No. A133868
(County of Marin Super. Ct. No. CIV1100996)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SAVE THE PLASTIC BAG COALITION,
an unincorporated association

PLAINTIFF AND APPELLANT

V.

COUNTY OF MARIN et al.,
a political subdivision of the State of California

DEFENDANTS AND RESPONDENTS

Appeal From Judgment Of
The Superior Court of California
County Of Marin
(Hon. Lynn Duryee, Presiding)

APPELLANT'S REPLY BRIEF

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INTRODUCTION AND SUMMARY OF LAW

"The road to hell is paved with good intentions"

There are two stages when an agency proposes to rely on Guidelines §§ 15307 or 15308. If any of the conditions in the first stage are not satisfied, there is no second stage.

First stage: Make the exemption determination

All of the following conditions must be satisfied:

A. The agency must be a "regulatory agency." (§§ 15307 and 15308.)

B. The regulatory action must be "authorized by state law or local ordinance." (§§ 15307 and 15308.)

C. The purpose of the action must be protection of the environment or a natural resource. (§§ 15307 and 15308.)

D. The "regulatory process involves procedures for protection of the environment." (§§ 15307 and 15308.)

E. The agency must determine that none of the exceptions in § 15300.2 are applicable, including 15300.2(c) which states: "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." The agency must determine whether the exceptions in § 15300.2 apply, regardless of whether a fair argument has been made. (*Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 124.)

F. "Once a lead agency has determined that an activity is a project subject to CEQA, a lead agency shall determine whether the project is exempt from CEQA." (Guidelines § 15061(a), italics added.) The determination must be made prior to project approval.

Second stage: Respond to a "fair argument"

If a member of the public makes a "fair argument" that there is a reasonable possibility that the activity will have a significant cumulative negative effect on the environment, the agency must also satisfy all of the following conditions.

G. The agency must make findings of fact that refute the fair argument to a *certainty*. (*Banker's Hill*, *supra*, 139 Cal.App.4th at 264; *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 118.)

H. The agency cannot rely on contrary evidence to refute the fair argument. (Guidelines § 15064(f)(1); *County Sanitation District No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1580.)

I. The agency cannot rely on mitigation measures to refute the fair argument. (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1200; *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1102.)

J. The 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.)

In this case, only condition C was satisfied.

ARGUMENT

I. The County Is Misreading The Ruling Of The Supreme Court In *Manhattan Beach*

The Supreme Court decision in *Manhattan Beach* controls the outcome of this case. However, the County argues that the Supreme Court's decision is inapplicable. (County brief at 16-18.)

First, the County says that *Manhattan Beach* involved an initial study followed by a negative declaration. The County asserts that *Manhattan Beach* "did not address the use of categorical exemptions in any way, except to note the city could have pursued that approach had it not instead decided to go ahead with an initial study." (County brief at 16.)

The Supreme Court said that comprehensive environmental review "will be required" for plastic bag ban ordinances adopted by "larger governmental bodies" than the City of Manhattan Beach "which might precipitate a significant increase in paper bag consumption." The court also said that "cumulative impacts should not be allowed to escape review when they arise from a series of small-scale projects." (*Manhattan Beach, supra,* 52 Cal.4th at 174.)

The Supreme Court did *not* say that the City of Manhattan Beach could have relied on a categorical exemption. The Supreme Court never mentioned categorical exemptions at all. The only exemption mentioned by the court was the "common sense" exemption in Guidelines § 15061(b)(3). (*Manhattan Beach, supra,* 52 Cal.4th at 172, n.8.) The court did *not* say that a city or county larger than the City of Manhattan Beach could rely on the "common sense" exemption when there might be a significant increase in paper bag consumption.

As the Supreme Court in *Manhattan Beach* said that comprehensive environmental review "will be required" if there might be a significant increase in paper bag consumption, plastic bag ban ordinances as a *class* or *type* cannot be categorically exempt. In *Mountain Lion, supra*, the Supreme Court stated that "an activity that may have a significant effect on the environment cannot be categorically exempt." (*Mountain Lion, supra,* 16 Cal.4th at 124.)

Second, the County argues that "the *Manhattan Beach* case dealt with an entirely different ordinance, and therefore entirely different facts. The Manhattan Beach ordinance, while banning plastic bags, did not take any action with respect to limiting the use of single-use paper bags as Marin County's ordinance does." (County brief at 17.)

The County has indeed taken action with respect to paper bags, an inconsequential five-cent paper bag fee (except for certain economically challenged consumers who pay nothing at all). The question is whether this is a high enough fee to eliminate the reasonable possibility, as a *certainty,* that there will be no significant increase in paper bag consumption. Of course, no one can be *certain* of that. In any event, evaluation of the adequacy of the fee cannot be determined as part of a categorical exemption determination. (*Azusa Land, supra,* 52 Cal.App.4th at 1200; *Salmon Protection, supra,* 125 Cal.App.4th at 1102.)

Third, the County argues that the words "will be required" were a paraphrasing of Plaintiff's position by the Supreme Court. (County brief at 17.) As much as Plaintiff would like to have the power to "require" EIRs, regrettably it doesn't. Only the courts have that power. The Supreme Court was stating its own position.

Fourth, the County points that the Supreme Court said that "an appropriately comprehensive environmental review" will be required. The County argues that the Supreme Court "said nothing to even infer this meant EIRs for all future ordinances or other regulations banning plastic bags irrespective of the size of the jurisdiction or the restrictions placed on paper bags." (County brief at 17.) That is not what Plaintiff is saying. Plaintiff is saying that an EIR is required for Marin County's Ordinance.

Since the Supreme Court decision, Plaintiff has not demanded EIRs in any city or county smaller than Manhattan Beach that has proposed to ban plastic bags, including the Cities of Carpinteria, Dana Point, Laguna Beach, Monterey, and Ojai. As for larger jurisdictions, all except three have complied with the Supreme Court decision requiring them to prepare EIRs or proposed much higher paper bag fees than Marin County, so EIR demands have been unnecessary. The exceptions are Marin County, San Francisco (which expanded its plastic bag ban in February 2012) and the San Luis Obispo County Integrated Waste Management Authority ("SLO IWMA"), all of which refused to prepare EIRs or even Initial Studies. Plaintiff has filed petitions for writs of mandate against San Francisco and the SLO IWMA under CEQA. Plaintiff has no other pending CEQA lawsuits. Plaintiff has never sued any city or county that prepared an EIR.

