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SAVE THE PLASTIC BAG COALITION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

SAVE THE PLASTIC BAG COALITION, an unincorporated association, Petitioner, v. CITY AND COUNTY OF SAN FRANCISCO, a political subdivision of the State of California and a municipal corporation; SAN FRANCISCO PLANNING DEPARTMENT, an agency of the City and County of San Francisco; SAN FRANCISCO DEPARTMENT OF THE ENVIRONMENT, an agency of the City and County of San Francisco; and DOES 1-100, inclusive, Respondents.	Case No. CPF-12-511978 Action filed: February 29, 2012 CEQA case assigned to Dept. 503 **PETITIONER'S REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION TO STAY IMPLEMENTATION AND ENFORCEMENT OF CARRYOUT BAG ORDINANCE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF STEPHEN L. JOSEPH** Hearing date: June 1, 2012 Time: 9:00 a.m. Dept. 503

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ARGUMENT

I. INCREDIBLY, THE CITY COMPLETELY IGNORES THE SUPREME COURT'S RULING IN *MANHATTAN BEACH*

How on earth can the City completely ignore the ruling of the Supreme Court in *Manhattan Beach*? It is like discussing abortion law without mentioning *Roe v. Wade*. The City does not deal with the Supreme Court's ruling, because it cannot. The City's silence speaks volumes. This Court must apply the *Manhattan Beach* ruling and require an EIR.

II. GUIDELINES §§ 15307 AND 15308 DO NOT APPLY TO LEGISLATIVE ACTS; THEY ONLY APPLY TO "REGULATORY" ACTIONS

The City argues that categorical exemptions are based on a two-level hierarchy: ministerial versus discretionary acts. (City brief at 5.) In fact §§ 15307/08 uses the term "regulatory."

> 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. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption.
>
> 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.

It is obvious that §§ 15307/08 are referring to derivative regulatory actions, not enabling legislative actions, because the actions taken by regulatory agencies must be "authorized by state law or local ordinance." The City argues that the police power authorizes the Ordinance banning plastic bags. (City brief at 5.) The City is grasping at straws. The police power does not convert legislative actions into regulatory actions.

The CEQA Guidelines are issued by the Secretary for Natural Resources. 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.)

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 shows that the Secretary did not intend to exempt legislative activities. Clearly, §§ 15307/08 address actions further down the food chain that the initial legislation.

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 Cal.4th 709, 715.)

A categorical exemption for all "green" *ordinances* would make a mockery of CEQA and would be damaging to the environment. The categorical exemptions in §§ 15307 and 15308 must not be treated as a license to evade CEQA.

If a city or county could ban plastic bags without any CEQA environmental review, simply by claiming that it is exempt from CEQA under §§ 15307/08, the Supreme Court's ruling in Manhattan Beach ruling would be meaningless.

III. THE MARIN SUPERIOR COURT RULING DOES NOT HELP THE CITY

The City points out that the Marin County Superior Court ruled that Marin County could rely on Guidelines §§ 15307/08 when banning plastic bags. (City brief at 4.) As noted in Petitioner's brief, Petitioner asked Marin Superior Court Judge Duryee address the Supreme Court's ruling in *Manhattan Beach* and the wording of Guidelines §§ 15307/08 in a statement of decision. She declined and her ruling is silent on these issues. She disposed of the factual and legal issues in just two sentences: "The Court finds that the County acted reasonably in enacting the Ordinance and was entitled to reply on the CEQA Exemption. There is substantial evidence to support the County's legislative action, as required by Section 21168.5." (City Exh. A.) With all due respect to Judge Duryee, that is not a reasoned decision. It is an unreasoned and dismissive conclusion. Petitioner has appealed and is confident that it will win.

IV. THE *MAGAN* CASE DOES NOT HELP THE CITY

The City states: "In a procedurally indistinguishable case, the Court of Appeal held that the Kings County Board of Supervisors properly invoked the Class 8 Exemption for an ordinance restricting the application of sewage on agricultural land. *Magan v. County of Kings* (2002) 105 Cal.App.4th 468." This is the only case authority cited by the City to try to counter the wording of §§ 15307/08. In fact, the Court of Appeal made no such ruling in *Magan* and the City's single-sentence treatment of the case is, to put it mildly, highly misleading. To ensure that there is no misunderstanding of the *Magan* case, Petitioner reviews it here extensively.

