels of lead in reusable bags. He questioned whether the bags could contaminate the food that consumers transport and whether the lead could be spread in landfills when the bags are discarded. De Leon even admitted that he is a “co-author and long-time advocate of legislative proposals to ban plastic bags from the stream of commerce.” (Doc #44.)

STPB recognizes that the draft ordinance contains a requirement that reusable bags must meet the standards of the California Toxics in Packaging Prevention Act (Cal. Health & Safety Code §§25214.11-25214.26), as amended, or any successor legislation. However, reusable bags are exempt from the toxic metals restrictions applicable to plastic and paper bags. (Health & Safety Code §25214.12(h)(2): “Package” does not include a reusable bag, as defined in subdivision (d) of Section 42250 of the Public Resources Code.)

The former restriction on toxic heavy metals in reusable bags was repealed by a bill authored by Assembly Member Julia Brownley (D-Santa Monica) in 2008. (Doc #45.) Assembly Member Brownley is the author of AB 1998, which would have banned plastic bags. She is the leading proponent in the Legislature for of banning plastic bags.

With the restrictions removed, reusable bags provided in the city, including reusable bags imported from China, may legally contain lead, mercury, cadmium, and hexavalent chromium.

Health and Safety Code §25214.13 defines a toxic amount for the purpose of regulating packaging including plastic and paper bags as:

the sum of the incidental total concentration levels of all regulated metals present in a single-component package or in an individual packaging component exceeds 100 parts per million by weight.

That definition needs to be incorporated into the proposed ordinance. The city will be permitting reusable bags to be distributed in the city with high levels of toxicity caused by lead, cadmium or other heavy metals.

**THE PROPOSED ORDINANCE MAY RESULT IN  
A SIGNIFICANT REDUCTION IN RECYCLING**

Free brown paper carryout bags are the key to a successful recycling program in the City of Santa Cruz. You put your recyclables in a brown paper carryout bag and then take the filled bag to the blue bin.

Residents save brown paper carryout bags for recycling. Residents dispose of so many recyclables that the paper bags fill up quickly. Residents may find that they have not saved enough paper bags. If the city bans free paper carryout bags and pushes for a goal of 100% reusable bags, what will be the impact on recycling? When people need a brown paper bag for recycling, they won't have one. They may simply dispose of their recyclables in the trash.

***This issue needs to be addressed in an EIR. If the city is trying to push people to use reusable bags 100% of the time, there may be a significant negative impact on recycling. This is an enormously important environmental issue for the city and the residents.***



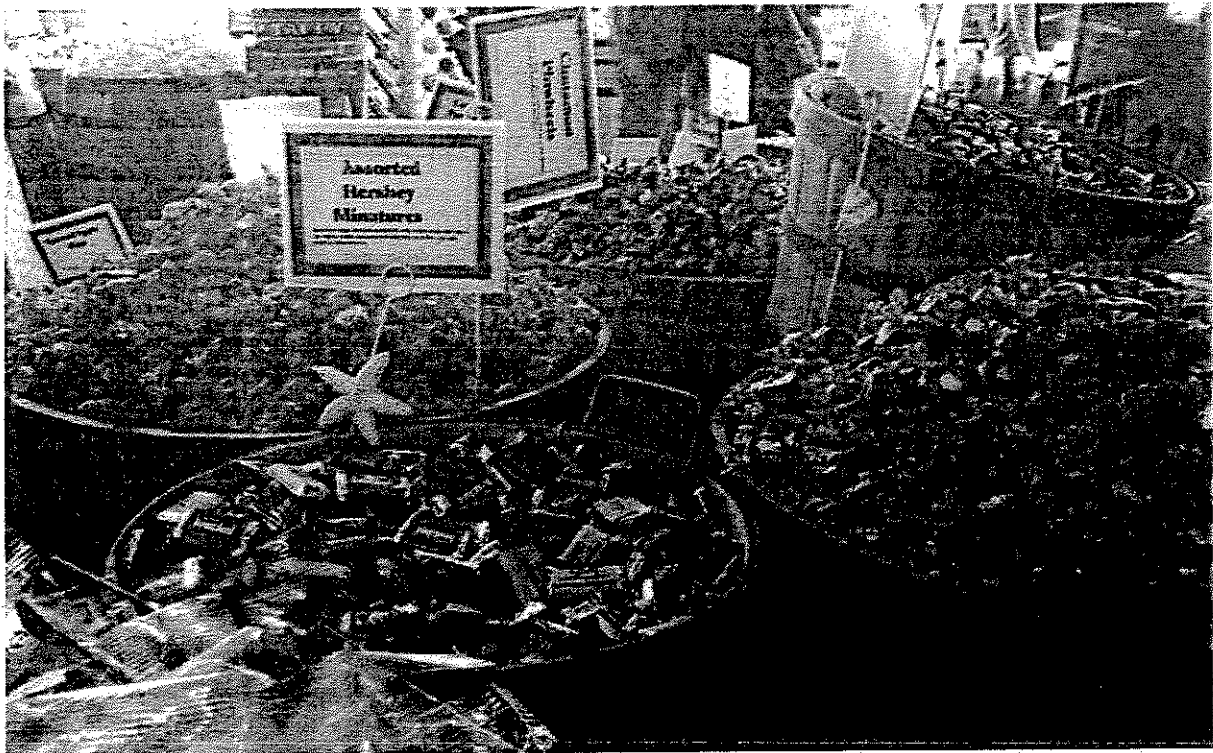
**Free brown paper carryout bags are critically important  
to recycling in the City of Santa Cruz**

**THE PROPOSED ORDINANCE MAY RESULT IN  
A SIGNIFICANT INCREASE IN SMALL LITTER**

One of the unintended consequences of the proposed ordinance is a significant increase in litter. The purpose of the proposed paper bag is to dissuade people from taking carryout bags. However, carryout bags are portable trash containers.

Carryout bags contain and consolidate small litter. People may refuse to purchase a carryout bag and opt to carry items loose. For example, suppose a family buys individually wrapped candies from a store on the boardwalk and take them in a plastic carryout bag. The carryout bag becomes a portable trash container. The bag may contain twenty wrappings by the time the family discards it. Now imagine that they have no carryout bag and put the candies in their pockets. What happens to the wrappings?

The city should be encouraging people to take carryout bags for multiple items, not discouraging them. By discouraging the use of carryout bags, the city may see a significant increase in small litter.

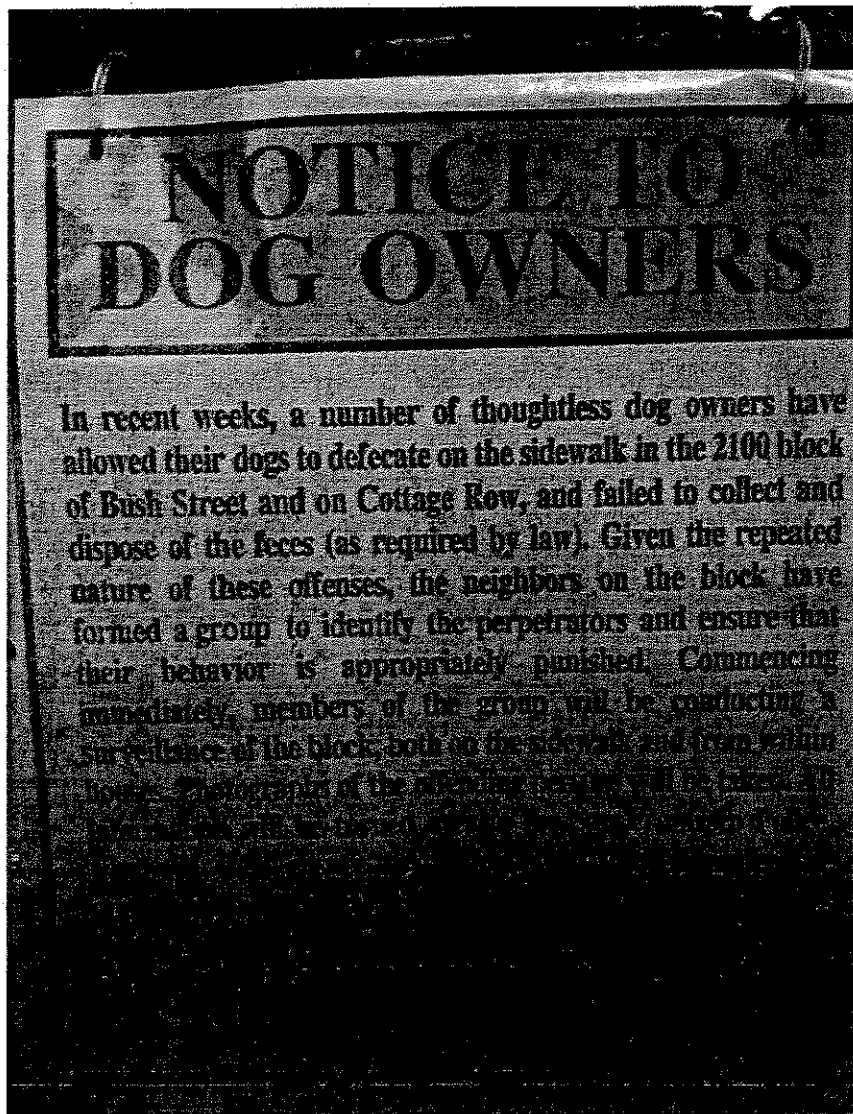


**A carryout bag is a portable trash container for the wrappings**

**THE PROPOSED ORDINANCE MAY RESULT IN A  
SIGNIFICANT INCREASE IN DOG WASTE ON THE STREETS**

Dog owners save plastic bags for this purpose to collect and dispose of dog waste.