II. Guidelines §§ 15307 And 15308 Must Be Interpreted In A Way That Does Not Exceed The Powers Of The Secretary Of Natural Resources

Guidelines § 15300 explains the basis for categorical exemptions as follows:

> **CATEGORICAL EXEMPTIONS**
>
> Section 21084 of the Public Resources Code requires these Guidelines to include a list of classes of projects *which have been determined* not to have a significant effect on the environment and which shall, therefore, be exempt from the provisions of CEQA.
>
> In response to that mandate, the Secretary for Resources has *found* that the following classes of projects listed in this article do not have a significant effect on the environment, and they are declared to be categorically exempt from the requirement for the preparation of environmental documents.

(Italics added.)

The key point is that categorical exemptions are based on *predeterminations* by the Secretary for Natural Resources that particular classes of project will not have a significant negative effect on the environment. Just how far did the Secretary go when issuing Guidelines §§ 15307 and 15308? Did the Secretary exempt from CEQA all future brand new *legislation* by boards of supervisors and city councils that are merely *intended* to protect the environment? Does the Secretary have that power under the CEQA statute?

The Secretary's power is limited. "The secretary is empowered by CEQA to adopt guidelines for public agencies to follow, but these guidelines must be consistent with CEQA's express statutory requirements." (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 204.) "The secretary is empowered to exempt only those activities which do not have a significant effect on the environment." (*Id*. at 205.) "Even if a regulation was intended to exempt the activity at issue in *Wildlife Alive*, however, such a regulation would be invalid, because "[t]he Secretary [of the California Resources Agency] is empowered to exempt only those

activities which do not have a significant effect on the environment." (*Berkeley Hillside Preservation v. City of Berkeley* (2012) ___ Cal.App.4th ___, Slip Op. at 11.) "Exemption categories are not to be expanded beyond the reasonable scope of their *statutory* language." (*Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 125, italics added.) CEQA must be interpreted so as to afford the "fullest possible protection" to the environment. (*Chickering, supra,* 18 Cal.3d. at 198; *Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 274; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.)

Guidelines § 15307 states: "Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game." The State Fish and Game *Commission* issues regulations. The Department implements and enforces those regulations. The Department's wildlife preservation activities are far removed from any kind of legislative activity. This is a strong indication, in addition to the language of §§ 15307 and 15308, that the Secretary did not intend to exempt legislative activities.[1]

It is within the powers of the Secretary for Natural Resources to determine that purely regulatory actions are exempt, because environmental review (or at least the opportunity for environmental review) has already occurred at the legislative level and does not need to be repeated. Guidelines §§ 15307 and 15308 must be interpreted accordingly, so as not to encompass legislative activities within their sweep. In construing statutes, the courts must "adopt the construction that best effectuates the purpose of the law." (*Hassan v. Mercy American River Hospital* (2003) 31

[1] At page 24 opening brief, Plaintiff erroneously stated that the Department of Fish and Game issues regulations.

Cal.4th 709, 715.)

If the County's interpretation is correct, the words shown below as stricken are meaningless, inoperative, and redundant.

> Class 7 consists of actions ~~taken by regulatory agencies as authorized by state law or local ordinance~~ to assure the maintenance, restoration, or enhancement of a natural resource. ~~where the regulatory process involves procedures for protection of the environment.~~
>
> Class 8 consists of actions ~~taken by regulatory agencies, as authorized by state or local ordinance,~~ to assure the maintenance, restoration, enhancement, or protection of the environment. ~~where the regulatory process involves procedures for protection of the environment.~~

"Well-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative." (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274.)

Consideration should be given to the consequences that will flow from a particular interpretation. (*Dyna-Med, Inc. v. Fair Employment & Housing Commission* (1987) 43 Cal.3d 1379, 1387.) If the Court accepts the County's interpretation, ordinances deemed to be "green" will sail through without any requirements for CEQA notices to the public or the preparation of any environmental documents. Boards of supervisors, city councils, and the public will be unaware of unintended negative environmental consequences.[2]

A categorical exemption for "green" ordinances would make a mockery of CEQA and would be damaging to the environment. The

[2] The sole exceptions in §§ 15307 and 15308 are "construction activities" and "relaxation of standards allowing environmental degradation."

categorical exemptions in §§ 15307 and 15308 must not be treated as a license to evade CEQA. That is exactly how this case will be viewed if the County wins.

III. The Police Power Is Not The Basis For A Categorical Exemption

The County argues that the Ordinance is "authorized by" the police power in the California Constitution. (County brief at 22.) The County is grasping at straws. The police power in the Constitution is not an enabling state law granting specific regulatory authority to the Marin County Board of Supervisors to ban plastic bags. There is no state law that bans plastic bags.[3]

IV. *Magan* Does Not Help Either Party In This Case

The County claims that the *Magan* case "is directly supportive of Marin County's action herein." (County brief at 22 citing *Magan v. County of Kings* (2002) 105 Cal.App.4th 468.) In fact, *Magan* does not help either side in this case. As discussed, below, the court stated that it was not ruling on whether the ordinance adopted by Kings County Board of Supervisors qualified for a categorical exemption under §15308.[4]

Magan concerned the spreading of sewage sludge on agricultural land as a fertilizer. Sewage sludge is subject to strict standards in U.S.

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[3] There is a state statute that requires certain stores that provide plastic bags to (i) install plastic bag recycling bins and (ii) make reusable bags available to customers. (AB 2449, Pub. Res. Code §§ 42250-57.) The statute does not ban plastic bags. It sunsets on January 1, 2013. Pursuant to its regulatory authority in Pub. Res. Code § 40502, the California Department of Resources Recycling and Recovery (CalRecycle) has issued regulations implementing the statute. (Cal. Code Reg., tit. 14, § 17987.)

[4] After reviewing the opening brief, Plaintiff confesses that its short description of the ruling in *Magan* was unclear. Plaintiff discusses *Magan* here in more depth to ensure that there is no misunderstanding.

Environmental Protection Agency ("EPA") regulations. (40 C.F.R. Part 503; *Magan*, *supra*, 105 Cal.App.4th at 471-472.) A State "or political subdivision thereof" may impose "more stringent" or "additional" requirements regarding sewage sludge. (40 C.F.R. § 503.5(b).) Sewage sludge is also subject to California Food and Agricultural Code § 14505 which states: "Agricultural products derived from municipal sewage sludge shall be regulated as a fertilizing material pursuant to this chapter." Distributors of sewage sludge must be licensed by the California Department of Food and Agriculture. (Food and Agriculture Code §14591.)