Magan concerned the spreading of sewage sludge on agricultural land as a fertilizer. Sewage sludge is subject to strict standards in U.S. 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 of Appeal 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 and said it was intentionally not addressing the issue. The court stated:

> 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 *WOLLMER* CASE DOES NOT HELP THE CITY

The City cites *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329. The city claims that the Court of Appeal held that if a mitigation measure is a component of a project, it might be taken into account in determining whether to claim a categorical exemption. (City brief at 6.) That is ***not*** what the Court of Appeal said. Let us examine the facts and the ruling.

The City of Berkeley approved a housing project. Stephen Wollmer opposed the project and cited CEQA. He argued that the project developer's dedication of land for a left-turn lane to ease traffic flow was a mitigation measure that was improperly taken into account in determining that the project was categorically exempt. The court disagreed. It is *impossible* to understand the ruling without reading the following part of the opinion.

> As the lower court found, the dedication of a five-foot right-of-way, enabling the City to improve the San Pablo and Ashby Avenues intersection, was not a CEQA mitigation measure for project impacts, but a component of the project that assisted the City with an ***existing traffic issue***. [Emphasis added.]
>
> Comments by the City's traffic engineer staff on the draft traffic study indicated a need to explore alternatives to the Carrison Street/San Pablo intersection, and also the possibility of a westbound left-turn lane which was "considered the City's highest priority for intersection improvements." Assuming this latter comment refers to the San Pablo and Ashby Avenues intersection, as Wollmer suggests, it is true that ***by the time of the final traffic study, the Developers had made the dedication offer and that reality was included in the traffic analysis.*** [Emphasis added.] Our response is, so what? The point is, the offer of dedication did become part of the project design, ***improving an existing traffic concern***. [Emphasis added.] This is no secret. The revised applicant statement for July 2008 specifically noted that during the first half of 2008, the project underwent "several programmatic and architectural revisions to improve its contribution to the community," including the Ashby Avenue left-turn lane dedication. And further: "The applicant and city staff have been working diligently for the past several months to understand and address both the ***existing traffic issues*** [emphasis added] and also the long term effects of the proposed project ad [*sic*] San Pablo corridor development ***in general***. **[Emphasis by court.]** The future installation of the left turn lane will create a much improved situation for the intersection ***in general***, and especially on Ashby Avenue during peak hours." **[Emphasis by court.]**
>
> Wollmer offers no authority for the proposition that a positive effort between developers and a municipality to improve the project for the benefit of the

> community and address existing traffic concerns somehow becomes an evasion of CEQA. *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1108 (*Salmon Protection, supra,*) is of no help. There, the county found that the proposed construction of a home within a riparian area deemed of critical concern was categorically exempt from CEQA. In the process, it found there was no reasonable possibility of significant adverse impacts. However, in arriving at this ultimate conclusion, the county relied on proposed mitigation measures to grant the categorical exemption. (*Salmon Protection, supra*, at pp. 1106-1108.) The appellant there argued that it was okay to rely on proposed mitigation measures in deciding whether the project was eligible for a categorical exemption, if those measures were included in the initial project application. The reviewing court said no, that reliance on mitigation measures, whether in the application or later adopted, involves an evaluative process that must be conducted under established CEQA procedures. (*Salmon Protection, supra*, at p. 1108.)
>
> Here, the Developers dedicated land for a left-turn lane. Unlike the situation in Salmon Protection, the traffic situation improved by the Developers' dedication ***preexisted*** the proposed project. [Emphasis added.] The dedication became ***part of*** the project design--it was never a ***proposed*** mitigation measure. **[Emphasis by court.]**

(*Wollmer, supra,* 193 Cal.App.4th at 1352-1353.)

