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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

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7 Attorneys for Defendant
CITY OF CARPINTERIA

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 FOR THE COUNTY OF SANTA BARBARA

10 ANACAPA DIVISION

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

13 Plaintiff,

14 v.

15 CITY OF CARPINTERIA, a municipal
16 corporation; and DOES 1-10, inclusive,

17 Defendant.

Case No. 1385674

Assigned for All Purposes to the
Honorable Thomas P. Anderle

**NOTICE OF DEMURRER AND
DEMURRER OF DEFENDANT CITY OF
CARPINTERIA TO COMPLAINT FOR
INVALIDATION OF PLASTIC BAG
ORDINANCE; MEMORANDUM OF
POINTS AND AUTHORITIES**

[Request for Judicial Notice Filed Concurrently
Herewith]

Date: May 15, 2012
Time: 9:30 a.m.
Dept: SB3

Complaint Filed: March 20, 2012

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COPY

1 **I. NOTICE**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:**

3 PLEASE TAKE NOTICE that, on May 15, 2012, at 9:30 a.m. or as soon thereafter as the matter
4 may be heard in Department SB3 of this Court, located at 1100 Anacapa Street, Santa Barbara,
5 California, Defendant City of Carpinteria (“City”) will and hereby does file this Demurrer as to Plaintiff
6 Save the Plastic Bag Coalition (“Plaintiff”)’s first and only cause of action and asks this Court to sustain
7 this Demurrer with prejudice.

8 This Demurrer is based upon this Notice, the Demurrer, the Memorandum of Points and
9 Authorities, the Request for Judicial Notice and upon such oral and documentary matters as may be
10 considered by the Court at the hearing.

11 **II. DEMURRER AS TO FIRST CAUSE OF ACTION**

12 City hereby brings this Demurrer to Plaintiff’s first and only cause of action pursuant to Code of
13 Civil Procedure section 430.10, *et seq.* on the following grounds:

14 A. Plaintiff’s claim that the City’s Ordinance No. 655 (“Ordinance”) is preempted by the
15 California Retail Food Code fails as a matter of law and cannot be amended to state a valid cause of
16 action.

17 B. The Retail Food Code creates “uniform statewide health and sanitation standards for
18 retail food facilities” to protect customers from foodborne illnesses. (See Health & Saf. Code §
19 113705.)

20 C. The Ordinance bans the distribution of certain bags to customers at the point of sale to
21 hold their purchases. The City adopted the ban to limit the number of single-use bags that become litter
22 and waste and to help the City reduce waste and litter in the local environment, protect the City’s unique
23 coastal resources, and meet waste reduction mandates.

24 D. A city may make and enforce ordinances “not in conflict with general laws.” (Cal.
25 Const., art. XI, § 7.) An ordinance is only in conflict with, or preempted by, general law if the local
26 regulation “duplicates, contradicts, or enters an area fully occupied by general law, either expressly or
27 by legislative implication.” (*Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39
28 Cal.3d 878, 885 [citations omitted].)

1 E. The Court should presume that the Ordinance is not preempted because it regulates
2 within areas of local interest and in areas such as waste management where local governments have
3 traditionally exercised control. (See *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th
4 1139, 1149-50 [Absent a clear indication of preemptive intent, California courts regularly “will presume
5 ... that ... [local] regulation is *not* preempted by state statute” when (1) “there is a significant local
6 interest to be served which may differ from one locality to another” and (2) “local government regulates
7 in an area over which it traditionally has exercised control.”].)

8 F. Even without the presumption, the Ordinance fails all tests for finding preemption. The
9 Ordinance is not expressly preempted by the Retail Food Code because the Ordinance simply bans the
10 distribution of certain bags at the point of sale, which does not “overlap” with the field of statewide
11 health and sanitation standards. (See *California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th
12 177, 188 [finding no overlap and therefore no preemption where local ordinance created a 90-day ban
13 on firing certain employees and the Retail Food Code created a standard, because a ban is not a
14 standard.] As in *California Grocers*, the Ordinance creates a ban, while the Retail Food Code sets a
15 standard; there is no overlap between the Ordinance and the Retail Food Code, so there is no
16 preemption.

17 G. Implied preemption cannot exist here because the Legislature expressly occupied a
18 certain field and specifically exempted certain local regulations. (See *Big Creek Lumber, supra*, 38
19 Cal.4th at 1157 [“Preemption by implication of legislative intent may not be found when the Legislature
20 has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory
21 scheme recognizes local regulations.”].)

22 H. Even if implied preemption could exist, it is not present here because the subject matter
23 of the Ordinance (banning certain bags at the point of sale to reduce waste) bears no relation to the
24 Retail Food Code (establishing health and sanitation standards). (See *Sherwin-Williams Co. v. City of*
25 *Los Angeles* (1993) 4 Cal.4th 893, 904-906 [finding no implied preemption of local ordinance requiring
26 aerosol cans be displayed in areas inaccessible to the public by a state law controlling the sale of aerosol
27 paint to minors because the “subject matter” of the two laws differed.]

28 I. The Ordinance does not duplicate or contradict the Retail Food Code. There is no

1 duplication because the Ordinance does not regulate the same conduct regulated by the Retail Food
2 Code. (See *In re Portnoy* (1942) 21 Cal.2d 237, 241.) There is no contradiction because the Ordinance
3 does not “prohibit what the [Retail Food Code] commands or command what it prohibits.” (See
4 *Sherwin-Williams Co., supra*, 4 Cal.4th at 902.)