In 2001, the Kings County Board of Supervisors adopted an ordinance banning the spreading of sewage sludge on agricultural land, including Class B sewage sludge. (*Magan*, *supra*, 105 Cal.App.4th at 471.) The Board of Supervisors approved the filing of a notice of exemption determining that the adoption of the ordinance was categorically exempt from CEQA under § 15308. (*Id.* at 472.)

Appellant Shaen Magan held permits to apply Class B sewage sludge to certain agricultural land. (*Id*.) He filed a petition for writ of mandate under CEQA challenging the ordinance. The court summarized his arguments as follows:

> Appellant argues the [trial] court erred in denying his petition for writ of mandate because 1) there is no substantial evidence in the record demonstrating that the County considered whether the ordinance could have a significant effect on the environment; and 2) there is substantial evidence in the record demonstrating a reasonable possibility of environmental impacts sufficient to remove the ordinance from the exempt class.

(*Id.* at 472-473.)

The court rejected Shaen Magan's assertion under Guidelines § 15300.2(c) that there may be significant negative effects on the environment stating: "Appellant has failed to support his claims with *any* evidence in the record." (*Id.* at 472, italics by court.)

The *Magan* court did ***not*** discuss whether Kings County was entitled to rely on the categorical exemption. The court stated as follows:

> With no citation to legal authority, appellant also maintains 1) the class 8 categorical exemption should not apply to the adoption of a new complex regulatory program, and 2) the County failed to consider the cumulative impact of the ordinance. We deem the points to be without foundation and waived. (See *Akins v. State of California* (1998) 61 Cal.App.4th 1, 50 [waiver of contention by failure to cite any legal authority]; *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [where point is merely asserted by appellant without argument or authority, it is deemed to be without foundation and requires no discussion by reviewing court].)

(*Magan*, *supra*, 105 Cal.App.4th at 477, n.4.) Cases are not authority for propositions not considered. (*Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 118.)

V. The Fair Argument Standard Applies To The "Unusual Circumstances" Exception

The applicable standard for determining whether Plaintiff has demonstrated "unusual circumstances" under Guidelines § 15300(c)(2) is the "fair argument" standard. (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 264-267.) The County says that it "has scoured the cited portion of *Banker's Hill* and can find no support for appellant's claim." (County brief at 24.) The following statements are in the *Banker's Hill* opinion:

> As we will explain, we conclude that an agency must apply a fair argument approach in determining whether, under Guidelines section 15300.2(c), there is no reasonable possibility of a significant effect on the environment due to unusual circumstances. Accordingly, as a reviewing court we independently review the agency's determination under Guidelines section 15300.2(c) to determine whether the record contains evidence of a fair argument of a significant effect on the environment.

(*Banker's Hill, supra,* 139 Cal.App.4th at 264.)

> We further conclude that it is consistent with the policy behind CEQA to preclude an agency from relying on a categorical exemption when there is a fair argument that a project will have a significant effect on the environment, because, as our Supreme Court has noted, the Secretary "is empowered to exempt only those activities which do not have a significant effect on the environment. [Citation.] It follows that where there is *any reasonable possibility* that a project or activity may have a significant effect on the environment, an exemption would be improper." [Citing *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205-206, italics by court.] This important limitation on the Secretary's authority, as established by CEQA, is best upheld by disallowing an exemption for any project where the record reflects a fair argument that there may be a significant effect on the environment due to unusual circumstances.

(*Banker's Hill, supra,* at 266-267.)

There is no separate requirement that the circumstances be "unusual." "[T]he fact that proposed activity may have an effect on the environment is itself an unusual circumstance, because such action would not fall 'within a class of activities that does not normally threaten the environment,' and thus should be subject to further environmental review." (*Berkeley Hillside Preservation v. City of Berkeley* (2012) ___ Cal.App.4th ___, Slip Op. at 13.)

Ultimately, for the purpose of this appeal, the County states that it "concedes that the actual 'fair argument' standard does indeed apply to this Court's review of whether the significant effects exception applies to remove the ordinance from the ambit of the categorical exemption." (County brief at 24.)

VI. The Issue Of Whether The Paper Bag Fee Is A Mitigation Measure Must Be Resolved Based On The Reason For Excluding Mitigation Measures From Categorical Exemption Determinations

The County argues that the paper bag fee is part of the "project design" and not a mitigation measure. Therefore, according to the County, the paper bag fee may be considered in refuting Plaintiff's fair argument. (County brief at 29.) The County states: "As the County has noted throughout this brief, there is substantial evidence to support the County's determination that a plastic bag ban combined with a fee on paper bags will result in a decrease in both types of single-use bags." (County brief at 33, underlining by County.)

This issue of whether the paper bag fee is a mitigation measure will not be resolved by semantics. We need to look at the *reason* for excluding mitigation measures from categorical exemption determinations in order to determine whether the paper bag fee is a mitigation measure. In *Azusa Land, supra,* the court stated:

> In determining whether the significant effect exception to a categorical exemption exists, "[i]t is the possibility of a significant effect ... which is at issue, not a determination of the actual effect, which would be the subject of a negative declaration or an EIR. Appellants cannot escape the law by taking a minor step in mitigation and then find themselves exempt from the exception to the exemption."

> The reason is not simply because that is what the Guidelines require; the fundamental reason is substantive. The Guidelines dealing with the second phase of the environmental review process [the Initial Study resulting in a possible Mitigated Negative Declaration] contain elaborate standards -- as well as significant procedural requirements -- for determining whether proposed mitigation will adequately protect the environment and hence make an EIR unnecessary; in sharp contrast, the Guidelines governing preliminary review do not contain any requirements that expressly deal with the evaluation of mitigation measures.

(*Azusa Land, supra,* 52 Cal.App.4th at 1200, citations omitted.)

Based on the reasoning in *Azusa Land*, there is no adequate procedure and there are no requirements or standards for evaluating the five-cent paper bag fee as part of the categorical exemption determination process. The fee must be evaluated as part of an Initial Study to determine if it is high enough such that it "will adequately protect the environment and hence make an EIR unnecessary." (*Id.*) Therefore, the fee must be treated as a mitigation measure. It cannot be relied upon by the County to refute Plaintiff's fair argument.

