2nd Civ. No. B 240592

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION THREE

LEE SCHMEER, et al.
Petitioners and Appellants,

v.

COUNTY OF LOS ANGELES, et al.
Respondents and Appellees.

On Appeal from the Superior Court, County of Los Angeles
The Honorable James C. Chalfant, Judge Presiding
BC 470705

RESPONDENTS' BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, **APPELLATE DISTRICT, DIVISION**	Court of Appeal Case Number: 2nd Civ. B 240592
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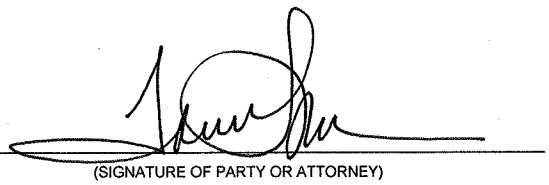
▶ 
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I.

INTRODUCTION

The United States Supreme Court noted in a June 2012 opinion that "the essential feature of any tax...produces at least some revenue for the government." (*Nat'l Fed'n of Indep. Bus. v. Sebelius,* (2012) 132 S. Ct. 2566, 2594.) Without the benefit of the High Court's published opinion, the trial court in this matter reached the same conclusion earlier this year. In April 2012, the trial court ruled that the ordinance at issue banning plastic carryout bags and regulating recyclable paper carryout bags[1] (the "Ordinance"), did not impose a tax because it generates no revenue for the County of Los Angeles (the "County"). (Joint Appendix in Lieu of Clerk's Transcript , Vol. III, 0696–0707, [3 JA 696-707].) Indeed, Appellants, Hilex Poly Co., LLC and a few named "taxpayers" (collectively "Hilex"[2]), concede that the Ordinance generates no government revenues.

The County is among a number of local jurisdictions in California that have taken steps to address the environmental problems caused by plastic bags. The County adopted the Ordinance at issue in November 2010, which bans the use of plastic bags and requires stores to separately

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[1] "Plastic carryout bag(s)" shall be referred to as "plastic bag(s)". "Recyclable paper carryout bag(s)" shall be referred to as "paper bag(s)".

[2] Hilex is a South Carolina manufacturer of plastic bags. Lee Schmeer and Salim Bana are employees of Hilex. None of the Appellants appear to be involved in the paper bag industry.

itemize and price paper bags at 10 cents. It is undisputed that the stores keep the entire 10 cents; not a penny of it goes to the County.

Still, Hilex seeks to invalidate the Ordinance by claiming that the 10 cents is a "tax" that was not approved by a super-majority vote as required by Proposition 26. The trial court rejected this argument for a very basic reason. It ruled that the 10 cents is not a "tax" because it does not raise government revenue. (3 JA 704.) Further, even if it were a "tax," the trial court concluded that Proposition 26's exemption for "a specific benefit conferred" on the "payor" would apply since a customer receives a paper bag in exchange for paying 10 cents, and that the price is supported by substantial evidence. (Cal.Const., art. XIIIC, §1(e); 3 JA 706.)

On appeal, Hilex insists that the trial court erred and that the 10 cents customers pay when they buy a paper bag, is a "tax." To this end, Hilex points out that Proposition 26 refers to "any levy, charge, or exaction of any kind imposed by a local government" (Cal.Const., art. XIIIC, §1), and argues that this language includes the 10 cents at issue. But in making this argument, Hilex has fitted itself with a pair of blinders of a very narrow scope. Hilex ignores that Proposition 26 uses a definition of "tax" that when considered in context, refers to charges and fees that actually produce government revenues. The ballot materials and other indicia of the voters' intent reinforce the same conclusion: a "levy, charge, or exaction" must function as a tax and raise government revenue.

Throughout its brief, Hilex takes issue with the County's decision to adopt the Ordinance contending that it has the economic effect of requiring customers to "pay twice for the same bag". But Hilex's complaints, which are rooted in its economic self-interest, are misplaced, and do not serve as a proper basis for appeal. The Ordinance is a valid exercise of the County's police power to regulate matters of public concern, and its police powers allow it to specify what a third party may charge for a particular good or service when it furthers a legitimate governmental purpose.

Although Hilex may believe that a plastic bag ban is unwise, the County reached a different conclusion based on extensive studies describing the environmental harm and costs caused by plastic bags. Hilex's quibble with the goals of the Ordinance and its hyperliteral reading of Proposition 26 is not enough to invalidate the Ordinance. The Ordinance is otherwise severable and the plastic bag ban should continue.