If plastic bags become a rarity, there may be a significant increase in dog waste on the streets. This is an environmental problem for residents, especially when they are walking at night and step right in it. It doesn't take much additional dog poop on a street to make a big difference.



# **CEQA OBJECTIONS**

**OBJECTIONS BASED ON CEQA**  
**AND THE CALIFORNIA SUPREME COURT RULING IN**  
**SAVE THE PLASTIC BAG V. CITY OF MANHATTAN BEACH;**

Pursuant to Pub. Res. Code §21177(b) and other applicable provisions of the California Environmental Quality Act ("CEQA"), Save the Plastic Bag Coalition ("STPB") hereby objects to the approval of the proposed ordinance or any substantially similar ordinance banning the provision of plastic carryout bags as no Environmental Impact Report ("EIR") has been or is being prepared.

If the city adopts an ordinance without preparing and certifying an EIR that fully complies with CEQA, STPB will file a petition for writ of mandate in the Santa Cruz Superior Court and a request for preliminary and permanent injunctive relief.

All of the foregoing parts of this document are realleged in support of these CEQA objections. They constitute a fair argument that the ordinance may result in significant negative environmental impacts as a result of the increased numbers of environmentally worse paper and reusable bags and the loss of free plastic and paper bags for reuse.

**A. THE CALIFORNIA SUPREME COURT HAS RULED THAT CITIES**  
**LARGER THAN MANHATTAN BEACH MUST PREPARE EIRS BEFORE**  
**BANNING PLASTIC BAGS**

In July 2008, the City of Manhattan Beach passed an ordinance banning plastic bags without preparing an EIR. Manhattan Beach prepared an Initial Study finding that there would be no significant negative environmental impact as the city was small. STPB objected and demanded that the city prepare an EIR on the ground that a shift to paper bags would have a significant negative impact on the environment. STPB filed a petition for writ of mandate in the Los Angeles Superior Court. The cases was ultimately ruled upon by the California Supreme Court which ruled as follows: *Save The Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155

1. STPB has legal standing to file CEQA actions. (*Id.* 52 Cal.4th at 165-170.)
2. The City of Manhattan Beach was too small to have been required to prepare an EIR. The population is only 33,852. "There are only two supermarkets, three (and two future) drug stores, and one Target store known to be high volume users of plastic shopping bags in the City which would be affected by the ban." (*Id.* 52 Cal.4th at 161.)
3. The court stated: **"[T]he analysis would be different for a ban on plastic bags by a larger governmental body, which might precipitate a significant increase in paper bag consumption."** (*Id.* 52 Cal.4th at 174.)
4. The court stated: "While cumulative impacts should not be allowed to escape review when they arise from a series of small-scale projects, that prospect does not appear in this



case. [That is, as of July 2008.] 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." (*Id.* 52 Cal.4th at 174, n.10, emphasis added.)

In summary, EIRs are required for plastic bag bans by (i) cities and counties that are larger than Manhattan Beach and (ii) small cities and counties based on the cumulative impacts.

When Manhattan Beach passed its ban in July 2008 only San Francisco and Malibu had banned plastic bags. At the present time, the following additional plastic bans have been enacted:

- Los Angeles County adopted a plastic bag ban on November 16, 2010 and prepared and certified an EIR. (Doc #91.) In the Manhattan Beach opinion, which was as of July 2008, this was referred to a "possible" future ban. (*Id.*, 52 Cal.4th at 174.)
- The City of San Jose adopted a plastic bag ban on December 14, 2010 and prepared and certified an EIR. (Doc #72.)
- The City of Santa Monica adopted a plastic bag ban on January 25, 2011 and prepared and certified an EIR.
- Marin County adopted a plastic bag ban on January 25, 2011. Marin County failed to prepare an Initial Study or EIR. STPB has sued Marin County.

Based on these bans, the cumulative impacts of a shift to paper bags have reached critical mass and all cities and counties must prepare EIRs.

**B. THE CITY OF SANTA CRUZ IS LARGER THAN MANHATTAN BEACH AND RECEIVES MILLIONS OF TOURISTS ANNUALLY**

According to the U.S. Census Bureau, the population of the City of Santa Cruz is approximately 60,000. In addition, millions of tourists and visitors come to the City of Santa Cruz each year. [Docs ## 1-4.] Therefore, the City of Santa Cruz must prepare an EIR.

**C. THE CRITICALLY IMPORTANT TOURISM FACTOR MUST BE TAKEN INTO ACCOUNT**

The vast majority of tourists who come to the city will not bring their own reusable bags, especially tourists from other parts of the country and overseas. They will readily pay for paper bags. A 10-cent fee will not deter them. They will not be prepared to pay for more expensive reusable bags and carry them as they tour the city.

Tourists will not remain in Santa Cruz long enough to use reusable bags more than once or twice or perhaps a few more times. Those tourists do buy reusable bags will discard them quickly, after one or two uses.

Tourists simply will not take the reusable bags home with them – which means that the city and landfills will be flooded with discarded reusable bags that have hardly been used.

The city cannot make a determination of the environmental impact of banning plastic bags without taking the tourism factor into account. This must be addressed and evaluated in an EIR.

**D. THE CEQA “COMMON SENSE EXEMPTION” IS UNAVAILABLE**

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

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

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

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

(*Id.* at 117.) This approach is incorporated in Guidelines §15064(g) which states:

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

In *County Sanitation District No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, the Court of Appeal emphasized that this is a low threshold test designed to ensure that the environment is protected. The court stated:

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

(*Id.* at 1558.)

California courts, including the Fifth Appellate District, routinely describe the fair argument test as a low threshold requirement for

the initial preparation of an EIR that reflects a preference for resolving doubts in favor of environmental review....

In contrast to this description of the fair argument test, County asserts that “[a]ny reasonable doubts whether substantial evidence exists must be resolved in favor of the agency’s decision.” This assertion is rejected because (1) it misstates the low threshold of the fair argument test and (2) the case relied upon by County did not actually involve the fair argument test or the approval of a negative declaration....

(*Id.* at p. 1579.)

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

(*Id.* at p. 1580.

**E. AS STPB HAS MADE A FAIR ARGUMENT, THE CITY MAY NOT RELY ON CONTRARY EVIDENCE THAT THE ORDINANCE WILL NOT HAVE A SIGNIFICANT EFFECT ON THE ENVIRONEMMENT**

“[I]f a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.” (Guidelines § 15064(f)(1); see also *Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337, 1348) [“If such evidence [supporting a fair argument of significant environmental impact] is found, it cannot be overcome by substantial evidence to the contrary.”]; *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002) [“[E]vidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact.”]]

**F. A 10-CENT PAPER BAG FEE IS INSUFFICIENT TO AVOID THE REASONABLE POSSIBILITY OF SIGNIFICANT NEGATIVE ENVIRONEMNTAL IMPACTS, WHICH IS WHY THE COUNTY WILL HAVE A 25-CENT FEE**

Santa Cruz County’s paper bag fee is presently 10 cents, but will increase to 25 cents. The City of Santa Cruz is only proposing a 10-cent fee. This is insufficient to avoid the reasonable possibility of significant negative environmental impacts caused by a huge increase in the number of environmentally worse paper bags.

The city states in its Initial Study (at page 8): "In January 2010, Washington D.C. saw a 50 to 80% reduction in the use of single-use plastic bags one month after the imposition of a five-cent charge." This is misleading and inaccurate and STPB objects.

Docs ## 57-63, 80, 84 show the following:

- There is no finalized empirical data regarding Washington, D.C.
- The DC Government and retailers have been giving away reusable bags since the effective date of the fee on January 1, 2010. Six documents are provided herewith showing a huge number of free reusable bags given to District of Columbia shoppers as follows.
- There were no reporting requirements for bag usage before the DC ordinance took effect in January 2010. How on earth could anyone know how many bags were used in DC prior to January 2010? There was no data.
- There is no reporting requirement for bag usage in the DC ordinance or regulations. In the first month after the ordinance took effect or at any time thereafter, how would anyone know how many bags were used? Again, there is no data. Fanciful "before and after" numbers invented by promoters of the DC bag ordinance to justify their actions are no substitute for real data.
- The leading supermarket chains in DC are Safeway and Giant. Before the law took effect, Safeway gave away 122,000 reusable bags at its checkouts before the ordinance took effect. Giant gave away 250,000 free reusable bags at its checkouts in the first week of January 2010. CVS pharmacies in association with the DC Government gave away 112,000 reusable bags. (Doc # 62.) Many more reusable bags were given away. DC has 248,000 households. (Doc # 57.) DC was awash in free reusable bags!
- Part of the fee remitted to the DC Government must be used for "[p]roviding reusable carryout bags to District residents, with priority distribution to seniors and low-income residents." (Doc # 84 at 4.) When the store-financed free reusable bag ends, the DC Government is right there buying more bags to give away.
- How many stores in DC, especially small stores where the transactions are primarily cash, are still discretely giving away bags to keep their customers happy? Perhaps some are deducting the fee from the price of the goods, so that the customer pays the same total amount as if the bag was free. Stores are merely required to remit the proceeds of the fee to DC Government without any kind of reporting. They just send a lump sum based on the honor system. (Doc # 80 - Rule § 1007.) Other than large chain stores, there is no way to check on them.
- It is easy to drive across the district line from DC to Virginia and Maryland where plastic bags and paper bags are free. This is important as reduced bag usage could be the result of DC residents opting to shop in Virginia or Maryland. This is not something that the

DC Government would be keen to publicize.