5 J. Code of Civil Procedure section 430.10(e) allows a party to demur to a complaint on the
6 ground that “[t]he pleading does not state facts sufficient to constitute a cause of action.”

7 K. Plaintiff has failed to state a cause of action, and Plaintiff’s Complaint cannot be
8 amended to state a cause of action, because the Ordinance neither enters the field occupied by the Retail
9 Food Code nor duplicates or contradicts the Retail Food Code.

10 **III. PRAYER**

11 WHEREFORE, the City prays that (1) the Court sustain this demurrer as to Plaintiff’s first and
12 only cause of action, without leave to amend; (2) the Court grant the supporting Request for Judicial
13 Notice, (3) Petitioner take nothing by way of this action; (4) the City be awarded its costs of suit and
14 attorneys’ fees; and (5) the Court award such other and further relief as the Court may deem just, fitting,
15 and proper.

16 Dated: April 17, 2012

BROWNSTEIN HYATT FARBER SCHRECK, LLP

17 By: 

PETER N. BROWN
BETH COLLINS-BURGARD
DYLAN K. JOHNSON
Attorneys for Defendant
CITY OF CARPINTERIA.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 On March 12, 2012, the City of Carpinteria approved on second reading Ordinance No. 655,
4 which regulates distribution at the point of sale of paper and plastic single-use carry-out bags at
5 commercial establishments in the City ("Ordinance"). Beginning on July 11, 2012, the Ordinance will
6 prohibit most grocery stores and businesses with over \$5,000,000 in annual gross retail sales volume
7 from distributing to customers at the check-out any *paper or plastic* single-use bags. Beginning on
8 April 11, 2013, the Ordinance will prohibit all other businesses and all food providers, such as
9 restaurants or delicatessens, from distributing single-use *plastic* bags at the check-out; however, such
10 businesses can distribute single-use *paper* bags. The Ordinance provides several exemptions from these
11 regulations.

12 Before adopting the Ordinance, the City held at least eleven publicly-noticed meetings and
13 hosted two community workshops. There was extensive public outreach and participation as the
14 Ordinance was developed. In adopting the Ordinance, the City exercised its police power to address a
15 number of serious local concerns, including (1) protection of the City's unique coastal resources, City
16 parks, and open spaces from waste and debris, (2) compliance with federal and state mandates to reduce
17 waste and debris in creeks and other waters of the United States, (3) conservation of regional landfill
18 space, and (4) compliance with state waste reduction mandates. (See Exhs.¹ A-D. [Ordinance and Staff
19 Reports].)

20 Plaintiff, the Save the Plastic Bag Coalition, brings a single cause of action to challenge the
21 Ordinance, alleging that the Ordinance is preempted by the California Retail Food Code. Plaintiff's
22 claim fails as a matter of law because the Ordinance in no way duplicates, contradicts, or enters the field
23 occupied by the Retail Food Code, which the Legislature adopted to establish "uniform statewide health
24 and sanitation standards for retail food facilities." (See *California Grocers Assn. v. City of Los Angeles*
25 (2011) 52 Cal.4th 177, 191 [citing Health and Saf. Code §113705].) The complaint cannot be amended
26 to state a valid cause of action

27 _____
28 ¹ All Exhibits are to the Request for Judicial Notice filed with this Demurrer.

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1 As discussed below, California Courts have created a presumption against finding preemption
2 when a city exercises its police power to regulate issues of unique local interest or in areas traditionally
3 regulated by cities. Here, the City adopted the Ordinance to limit the volumes of single-use bags
4 distributed in the City that impact the local waste stream and becoming litter and debris in the local
5 environment, damaging the City's unique coastal resources.

6 Even without this non-preemption presumption, Plaintiff's preemption claim must fail. Nothing
7 in the Ordinance mandates or prohibits anything mandated or prohibited in the Retail Food Code, so
8 there is no duplication or contradiction of State law. No possible reading of the Legislature's statement
9 of its intent to "occupy the whole field of health and sanitation standards for retail food facilities" could
10 suggest that the Ordinance has entered that field. The Ordinance simply regulates the bags that
11 businesses may provide to customers at the check-out stand to hold their purchases. Because it sets no
12 health and sanitation standards, the Ordinance is not expressly preempted.

13 As to implied preemption, the Supreme Court has concluded that implied preemption should not
14 be found when the Legislature has carefully described the field it intended to occupy. (See *Big Creek*
15 *Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1157 ["Preemption by implication of
16 legislative intent *may not be found* when the Legislature has expressed its intent to permit local
17 regulations. Similarly, it *should not be found* when the statutory scheme recognizes local
18 regulations."].) This is the case with regard to the Retail Food Code. Even without this rule, implied
19 preemption cannot be found here; the subject matter of the Ordinance, which bans distribution of certain
20 single-use bags at the check out counter, is utterly different from the subject matter of the Retail Food
21 Code, which sets health and sanitation standards. The Ordinance is not impliedly preempted.

22 Plaintiff's only cause of action against the Ordinance fails as a matter of law. It cannot be
23 resuscitated by any amendment. The City therefore asks the Court to sustain this demurrer with
24 prejudice.