VII. The County Has Admitted That Plaintiff Made A Fair Argument Regarding Paper Bags If The Paper Bag Fee Is Not Taken Into Account

The County asserts that "the only potential significant environmental impact [Plaintiff] apparently alleges is 'greenhouse gas emissions.'" (County brief at 24.) In fact, Plaintiff submitted studies that showing that paper bags are significantly worse than plastic bags regarding greenhouse gas emissions, ground level ozone formation, atmospheric acidification, water consumption, and solid waste generation (i.e. landfills). (See Plaintiff's Opening Brief at 5-11.) This is a mountain of evidence with

which the County does not disagree.

As noted in the Plaintiff's opening brief, the Ordinance states that "the use of single-use paper bags result in *greater* (GHG) emissions, atmospheric acidification, water consumption, and ozone production than single-use plastic bags." (AR tab E. italics added.) In its brief in the trial court, the County stated:

> The County agrees with [Plaintiff's] primary argument herein that in several respects, the negative environmental impacts from the production, use and disposal of single-use paper bags are as bad, if not worse, than the impacts from single-use plastic bags.

(County's Trial Court Brief at 1-2.) In this brief in this Court, the County states:

> However, it is equally true that almost no one would deny [Plaintiff's] primary point that severely limiting the use of single-use plastic bags would not have an overall environmentally beneficial effect if single-use plastic bags were merely replaced by single-use paper bags as opposed to reusable bags.

(County's Brief at 4-5.)

The Ordinance states that plastic and paper bags have "severe" environmental impacts. (AR tab E.) The Agricultural Commissioner states as follows in his letter:

> The Marin County Hazardous and Solid Waste Joint Powers Authority, made up of representatives from each of the 11 cities and towns in Marin as well as the County of Marin, estimates that Marin residents use upwards of 138 million bags annually that end up in Marin's landfill or in the waste stream. Bags have been baled together into shipping containers and sent to distant lands for handling – often to be burned or buried.

> From state waste characterization studies, this is equivalent to 539.87 tons or 1,079,736 lbs. of plastic bags.

(AR tab 83 at 2.) The letter contains no figure for paper bags in Marin's landfill or the waste stream.

If there is a major shift to paper bags, there will be significant negative impacts. Paper bags produce between 2.0 and 3.3 times more greenhouse gas emissions than plastic bags. Guidelines § 15064.4 states that the agency must make a good faith effort to describe, calculate, or estimate greenhouse gas emissions. The County argues that this only applies to Initial Studies. (County brief at 24.) However, § 15064.4 does not mention Initial Studies. It applies when making a "determination of the significance of greenhouse gas emissions," which would include an agency response to a fair argument as part of a categorical exemption determination. This was not done by the County.

Plaintiff is not required to do the greenhouse gas calculations. That is the County's responsibility. "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." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.)

Landfill space is a significant and critical issue in Marin County, as the County points out in its brief. (County brief at 7; AR tab A at 52-53.) Paper bags produce between 2.7 and 4.8 times *more* solid waste than plastic bags, meaning that an increase in paper bag usage will significantly and negatively impact Marin's landfill. (See Plaintiff's opening brief at 6-7.) In fact, a shift to paper bags will have even greater impacts, because paper bag

handles are weak and therefore store baggers often double-bag or only half fill paper bags. (See photo at AR tab F at 17.) The Ordinance will or may make the landfill problem significantly *worse* by *adding* many hundreds of tons of higher volume paper bag waste each year.

In view of its admissions, how can the County legitimately deny that the Ordinance may have a significant negative impact on the environment? The County is entirely dependent on its assertion that "there is substantial evidence to support the County's determination that a plastic bag ban combined with a fee on paper bags will result in a decrease in both types of single-use bags." (County brief at 33, underlining by County.) However, the County cannot rely on the fee or any contrary evidence in refuting Plaintiff's "fair argument" under Guidelines § 15300.2(c). (Guidelines § 15064(f)(1); *Azusa Land, supra*, 52 Cal.App.4th at 1200; *County Sanitation District No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1580.)

There is no statement in the Agricultural Commissioner's letter (AR tab 83), the Ordinance (AR tab E), the Notice of Exemption (AR tab E at 6), or the County's brief that the County takes the position that it is *certain* that there will be no significant negative environmental impacts, even with the five-cent paper bag fee taken into account. It is not a position that the County could have taken. No one can say for sure that there will be no significant negative environmental impacts.

VIII. The District of Columbia Experience Does Not Refute To A Certainty Plaintiff's Fair Argument Regarding Paper Bags

The County states as follows:

> And as even appellant is forced to admit, the record herein contains several examples of regulations where even a small charge greatly influenced consumer behavior. The most recent and relevant is the experience

> in Washington, D.C. where a plastic bag ban combined with a five (5) cent fee on paper bags resulted in a 50-60 per cent reduction in all single-use bags.

(County brief at 27-28.) This is the County talking about the sufficiency of the five-cent fee, which is a mitigation measure that cannot be part of refuting Plaintiff's fair argument. Further, "if 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 *County Sanitation District No. 2, supra,* 127 Cal.App.4th at 1580 ["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."]) Therefore, Plaintiff objects to reliance on the DC experience.

In any event, without waiving the objection, the DC experience is not comparable to Marin County. Plaintiff pointed out in its Objections that the Agricultural Commissioner had omitted critically important facts about the DC experience. (AR tab F at pages 19-21. Plaintiff submitted documentary support, including the DC ordinance and regulations and other relevant documents. AR tabs 57-63, 80, 84.) The facts about the DC experience, as stated in the Objections are as follows.

Effective January 1, 2010, DC law requires stores to charge a five-cent fee for plastic and paper bags. (AR tab 84.) The Marin Agricultural Commissioner cited the example of DC in his December 7, 2010 letter to the Board of Supervisors, claiming that DC experienced a significant reduction in single-use bags. However, he admitted: "It is still too early to

document reductions with certainty…." (AR tab 83 at 4.)

The DC Government and retailers instituted a massive reusable bag giveaway program after the effective date of the fee on January 1, 2010. For example, Giant Food stores gave away 250,000 reusable bags. CVS pharmacies in association with the DC Government gave away 112,000 reusable bags. Safeway stores gave away 10,000 reusable bags. (AR tabs 58-63 and 80.) On average, every household in DC received at least 1.5 free reusable bags in 2010 from these sources. (AR tab F at 20.) That explains why there was an upsurge in the number of reusable bags, rather than the fee on plastic and paper bags. When the reusable bags become dirty and worn, they will be discarded. At that point, the majority of consumers may prefer to pay the five-cent fee rather than purchase more expensive reusable bags.