- Any data resulting from huge reusable bag giveaway bonanzas that were used to promote and launch the project in DC are not valid data for the long-term in DC or anywhere else.
- When the free reusable bags given away in DC become dirty and the store giveaways have stopped, they will be thrown away. The honeymoon will be over and the day of reckoning will arrive.

The city cannot state with certainty that the 10-cent paper bag fee will avoid significant negative environmental impacts caused by an increase in the number of paper bags.

**G. THE ASSUMPTION IN THE INITIAL STUDY THAT EVERY REUSABLE BAG WILL BE USED 100 TIMES ANNUALLY IS ABSURD AND INVALID AND CANNOT REASONABLY BE STATED AS A CERTAINTY**

At page 9 of the Initial Study, the City states: "Based on County assumptions that a reusable bag would be used a total of 100 times annually, or twice per week prior to recycling or disposal, the actual number of replacement reusable bags expected under the proposed ordinance would be 250,000."

This assumption is absurd and invalid. It is nothing more than wishful thinking. Reusable bags will become filthy after far fewer than 100 uses and very few people wash them, as we have seen. They will throw them away and buy new ones. Reusable bags are worse for the environment than plastic bags is they are not used at least between 104 and 173 times depending on the material.

**H. THE CITY MUST CONDUCT A CUMULATIVE ANALYSIS**

CEQA Guidelines §15130(a) states that an EIR "shall discuss cumulative impacts of a project when the project's incremental effect is cumulatively considerable, as defined in section 15065(a)(3). Guidelines §15065(3) states that an EIR must be prepared if "the project has possible environmental effects that are individually limited but cumulatively considerable." Guidelines §15065(3) states that "cumulatively considerable" means that the "incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." Guidelines §15355 defines "cumulative impacts" as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." Guidelines §15355(b) states that "[c]umulative impacts can result from individually minor but collectively significant projects taking place over a period of time."

In *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, the court stated:

At 114: "Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a

vacuum. [Footnote] One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

At 118: From *Kings County and Los Angeles Unified*, the guiding criterion on the subject of cumulative impact is whether *any* additional effect caused by the proposed project should be considered significant given the existing cumulative effect. (Emphasis added.)

At 119: However, under CEQA section 21083, under the Guidelines section 15355 definition of cumulative impacts, and under the *Kings County/Los Angeles Unified* approach, the need for an EIR turns on the impacts of *both* the project under review and the relevant past, present and future projects. [Emphasis by court.]”

In *San Franciscans for Reasonable Growth v. City and County of San Francisco*, (1984) 151 Cal.App.3d 61, 75, the court stated:

[W]e must reject the argument that, because some of the projects under review might never be built, it was reasonable for the Commission not to consider any of them in its cumulative analyses. Such argument is without merit. The fact that the EIR's subject project itself might be built, rather than the fact that it might not be built, creates the need for an EIR. Similarly, the fact that other projects being reviewed are as close to being built as the subject project makes it reasonable to consider them in the cumulative analyses.

Based on the foregoing, the EIR must consider the impact of the proposed County ordinance together with the following projects as part of a cumulative analysis.

**Northern California:**

- The County of Alameda plastic bag ban.
- The County of Marin plastic bag ban.
- The County of Santa Clara plastic bag ban.
- The County of Santa Cruz plastic bag ban.
- The County of San Luis Obispo plastic bag ban.
- The City of Palo Alto plastic bag.
- The City of San Jose plastic bag ban.
- The City and County of San Francisco plastic bag ban.

**Southern California:**

- The County of Los Angeles plastic bag ban.
- The City of Los Angeles proposed plastic bag ban.
- The City of Calabasas plastic bag ban.
- The City of Long Beach plastic bag ban.
- The City of Malibu plastic bag ban.
- The City of Manhattan Beach plastic bag ban
- The City of Santa Monica plastic bag ban.

**I. THE CITY MUST CALCULATE GREENHOUSE GAS EMISSIONS, BUT HAS FAILED TO DO SO**

An agency cannot find that greenhouse gas impacts are insignificant without making “a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from [the] project.” (Guidelines § 15064.4.) The Initial Study contains no such description, calculation or estimate, and STPB therefore objects.

**J. THE CITY AND THE VOTERS NEED AN EIR**

There are many outstanding important environment questions that must be addressed in an EIR. This is information that the City Council *needs* before the ordinance is adopted. It is also needed by the public, so that they can evaluate the city’s decision.

The city and the public needs to know the following (among other things) before the ordinance is adopted:

- In what quantities paper, plastic, compostable, and reusable bags are delivered into the city
- The number of paper, plastic, compostable, and reusable bags consumed at stores and food establishments
- The quantity of plastic, paper, compostable, and reusable bags disposed of in city trash
- How the city disposes of its trash
- The impact on blue bin residential and commercial recycling if paper carryout bags are no longer available for free
- The impact on landfills
- Whether there may be an increase in small litter as people will not be using carryout bags as trash containers

- Whether there may be an increase in dog poop on the streets
- Recycling rates for plastic and paper bags
- Whether reusable bags are recyclable
- How reusable bags are disposed of
- Whether plastic bags are a significant portion of litter found
- Whether paper bags are a significant portion of litter found
- Whether compostable bags are a significant portion of litter found
- Whether reusable bags are a significant portion of litter found
- Is bag litter polluting the City of Santa Cruz coastline and reaching the oceans? At what locations along the shoreline? In what quantities?
- How many tourists there are in the city at any time compared to locals.
- To what extent are restaurant patrons in the city actually tourists.
- How tourists will react to the proposed 10-cent fee.
- Will tourists buy paper bags and avoid reusable bags?
- Will customers of food establishments buy carryout bags? What will be the impact on litter if they do not?
- The possibility of unintended consequences, including an increase in litter and a reduction in recycling.
- Alternatives to a ban such as expanding the city's street cleaning services

It is not STPB's job to point out the environmental impacts. It is the city's job. In *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, the Court of Appeal stated (at 311):

While a fair argument of environmental impact must be based on substantial evidence, mechanical application of this rule would defeat the purpose of CEQA where the local agency has failed to undertake an adequate initial study. The agency should not be allowed to hide behind its own failure to gather relevant data....



CEQA places the burden of environmental investigation on government rather than the public. If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.

## **CONCLUSION**

### NOTICE OF INTENT TO LITIGATE

STPB has made a fair argument that the proposed ordinance may have a significant negative effect on the environment as a result of increased numbers of paper and reusable bags. Therefore, an EIR must be prepared and certified. STPB demands that an EIR be prepared.

STPB hereby notifies the City of Santa Cruz that STPB *will* file a petition for writ of mandate in the Santa Cruz Superior Court or other appropriate court to enforce CEQA in the public interest, based on the points and objections herein, if no EIR is prepared and certified. The litigation will be based on (i) STPB's beneficial interest and (ii) citizen standing in the public interest.

### REQUEST FOR NOTICES

Pursuant to CEQA Guidelines §15072(b), I request that you send me by e-mail and regular mail to the above address any notices regarding the proposed ordinance.

### CONCLUSION

All rights are reserved. No rights or duties are waived by any statement or omission herein.

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

If the city prepares an EIR, the voters will know the truth about the environmental impacts of banning plastic bags. As the Court of Appeal stated in *People v. County of Kern* (1974) 39 Cal.App.3d 830:

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

(*Id.* at 842.)

**SAVE THE PLASTIC BAG COALITION**

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

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By: STEPHEN L. JOSEPH, Counsel

# **EXHIBIT D**

Petitioner's e-mail  
Dated June 21, 2012

Stephen L. Joseph <savetheplasticbag@earthlink.net>  
To: Bob Nelson <bnelson@cityofsantacruz.com>  
Re: City of Santa Cruz proposed Single Use Bag Reduction Ordinance

June 21, 2012 5:24 PM

6 Attachments, 2.6 MB

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Mr. Nelson:

I see that the draft ordinance would not exempt restaurants and other food facilities. We object.

We will file a lawsuit against the City of Santa Cruz if it bans plastic bags at restaurants or other food facilities. Any such bans are preempted and prohibited by the California Retail Food Code. We shall be asking the court to issue a Preliminary Injunction.

The Santa Barbara Superior Court has ruled in our favor on this issue. A copy of the ruling is attached. Although the ruling is described as a "Tentative Ruling," it was adopted as the final ruling of the court on May 15, 2012.

See also attached legal memo.

All rights are reserved, including rights under CEQA.

Please acknowledge receipt of this e-mail.

Thank you.