The dedication of land for a left-hand turn lane was deemed by the court to be part of the ***preexisting status quo***. The following words are the critical part of the opinion: "by the time of the final traffic study, the Developers had made the dedication offer and that reality was included in the traffic analysis." (*Wollmer*, supra, 193 Cal.App.4th at 1353.) The dedication offer was part of the project design only in the sense that it was part of the ***preexisting reality***, not a ***proposed*** mitigation measure. (*Id.*)

In this case, the 10-cent paper bag fee was not a ***preexisting reality***. It was a ***proposed*** mitigation measure to reduce the impacts of this particular project.

We can 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 Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 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.

(*Id.* at 1200, citations omitted.) Based on this reasoning, there are no "standards" or "procedure" for evaluating the 10-cent paper bag fee as part of the categorical exemption determination process. Therefore, the fee must be treated as a mitigation measure.

VI. PETITIONER MADE A FAIR ARGUMENT

The standard for determining whether a plaintiff has demonstrated "unusual circumstances" under § 15300(c)(2) is the "fair argument" standard. In *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, the court stated:

> 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, italics by court.)

The First District Court of Appeal recently confirmed that the "fair argument" standard" applies to categorical exemptions. (*Berkeley Hillside Preservation v. City of Berkeley* (2012) ___ Cal.App.4th ___, Slip Op. at 16.) 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." (*Id.,* Slip Op. at 13.)

An agency cannot rely on contrary evidence to refute a fair argument. (Guidelines § 15064(f)(1); *County Sanitation District No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1580.) Nevertheless, the City attempts to do exactly that. The City alleges that a 5-cent single-use bag fee in DC resulted in an 81% reduction in single-use bags and that studies from other jurisdictions show fees of 5-25 cents have reduced single-bag use by 60-95% (City brief at 9.) Without waiving its objection that the fee cannot be taken into account in determining whether the City can rely on categorical exemptions, Petitioner extensively addressed the DC fee and the other jurisdictions in its written objections and showed that they are ***totally different from and inapplicable to San Francisco***. (Petitioner's Exh. D at 76-82; AR 4084-90.) The City's single-sentence descriptions and use of these examples is utterly misleading.

The agency must respond to the fair argument and 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.) The City ***ignored*** Plaintiff's objections, made no findings regarding Petitioner's points, and thereby ***waived*** the right to challenge Petitioner's fair argument in this litigation. Actually, the City doesn't really respond to Petitioner's fair argument at all in its brief. It takes a dismissive and almost flippant approach: plastic bags are bad, end of story, the Court will rubber-stamp the categorical exemption determination, no need to take Petitioner's arguments seriously or even discuss them.

VII. PETITIONER ADOPTS THE RULING OF THE SANTA BARBARA SUPERIOR COURT IN THE *CARPINTERIA* CASE REGARDING RETAIL FOOD CODE PREEMPTION

On May 15, 2012, the Santa Barbara Superior Court overruled the City of Carpentaria's demurrer in *Save The Plastic Bag Coalition v. City of Carpinteria.* (Petitioner's Exh. L.) Judge Anderle's ruling is fully reasoned and sound. He ruled that the Retail Food Code preempts the City of Carpentaria's ordinance banning plastic bags at restaurants and other food facilities and creating standards for paper bags. Petitioner hereby adopts his ruling in response to the City's arguments and incorporates it herein by reference. The ruling is attached hereto.[1]

VIII. THE CITY HAS NOT RESPONDED TO PETITIONER'S STATEMENTS ABOUT THE DIRE CONSEQUENCES OF NOT ISSUING AN INJUNCTION

The City has not responded in any way to Petitioner's statements about the dire consequences of not granting the motion. ***It must be deemed to have conceded the points.***

One of the many consequences is a serious health risk. The University of Arizona tested reusable bags carried by shoppers in San Francisco and other areas. (AR 755, 757-771.) The University stated: "Our findings suggest a serious threat to public health, especially from coliform bacteria including E.coli, which were detected in half the bags sampled.... The bacteria levels found in reusable bags were significant enough to cause a wide range of serious health problems and even lead to death – a particular danger for young children, who are especially vulnerable to food-borne illness." (AR 755.)