There is nothing in the record indicating that Marin County or stores in Marin County planned a similar giveaway program after the Ordinance was adopted.

In DC, stores keep one cent of the five-cent fee and remit four cents to the DC Government. However, the DC regulations provide that the store may retain an additional cent if it "[c]redits the customer at least five cents ($0.05) for each carryout bag provided by the customer for packaging his or her purchases, regardless of whether the bag is paper, plastic, or reusable." (AR tab 80 at 5-6.) Pursuant to the program, Giant and Target in DC give a five-cent discount for each reusable bag that customers provide. (AR tabs 58, 59.)

In Marin County, where stores retain the entire fee, there is no similar credit program.

In DC, 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." (AR tab 84 at 4.)

In Marin County, there is no similar program.

Comparing Marin County with DC is comparing apples and oranges. Even if the DC experience could be taken into account as part of a categorical exemption determination, it does not refute to a certainty Plaintiff's fair argument that the Marin County Ordinance may have a significant negative impact on the environment.

The Agricultural Commissioner did not cite the fee experience in any other jurisdiction. (AR tab 83.)

IX. Plaintiff Made A Fair Argument Regarding The Impacts Of Reusable Bags, Which The County Has Completely Ignored

Plaintiff made a fair argument that an increase in the number of non-recyclable resource-heavy reusable bags resulting from the Ordinance may have a significant negative impact on the environment. The Los Angeles County EIR found that polypropylene and cotton reusable bags must be used at least 104 times before offsetting their enormous negative environmental impacts compared to a plastic bag. (See Plaintiff's opening brief at 13-15.)[5] Plaintiff recommends that this Court read AR tab 31,

[5] The County points out that the hyperlink for the LA County EIR in Plaintiff's Objections is different from the link in Plaintiff's opening brief. (County brief at 11.) LA County canceled the prior link and consolidated the links to all of its environmental documents on its ordinance on a single web page. http://dpw.lacounty.gov/epd/aboutthebag/ordinance_govt.cfm. Plaintiff quoted the relevant portions of the LA County EIR in its Objections and requested that the full EIR be made part of the administrative record. (AR tab F at 39-40, AR tab 86.)

which is an excellent *Wall Street Journal* article about the huge negative environmental impacts that result from the underuse of reusable bags.[6]

The County doesn't mention the negative environmental impacts of reusable bags in its brief, thereby conceding that Plaintiff made a fair argument regarding reusable bags.[7]

X. The Countywide Impacts Of The Ordinance Must Be Take Into Account, Just As The County Has Done

The Agricultural Commissioner cites countywide impacts, including all of the cities in the County, to assess the beneficial impacts of the Ordinance. (AR tab 83 at 2.) However, when Plaintiff says that countywide impacts, including all of the cities, are relevant in assessing the negative impacts of the Ordinance, the County says that is inappropriate. (County brief at 30-32.) The County is blatantly applying a double standard. Countywide impacts are relevant, because the Ordinance is the first stage of a countywide project. Marin County is proceeding slice by slice, a salami strategy to encompass all of the cities and all of the stores in the county. This is the right stage for the EIR. If not now, when?

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[6] The overwhelming majority of reusable bags are imported from China. (AR tab F at 22, 23, 31, 32; AR tab 31.) About 72.5% of plastic bags used in the USA are made in the USA. In its Objections, Plaintiff stated that the domestic production figure was 85%, but that figure is now outdated. (AR tab F at 5.)

[7] The negative environmental impacts of reusable bags were not mentioned in the Supreme Court's opinion in *Manhattan Beach* and were not part of that case. The Los Angeles County EIR, which evaluated the impacts of reusable bags, was completed two years after the City of Manhattan Beach adopted its ordinance.

XI. Plaintiff Did Not Fail To Exhaust Administrative Remedies

For the first time in this case, the County argues that Plaintiff did not exhaust its administrative remedies, because Plaintiff did not present legal positions before the Ordinance was adopted regarding the applicability of §§ 15307 and 15308 or reliance on mitigation measures. (County brief at 19-21 and 29.) Failure to exhaust remedies is not mentioned as a defense in the County's Answer To Verified Petition. The County has waived the defense and Plaintiff objects to it being raised now. As discussed below, without waiving the objection, Plaintiff did not fail to exhaust administrative remedies.

The Marin Guidelines

CEQA Guidelines § 15062(b) states:

> A Notice of Exemption may be filled out and may accompany the project application through the approval process. The notice shall not be filed with the county clerk or the OPR until the project has been approved.

Marin County has issued "Environmental Impact Review Guidelines" that were adopted by the Board of Supervisors ("Marin Guidelines"). These are described as "policy and procedures for implementation of the California Environmental Quality Act (CEQA)." Marin Guidelines § I states: "County Agencies and Departments must follow these procedures in addition to the State requirements for implementing CEQA." They can be downloaded at: http://goo.gl/QPucX or http://www.co.marin.ca.us/depts/CD/main/pdf/eir/ERGuide1994.pdf.

Marin Guidelines § IV(D)(6) implements CEQA Guidelines §15062(b). Marin Guidelines § IV(D)(6) states:

> Preliminary Review. Immediately after determining the application is complete, the Lead County Department *shall* transmit the required project description and environmental data to the Environmental Coordinator in the Community Development Agency for preliminary review. If the Lead County Department initially concludes that a project should be exempted from CEQA review, the Lead County Department *shall* fill out a Notice of Exemption form for preliminary review (see Appendix C). The Environmental Coordinator *shall* review the project and make the following determination:
>
> b. Determine if the project can be exempted by statute, including, but not limited to…by categorical exemption (see Article 19, commencing with Section 15300 of the State CEQA Guidelines).

(Italics added.)

Chronology

In this case, there was no proposed Notice of Exemption or determination of exemption by the Environmental Coordinator or the Board of Supervisors prior to or simultaneous with adoption of the Ordinance. Here is a chronology of what happened, and what didn't happen.