Regards,

Stephen L. Joseph, Counsel  
SAVE THE PLASTIC BAG COALITION  
350 Bay Street, Suite 100-328  
San Francisco, CA 94133  
Phone: (415) 577-6660  
Fax: (415) 869-5380  
Website: [www.savetheplasticbag.com](http://www.savetheplasticbag.com)  
E-mail: [savetheplasticbag@earthlink.net](mailto:savetheplasticbag@earthlink.net)

FOLLOW US ON TWITTER:

<http://twitter.com/saveplasticbag#>

SUBSCRIBE TO OUR RSS FEED:

<http://tinyurl.com/4vlc9cr>

NOTE: This e-mail and any attachments are confidential and privileged. If you are not the intended recipient, you may not use, copy or disclose them to anyone. Please notify the sender and delete them. Thank you.

On Jun 21, 2012, at 2:54 PM, Bob Nelson wrote:

Mr. Joseph,

You had requested to be informed when the City Council will take action on the proposed Single Use Bag Reduction ordinance. They are scheduled to hear this item on July 10, 2012. Unfortunately, we do not yet have an exact time that it is scheduled so please check the posted City Council agenda. It can be found electronically on the City of Santa Cruz web page.

To view the current proposed language of the ordinance you can view it at:  
<http://www.cityofsantacruz.com/Modules/ShowDocument.aspx?documentid=27553>

If you have any questions or comments, please feel free to contact me. Thanks

Bob Nelson  
Superintendent of Resource Recovery  
(831) 420-5548

Bob Nelson  
Superintendent of Resource Recovery  
(831) 420-5548




[STPB restaurant bag memo.pdf \(255 KB\)](#) [Ruling denying Carpinteria demurrer.pdf \(104 KB\)](#)



[Exh. 1. University of Florida - burns.pdf \(186 KB\)](#) [Exh. 2. Safety Facts on Scalding Injuries St. Francis.pdf \(61 KB\)](#)



  
[Exh. 3. Hot coffee case photos WARNING DISTURBING IMAGES.pdf \(1.4 MB\)](#)

  
[Exh. 4. Subway Soup Severely Burns Woman. Lawsuit Claims.pdf \(613 KB\)](#)



# **EXHIBIT E**

Petitioner's e-mail  
Dated July 9, 2012

Stephen L. Joseph <savetheplasticbag@earthlink.net>

July 9, 2012 10:15 AM

To: Bob Nelson <bnelson@cityofsantacruz.com>,  
dlane@cityofsantacruz.com, hbryant@cityofsantacruz.com, rcoonerty@cityofsantacruz.com,  
tmadrigal@cityofsantacruz.com, lrobinson@cityofsantacruz.com,  
dterrazas@cityofsantacruz.com  
Objections to carryout bag ordinance

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To Bob Nelson and the Santa Cruz City Council:

I have reviewed the city's responses to our objections to the carryout bag ordinance.

1. The responses do not even mention visitors and tourists, which is remarkable. As we stated and emphasized in our objections, an estimated six million visitors and tourists come to the City of Santa Cruz every year.
2. It is unrealistic and wishful thinking to expect and trust that visitors and tourists will buy reusable bags rather than paying 10 cents for a paper bag. Why would they need a reusable bag if they are only in the city for a day or two? They wouldn't. Why would they want to carry a clunky reusable bag around town with them, just to save a dime? They wouldn't. The draft ordinance will result in a huge increase in the number of paper bags. Paper bags are much worse for the environment than plastic bags, especially regarding greenhouse gas emissions.
3. PP, canvas, and cloth reusable bags are not recyclable. To the extent that visitors buy reusable bags (and few will), the overwhelming majority are likely to use them once or just a few times before they leave. The city will have to dispose of the discarded non-recyclable reusable bags that they leave behind.
4. The responses focus on polyethylene (that is plastic) reusable bags as these are the best reusable bags for the environment. We agree. However, these kinds of bags are rarely used. Almost all reusable bags are actually made from polypropylene (PP), canvas, or cloth. As the Los Angeles EIR and the British LCA show, PP, canvas, and cotton bags must be used at least 104, 104, and 173 times respectively before they offset their greater environmental impacts compared to a reusable bag. The responses indicate that because a reusable bag CAN be used that many times, it WILL be used that many times. That is a non sequitur. They will be discarded much sooner than that, especially by tourists and visitors. Most residents will not use them that many times, because as the University of Arizona study shows, the bags become filthy and unhygienic long before that number of uses is achieved and very

few people wash them. Most will just buy a new bag.

5. Santa Cruz County is requiring a minimum 25-cent charge for paper bags. Residents of the unincorporated areas may come into the City of Santa Cruz to do their shopping to get cheaper paper bags, thereby adding to the problem of the proliferation of paper bags.

6. CEQA Guidelines section 15064(f) states: "[I]f a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect." We have unquestionably made a fair argument.

7. Regarding the Manhattan Beach case, the City of Santa Cruz is almost twice as large as the City of Manhattan Beach in terms of the number of residents. Moreover, an estimated six million visitors and tourists come to the City of Santa Cruz every year and they do a great deal of shopping. Therefore, the City of Santa Cruz must be considered to be many times larger than the City of Manhattan Beach. The Supreme Court ruled that cities and counties larger than the City of Manhattan Beach "will be required" to prepare EIRs before banning plastic bags. The City of Santa Cruz is bound by the Supreme Court decision.

8. The reusable bag definition in the draft ordinance requires that reusable bags be "machine washable." That is too restrictive. It would eliminate most reusable bags. The standard adopted in all other jurisdictions that have adopted the long form definition is that the bag must be capable of being cleaned or disinfected, regardless of machine washability.

9. It is absurd that the City of Santa Cruz County is proposing a different reusable bag definition than the one adopted by Santa Cruz County. Santa Cruz County has adopted the short form definition, which is the same as the City of San Jose's definition. The County ordinance defines a reusable bag as follows:

" 'Reusable bag' means any bag with handles that is specifically designed and manufactured for multiple reuse, and is either 1) made of cloth or other washable woven fabric, or 2) made of durable material that is at least 2.25 mils thick. A "reusable bag" may be made of recyclable plastic such as high density polyethylene (HDPE), low density polyethylene (LDPE), or polypropylene."

Without waiving any other objections, we object to a different definition than the one adopted by Santa Cruz County.

10. The draft ordinance states: "Restaurants, defined as an establishment whose principal business is the sale of prepared food for consumption either on or off premises, are not covered under this ordinance." Without waiving any objections, we object as this definition is too restrictive to comply with the Retail Food Code which applies to all "food facilities." Since the Santa Barbara Superior Court's ruling in of favor on this issue, the Cities of Carpinteria and Solana Beach will be adopting the following definition:

" 'Restaurant' means any person or establishment doing business within the City of \_\_\_\_\_ that provides prepared food or beverages for consumption on or off its premises such as a restaurant, café, bakery, grocery or convenience store food counter or delicatessen, or catering truck vehicle."

Without waiving any other objections, this definition would be acceptable.

11. We will file a petition for writ of mandate and/or complaint in the Santa Cruz Superior Court if the City of Santa Cruz bans plastic bags without preparing an EIR and/or violates Retail Food Code preemption.

12. All objections and rights are reserved.

Regards,

Stephen L. Joseph, Counsel  
SAVE THE PLASTIC BAG COALITION  
350 Bay Street, Suite 100-328  
San Francisco, CA 94133  
Phone: (415) 577-6660  
Fax: (415) 869-5380  
Website: [www.savetheplasticbag.com](http://www.savetheplasticbag.com)  
E-mail: [savetheplasticbag@earthlink.net](mailto:savetheplasticbag@earthlink.net)

# **EXHIBIT F**

Santa Barbara Superior Court  
ruling in Carpinteria case

## TENTATIVE RULING

Judge Thomas Anderle  
Department 3 SB-Anacapa  
1100 Anacapa Street  
P.O. Box 21107  
Santa Barbara, CA 93121-1107

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## CIVIL LAW & MOTION

<b>Save the Plastic Bag Coalition vs City of Carpinteria</b>	
<b>Case No:</b>	1385674
<b>Hearing Date:</b>	Tue May 15, 2012 9:30

**Nature of Proceedings:** Demurrer

Demurrer of City of Carpinteria to Complaint

**Ruling:**

For the reasons set forth herein, the demurrer of defendant City of Carpinteria to the complaint is overruled. Defendant shall file and serve its answer to the complaint on or before May 25, 2012.

**Background:**

On March 12, 2012, the City of Carpinteria adopted Ordinance No. 655 (the "Ordinance"), enacting chapter 8.51 in the Carpinteria Municipal Code entitled "Single-Use Bag Regulations."

"The purpose of these provisions is to promote:

"A. The protection of unique coastal resources found in Carpinteria and identified for protection in policies of the City's General Plan/Local Coastal Plan, including the Carpinteria 'El Estero' Salt Marsh, Beaches, Tidelands, and Offshore Reefs, Harbor Seal Hauling Grounds, and Creekways and Riparian Habitat;

"B. Compliance with federal and state mandates for Clean Water (including National Pollutant Discharge Elimination System Permit Program and waste stream reduction (AB 939 and AB 341));

"C. A reduction in the amount of plastic and paper material that is manufactured, transported, handled/processed, and discarded, and the impacts associated with such activities.