The judgment should be affirmed.

II.

STATEMENT OF THE FACTS AND THE CASE

A. The Ordinance was Adopted by the County Pursuant to Its Police Powers to Address the Negative Impacts of Plastic Bags.

The Board of Supervisors for the County of Los Angeles (the "Board") adopted the Ordinance at issue on November 23, 2010, after years of analysis and public outreach by the County.

1. Extensive Analysis, Review, and Compliance with CEQA, Support the County's Decision to Ban Plastic Bags.

The Board, in April 2007, requested that County staff analyze the issue of plastic and paper bag consumption in Los Angeles County. (Certified Record ("CR"), Vol. VI, 1530 [6 CR 1530].) County staff analyzed this issue and returned to the Board on September 4, 2007 with a written report titled "An Overview of Carryout Bags in Los Angeles County – *A Staff Report to the Los Angeles County Board of Supervisors, August 2007*" (the "Staff Report"). (6 CR 1528-1584.) The Staff Report identified a number of key findings, including that plastic bags have been found to significantly contribute to litter and have other negative impacts on marine wildlife and the environment. (6 CR 1535.)

On January 22, 2008, the Board directed County staff to return with a draft ordinance banning plastic bags (the "Project") for the Board's consideration, and to complete any environmental review required under the California Environmental Quality Act ("CEQA").

In compliance with CEQA, the County prepared, and the Board certified and adopted on November 16, 2010, a 1400-page Final Environmental Impact Report ("FEIR") entitled "Ordinances to Ban Plastic Carryout Bags In Los Angeles County." (3 JA 560.) The FEIR studied the litter problem that plastic bags pose in the County and the possible environmental impacts that could result from adopting an ordinance

banning plastic bags. (1 CR 26 through 5 CR 1413.) The Board also adopted a Findings of Fact and Statement of Overriding Considerations ("FOFSOC"). (6 CR 1414-1493.) Significantly, the FOFSOC sets forth a number of reasons why the Board was moving forward with a plastic bag ban despite the negative impacts that may result from increased paper bag usage. (3 JA 535-540.)

While the plastic bag industry threatened repeatedly to file a CEQA lawsuit challenging the FEIR and FOFSOC, no lawsuit was ever filed within the applicable statute of limitations period. All CEQA challenges are now time-barred, and there is a conclusive presumption that the FEIR and FOFSOC are legally adequate. (Cal. Pub. Resources Code §§21167, 21167.2; *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors,* (2010) 48 Cal. 4th 32.)

As documented in the FEIR and the FOFSOC, plastic bags contribute to the litter stream, increase litter clean-up costs, cause urban blight, and have adverse effects on marine wildlife. (3 JA 523-525.) Plastic bags do not biodegrade, persist in the urban and marine environment, and are recycled at a rate of less than 5 percent. (3 JA 538-540.) In contrast, paper bags are less likely to be littered, are biodegradable and compostable, have a larger volume for carrying more groceries, and are recycled at a higher rate of 36.8 percent. (3 JA 526.) Paper bags do,

however, like their plastic counterparts, have impacts on greenhouse gas ("GHG") emissions. (3 JA 1470.)

Recognizing the serious impacts from plastic bag use, and balancing the impacts from paper bag use, the Board acted pursuant to its police powers to enact the Ordinance on November 23, 2010 to ban the use of plastics bags, and to require affected stores to separately itemize and price paper bags at 10 cents. Pursuant to that authority, the Board enacted Ordinance No. 2010-0059 in November 2010 to add to the Los Angeles County Code, Chapter 12.85 CARRYOUT BAGS to Title 12 – Environmental Protection. (3 JA 464–473; 592.)

As supported by the CEQA record, the Ordinance restricts the use of plastic and paper bags for bona fide purposes. These purposes, as identified below, are reiterated numerous times in the FEIR and the FOFSOC:

> The County is seeking to substantially reduce the operational cost and environmental degradation associated with the use of plastic carryout bags in the County, particularly the component of the litter stream composed of plastic bags, and reduce the associated government funds used for prevention, clean-up, and enforcement efforts.
>
> The County has identified five goals of the proposed ordinances, listed in order of importance: (1) litter reduction, (2) blight prevention, (3) coastal waterways and animal and wildlife protection, (4) sustainability (as it relates to the County's energy and environmental goals), and (5) landfill disposal reduction.