On December 7, 2010, the Agricultural Commissioner wrote to the Board of Supervisors making "recommendations." He stated in relevant part as follows:

> By enforcing both the ban on plastic and a mandatory charge on paper bags, the County achieves a clearly preferable result. Thus, under CEQA, the County of Marin *can* claim a categorical exemption by demonstrating and achieving a result that is environmentally superior: moving people to reusable bags and reducing waste from all single-use products.

(AR tab 83 at page 4 and tab B at page 4, italics added.) The letter did not cite any CEQA Guidelines sections. There was no other mention of

categorical exemptions in the letter.

On December 28, 2010, Plaintiff submitted its Objections to the County. Plaintiff stated therein:

> The County may not rely on a categorical exemption to avoid preparing an EIR.
>
> It is not clear whether the County is relying upon a categorical exemption under CEQA.

(AR tab F at 36.)

Despite the fact that Plaintiff told the County that it was not clear whether the County would be relying on a categorical exemption, the County did nothing to clarify the situation. On January 4, 2011, the Agricultural Commissioner sent the same "recommendations" letter to the Board of Supervisors, advising the Board of Supervisors again that the County "can" claim a categorical exemption. (AR tab C.)

On January 25, 2011, the Board of Supervisors adopted the Ordinance. It did not determine that the Ordinance was categorically exempt from CEQA. There is no mention of CEQA or any exemptions in the Ordinance.

Prior to the adoption of the Ordinance, there was no proposed Notice of Exemption or transmittal of the project description and environmental data to the Environmental Coordinator in the Community Development Agency for preliminary review. The Environmental Coordinator did not conduct an environmental review. The Environmental Coordinator also did not make a determination that any categorical exemptions were applicable. The Marin Guidelines were ignored and violated.

On February 24, 2011, Plaintiff filed its Petition for Writ of Mandate. Plaintiff was not aware of any Notice of Exemption at that time

as no such notice had been filed with the County Clerk or sent to Plaintiff. In the Petition, Plaintiff stated:

> The County has indicated that it might claim a categorical exemption under CEQA as the basis for not preparing an Initial Study or EIR. At the time of preparing this Petition, the County has made no official statement that it is relying on a categorical exemption and it has not filed a Notice of Exemption with the County Clerk or the State Clearinghouse pursuant to CEQA Guidelines §15062.

(Verified Petition for Writ Of Mandate ¶81.)

On March 2, 2011, the County filed the Notice of Exemption with the Marin County Clerk. (AR tab E at 6.) The Notice is signed by the Marin County Environmental Coordinator. It is dated February 3, 2011, nine days *after* the Ordinance was adopted. Plaintiff does not know why the County did not file it until a full month after it was apparently signed.[8]

The Notice of Exemption was not sent to Plaintiff prior to the filing of the lawsuit, despite Plaintiff's written request on December 28, 2010 for "any notices regarding the proposed ordinance." (AR tab F at 41.)

The "Reasons for Exemption" section in the Notice of Exemption states in its entirety as follows:

> The ordinance is intended to maintain, restore and enhance natural resources and the environment generally based upon substantial evidence that it will reduce the County's contribution of oil-based plastic waste as well as paper waste to landfills; reduce oil consumption and greenhouse gas emissions in general; reduce the amount of plastic and paper litter in the environment; and reduce degradation of the marine environment and harm to

[8] "Approved 1/25/11" is handwritten on the Notice of Exemption, but there is nothing in the record showing that an exemption was approved on that date. The person who wrote that notation must have been referring to the date of approval of the Ordinance.

marine wildlife.

(AR tab E at 6.) There was no mention of the five-cent paper bag fee in the Notice of Exemption.[9]

In its opening brief in the trial court, Plaintiff argued that the Ordinance was not adopted as part of a "regulatory" process involving procedures for the protection for the environment. (Plaintiff's trial court opening brief at 9.) The first time that the County ever stated that it was relying on the five-cent paper bag fee *as the basis for its reliance on the categorical exemptions* was in its trial court brief. (County's trial court brief at 12.) In its reply brief, Plaintiff responded by pointing out that the fee is a mitigating factor that may not be considered for the purpose of a categorical exemption determination. (Plaintiff's trial court reply brief at 1, 6-7.)

Discussion

"Once a lead agency has determined that an activity is a project subject to CEQA, a lead agency shall determine whether the project is exempt from CEQA." (Guidelines § 15061(a).) The County did not make a categorical exemption determination, or even give notice that it proposed to make a determination, until after the Ordinance was adopted. Plaintiff raised all of the grounds for noncompliance as soon as the County stated that it was relying on the categorical exemptions and explained the basis for its reliance.

The County cites Pub. Res. Code § 21177(a). (County brief at 19-21.) That provision requires that "the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing

[9] The allegation that plastic bags are made of oil is another myth. (AR tab F at 5.)

by any person during the public comment period provided *by this division* or prior to the close of the public hearing on the project before the issuance of the notice of *determination*." That section does not apply to this case for two reasons.

First, there was no CEQA public comment period. "CEQA provides for public comment on a negative declaration and an EIR. By contrast, CEQA does not provide for a public comment period before an agency decides a project is exempt." (*Azusa Land, supra,* 52 Cal.App.4th at 1210, citation to Guidelines omitted.)

Second, there was no notice of "determination." A "Notice of Determination" is only filed for a project that is *not* exempt. (Guidelines §§ 15075, 15373.) CEQA Guidelines Appendix D is a Notice of Determination. A "Notice of Exemption" is a notice that the project is exempt from CEQA under a categorical or other exemption. (Guidelines §§ 15062 and 15374.) CEQA Guidelines Appendix E is a Notice of Exemption.

In *Azusa Land*, the court held that there is no exhaustion of remedies requirement for categorical exemptions as there is no CEQA public comment period and no notice of "determination" for categorical exemptions. (*Azusa Land, supra,* 52 Cal.App.4th at 1210, citation to Guidelines omitted.)

The County cites *Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830. (County brief at 19.) In that case, the writ petition filed by the appellants sought to overturn an approval by the Sonoma County Board of Supervisors of a coastal permit to construct a residence and a use permit allowing reduction of a riparian corridor setback from 100 feet to 50 feet for the project. Sonoma County noticed the appellants and

other owners of property within 300 feet of the subject property by mailing notice of the applicant's permit application and of the public hearing to be held before the Board of Zoning Appeals. The court stated:

> The notice advised that the County Permit and Resources Management Department had determined the project to be categorically exempt from CEQA, because CEQA Guidelines provide a categorical exemption for new construction and conversion of small structures. (Cal. Code Regs., tit. 14, § 15303, subd. (a).) The notice also advised that appeals of the [Board of Zoning Appeals] determination could be made to the Board [of Supervisors] and the Board [of Supervisor's] decision could be appealed to the Coastal Commission. The notice further advised that in a later court challenge to the project "you may be limited to raising only those issues previously raised before the [BZA] at the hearing or in written form delivered to the [BZA] prior to or at the hearing."