Petitioner's Exh. K is a report by Oregon public health officials. Nine members of a soccer team, girls aged 13-14 and adults, experienced vomiting and diarrhea. Symptoms ranged from one to seven days. Five presumptive secondary infections among household members were identified. All the people who became ill consumed cookies from sealed packages that

[1] The City in a footnote points out that AB 2449 prohibits cities and counties from imposing fees on plastic bags at supermarkets checkouts. (City brief at 12, n.1.) So what? Is the City suggesting that this means that with respect to restaurants, cities and counties may ban plastic bags, create legal standards for the materials used in paper bags, impose a 10-cent fee for paper and compostable bags, and encourage compostable and reusable bags – all without violating Retail Food Code preemption? Surely not. Such an argument would be illogical.

were in the reusable bag. They touched the packaging of the cookies that were in contact with the inside of the reusable bag. Stool specimens were positive for norovirus GII.2. Two swabs taken from the reusable bag two weeks later were positive for the same norovirus genotype. The report states: "Fingers contaminated with norovirus have been shown to sequentially transfer virus to up to 7 clean surfaces, and environmental contamination with transmission via fomites has been documented. Incidentally, this also illustrates one of the less obvious hazards of reusable grocery bags."

The City by its Ordinance is irresponsibly encouraging people to bring their own reusable bags to carry prepared food from restaurants and other food facilities. This is a proven major public health hazard. No wonder that Health and Safety Code § 114018(d) states that restaurant and other food facility carryout bags shall not be reused.[2]

CONCLUSION

If the motion is denied and Petitioner wins this case in this Court or on appeal, this Court will be presented with an almighty mess to try to unravel, including a sales tax nightmare, possible class actions, possible invalid criminal convictions, and possibly a public health issue.

DATED: May 21, 2012 **STEPHEN L. JOSEPH**

Attorney for Petitioner
SAVE THE PLASTIC BAG COALITION

[2] Before the Ordinance was adopted, Petitioner repeatedly advised the City that it would file a lawsuit. The Ordinance was finally adopted on February 14, 2012. Petitioner filed this lawsuit on February 29, 2012. The Complaint was captioned in part: "REQUEST FOR... INJUNCTIVE RELIEF." Petitioner stated in the Complaint that it would file a motion a preliminary injunction. (Prayer for Relief ¶ E.) Petitioner applied *ex parte* for an early hearing date on the motion. If the City spent money and taken preparatory steps, it did so knowing full well that the Ordinance was being challenged in court and that a preliminary injunction had been requested. ***It knowingly assumed the risk, apparently assuming that a San Francisco judge would never rule against it on the subject of plastic bags, no matter what laws were broken or disregarded. The City is taking this Court for granted.***

DECLARATION OF STEPHEN L. JOSEPH

I, Stephen L. Joseph, declare as follows:

1. I know all of the facts herein of my own personal knowledge, and if called upon as a witness to this proceeding, I would and could competently testify thereto under oath.
2. I am an attorney admitted to practice in the State of California.
3. I am counsel for Petitioner Save The Plastic Bag Coalition.
4. I am also counsel for the plaintiff in *Save The Plastic Bag Coalition v. City of Carpinteria,* Santa Barbara Superior Court, Case No. 1385674 (the "Carpinteria case").
5. The document appended hereto is a true and correct copy of a ruling adopted by the Santa Barbara Superior Court in the Carpinteria case on May 15, 2012.

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

Executed on May 21, 2012 at San Francisco, California.

STEPHEN L. JOSEPH

CIVIL LAW AND MOTION CALENDAR

Final Decisions

May 15, 2012

(4) Save the Plastic Bag Coalition v. City of Carpinteria

Demurrer of City of Carpinteria to Complaint

Ruling:

For the reasons set forth herein, the demurrer of defendant City of Carpinteria to the complaint is overruled. Defendant shall file and serve its answer to the complaint on or before June 15, 2012.

Background:

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

"The purpose of these provisions is to promote:

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

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

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

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

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

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

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

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

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

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

"'Point of Sale' means the location in the commercial establishment where purchase is made."