(3 JA 476; 521.) In addition, the Board's countywide objectives in banning plastic bags include:

- Reduce the Countywide consumption of plastic carryout bags from the estimated 1,600 plastic carryout bags per household in 2007, to fewer than 800 plastic bags per household in 2013.
- Reduce the Countywide contribution of plastic carryout bags to litter that blights public spaces Countywide by 50 percent by 2013.
- Reduce the County's, Cities', and Flood Control District's costs for prevention, clean-up, and enforcement efforts to reduce litter in the County by $4 million.
- Substantially increase awareness of the negative impacts of plastic carryout bags and the benefits of reusable bags, and reach at least 50,000 residents (5 percent of the population) with an environmental awareness message.
- Reduce Countywide disposal of plastic carryout bags in landfills by 50 percent from 2007 annual amounts.

(3 JA 459; 477; 521.)

The Ordinance passed with significant support from the public, government leaders, environmental groups like Heal the Bay, Californians Against Waste, and the Surfrider Foundation, and the California Grocers Association (who represents many of the stores affected by the Ordinance). (3 JA 568-590.) The County received over 1,800 signed petitions urging the Board to ban plastic bags. (6 CR 900-1204.)

2. The Ordinance Requirements are Reasonable.

The main purpose of the Ordinance is to ban the use of plastic bags at affected stores. (Ordinance ("Ord.") §12.85.020.) The Ordinance does not require stores to give out paper bags. If a store wants to eliminate paper bags as a choice for customers, it may do so. Likewise, the Ordinance does not require a customer to use a paper bag—the Ordinance provides that a

customer may use bags of any type brought to the store, including a reusable bag, or no bag at all. (Ord. §12.85.030.) If a store chooses to make paper bags available, and a customer chooses to purchase a paper bag, the store must separately itemize and charge 10 cents for each bag provided. (Ord. §12.85.040.)

The 10 cents is collected by the store when a customer elects to purchase a paper bag, and the moneys are retained by the store.[3] (Ord. §12.85.040.) The 10 cents, which is a pricing protocol and cost-pass through, is the reasonable average cost to a store of providing paper bags to its customers. (6 CR 1505, 1570; 3 JA 460.) This is confirmed by substantial evidence in the record as summarized in the November 16, 2007 Staff Board letter, and as the trial court noted, Hilex failed to offer any rebuttal evidence that 10 cents is not the reasonable average cost. (3 JA 460; 707.)

The stores, in their discretion, direct the monies collected from the sale of the paper bags towards the cost for compliance with the Ordinance,

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[3] Hilex characterizes the County's decision to allow stores to retain the 10 cents as a recent "novel ploy" and an "end run" to get around Proposition 26. (*See* Opening Brief, p. 47). The record, however, evidences that the County has been entertaining the concept of allowing stores to retain 10 cents for the sale of carryout bags since 2007. (6 CR 1582.) The County was also aware of proposed state legislation AB 87 (2009) and AB 68 (2009) that allowed stores to retain 7 and 10 cents, respectively. (3 JA 461.)

recovery of actual costs for providing paper bags, or for costs associated with any educational materials or campaign encouraging the use of reusable bags, if any. (Ord. §12.85.040D.) Significantly, stores are not required to have educational materials or a campaign encouraging the use of recyclable bags—any efforts undertaken are purely voluntary. (Ord. §12.85.040D.) There is no need to audit the stores, given that substantial evidence establishes that 10 cents is the reasonable average cost of a paper bag. (6 CR 1505, 1570; 3 JA 460.)

3. Representatives of the Plastic Bag Industry Challenge the Ordinance in the Trial Court.

Almost a year after the County enacted the Ordinance, Hilex filed a Complaint for Writ of Mandate, Injunctive Relief, and Declaratory Relief, alleging that the measure imposed an "illegal and unconstitutional special tax" that violates the California Constitution because it was not approved by a vote of qualified electors in the County of Los Angeles. (3 JA 613:2-5.) Though Hilex acknowledges that it had "closely followed the legislative process before the Los Angeles County Board of Supervisors culminating in the adoption of [the] Ordinance" and "studied and [were] very familiar with the history and background of the Ordinance" (1 JA 69:7-13), Hilex filed suit well after the Ordinance had taken effect and plastic bags were already banned from the County's unincorporated areas.

The parties twice fully briefed the issues raised by the writ. The first round of briefing occurred in connection with Hilex's peremptory motion in Department 17 (Hon. Richard Rico), in preparation for a December 12, 2011 writ hearing date. (*See* 1 JA 30 (Opening Brief); 1 JA 89 (Opposition); and 1 JA 150 (Reply).)