(*Hines, supra,* 186 Cal.App.4th at 836.) The Board of Supervisors found that the project was categorically exempt from CEQA under Guidelines § 15303. (*Id.* at 839.) The appellants' appeal to the Coastal Commission was unsuccessful.

The appellants conceded that the project would normally be exempt under § 15303. (*Id.* at 851.) However, in court they attempted for the first time to make a fair argument that there were unusual circumstances under 15300.2(b) and (c). (*Id.* at 852-853.) The court ruled that they had failed to exhaust their administrative remedies. (*Id.* at 855.) The court stated that the normal rule that exhaustion of remedies does not apply to categorical exemptions did not apply under the particular circumstances of that case for two reasons. First, Sonoma County's CEQA ordinance required a public hearing on the exemption determination and the environmental documents generally, which was held by the Board of Zoning Appeals. (*Id.* at 854-

855.) Second, the appellants had received ample formal notice of the categorical exemption hearing and had testified at the hearing. (*Id.* at 854.) The *Hines* court did not disagree with *Azusa Land* and cited the case. (*Id.*)

The facts of *Hines* are distinguishable from the instant case. In *Hines* there was a public hearing on an actual exemption determination. The appellants had ample notice and opportunity to present their fair argument at that time in response to the determination of exemption, but failed to do so. The failure of the appellants to make a fair argument and provide supporting evidence meant that the court could not decide the case based on the administrative record.

In the instant case, there was a vague statement in a "recommendation" letter from the Agricultural Commissioner that the County "can" (i.e. could in theory) rely on a categorical exemption. The lead agency did not "fill out a Notice of Exemption form for preliminary review" as required by the Marin Guidelines. No determination of exemption was made by the Environment Coordinator or the Board of Supervisors prior to adoption of the Ordinance (in violation of the Marin Guidelines and Pub. Res. Code § 15061(a)). Plaintiff objected to the potential reliance on categorical exemptions, made a fair argument, and presented all of its evidence supporting its fair argument before the Ordinance was adopted.

Under these circumstances, Plaintiff was not required to make comprehensive legal objections or arguments in anticipation of the mere possibility that the Environmental Coordinator might decide at some point to issue a proposed Notice of Exemption, as he was required to do under the Marin Guidelines. There was a range of possibilities as to how the County might proceed under CEQA, including preparing an Initial Study

and issuing a Negative Declaration, or preparing an EIR. The County should have provided clear notice to Plaintiff.[10]

XII. The Board Of Supervisors And The Public Need To Know The Facts, Not Fiction Such As The Absurd $200 Figure In the Agricultural Commissioner's Letter

The County touts the alleged positive effects of the Ordinance in reducing the number of plastic bags that become litter or end up in landfills and the associated costs. (County brief at 5-7.) However, "[t]he positive effects of a project do not absolve the public agency from the responsibility of preparing an EIR to analyze the potentially significant negative environmental effects of the project, because those negative effects might be reduced through the adoption of feasible alternatives or mitigation measures analyzed in the EIR." (*County Sanitation Dist. No. 2, supra,* 127 Cal.App.4th at 1558.)

The County cites litter statistics in a law review article that was filed in the trial court, but is not in the administrative record. (County brief at 5.) The article states that plastic bags were the second most found item on beaches, representing 12% of the items found, citing the Ocean Conservancy website. Plaintiff objects as the article is not in the administrative record. Without waiving the objection, based on 25 years of litter cleanups, Ocean Conservancy reported in 2011 that plastic bags are the *sixth* most found item, representing *5%* of the items found. This includes every type of plastic bag, including grocery bags, produce bags,

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[10] At this time, a case is pending in the Supreme Court in which the sole issue is whether Pub. Res. Code § 21177 requires a petitioner to exhaust administrative remedies before challenging a public agency's decision that a project is categorically exempt from CEQA. (*Tomlinson v. County of Alameda*, Cal. Supr. Ct. No. S188161, 188 Cal.App.4th 1406.)

merchandise bags, and newspaper bags.[11]

The Agricultural Commissioner's letter states:

> Californians Against Waste (CAW) estimates that state residents pay up to **$200 per household** per year in state and local fees and taxes to clean up litter and waste associated with single-use bags.

(AR tab 83 at 2, emphasis added.) The Commissioner simply accepted the figure without question or verification. The $200 figure is absurd.

Based on the administrative record, the real cost is no more than **$2.77 per household** per year or **91 cents per person** per year for plastic bag litter cleanup and disposal of plastic bags in landfills. (See calculation on page 33 of this brief.)[12]

The County mentions the Redwood Landfill. (County brief at 7.) Based on the Redwood Landfill contract tipping fee of about $55 per ton, Marin residents actually pay less than $2.77 per household or 91 cents per person. (http://goo.gl/tKPUc.) Marin residents pay about **$1.12 cents per household** per year or **37 cents per person** per year, for all costs of plastic bag litter cleanup and landfill tipping fees. (See calculation on page 33 of this brief.) The Redwood Landfill tipping fee figure is not in the record, but Plaintiff mentions it here for the purpose of cross-checking to confirm that the $200 figure is a massive exaggeration.

The Los Angeles County EIR found that adopting plastic bag ban ordinances in the unincorporated part of the county and all of the cities in the county, with a ten-cent fee on paper bags, would have the following

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[11] Ocean Conservancy, Int'l Coastal Cleanup Global Summary 2011. (http://www.oceanconservancy.org/news-room/collateral/icc2011report__global_final.pdf)

[12] As the Agricultural Commissioner provided no figures for paper bag usage or tonnage in Marin County, Plaintiff cannot calculate paper bag landfill costs.

result: "Reduce by $4 million the County's, cities', and Flood Control District's costs for prevention, cleanup, and enforcement efforts to reduce litter in the County." (Los Angeles County EIR at V-2.) $4 million amounts to **$1.25 per household** per year or **41 cents per person** per year.[13]

To put the figures in perspective, each state resident pays less per year for plastic bag litter cleanup and landfill disposal than the cost of one reusable bag. Plaintiff acknowledges that low dollar impacts do not mean low environmental impacts. However, the Agricultural Commissioner made a dramatic and wildly inaccurate assertion about costs and it is appropriate for Plaintiff to respond, especially as the County has raised the litter and landfill cost issues in its brief.