25 **II. STANDARD OF REVIEW**

26 A demurrer challenges defects that appear on the face of the pleading or in matters subject to
27 judicial notice. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591; Cod Civ. Proc. § 430.30(a).) A party may
28 specially demur to a complaint on the ground that "[t]he pleading does not state facts sufficient to

1 constitute a cause of action.” (Code of Civ. Proc. § 430.10(e).)

2 When a pleading is challenged, the court generally must accept as true all facts that are properly
3 pleaded in the complaint. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-67.) The court,
4 however, is not required to accept either factual or legal conclusions expressed in the complaint. (*Blank*
5 *v. Kirwan* (1985) 39 Cal.3d 311, 318.) Any doubt in the complaint must be resolved against the
6 plaintiff, and facts not alleged are presumed not to exist. (*Schick v. Lerner* (1987) 193 Cal.App.3d 1321,
7 1327.) The court may reject allegations by a plaintiff that are contrary to facts that the court may
8 judicially notice. (*City of Chula Vista v. County of San Diego* (1994) 23 Cal.App.4th 1713, 1719.)

9 Leave to amend should be granted only if the complaint is reasonably capable of being amended
10 to state a viable claim. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The burden is on the
11 plaintiff to show how the complaint could be amended to state a valid cause of action. (*City of Chula*
12 *Vista, supra*, 23 Cal.App.4th at 1719.)

13 **III. THE RETAIL FOOD CODE DOES NOT PREEMPT THE CITY’S SINGLE-USE BAG**
14 **ORDINANCE**

15 The California Constitution provides that a county or city may make and enforce within its
16 limits all ordinances and regulations “not in conflict with general laws.” (Cal. Const., art. XI, § 7
17 [emphasis added].) If a local ordinance “conflicts with state law, it is preempted by such law and is
18 void” (*Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885.) “A
19 conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general
20 law, either expressly or by legislative implication.” (*Id.* [citations omitted].)

21 “The party claiming that general state law preempts a local ordinance has the burden of
22 demonstrating preemption.” (*Big Creek Lumber Co., supra*, 38 Cal.4th at 1149.) As a matter of law,
23 the Save the Plastic Bag Coalition cannot meet its burden – now or with amendment of the complaint –
24 to establish that the City’s single-use bag regulation is preempted by the state’s Retail Food Code. As
25 described in more detail below, the City’s single-use bag Ordinance regulates issues of particular local
26 interest and operates in an area traditionally regulated by local government, and therefore is presumed
27 valid. Even without the non-preemption presumption, however, the Ordinance cannot be preempted
28 because it (1) does not expressly or impliedly “enter an area occupied by general law” and (2) in no way

1 duplicates or contradicts the Retail Food Code. The Ordinance is both presumed valid and factually
2 valid.

3 A. The Ordinance Should Be Presumed Valid Because It Addresses Issues of
4 Significant Local Interest and Regulates in an Area Traditionally Within Local
5 Control

6 Absent a clear indication of preemptive intent, California courts regularly “will presume ... that
7 ... [local] regulation is *not* preempted by state statute” in two independent instances: (1) when “there is
8 a significant local interest to be served which may differ from one locality to another” and (2) “when
9 local government regulates in an area over which it traditionally has exercised control.” (See *Big Creek*
10 *Lumber Co., supra*, 38 Cal.4th at 1149-50, 1161-62 [applying non-preemption presumption to zoning
11 ordinance restricting timber harvesting because zoning is an area of traditional local authority]; see also
12 *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 866-67 [applying non-
13 preemption presumption to ordinance banning gun show because of significant local interest in
14 regulating gun sales due to local gun related crimes].)

15 The reason for the presumption against preemption is that the rule “accords with our more
16 general understanding that ‘it is not to be presumed that the legislature in the enactment of statutes
17 intends to overthrow long-established principles of law unless such intention is made clearly to appear
18 either by express declaration or by necessary implication.’” (*Id.* at 1149-50 [citations omitted].) Both
19 rules for the application of the non-preemption presumption apply here.

20 1. The Ordinance Addresses a Number of Significant Local Concerns

21 The City’s Ordinance addresses many issues of significant local interest. The Ordinance serves
22 to protect Carpinteria’s “unique coastal resources” from single-use bags which often become trash and
23 debris in the environment, thereby impacting the local economy and quality of life. (See Exh. A
24 [Recitals and § 8.51.020 (purpose)].) The Ordinance also seeks to decrease the quantity of single-use
25 bags that become waste, ending up in local landfills and the local environment. (*Id.*) Maintaining a
26 clean and attractive community serves the City’s public policy goals.

27 The Ordinance also helps prevent local water pollution and ensures compliance with waste
28 reduction requirements. Under the Federal Clean Water Act and State Porter-Cologne Act, the City
SB 611036 v1.0:013494.0008 4

1 must enact and enforce a Storm Water Management Plan that reduces trash and debris in local creeks,
2 estuaries, and other waters of the United States. (See 33 U.S.C. § 1342(p); 40 C.F.R. § 122.33.) City
3 staff has “documented the prevalence of single-use bags in the local environment, including in creeks
4 and on beaches....” (Exh. A [Ordinance], see Exh. B [Dec. 12, 2011 Staff Report].) Under the
5 Integrated Waste Management Act, the City must enact and maintain a Source Reduction and Recycling
6 Element demonstrating how it will comply with specific waste reduction and diversion mandates. (See
7 Pub. Resources Code §§ 41000, 41780.) If the City fails to make a “good faith effort to implement its
8 source reduction and recycling element,” it could be subject to administrative civil penalties of up to
9 \$10,000 per day. (Pub. Resources Code § 41850.) The single-use bag Ordinance therefore addresses
10 issues of significant local interest, satisfying the first independent trigger for satisfaction of the non-
11 preemption presumption.