However, Judge Rico did not hear the matter, and a second round of briefing occurred after the case was reassigned to Department 85 (Hon. James C. Chalfant). (*See* 1 JA 185 (Opening Brief); 2 JA 260 (Opposition); and 2 JA 419 (Reply)). Department 85 set a new hearing date of March 23, 2012. (1 JA 179.) The Joint Appendix of documents referred to by the parties begins at 3 JA 457; and is described in index format at 3 JA451.[4]

Before the trial court, Hilex argued that the County's Ordinance should be invalidated in its entirety because the 10 cent charge on paper bags is a special tax imposed without compliance with Proposition 26's requirement for approval by a two-thirds vote of the electorate. Hilex also argued that Proposition 26 did a complete reset of all tax law that existed prior to the passage of Proposition 26, and that there is no requirement that a tax generate revenue for the government. Finally, in an effort to restart

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[4] All documents in the Joint Appendix can be found, in full, in the Certified Record. The index at 3 JA 451 provides a description of documents cited by the parties in the Joint Appendix, and the corresponding bate numbers in the Certified Record. The Certified Record was lodged with Department 85 on March 8, 2012.

plastic bag sales in the County, Hilex argued that the plastic bag ban was not severable from the paper bag provision in the Ordinance, and as a result, the entire Ordinance should be invalidated.

The County in response disputed the application of Proposition 26 to the Ordinance and noted that the 10 cents fee is not collected by the County, does not generate revenue for the County, and is not placed into any County fund to pay for any County program. Given that the charge does not generate revenues to pay for a County program, the 10 cents does not come within the definition of "tax" in Proposition 26, or meet the requirements of a special tax as set forth in the California Constitution. The County also argued that the 10 cents falls within the Proposition 26 exceptions for charges imposed for a benefit, product or service provided "which [do] not exceed the reasonable costs of providing" that benefit, product or service. (Cal.Const., art. XIIIC, §1(e)(1).) Finally, the County asserted that the Ordinance is otherwise severable, and that case law requires a presumption of validity for the plastic bag ban.

Despite having two opportunities for briefing, Hilex asserted in a few words in its Reply that the County cannot rely on the exception in Section 1(e)(1) because "certain customers …receive bags without charge". (2 JA 430.) Hilex did not brief this argument in a sufficient manner to allow the County or the trial court to understand and assess the merits of

Hilex's argument. Further, given this argument was raised in the Reply, the County had no opportunity to respond.

4. The Trial Court Rules in Favor of the County.

The trial court issued at the March 23, 2012 writ hearing, a tentative decision contained at 3 JA 681 that rejected Hilex's attempt to invalidate the Ordinance. The trial court found that Proposition 26's purpose is to "prevent local governments from raising revenue by disguising new taxes as fees without having to abide by constitutional voting requirements"; the Ordinance did not generate government revenue; and the Ordinance did not impose a special tax, given "[n]one of the money generated by the Ordinance is collected by the County and earmarked or spent for a specific purpose." (3 JA 688.)

The trial court further noted, "Where a local government has, as here, passed an ordinance pursuant to its police power that requires a third party to charge customers a fee for a particular item because the item bears a collective environmental cost from its use, the ordinance is intended to discourage the use of that item, and the local government receives no revenue or even indirect benefit from the fee, it does not qualify as a special or general tax under Proposition 218. As such it also is not []a tax under Proposition 26." (*Id.*)

Lastly, while it was not required to reach this issue given its ruling that Proposition 26 does not apply to the Ordinance, the trial court also

found that to the extent that affected stores are said to indirectly generate revenue for the County, then the "specific benefit or privilege" exception in Proposition 26 would apply. (*Id.* at 689; Cal. Const., art. XIIIC, §1(e)(1).) In ruling in the County's favor on this issue, the trial court noted that Hilex failed to timely and properly brief why Section 1(e)(1) did not apply, in order for the County and the trial court to assess the merits of its argument. (*Id.* at 690.)

Following oral argument, Hilex's counsel stipulated to summary denial of the declaratory relief cause of action, stating the "mandamus claim is central. I think your ruling on the mandamus claim essentially ends this case." (Reporter's Transcript of Proceedings, March 23, 2012 ["RT"], 45:9-13.) The Court subsequently entered judgment in the County's favor on April 6, 2012, consistent with its tentative decision, and a timely notice of appeal followed. (3 JA 696-709; 714–715.)

III.