“D. A reduction in the amount of waste/debris in City parks, public open spaces, creeks, estuary, tidelands and the ocean, and the amount of material going to landfills;” (Carpinteria Mun. Code, § 8.51.020.)

The Single-Use Bag Regulations prohibit the dispensing of single-use bags as follows:

“A. Commencing on July 11, 2012 large commercial establishments are prohibited from dispensing to any customer at the point of sale a single-use bag.

“B. Commencing on April 11, 2013 small commercial establishments are prohibited from dispensing to any customer at the point of sale a single-use bag, except gift bags or paper bags, as defined in this chapter.” (Carpinteria Mun. Code, § 8.51.040.)

Under the Single-Use Bag Regulations, a “‘Large Commercial Establishment’ is a commercial establishment with over \$5,000,000 in annual gross retail sales volume” or is a grocery store of greater than 500 square feet in area. (Carpinteria Mun. Code, § 8.51.030, subs. (A), (B), (F).) A “‘Small Commercial Establishment’ is a food provider or a commercial establishment that does not qualify as a large commercial establishment.” (§ 8.51.030, subd. (C).) “Food providers” include restaurants. (§ 8.51.030, subd. (D).)

When the prohibitions become effective, both large and small commercial establishments are prohibited from dispensing “a single-use bag” “at the point of sale.”

“‘Single-Use Bag’ means any bag that is provided to customers for carryout purchases by a commercial establishment, excluding gift bags, product bags, and reusable bags ....”

“‘Point of Sale’ means the location in the commercial establishment where purchase is made.”

A “Reusable Bag” is a bag that is “specifically designed and manufactured for multiple reuse” and is made of cloth or other machine washable fabric or is made of other durable material “including plastic that is at least 2.25 mils thick.”

“‘Paper Bag’ means any paper bag that has a post-consumer recycled content of at least 40 percent and is 100 percent recyclable.”

On March 20, 2012, plaintiff Save the Plastic Bag Coalition, an unincorporated association, consisting of suppliers of plastic bags to restaurants and other food facilities in Carpinteria, filed its complaint for invalidation of the Ordinance based upon preemption by the California Retail Food Code. Plaintiff alleges: “[T]he Ordinance is invalid as it bans plastic bags at restaurants and other ‘food facilities’ as defined by H&S Code § 113789. The Ordinance intrudes into an area that the State of California has reserved to itself.”

Defendant City of Carpinteria (“City”) demurs to plaintiff’s complaint. City argues that plaintiff does not state a cause of action in its complaint because the Ordinance is not preempted by the Retail Food Code. Plaintiff opposes the demurrer, arguing that the California Supreme Court in *California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177 explained the scope of preemption by the Retail Food Code as including “how food should be handled or transported” and that the Ordinance is therefore preempted.

## Analysis:

“The function of a demurrer is to test the sufficiency of the complaint alone and not the evidence or other extrinsic matters.” (Ingram v. Flippo (1999) 74 Cal.App.4th 1280, 1283.) “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed. [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]” (Evans v. City of Berkeley (2006) 38 Cal.4th 1, 6, internal quotation marks omitted.) “If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer.” (Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 38.)

### Request for Judicial Notice

City requests that the court take judicial notice of four documents: (Exhibit A) the Ordinance; (Exhibit B) a copy of the City’s Staff Report for City Council Meeting on December 12, 2011; (Exhibit C) a copy of the City’s Staff Report for City Council Meeting on February 27, 2012; and (Exhibit D) a copy of the City’s Staff Report for City Council Meeting on March 12, 2012. The court will grant City’s request as to Exhibit A, the Ordinance, which is also attached as exhibit A to plaintiff’s complaint. (Evid. Code, § 452, subs. (b), (c).)

Plaintiff objects to judicial notice being taken of exhibits B, C and D. City states that the purpose for its request for judicial notice of these exhibits is that the “Staff Reports will assist the Court in interpreting the intent of City Council in adopting the single-use bag regulations.” (RJN, at p. 2.) The court notes that city staff reports may, like other legislative history, be the subject of judicial notice to ascertain the purpose of the legislative enactment. (Bravo Vending v. City of Rancho Mirage (1993) 16 Cal.App.4th 383, 404-405.) However, the purpose of the Ordinance, to the extent it is relevant, is stated in the Ordinance directly. This stated purpose is not disputed by plaintiff in this demurrer. The staff reports elaborate on this stated purpose, but the staff reports do not provide any additional material that is relevant or useful to the court’s disposition of this demurrer. The City’s request for judicial notice of exhibits B, C and D will be denied. (See Mangini v. R. J. Reynolds Tobacco Co. (1994) 7 Cal.4th 1057, 1063.)

### Plaintiff’s Cause of Action

Plaintiff styles its complaint as seeking “invalidation of plastic bag ban ordinance based on state retail food code for preemption; request for declaratory and injunctive relief.” (Complaint, at p. 1, capitalization altered.) In its prayer for relief, the first remedy plaintiff seeks is a “judgment declaring that the Ordinance is invalid as it is preempted and prohibited by the California Retail Food Code.” (Complaint, at p. 9.) Although plaintiff does not expressly cite the statute, it appears from these statements in the complaint that plaintiff seeks declaratory relief pursuant to Code of Civil Procedure section 1060.

“Any person ... who desires a declaration of his or her rights or duties with respect to another, ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises ....” (Code Civ. Proc., § 1060.) “It is well established that parties may seek declaratory relief with respect to the interpretation



and application of local ordinances.” (Action Apartment Assn., Inc. v. City of Santa Monica (2007) 41 Cal.4th 1232, 1250.)

“A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties ... and requests that these rights and duties be adjudged by the court.” (Maguire v. Hibernia Sav. & Loan Soc. (1944) 23 Cal.2d 719, 728.) “If these requirements are met, the court must declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to a favorable declaration.” (Tiburon v. Northwestern P. R. Co. (1970) 4 Cal.App.3d 160, 170.)

### The California Retail Food Code

Plaintiff’s complaint alleges that the Ordinance is invalid because it is preempted by the California Retail Food Code, Health and Safety Code section 113700 et seq. The Retail Food Code’s preemption provision is set forth in Health and Safety Code section 113705, which provides:

“The Legislature finds and declares that the public health interest requires that there be uniform statewide health and sanitation standards for retail food facilities to assure the people of this state that the food will be pure, safe, and unadulterated. Except as provided in Section 113709, it is the intent of the Legislature to occupy the whole field of health and sanitation standards for retail food facilities, and the standards set forth in this part and regulations adopted pursuant to this part shall be exclusive of all local health and sanitation standards relating to retail food facilities.”

Section 113709 provides narrow exceptions: “This part does not prohibit a local governing body from adopting an evaluation or grading system for food facilities, from prohibiting any type of food facility, from adopting an employee health certification program, from regulating the provision of consumer toilet and handwashing facilities, or from adopting requirements for the public safety regulating the type of vending and the time, place, and manner of vending from vehicles upon a street pursuant to its authority under subdivision (b) of Section 22455 of the Vehicle Code.” By their terms, these exceptions do not apply to the Ordinance as challenged by plaintiff in its complaint.

Plaintiff argues, and City does not appear to contest, that “retail food facilities” as defined by the Retail Food Code include “food providers” as defined in the Ordinance. (Health & Saf. Code, § 113789, subd. (a); Carpinteria Mun. Code, § 8.51.030, subd. (D).) Plaintiff cites to a number of provisions in the Retail Food Code to demonstrate that the Retail Food Code regulates the single-use bags prohibited by the Ordinance, including:

“‘Single-use articles’ mean utensils, tableware, carry-out utensils, bulk food containers, and other items such as bags, containers, placemats, stirrers, straws, toothpicks, and wrappers that are designed and constructed for one time, one person use, after which they are intended for discard.” (Health & Saf. Code, § 113914.)

“Single-use articles shall not be reused.” (Health & Saf. Code, § 114081, subd. (d).)

“Materials that are used to make single-use articles shall not allow the migration of deleterious substances or impart colors, odors, or tastes to food, and shall be safe and clean.” (Health & Saf. Code, § 114130.2.)

“‘Utensil’ means a food-contact implement or container used in the storage, preparation, transportation, dispensing, sale, or service of food, such as kitchenware or tableware that is multiuse, single-service, or single-use, gloves used in contact with food, temperature sensing probes of food temperature measuring devices, and probe-type price or identification tags used in contact with food.” (Health & Saf. Code, § 113934.)

Because plastic bags are used in the transportation of food, plaintiff argues, these above-quoted sections apply to preempt local standards, including an outright ban, on plastic bags.

### The California Grocers Case

Both parties cite to the California Supreme Court’s decision in *California Grocers Assn. v. City of Los Angeles*, supra, 52 Cal.4th 177 as supporting their respective arguments. At issue in *California Grocers* was an ordinance adopted by the City of Los Angeles that required grocery stores of a specific size that undergo a change of ownership to retain current employees and take certain actions during a 90-day transition period. Plaintiff California Grocers Association filed an action seeking to invalidate the ordinance on various grounds, including preemption under the Retail Food Code. The trial court and the court of appeal agreed that the ordinance was preempted by the Retail Food Code. The Supreme Court, however, reversed, finding no preemption.