12 2. The Ordinance Regulates Waste, Which Is an Area of Traditional Local Control

13 At its heart, the Ordinance is a waste reduction measure. Waste management is an area in
14 which municipalities have traditionally exercised control. (See *Waste Resources Technologies v.*
15 *Department of Public Health* (1994) 23 Cal.App.4th 299, 306 [“refuse collection and disposal” is a
16 “subject where municipalities have traditionally enjoyed a broad measure of autonomy”]; *Park & Shop*
17 *Markets, Inc. v. City of Berkeley* (1981) 116 Cal.App.3d, 78, 86 [upholding ordinance requiring bottle
18 deposit to reduce disposal of bottles]; *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264,
19 275 [upholding ordinance establishing a program to minimize the generation of refuse and encourage
20 recycling].) The Legislature has recognized the importance of maintaining local control within this
21 field. (See Pub. Resources Code § 40004(a)(3) [“further progress toward decreasing solid waste
22 disposal requires that this essential element of local control be preserved.”].) The Ordinance thus meets
23 the second independent rule in which the non-preemption is presumed.

24 3. The Ordinance Must be Presumed to Not be Subject to Preemption

25 In summary, courts regularly apply the non-preemption presumption when *just one* local interest
26 is implicated or when the local agency is regulating in *just one* area traditionally subject to local control.
27 (See *Big Creek Lumber Co., supra*, 38 Cal.4th at 1149; *Gluck v. County of Los Angeles* (1979) 93
28 Cal.App.3d 133 [citing many examples of regulations with significant local interest].) The City’s

1 single-use bag Ordinance addresses many areas of significant local interest. The Ordinance also
2 regulates in the area of waste management, an area over which municipalities have traditionally
3 exercised control. The Ordinance therefore must be presumed valid against any claim of preemption.

4 **B. Plaintiff's Claim Fails All The Tests for Preemption As a Matter of Law**

5 Even without the presumption, Plaintiff's complaint utterly fails every test for finding
6 preemption. Plaintiff cannot as a matter of law state facts sufficient to support its preemption claim.

7 1. The Legislature Has Not Expressly Preempted Enactment of the Ordinance

8 "Express field preemption turns on a comparative statutory analysis: What field of exclusivity
9 does the state preemption clause define, what subject matter does the local ordinance regulate, and do
10 the two overlap?" (*California Grocers Assn., supra*, 52 Cal.4th at 188.)

- 11 a. Under the Retail Food Code, the Legislature's Occupation of the Field
12 for Retail Food Facilities was Limited to Health and Sanitation
13 Standards

14 The Retail Food Code expressly defined the field reserved for the state as follows:

15 The Legislature finds and declares that the public health interest requires that there be
16 uniform statewide health and sanitation standards for retail food facilities to assure the
17 people of this state that the food will be pure, safe, and unadulterated. Except as provided
18 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.

19 (Health and Saf. Code § 113705 [emphasis added].) Addressing this section of the statute, the Supreme
20 Court recently examined the field occupied by the Retail Food Code, and concluded that the Retail Food
21 Code only preempts local ordinances that "establish 'health and sanitation standards' for retail food
22 establishments," noting that the purpose of the Retail Food Code is to "ensure uniformity" in health and
23 sanitation standards for such establishments in the state. (*California Grocers Assn., supra*, 52 Cal.4th at
24 191 [citing Health and Saf. Code §113705].)

25 The Supreme Court supported its conclusion in *California Grocers* by summarizing the
26 statutory scheme established in the Retail Food Code. This statutory scheme demonstrates the Code's
27 purpose as being the establishment of uniform health and sanitation standards by "comprehensively
28 detailing [health and sanitation] standards for [retail food facilities], e.g., employee training on health

1 matters ([Health and Saf. Code], §§ 113947-113947.3), employee health and hygiene (*id.*, §§ 113949-
2 113978), food transportation, storage, and preparation (*id.*, §§ 113980-114057.1), food display and
3 service (*id.*, §§ 114060-114083), food labeling (*id.*, §§ 114087-114094), the design and sanitizing of
4 food preparation areas and utensils (*id.*, §§ 114095-114185.5), and the design and cleanliness of food
5 facilities (*id.*, §§ 114250-114282).” (*California Grocers Assn., supra*, 52 Cal.4th at 189.)

6 As a result, the Supreme Court has clearly defined the field occupied by the Retail Food Code,
7 and has found that the statutory scheme supports the Legislature’s stated intent. (*California Grocers*
8 *Assn., supra*, 52 Cal.4th at 189.) Now we must consider whether the subject matter that is regulated by
9 the City’s Ordinance falls within this ambit.

10 b. The Ordinance Regulates the Distribution of Bags at the Point of Sale

11 The City’s Single-Use Bag Ordinance sets no health and sanitation standard. It essentially
12 creates two prohibitions. First, “[c]ommencing on July 11, 2012 large commercial establishments are
13 prohibited from dispensing to any customer at the point of sale a single-use bag.” (Ex. A [§
14 8.51.040.A].) Second, “[c]ommencing on April 11, 2013 small commercial establishments are
15 prohibited from dispensing to any customer at the point of sale a single-use bag, except gift bags or
16 paper bags, as defined in this chapter.” (Ex. A [§ 8.51.040.B].)