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

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

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

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

Analysis:

"The function of a demurrer is to test the sufficiency of the complaint alone and not the evidence or other extrinsic matters." (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1283.) "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.

[Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6, internal quotation marks omitted.) "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.)

Request for Judicial Notice

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

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

Plaintiff's Cause of Action

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

"Any person ... who desires a declaration of his or her rights or duties with respect to another, ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises ...." (Code Civ. Proc., § 1060.) "It is well established that parties may seek declaratory relief with respect to the interpretation and application of local ordinances." (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1250.)

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

The California Retail Food Code

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

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

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

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

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

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

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

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

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

The *California Grocers* Case

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

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

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

The Court then summarized the sweep of preemption under the Retail Food Code: "Thus, the state alone may adopt 'health and sanitation standards for retail food facilities.' [Citation.] The remainder of the statutory scheme demonstrates by way of example the precise scope of exclusive state regulation, comprehensively detailing standards for, e.g., employee training on health matters ([Health & Saf. Code], §§ 113947–113947.3), employee health and hygiene (*id.*, §§ 113949–113978), food transportation, storage, and preparation (*id.*, §§ 113980–114057.1),

food display and service (*id.*, §§ 114060–114083), food labeling (*id.*, §§ 114087–114094), the design and sanitizing of food preparation areas and utensils (*id.*, §§ 114095–114185.5), and the design and cleanliness of food facilities (*id.*, §§ 114250–114282)." (*California Grocers*, *supra*, 52 Cal.4th at p. 189, footnote omitted.)

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

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

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

Purpose of the City's Ordinance

City goes to some length to discuss and argue the importance of the Ordinance in addressing environmental concerns of significant local concern. As discussed above in the context of the request for judicial notice, the Ordinance itself sets forth those concerns as being a basis for its enactment. The stated purpose of the Ordinance is not challenged by plaintiff. However, as

California Grocers makes clear, the legal analysis to determine whether or not state law expressly preempts local law depends upon the scope of the state's exclusivity. "To rest preemption analysis solely on considerations of purpose would generate the anomalous circumstance, rejected by the United States Supreme Court, that one jurisdiction's measure might survive preemption, while another identical measure passed in a different jurisdiction might fall, 'merely because its authors had different aspirations.'" (*California Grocers*, *supra*, 52 Cal.4th at p. 190, fn. 4, quoting *Shady Grove Orthopedic Associates, P. A. v. Allstate Ins. Co.* (2010) 559 U.S. ___, ___ [130 S. Ct. 1431, 1441, 176 L. Ed. 2d 311].)

Preemption Analysis

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

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

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

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

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

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

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

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

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

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

Returning to the central question of whether there is overlap between the Retail Food Code and the Ordinance, the above discussion demonstrates that in some respects the Ordinance provides standards for materials used in statutorily defined "single-use articles" that are different from the standards provided in the Retail Food Code. Under the Ordinance, single-use plastic bags are

never allowed; paper bags are allowed only if they contain sufficient post-consumer recycled content. The Retail Food Code allows single-use plastic bags and paper bags, but only if the materials used in those bags meet the qualitative requirements set forth in the statute. Consequently, the Retail Food Code and the Ordinance contain overlapping standards for acceptable materials used in making "single use articles."

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

The Extent of This Disposition

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

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

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am over the age of 18 and not a party to the within action. My business address is 350 Bay Street, Suite 100-328, San Francisco, CA 94133.

On May 22, 2012, I personally delivered a true and correct copy of the foregoing PETITIONER'S REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION TO STAY IMPLEMENTATION AND ENFORCEMENT OF CARRYOUT BAG ORDINANCE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF STEPHEN L. JOSEPH to Counsel for Respondents at San Francisco City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102-4682, in an envelope clearly labeled to identify the attorneys being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. The envelope was labeled as follows:

DENNIS J. HERRERA
City Attorney
KRISTEN A. JENSEN
JAMES M. EMERY
Deputy City Attorney
San Francisco City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682

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

Executed on May 22, 2012 at San Francisco, California.

STEPHEN L. JOSEPH