In reaching this conclusion, the Supreme Court began its discussion of preemption under the Retail Food Code by stating general principles:

“Local ordinances and regulations are subordinate to state law. [Citation.] Insofar as a local regulation conflicts with state law, it is preempted and invalid. [Citations.] ‘A conflict exists if the local legislation “duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.”’ [Citations.]” (*California Grocers*, supra, 52 Cal.4th at p. 188, internal quotation marks omitted.) “Only the last of these bases for conflict, field preemption, is at issue here. ‘Local legislation enters an area “fully occupied” by general law when the Legislature has expressly manifested its intent to fully occupy the area or when it has impliedly done so in light of recognized indicia of intent.’ [Citation.] ... Express field preemption turns on a comparative statutory analysis: What field of exclusivity does the state preemption clause define, what subject matter does the local ordinance regulate, and do the two overlap?” (Id. at p. 188.)

The Court then summarized the sweep of preemption under the Retail Food Code: “Thus, the state alone may adopt ‘health and sanitation standards for retail food facilities.’ [Citation.] The remainder of the statutory scheme demonstrates by way of example the precise scope of exclusive state regulation, comprehensively detailing standards for, e.g., employee training on health matters ([Health & Saf. Code], §§ 113947–113947.3), employee health and hygiene (id., §§ 113949–113978), food transportation, storage, and preparation (id., §§ 113980–114057.1), food display and service (id., §§ 114060–114083), food labeling (id., §§ 114087–114094), the design and sanitizing of food preparation areas and utensils (id., §§ 114095–114185.5), and the design and cleanliness of food facilities (id., §§ 114250–114282).” (*California Grocers*, supra, 52 Cal.4th at p. 189, footnote omitted.)

The Court focused upon the scope of the field of exclusivity, rejecting the argument that the purpose in enacting the local ordinance determines preemption: “We may accept for the

sake of argument that the promotion of health and safety was one of the City's purposes in passing the Ordinance. That the Ordinance is preempted does not, however, follow. Purpose alone is not a basis for concluding a local measure is preempted. While we and the Courts of Appeal have occasionally treated an ordinance's purpose as relevant to state preemption analysis [citations], we have done so in the context of a nuanced inquiry into the ultimate question in determining field preemption: whether the effect of the local ordinance is in fact to regulate in the very field the state has reserved to itself." (California Grocers, supra, 52 Cal.4th at p. 190, footnote omitted.)

Applying these principles, the Court reasoned that the Los Angeles ordinance was not preempted: "The Retail Food Code does not preempt all laws that have as their purpose the promotion of food health and safety; it preempts only those that establish 'health and sanitation standards' for retail food establishments, so as to ensure uniformity for such facilities. [Citation.] The Retail Food Code itself dictates those uniform standards, but does not specify by whom they are to be carried out; as far as state law is concerned, a retail food store may employ whomever it likes, so long as those it employs comply with the state's standards for distributing food in a safe and healthful manner. For its part, the Ordinance ... regulates only who may be hired to engage in certain work, and though it may have been intended in part to reduce violations of state law by those workers, it does not itself add to or subtract from the state's uniform standards of conduct for whoever engages in that work." (California Grocers, supra, 52 Cal.4th at pp. 191-192.) "The Retail Food Code establishes standards for what certain employees, particularly one certified owner or supervising food service employee, must know or be taught, but does not regulate who must be hired; the Ordinance regulates the pool of nonsupervising, nonmanagerial employees from which a new owner temporarily must hire, but imposes no standards concerning what the hired employees must know or be taught about food safety." (Id. at p. 192.)

Both parties find support in the California Grocers opinion. Plaintiff relies upon the statements that the Retail Food Code exclusively governs food transportation, storage, and preparation. City relies upon the statements that no preemption existed because the Los Angeles ordinance imposed no standards concerning health and sanitation. City thus argues that the "Ordinance simply regulates the bags a cashier can provide at check-out, and does not set any health and sanitation standard for retail food facilities." (Demurrer, at p. 10.)

#### Purpose of the City's Ordinance

City goes to some length to discuss and argue the importance of the Ordinance in addressing environmental concerns of significant local concern. As discussed above in the context of the request for judicial notice, the Ordinance itself sets forth those concerns as being a basis for its enactment. The stated purpose of the Ordinance is not challenged by plaintiff. However, as California Grocers makes clear, the legal analysis to determine whether or not state law expressly preempts local law depends upon the scope of the state's exclusivity. "To rest preemption analysis solely on considerations of purpose would generate the anomalous circumstance, rejected by the United States Supreme Court, that one jurisdiction's measure might survive preemption, while another identical measure passed in a different jurisdiction might fall, 'merely because its authors had different aspirations.'" (California Grocers, supra, 52 Cal.4th at p. 190, fn. 4, quoting Shady Grove Orthopedic Associates, P. A. v. Allstate Ins. Co. (2010) 559 U.S. \_\_\_, \_\_\_ [130 S. Ct. 1431, 1441, 176 L. Ed. 2d 311].)

## Preemption Analysis

Where, as here, the issue is express field preemption, the court must answer three questions: “What field of exclusivity does the state preemption clause define, what subject matter does the local ordinance regulate, and do the two overlap?” (California Grocers, *supra*, 52 Cal.4th at p. 188.)

The field of state preemption defined by the Retail Food Code is “health and sanitation standards for retail food facilities.” (Health & Saf. Code, § 113705.) “[T]he standards set forth in this part ... shall be exclusive of all local health and sanitation standards relating to retail food facilities.” (Ibid.)

The subject matter of the Ordinance is the prohibition of dispensing to consumers at the point of sale a single-use bag, as defined therein. (Carpinteria Mun. Code, § 8.51.040.)

The final question then is whether the state’s health and sanitation standards for retail food facilities overlap the City’s prohibition of dispensing plastic bags. Plaintiff argues that there is overlap between the Ordinance’s prohibitions and the Retail Food Code because the state alone may regulate “food transportation, storage, and preparation,” “how food should be handled or transported,” and “food display and service.” These statements, repeated from California Grocers, are accurate generalizations, but are not sufficient by themselves to determine overlap. (See *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1152-1157 [extent of the field of express preemption determined by scope and interpretation of preempting statutes].) Instead, the question of overlap can be most simply addressed by determining in the first instance whether both the Retail Food Code and the Ordinance contain standards that regulate point of sale bags.

Point of sale bags fall within two definitions set forth in the Retail Food Code. The Retail Food Code defines a “utensil” as “a food-contact implement or container used in the storage, preparation, transportation, dispensing, sale, or service of food.” (Health & Saf. Code, § 113934.) A bag is a container. (Webster’s 3d New Internat. Dict. (1986) p. 162 [definition of “bag”].) A point of sale bag, as discussed herein, is used in the sale of food. Thus, at least to the extent there is “food-contact,” a point of sale bag is a “utensil.” For example, if a customer bought an apple and the seller put the apple in a plastic bag at the point of sale for transportation of the apple home, that bag would be a “utensil” under the Retail Food Code. At the same time, the bag, if made of single-use plastic, would be a “single-use bag” as defined and prohibited by the Ordinance.

A wrinkle in this example of buying an apple is the timing and purpose of the use of the bag. The Ordinance excludes “product bags” from the definition of “single-use bag.” (Carpinteria Mun. Code, § 8.51.030, subd. (K).) A “Product Bag” is “any bag provided to a customer within a commercial establishment for the purposes of transporting items to the point of sale.” (Id., subd. (H).) If the apple in the above example is first put into a bag and that bag is given to the customer to take to the cashier (i.e., the point of sale), that bag would be a “product bag” and not prohibited by the Ordinance even if the bag were made of plastic. However, if at the point of sale the product bag were placed inside another single-use bag, the outer bag would be subject to the prohibitions of the Ordinance, but the inner bag would not.

The second definition applicable to point of sale bags is "single-use articles." The Retail Food Code defines "single-use articles" as "utensils, tableware, carry-out utensils, bulk food containers, and other items such as bags, containers, placemats, stirrers, straws, toothpicks, and wrappers that are designed and constructed for one time, one person use, after which they are intended for discard." (Health & Saf. Code, § 113914.) The bag used to carry the apple in the first example would qualify as a "utensil" and therefore that single-use bag would fall within the definition of "single-use articles."

The definition of "single-use articles" encompasses more items than "utensils" and specifically includes "bags." (Health & Saf. Code, § 113914.) "Utensil," as defined in Health and Safety Code section 113934, is by its terms limited to items in contact with food. However, "single-use articles" include items such as "placemats" which by their nature do not necessitate direct or immediate contact with food. Moreover, placemats, like plastic bags dispensed by restaurants, mitigate the impact of post-sale food spillage. (See Complaint, ¶¶ 21-24.) Consequently, the definition of "single-use articles" is sufficiently broad to include single-use bags dispensed by food providers at the point of sale.

The Retail Food Code provides standards for materials that are used to make single-use articles, namely, that the materials must be safe, clean and do not affect the food. (Health & Saf. Code, § 114130.2.) Thus, for example, it would be a violation of the Retail Food Code if the type of plastic used in a bag gave off a noxious odor permeating the food contained in the bag.