17 The Ordinance defines a large commercial establishment as a “commercial establishment with
18 over \$5,000,000 in annual gross retail sales volume” or a “grocery store as defined in this section.” (Ex.
19 A [§ 8.51.030.B].) After July 11, 2012, cashiers at these businesses in the City will not be able to give
20 customers *paper or plastic* single-use bags at the point of sale to carry their items out of the store. (See
21 Ex. A [§ 8.51.040.A].)

22 Small commercial establishments include all other businesses and all food providers. (Ex. A [§
23 8.51.030.C].) A “food provider” is defined as any business in the City “that provides prepared food for
24 public consumption on or off its premises and includes, without limitation, any store, shop, sales outlet,
25 restaurant, grocery store, delicatessen, or catering truck vehicle.” (Ex. A [§ 8.51.030.D].) “If a portion
26 of a large commercial establishment qualifies as a food provider, that portion of the large commercial
27 establishment shall qualify and be treated as a small commercial establishment under this chapter.” (Ex.
28 A [§ 8.51.030.C].) After April 11, 2013, cashiers at all food providers and other small commercial

1 establishments cannot give customers plastic single-use bags at the point of sale to carry their items out
2 of the store, but they can provide “gift bags or paper bags...” (See Ex. A [§ 8.51.040.B].)

3 Exempted from regulation under the Ordinance are “product bags,” which are defined as “any
4 bag provided to a customer *within a commercial establishment* for purposes of transporting items to the
5 point of sale.” (Ex. A [§ 8.51.030.H [defining product bag (emphasis added)]; 8.51.030.K [exempting
6 product bags from the definition of single-use bag].) For example, product bags include “bags used to
7 contain produce, vegetables, meat, prescription drugs, any bulk goods, as well as dry cleaning bags,
8 newspaper bags, and prepackaged goods.” (Ex. A [§ 8.51.030.H].)

9 Thus, the Ordinance does not regulate product bags used to package food and other products.
10 The Ordinance allows cashiers at food providers to bundle already packaged food in single-use *paper*
11 bags; it simply prohibits cashiers from bundling purchased goods in single-use *plastic* bags at the point
12 of sale. As discussed below, such regulation does not overlap with the Retail Food Code.

13 c. No Overlap Exists Between the Field Occupied by the Retail Food
14 Code and the Subject Matter of the Single-Use Bag Ordinance

15 Courts find express preemption when the state law’s field of exclusivity overlaps with the
16 subject matter regulated by the local ordinance. (See *O’Connell v. City of Stockton* (2007) 41 Cal.4th
17 1061, 1072-73 [finding express preemption of local ordinance that required forfeiture of vehicles used to
18 solicit prostitution where Vehicle Code stated “no local authority shall enact or enforce any ordinance
19 on the matters covered by this code unless expressly authorized herein” and another Vehicle Code
20 section addressed vehicles used to solicit prostitution and did not allow for forfeiture].)

21 Regulation of the same broad subject matter is not enough to implicate preemption; rather, the
22 precise field occupied by the state must overlap with the subject matter regulated by the local ordinance.
23 (See *Big Creek Lumber Co., supra*, 38 Cal.4th at 1145, 1157 [finding no express preemption of county
24 zoning ordinance restricting timber harvesting to specified zone districts by a state ordinance that
25 expressly forbid counties to “regulate the conduct” of timber operations because the local ordinance
26 regulated “*the location* of timber operations *but not the manner* in which they [we]re carried out....”];
27 *Galvan v. Superior Court* (1969) 70 Cal.2d 851, 856, fn. 2 [finding no preemption of San Francisco law
28 requiring gun registration where Penal Code stated that “no permit or license to purchase, own, possess,
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1 or keep any [concealable] firearm at [the owner's] place of residence or place of business shall be
2 required;" the Court "distinguished between licensing, which signifies permission or authorization, and
3 registration, which entails recording formally and exactly...." [quotations omitted].) In the present
4 case, the City's Ordinance and the Retail Food Code do not regulate the exact same subject matter, and
5 the subject matter of the Ordinance does not overlap with the field exclusively preempted. The Retail
6 Food Code sets uniform health and sanitation standards for retail food facilities to prevent foodborne
7 illnesses. In contrast, the City's single-use bag Ordinance simply prohibits cashiers from distributing
8 certain bags. It sets no health and sanitation standards, which is the field that has been occupied by State
9 regulation.

10 Courts have refused to find preemptive overlap when the State expressly states its intent to set
11 uniform standards and the local ordinance sets no standards. (See *California Grocers Assn., supra*, 52
12 Cal.4th at 186, 193 [finding no preemption by Retail Food Code of ordinance prohibiting larger grocery
13 stores in the city from firing certain staff for 90 days after a change in ownership because the local
14 prohibition did not set a health and sanitation standard]; see also *Personal Watercraft Coalition v. Marin*
15 *County Bd. of Supervisors* (2002) 100 Cal.App.4th 129, 155 [finding no preemption of local ordinance
16 banning the use of personal water craft by federal law prohibiting the adoption of state and local
17 emission standards because the local ban did not set an emission standard].)