The important point is that staff reports, such as the Agricultural Commissioner's letter, are not subject to any rules or standards whatsoever. The outlandish $200 figure would be unacceptable in an EIR. Categorically exempting "green" *ordinances* from the CEQA process is not the right way to go if we want environmental policy and laws to be based on fact, not fiction.[14]

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[13] The population of Los Angeles County is 9.8 million. The number of households is 3.2 million. (http://quickfacts.census.gov/qfd/states/06/06037.html.) Plaintiff pointed out to Los Angeles County that far less than $4 million would actually be saved in litter costs if plastic bags are banned as the same streets, highways, rivers, creeks, and beaches would still have to be cleared of other types of litter. (AR tab F at 40.)

[14] Santa Cruz County has passed an ordinance banning plastic bags. The ordinance states: "According to Californians Against Waste, Californians pay up to $200 per household each year in State and Federal taxes to clean up litter and waste associated with single-use bags…." (County of Santa Cruz Ordinance No. 5103 § 5.48.010(B)(9), http://goo.gl/PUdEi.) The findings in the Santa Cruz County ordinance are full of myths and exaggerations. Santa Cruz County did not prepare an EIR. However, it has imposed a 25-cent paper bag fee. (§ 5.48.020(C).)

CALCULATION OF ANNUAL COST PER HOUSEHOLD AND PER PERSON FOR PLASTIC BAG LITTER AND WASTE

The claim: "Californians Against Waste estimates that state residents pay up to $200 per household per year in state and local fees and taxes to clean up litter and waste associated with single-use bags." (AR tab 83 at 2.) If that figure is correct, the statewide cost would amount to $2.48 billion. (There are 12.4 million households and 37.7 million residents in California. http://quickfacts.census.gov/qfd/states/06000.html.)

Statewide litter costs: According to the Commissioner's letter and the LA County EIR, the cleanup and disposal budget for all public agencies in California for all types of litter, not just plastic and paper bags, is ***$375 million***. (AR tab E at 2; LA County EIR at 13-16.)

Plastic bag percentage of total litter: San Francisco conducted a litter audit before it banned plastic bags in 2007 and found that plastic bags (including retail and non-retail bags) were ***2.5%*** of total litter. (AR tab 78 at 29.) Toronto conducted a litter audit in 2006 and found that plastic bags (including retail and non-retail bags) were 1.72% of total litter. At that time, there were no plastic bag restrictions in Toronto. (AR tab 77 at 35.) There are no other litter audits in the record.

Plastic bag litter cost per household: ($375 million ÷ 12.4 million) x 2.5% = ***76 cents*** per household per year. (***25 cents*** per person per year.)

Statewide landfill costs for plastic bags: The Commissioner states that public agencies in California spend an additional "***$25 million*** to dispose of discarded plastic bags in landfills." (AR tab 83 at 2.)

Statewide plastic bags landfill cost per household: $25 million ÷ 12.4 million = ***$2.01*** per household = ***66 cents*** per person per year.

Marin landfill cost for plastic bags: The Redwood Landfill tipping fee is about $55 per ton. (http://goo.gl/tKPUc.) Marin disposes of 539.87 tons of plastic bags annually. (AR tab 83 at 2.) Therefore, landfill cost = $29,692 = ***36 cents*** per household = ***12 cents*** per resident per year.

Based on the record, the statewide cost for plastic bag cleanup and disposal = $2.77 per household = 91 cents per person.

Marin residents pay less. They pay about
$1.12 cents per household = 37 cents per person.

CONCLUSION

The Supreme Court ruling in *Manhattan Beach* requires that the County prepare an EIR before banning plastic bags. The County abused its discretion and violated CEQA by not preparing an EIR.

WHEREFORE, Plaintiff requests that this court reverse the judgment of the trial court denying the writ of mandate; order or require the trial court to order repeal of the Ordinance; and order or require the trial court to order the County to prepare an EIR before banning plastic bags.

DATED: April 3, 2012

STEPHEN L. JOSEPH

Attorney for Plaintiff and Appellant
SAVE THE PLASTIC BAG COALITION

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 9,368 words, including footnotes, excluding the Table of Contents, the Table of Authorities, this Certificate of Compliance, and the Proof of Service.

In making this certification, I have relied on the word count of the computer program used to prepare the brief.

DATED: April 3, 2012

STEPHEN L. JOSEPH

_____

Attorney for Plaintiff and Appellant
SAVE THE PLASTIC BAG COALITION

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am an active member of the State Bar of California and not a party to the within action. My business address is 350 Bay Street, Suite 100-328, San Francisco, CA 94133.

I served the foregoing document described as APPELLANT'S REPLY BRIEF in this action as follows.

BY FEDERAL EXPRESS

I maintain an account with Federal Express. On April 4, 2012, I placed one true copy of said document in a sealed Federal Express container and deposited it in a Federal Express drop-off receptacle in San Francisco, California. The Airbill was marked "FedEx Priority Overnight (Next business morning)" delivery; payment to be charged to sender's account; and permit delivery without signature. The names and address on the Airbill and the numbers of copies enclosed were as follows:

Patrick K. Faulkner
COUNTY COUNSEL
David L. Zaltsman, Deputy
3501 Civic Center Drive, #275
San Rafael, CA 94903
Phone: (415) 499-6127

County Counsel and I have agreed that we will serve all briefs by Federal Express or other overnight means, next business morning delivery.

BY PERSONAL DELIVERY

On April 4, 2012, I personally delivered four copies to the Supreme Court of California at the following address:

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

BY MAIL

On April 4, 2012, I placed true copies thereof in sealed envelopes with postage fully prepaid in the United States Mail at San Francisco, California. The names and addresses on the envelopes and the number of copies were as follows:

One copy for delivery to Superior Court Judge Lynn Duryee:

Civil Clerk
Room 113
Marin County Superior Court
3501 Civic Center Drive
San Rafael, CA 94903

One copy addressed as follows:

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

I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated herein.

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

Executed on April 4, 2012 at San Francisco, California.

_____
STEPHEN L. JOSEPH