The Ordinance also provides standards for materials that used to make "single-use bags." Where the Retail Food Code states its standards both affirmatively (safe and clean) and negatively (may not impart colors, odors or tastes to food), the Ordinance provides standards only negatively: No "single-use bags" may be dispensed by small establishments except for gift bags and paper bags. "Paper bag" means any paper bag that has a post-consumer recycled content of at least 40 percent and is 100 percent recyclable." (Carpinteria Mun. Code, § 8.51.030, subd. (I).) The effect of the Ordinance is to regulate the materials used to make "single-use bags" by permitting some materials and by prohibiting other materials.

Returning to the central question of whether there is overlap between the Retail Food Code and the Ordinance, the above discussion demonstrates that in some respects the Ordinance provides standards for materials used in statutorily defined "single-use articles" that are different from the standards provided in the Retail Food Code. Under the Ordinance, single-use plastic bags are never allowed; paper bags are allowed only if they contain sufficient post-consumer recycled content. The Retail Food Code allows single-use plastic bags and paper bags, but only if the materials used in those bags meet the qualitative requirements set forth in the statute. Consequently, the Retail Food Code and the Ordinance contain overlapping standards for acceptable materials used in making "single use articles."

In order to state a cause of action for declaratory relief, plaintiff must allege a justiciable controversy. The court concludes that plaintiff has alleged a substantial controversy as to whether the Ordinance is in some part preempted by the Retail Food Code. Plaintiff has therefore adequately alleged a cause of action for declaratory relief and the City's demurrer will be overruled.

The court must emphasize that City's demurrer raises the issue only of whether or not plaintiff has alleged a judicially recognizable cause of action. The court's determination that plaintiff has sufficiently alleged a cause of action does not determine whether plaintiff is ultimately entitled to a favorable declaration. The court notes, for example, that neither party has argued or provided legislative history that may shed further light on the intended scope of preemption set forth in the Retail Food Code.

The court recognizes that the parties argue important public policy questions regarding health, safety and the environment in support of their respective positions. Public policy choices, such as whether or not a plastic bag ban is a good idea, are inherently legislative decisions made in the political process and are not judicial decisions to be made in court. "[T]he judicial role in a democratic society is fundamentally to interpret laws, not to write them." (California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal.4th 627, 633, internal quotation marks and citation omitted.) As a consequence, "[c]ourts do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature." (Estate of Horman (1971) 5 Cal.3d 62, 77.) The court's role here is strictly limited to applying the law to this controversy.

# **EXHIBIT G**

Article about injury  
called by hot soup

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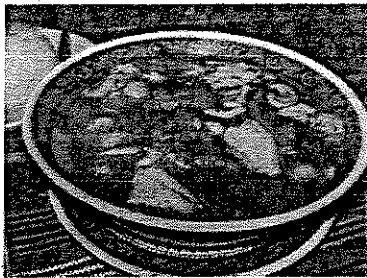
By Matthew Hendley

## Law Subway Soup Severely Burns Woman, Lawsuit Claims

By Victoria Bekiempis Sat., Sep. 10 2011 at 10:15 AM  
Categories: Law

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Claudia Vargas, 23, says she was burned by soup.

A Miami-Dade woman says that the soup she bought from Subway scalded her thigh, hip, and buttocks so extensively that she had to rush to the hospital -- and undergo emergency treatment for second-degree burns, according to a recently filed lawsuit.

On July 30, Claudia Vargas purchased soup and a sub from the Hollywood sandwich store, located at 6582 Taft St.

When she returned to her car, she tried to take the soup out of the bag. But the container was too full and the lid was not attached correctly, so the soup spilled on her lap, Vargas says.

Because the soup was extremely hot, 23-year old Vargas says that she suffered from second-degree burns that will leave her with permanent scarring.

The Pulp has acquired a photo of Vargas' injuries, but has posted it after the jump because of the disturbing nature of the image.

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Vargas' burns.

Richard Lydecker, the lawyer representing Subway, says that his client did nothing wrong.

"The investigation is still ongoing, but this soup was not any hotter than soup served normally," Lydecker tells the Pulp. "There was nothing special about this soup."

Lydecker insists that the soup was cooked and served at a reasonable temperature.

"I mean, soup is hot. And people want their soup hot. You're not supposed to spill it on yourself. My client just wanted to serve a good tasting, hot soup. He looks forward to exonerating himself in court."

Still, Vargas stands by her claim, and insists that Subway was negligent in how it prepped, marketed, and served her the soup.

Medical records furnished to the Pulp by Vargas' representative confirm that Vargas had to go to the emergency room after the accident, where she was given antibiotics, a tetanus shot, and topical ointment for the wounds.

A plastic surgeon who examined Vargas shortly after the accident has said that chances for full recovery are grim: The burns will take at least 6 months to heal. And, "despite laser intervention, the patient will always have some residual scarring," medical documents note.

Vargas thinks that this could have been avoided if Subway hadn't served overly hot soup – or if she'd had some kind of warning that the soup would be scalding and hazardous.

Vargas is suing Subway, in hopes of getting money for her medical bills.

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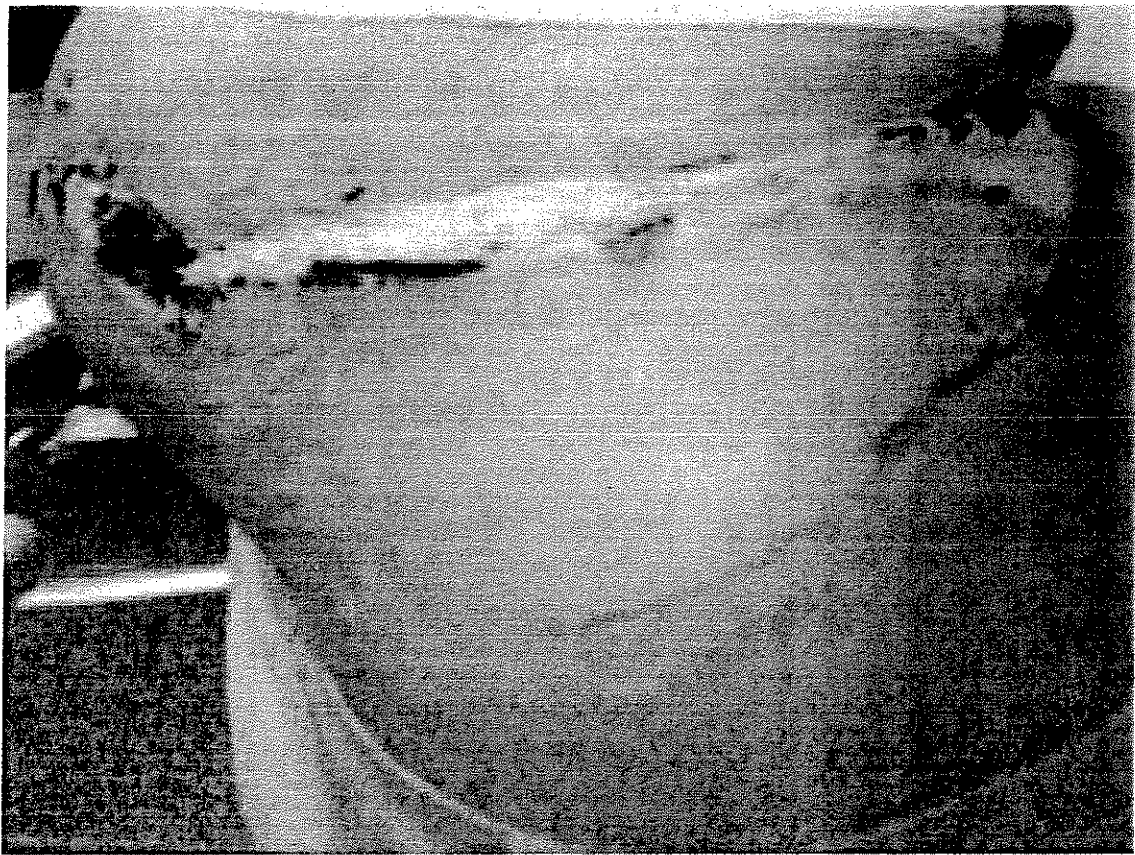
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**CLAUDIA VARGAS'S BURNS CAUSED  
WHEN TAKING HOT SOUP OUT OF A CARRYOUT BAG**

# **EXHIBIT H**

Oregon public health report  
regarding  
contaminated reusable bag

## A Point-Source Norovirus Outbreak Caused by Exposure to Fomites

Kimberly K. Repp<sup>1,a</sup> and William E. Keene<sup>2</sup>

<sup>1</sup>Department of Public Health and Preventive Medicine, Oregon Health and Science University, and <sup>2</sup>Oregon Public Health Division, Portland

(See the editorial commentary by Hall, on pages 1622–4.)

We investigated a norovirus outbreak (genotype GII.2) affecting 9 members of a soccer team. Illness was associated with touching a reusable grocery bag or consuming its packaged food contents (risk difference, 0.636;  $P < .01$ ). By polymerase chain reaction, GII norovirus was recovered from the bag, which had been stored in a bathroom used before the outbreak by a person with norovirus-like illness. Airborne contamination of fomites can lead to subsequent point-source outbreaks. When feasible, we recommend dedicated bathrooms for sick persons and informing cleaning staff (professional or otherwise) about the need for adequate environmental sanitation of surfaces and fomites to prevent spread.