18 In *California Grocers*, the Supreme Court found that the Retail Food Code and the ordinance
19 passed by the City of Los Angeles "do not overlap" and rejected plaintiff's preemption claim because
20 "[t]he Retail Food Code establishes *standards* for what certain employees ... must know or be taught,
21 but does not regulate who must be hired", while the ordinance "regulates the pool of ... employees from
22 which a new owner temporarily must hire, but *imposes no standards* concerning what the hired
23 employees must know or be taught about food safety." (*California Grocers Assn., supra*, 52 Cal.4th at
24 192 [emphasis added].) The Supreme Court went on to conclude that the Retail Food Code "preempts
25 only those [ordinances] that establish 'health and sanitation standards' for retail food establishments, so
26 as to ensure uniformity for such facilities.") Thus, if an ordinance does not set health and sanitation
27 standards for retail food establishments, there is no overlap and therefore no preemption.

28 The City's single-use bag Ordinance accords with *California Grocers*. The Ordinance simply
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1 regulates the bags a cashier can provide at check-out, and does not set any health and sanitation standard
2 for retail food facilities. (See *id.*) There is no overlap between the two laws, and therefore no
3 preemption.

4 2. The Legislature Has Not Impliedly Preempted the Ordinance

5 a. Since the Legislature Expressly Defined the Retail Food Code's Field of
6 Preemption, No Implied Preemption Should Be Found

7 In enacting the Retail Food Code, the Legislature expressly stated its intent to "occupy the
8 whole field of health and sanitation standards for retail food facilities." At the same time and in the
9 same statement, the Legislature authorized certain local regulations.² Such overt recognition of
10 specified local regulation is critical in preemption analysis; the Legislature's "preemptive action in
11 specific and expressly limited areas *weighs against an inference that preemption by implication was*
12 *intended elsewhere.*" (*IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 95 [emphasis
13 added].) "Preemption by implication of legislative intent may not be found when the Legislature has
14 expressed its intent to permit local regulations." (*Big Creek Lumber Co., supra*, 38 Cal.4th at 1157
15 [citations omitted].) "Similarly, it should not be found when the statutory scheme recognizes local
16 regulations." (*Id.*)

17 These rules make eminently good sense. When the Legislature makes the effort to expressly
18 occupy a field and also specifically exempts certain local regulations from that field, the Legislature thus
19 has explicitly limited the field of preemption. (See *IT Corp., supra*, 1 Cal.4th at 94, n. 10 ["An
20 expressed intent to allow local regulation, or an express recognition of local regulation, is convincing
21 evidence that the state legislative scheme was not intended to occupy the field."].) Where the
22 Legislature has limited so clearly the field that it intends to occupy, it is improper for courts to *imply*
23 additional fields of preemption. (*Big Creek Lumber Co., supra*, 38 Cal.4th at 1157 [finding that "both

24 _____
25 ² Health and Safety Code 113709 lists types of local health and sanitation standards for retail
26 food facilities that the Legislature did not preempt with the Retail Food Code. Specifically, the section
27 provides: "[t]his part does not prohibit a local governing body from adopting an evaluation or grading
28 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."

1 bars to implied preemption” existed when the Timberland Productivity Act expressly preempted only
2 certain local regulations, but allowed others] [citing *Cipollone v. Liggett Group* (1992) 505 U.S. 504,
3 517 [“Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that
4 matters beyond that reach are not pre-empted”].) Since the Legislature so expressly defined the field
5 preempted by the Retail Food Code, the Court should not consider implication of additional fields of
6 preemption.

7 b. Even if the Court Considers Potential Additional Implied Fields of
8 Preemption, No Implied Preemption Exists Because the Subject Matter
9 of the Ordinance Bears No Relation to the Retail Food Code,

10 Even if the Court wishes to analyze whether the Ordinance is impliedly preempted by the Retail
11 Food Code, the answer must be no. Courts regularly apply three tests when considering whether an
12 ordinance is preempted by implication. (*Candid Enterprises, Inc., supra*, 39 Cal.3d at 886 [describing
13 three tests for implied preemption, all of which require the general law to completely or partially cover
14 the subject matter of the ordinance].) We need not consider each test individually here because if “the
15 subject matter of the ordinance” does not relate to the statute, all the tests fail and there is no implied
16 preemption. (See *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 904-906.)

17 In *Sherwin-Williams*, the Supreme Court summarily rejected any claim of implied preemption
18 as to the graffiti ordinance’s regulation of “broad-tipped marker pens” because the state statute “d[id]
19 not even purport” to address pen regulation. (See *Sherwin-Williams Co., supra*, 4 Cal.4th at 902.) Even
20 though both the graffiti ordinance and the State statute were aimed in general at regulating aerosol cans,
21 the Court reasoned that the “subject matter of the ordinance” (retail display of aerosol paint cans and
22 broad-tipped marker pens) did not bear “in any way whatsoever” on the state statute (which defined the
23 “lawful transfer and possession of aerosol paint” and “require[d] retailers to post a warning against
24 vandalism”). (*Id.*, at 904-905.)