Noroviruses are a leading cause of gastroenteritis worldwide and the most common cause of foodborne outbreaks in the United States [1, 2]. The low infectious dose and the high viral load in vomit and feces [3] lead to efficient transmission through typical fecal-oral routes as well as airborne spread and environmental contamination of fomites [4]. Persistent, multigenerational outbreaks have been linked to fomites and reported on cruise ships [5], hotels [3], and institutional settings [3, 6] despite aggressive housekeeping [7], and point-source outbreaks from fomes exposure are rarely identified [8]. The role of fomites in transmission can be difficult to assess owing to lack of established protocol for testing fomites and environmental surfaces. We investigated a point-source norovirus outbreak caused by exposure to fomites.

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In October 2010, the Oregon Public Health Division was notified by colleagues from public health agencies in Washington State that a parent-chaperone had reported a cluster of acute gastroenteritis among persons who had recently participated in a soccer tournament held in King County, Washington. The weekend tournament comprised about 2000 children in approximately 120 teams from Washington and Oregon. The Oregon group comprised 17 Oregon girls who were 13–14 years old and 4 adult chaperones who had traveled to the tournament on Friday afternoon in private automobiles. They shared rooms at a hotel in Washington on Friday and Saturday nights, eating at local restaurants and in their hotel rooms, and they returned to Oregon after the tournament ended on Sunday afternoon. We investigated to determine the scope of the outbreak and its etiology and to take appropriate control measures.

### METHODS

Tournament organizers and contacts for other teams were canvassed by telephone and email to determine the extent of illness. Complaint logs were reviewed for reports of any contemporaneous illness among patrons of the restaurants and hotel visited by the Oregon group. This was a public health investigation to control a disease outbreak and therefore did not require approval by an institutional review board.

We conducted a retrospective cohort study of the Oregon group. Persons were interviewed by telephone or in person using a standardized questionnaire with questions about potential exposures (foods, hotel roommates, travel partners, etc), clinical history, and contemporary household illness.

A case was defined as a delegate of the Oregon group who developed vomiting or diarrhea ( $\geq 3$  loose stools within a 24-hour period) within 72 hours of their return from the tournament. Household members of cases who developed similar symptoms within the following week but who did not attend the tournament were considered secondary cases.

Risk differences were calculated for all exposures using EXTSIG and CID2BP software (MD Anderson Cancer Center, The University of Texas) with Cox-Snell 95% confidence intervals [CIs] and Fisher exact test  $P$  values [9]. Relative risks (not presented) are less informative due to small sample size and zero-count cells.

Stool specimens were solicited from persons who reported illness. A reusable grocery bag was tested for norovirus by vigorously swabbing small patches ( $\sim 25$  cm<sup>2</sup>) of the bag surface

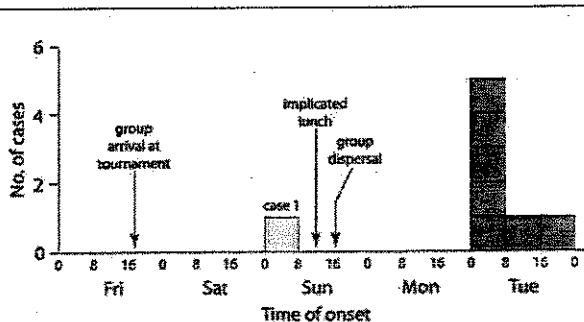
with sterile polyester swabs wetted with sterile nuclease-free water. The swabs were extracted using the MagAttract viral M48 RNA kit (Qiagen 955235) on an automated BioRobot M48 Extractor. All specimens were tested for the presence of norovirus RNA genogroups GI and GII by real-time reverse-transcriptase polymerase chain reaction [10, 11] and were further characterized using genetic sequencing of region C of the *ORF2* gene [12].

## RESULTS

There were no reports of similarly clustered illness among any other teams at the tournament, nor were there any coincident reports of illness among patrons of any of the restaurants or hotel patronized by the Oregon group.

All 21 members of the group were interviewed; however, 1 healthy person refused to answer exposure questions and 1 ill person was excluded due to direct exposure to case 1 and her vomit. We identified 7 cases who ranged from 13 to 48 years old (median, 13). All 7 (100%) reported vomiting; 4 (57%) also reported diarrhea. The reported duration of symptoms ranged from 1 to 7 days (median, 3). One case sought medical care, but there were no hospitalizations. There were no reports of mild illness not meeting the case definition. We identified at least 5 presumptive secondary infections among household members.

Case 1 initially became nauseated and developed abdominal pain late Saturday evening, at which time she left her room and moved in with one of the chaperones. Shortly after midnight, she began vomiting and having diarrhea that continued throughout the night. In the morning she was taken back to Oregon by this chaperone, who later became ill. Neither individual rejoined the group or participated in any of the Sunday group activities or meals; both were excluded from analysis for Sunday exposures. All other cases reported symptom onset on Tuesday (Figure 1).



**Figure 1.** Epidemic curve of gastroenteritis among attendees of a soccer tournament in Washington in October 2010. Presumptive secondary infections are not shown.

The following variables were assessed for association with illness: age; hotel roommates and hotel room; transportation groups for activities, soccer games, and car groups returning from the tournament; and all reported food exposures on Friday, Saturday, and Sunday. Logistic modeling was not possible due to small sample size. No significant association with illness was identified for any Friday or Saturday exposure. On initial analysis, consumption of sealed packaged cookies from the Sunday lunch was significantly associated with illness (risk difference [RD], 0.750; 95% confidence interval [CI], .24–.91,  $P = .01$ ); 3 of 7 cases (43%) and none of the 12 healthy attendees reported cookie consumption. The cookies and other lunch supplies had been purchased in Oregon and stored at the hotel until use.

On reinterview, we learned that the cookies, along with packaged chips and fresh grapes, had been stored in a reusable open-top grocery bag made from laminated woven polypropylene. This bag had been stored in the hotel bathroom of the chaperone who had cared for case 1. Case 1 reported never touching or handling the grocery bag, but it was in the bathroom she used throughout the night. At lunchtime on Sunday—hours after case 1 had departed—the bag was taken to another hotel room where the contents (cookies, chips, and grapes) were passed around as part of the lunch. The cookies and chips were in unopened commercial packages. We did not ascertain how many Oregon group members handled the grocery bag. Illness was associated with a composite exposure variable of any item in the bag (ie, cookies, chips, or grapes; 7 of 7 cases with exposure and 4 of 12 controls with exposure; RD, 0.636; 95% CI, .32–.87;  $P < .01$ ). No single item in the bag was reportedly consumed by more than 4 of 7 cases. Assuming exposure at the Sunday lunch, incubation periods ranged from 36 to 57 hours (median, 38.5 hours).

All 3 stool specimens collected from ill persons were positive for norovirus (genotype GII.2). No specimen was available from case 1. Viral sequences from the 3 stool specimens were identical and a 98% match to a GII.2 reference sequence (GII.2.Vaals NLD05). Two of 10 swabs taken from the grocery bag 2 weeks after the implicated meal were positive (genogroup GII). The grocery bag samples were insufficient to sequence; no leftover food was available.

There were no reports of subsequent illness among guests or staff reported to hotel management.

## DISCUSSION

Initial concerns that this outbreak may have involved other persons from the tournament or local restaurant patrons were quickly allayed. The distribution of incubation times for the Oregon group indicated that the larger group was exposed at the Sunday lunch. By that time, however, case 1 had been absent for over 12 hours, and because she had no contact with any of the

other cases after her onset of vomiting or diarrhea and no direct contact with any of the lunch food, it was initially unclear as to how these illnesses could be connected. Only when we learned about the bag in the bathroom did a coherent story emerge.

The data indicate that virus aerosolized within the hotel bathroom settled upon the grocery bag and its contents, and it was touching the bag and consumption of its contents that led to the outbreak. Touching the bag could not be analyzed separately from consumption of food items from within the bag. Consumption of food from the grocery bag was strongly associated with illness, as was handling the grocery bag. The nature of the contaminated foods—a bag of chips, grapes, and a package of cookies—facilitated transmission. Fingers contaminated with norovirus have been shown to sequentially transfer virus to up to 7 clean surfaces [7], and environmental contamination with transmission via fomites has been documented [7, 8]. Incidentally, this also illustrates one of the less obvious hazards of reusable grocery bags.

Aerosolization of vomit and feces has been demonstrated to be of major importance in norovirus outbreaks [13]. Even viruses aerosolized from flushing a toilet can contaminate surfaces throughout a bathroom [14]. Once a fomite is contaminated, transfer to hands and other animate objects can readily occur [15]. The more confined the space (eg, most bathrooms), the more intense would be the “fallout” [13].

This investigation confirms the potential for aerosol contamination of fomites in norovirus outbreaks, which has long been suspected to contribute to persistent problems on cruise ships, in nursing homes, and other settings [5, 6, 13]. Although we certainly recommend not storing food in bathrooms, it is more important to emphasize that areas where aerosol exposures may have occurred should be thoroughly disinfected; this includes not only exposed surfaces but also objects in the environment that could serve as fomites. If multiple bathrooms are available, it would be prudent to dedicate one for use by sick persons. We also recommend that persons with responsibilities for cleaning (eg, housekeeping staff or family members) be informed about incidents of vomiting or diarrhea and best practices for disinfection.

## Notes

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