25 In a similar case, the court found no implied preemption when the “subject matter” of the
26 ordinance “d[id] not intrude into the field” of the statute. (*Bravo Vending v. City of Rancho Mirage*
27 (1993) 16 Cal.App.4th 383, 403, 412.) Even though the statute and the ordinance were both enacted
28 generally to prevent cigarette sales to minors, the ordinance adopted a ban on cigarette vending

1 machines and the state law set penalties for selling cigarettes to minors. (*Id.* at 403, 412.) The Court
2 found the subject matter of the ban did not relate to the field of penalties set by state law and rejected the
3 claim of implied preemption. (*Id.*)

4 The subject matter of the City’s single-use bag Ordinance similarly bears no relation to the
5 Retail Food Code. The Ordinance is a prohibition on the distribution of certain bags at the point of sale.
6 The Retail Food Code establishes uniform health and sanitation standards for retail food facilities in the
7 state in order to prevent foodborne illnesses. Consistent with *Sherwin-Williams* and *Bravo Vending*,
8 Carpinteria’s Ordinance does not bear in any way whatsoever on any health or sanitation standards
9 established by the State in the Retail Food Code. (See *Sherwin-Williams Co., supra*, 4 Cal.4th at 902;
10 *Bravo Vending, supra*, 16 Cal.App.4th at 412.) The subject matter of the City’s Ordinance is a different
11 type of regulation than that of the Retail Food Code. Carpinteria adopted a ban (similar to the ban that
12 Rancho Mirage adopted on cigarette vending machines), while the Retail Food Code sets a standard
13 (similar to the penalty that the State in *Bravo Vending* set for the sale of cigarettes to minors). (*Id.*)
14 Because the subject matter of the Ordinance and Retail Food Code do not relate to each other, there can
15 be no implied preemption of the local regulation.

16 3. The Ordinance In No Way Duplicates or Contradicts the Retail Food Code

17 The final tests courts use to evaluate preemption are whether the local ordinance is duplicative
18 of or contradicts state law. The Ordinance is not preempted under either test.

19 a. The Ordinance Does Not Duplicate State Law

20 Local legislation is “duplicative” of and therefore preempted by general law when each
21 enactment regulates the same conduct. (*In re Portnoy* (1942) 21 Cal.2d 237, 241 [finding preemption of
22 slot machine ordinance where “substantially the entire text of section 4 of the ordinance is found in
23 Penal Code, section 330a” and where “provisions of [the ordinance] purport to prohibit acts which
24 already are made criminal by the Penal Code.”].)

25 While the word “bag” appears in both the Retail Food Code and the Ordinance, use of the same
26 word does not decide whether two laws are duplicative. The test is whether the “scope and substance”
27 of the two regulations are the same. Courts find no duplication and therefore no preemption where the
28 two laws are “different in scope and substance.” (*Sherwin-Williams Co., supra*, 4 Cal.4th at 902

1 [finding no duplication and therefore no preemption because spray paint regulations were “different in
2 scope and substance” where the state law “mainly defines the lawful transfer and possession of aerosol
3 paint and also requires retailers to post a warning against vandalism” but the local ordinance “simply
4 regulates the retail display of aerosol paint and broad-tipped marker pens.”]; *Great Western Shows*,
5 *supra*, 27 Cal.4th at 866 [finding no duplication and therefore no preemption where County’s ordinance
6 prohibiting and punishing the sale of firearms and ammunition on County property “[wa]s not identical”
7 to state prohibitions on the sale of machine guns, assault weapons, and unsafe handguns because the
8 ordinance did not “criminalize precisely the same acts” which were prohibited by statute and “someone
9 may be lawfully convicted of both offenses.” [quotations and citations omitted].) Put another way, a
10 local ordinance does not duplicate a state law if a person can violate the state law without violating the
11 ordinance. (*Harrahill v. City of Monrovia* (2002) 104 Cal.App.4th 761, 766-68 [finding no duplication
12 between an ordinance making it a citable offense for minors to be in public areas when school is in
13 session and state law requiring minors to attend school because a student who skips school, but stays at
14 home, violates state law but not the ordinance].)

15 While the Retail Food Code mentions bags six times, it does not address distribution of bags at
16 the point of sale; rather, it sets health and sanitation standards for retail food establishments. For
17 example, Health and Safety code section 114185.4 provides that “[s]oiled linens shall be kept in clean,
18 nonabsorbent receptacles or clean, washable laundry *bags*” Sections 114063 and 114089.1 provide
19 that certain types of bread “shall be considered properly wrapped if contained in an open-end *bag* of
20 sufficient size to enclose the loaves or rolls.” Section 114245.1 provides that “[a]ll refuse, recyclables,
21 and returnables shall be ... contained so as to minimize odor and insect development by covering with
22 close-fitting lids or placement in a disposable *bag* that is impervious to moisture and then sealed.”
23 Section 114004 defines “high humidity” in part as “in a moisture-impermeable *bag* that provides 100%
24 humidity.” Finally, Section 113914 defines “single-use articles” as “utensils, tableware, carry-out
25 utensils, bulk food containers, and other items such as *bags*, containers, placemats, stirrers, straws,
26 toothpicks, and wrappers that are designed and constructed for one time, one person use, after which
27 they are intended for discard.”

28 The City’s Ordinance, which regulates the distribution of certain single-use bags at the point of
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1 sale for the purpose of carrying away purchased goods, in no way duplicates the health and sanitation
2 standards set forth in the Retail Food Code. As in *Sherwin-Williams* and *Great Western Shows*, the
3 Ordinance does not prohibit anything prohibited by the Code or mandate anything mandated by the
4 Code. The Ordinance does not regulate laundry or garbage bags. Bags used to hold bread qualify as
5 product bags and are allowed under the Ordinance. The Retail Food Code establishes uniform health
6 and safety standards for retail food establishments; the Ordinance's restrictions on distribution of bags at
7 the point of sale are completely different in scope and substance, as well as purpose, and do not
8 duplicate the State's regulations.

9 b. The Ordinance Does Not Contradict State Law

10 Local legislation is "contradictory" to general law when it is inimical thereto. (*Big Creek*
11 *Lumber Co.*, *supra*, 38 Cal.4th at 1150.) Local legislation is inimical to a state statute when it
12 "prohibit[s] what the statute commands or command[s] what it prohibits." (*Sherwin-Williams Co.*,
13 *supra*, 4 Cal. 4th at 902.) Here, the Ordinance is not inimical to the Retail Food Code; it neither
14 commands what the State law prohibits nor prohibits what the State law commands. Any bags that food
15 facilities use to package a food item for sanitary purposes are exempted from the Ordinance as a
16 "product bag." (Exh. A [§ 8.51.030.H and K].) The only bags used by retail food facilities that are
17 banned by the Ordinance are single-use plastic bags provided at check-out. Nothing in the Retail Food
18 Code mandates that cashiers provide such bags.

19 The Retail Food Code mandates that temporary food facilities³ use only single-use articles such
20 as single-use utensils, plates, containers, and bags. (See Health and Saf. Code § 114353 ["A temporary
21 food facility shall provide only single-use articles for use by the consumer."].) The Retail Food Code,
22 however, does not mandate that these facilities use *all* the single-use items in the definition; it simply
23 states that if such items are used, they should be single-use. Cashiers at temporary facilities therefore
24 could put packaged food in boxes or other single-use containers. Nothing in the Retail Food Code
25 requires temporary food facilities to provide single-use bags at check out. More importantly, nothing in
26

27 ³ "'Temporary food facility' means a food facility approved by the enforcement officer that
28 operates at a fixed location for the duration of an approved community event or at a swap meet and only
as a part of the community event or swap meet." (Health and Saf. Code § 113930.)

1 the Retail Food Code mandates that temporary food facilities distribute single-use *plastic* bags at check
2 out. Under the City's Ordinance, temporary food facilities can continue to distribute single-use *paper*
3 bags at the point of sale if needed. (See Exh. A [§§ 8.51.030.B and C [allowing small commercial
4 establishments (which includes all food providers) to use single-use paper bags].)

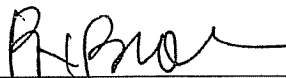
5 For all these reasons, nothing in the Ordinance is inimical or contradictory to the Code, and vice
6 versa. (See *Big Creek Lumber, supra*, 38 Cal.4th at 1161 [finding no preemption of local ordinance
7 where "it is reasonably possible for a timber operator to comply with both" the ordinance and the state
8 law because the state timber laws "do not require that every harvestable tree be cut" and "[t]he zone
9 district ordinance does not mandate what general forestry law forbids or forbid what general forestry
10 law mandates."]; see also *Great Western Shows, supra*, 27 Cal.4th at 866 [finding no preemption of
11 local ordinance banning gun show where the state statutes regulating gun shows and sales "do not
12 mandate such sales such that a limitation on sales on county property would be in direct conflict with the
13 statute."].) The City's Ordinance is not preempted.

14 **IV. CONCLUSION**

15 Plaintiff Save the Plastic Bag Coalition cannot meet its burden to establish preemption of the
16 City's single-use bag Ordinance. The longstanding presumption against preemption applies to the
17 Ordinance since it regulates in areas of local interest and traditional local control. None of the tests for
18 preemption are met; the Ordinance in no way duplicates, contradicts, or enters the field occupied by the
19 Retail Food Code, which the Legislature adopted to establish "uniform statewide health and sanitation
20 standards for retail food facilities." The Complaint cannot be amended to state a valid cause of action.
21 The City therefore respectfully asks this Court to sustain this demurrer with prejudice.

22 Dated: April 17, 2012

BROWNSTEIN HYATT FARBER SCHRECK, LLP

23 By: 

24 PETER N. BROWN
25 BETH COLLINS-BURGARD
26 DYLAN K. JOHNSON
27 Attorneys for Defendant
28 CITY OF CARPINTERIA

PROOF OF SERVICE

I am a citizen of the United States and employed in Santa Barbara County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Brownstein Hyatt Farber Schreck, LLP, 21 East Carrillo Street, Santa Barbara, California 93101-2706. On April 17, 2012, I served a copy of the within document(s):

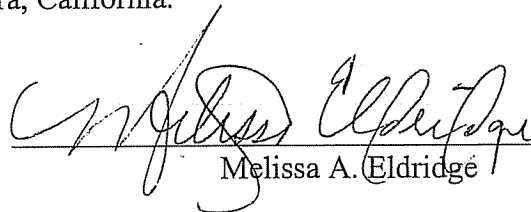
NOTICE OF DEMURRER AND DEMURRER OF DEFENDANT CITY OF CARPINTERIA TO COMPLAINT FOR INVALIDATION OF PLASTIC BAG ORDINANCE; MEMORANDUM OF POINTS AND AUTHORITIES

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Santa Barbara, California addressed as set forth below.
- by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

STEPHEN L. JOSEPH
350 Bay Street, Suite 100-328
San Francisco, CA 94133

Telephone: (415) 577-6660
Facsimile: (415) 869-5380
E-mail: savetheplasticbag@earthlink.net

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit. I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 17, 2012, at Santa Barbara, California.



Melissa A. Eldridge

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