STANDARD OF REVIEW

Hilex's arguments in this appeal implicate two standards of review. The Court reviews de novo the principal question in this case: whether the 10-cents charged for a paper bag is a "tax" under Proposition 26. That standard applies because resolution of the "tax" issue involves the meaning of Proposition 26's language, which presents a pure question of law, as applied to the undisputed fact that the bag fee does not raise any revenue

for the County. (*See Bruns v. E-Commerce Exchange, Inc.*, (2011) 51 Cal.4th 717, 724 (holding that "[s]tatutory interpretation is a question of law that we review de novo."); *California School Employees Assoc. v. Torrance Unified School Dist.*, (2010) 182 Cal.App.4th 1040, 1044 (reviewing de novo trial court's interpretation of statute because the "material facts are undisputed").

Further, to the extent statutory interpretation is involved, the de novo standard of review also applies to the trial court's secondary ruling that the bag fee, even if a "tax," comes within the exception stated in Section 1(e)(1) of Proposition 26. (*See Bruns v. E-Commerce Exchange, Inc., supra,* 51 Cal.4th at 724.) However, because Hilex challenged application of the exception as a factual matter, the substantial evidence standard of review applies to the trial court's factual findings that the bag fee qualifies for this exception. (*See SFPP, L.P. v. Burlington N. & S.F. Ry. Co.*, (2004) 121 Cal.App.4th 452, 461-62 (holding that "appellate courts independently review questions of law and apply the substantial evidence standard to a superior court's findings of fact"); (*Piedra v. Dugan,* (2004) 123 Cal.App.4th 1483,1489 (holding that substantial evidence standard applies whether the findings at issue were made by the court or a jury).

Although settled law provides that these standards of review apply, Hilex's Opening Brief at times, argues that resolution of this appeal must reflect Proposition 26's provision that required the County to "bear[] the

burden of proving by a preponderance of the evidence" (Cal.Const., art. XIIIC, §1(e)) that the bag fee is not a tax under Proposition 26 and that one of the Proposition's exceptions applies. However, Hilex provides no analysis or authority supporting this erroneous claim.

In context, Proposition 26's burden of proof provision refers to Division 5 of the Evidence Code, which in part describes which party has the burden of proof and the burden of producing evidence on various questions. (*See, e.g.,* Cal. Evid. Code § 500 ("Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting").) Yet, the burden of proof on factual matters in the trial court rarely has any impact on the standard of review, and Proposition 26's burden of proof provision is no different. The relevant cases are too numerous to cite, but where the party having the standard of proof prevailed at trial, the substantial evidence standard applies with full force to the losing party's claims that the record does not support the judgment.

For these reasons, Hilex's reliance on Proposition 26's burden of proof provision is misplaced. Proposition 26 does not change the rules that govern the interpretation of voter-enacted laws, diminish the evidentiary value of the evidence the County produced regarding application of Proposition 26's relevant exception, or in any way lessen Hilex's burden of proving on appeal that the trial court's ruling is erroneous. (*See Denham v.*

Superior Court, (1970) 2 Cal.3d 557, 564 (on appeal the trial court's judgment is "presumed correct".)

IV.

ARGUMENT

A. The County's Ordinance Does Not Impose a Special Tax in Violation of Proposition 26.

Hilex's challenge to the Ordinance requires this Court, like the trial court, to resolve issues regarding the meaning of Proposition 26. The courts apply general rules of statutory interpretation to ascertain the meaning of laws enacted by initiative. (*See Arias v. Superior Court,* (2009) 46 Cal.4th 969, 978.) Under these rules, the Court's "primary task" is to "ascertain the intent of the electorate" (*Id.*) based on the following analytic approach:

-- The Court "first examine[s] the statutory language, giving the words of the statute their ordinary and usual meaning and construing them in the context of the statute as a whole and the overall statutory scheme. [The Court] reads every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness" (*Farmers Ins. Co. v. Superior Court,* (2006) 137 Cal.App.4th 842, 851);

-- If the statutory language reveals an ambiguity, the Court considers "other indicia of the voters' intent, such as the analyses and arguments contained in the official ballot pamphlet" (*Farmers Ins. Co., supra,* 137 Cal.App.4th at 851);

-- Where uncertainty about the meaning of the enactment still exists, "'consideration should [also] be given to the consequences that will flow from a particular interpretation'" (*Outfitter Properties, LLC v. Wildlife Conservation Bd.,* (2012) 207 Cal.App.4th 237, 245 (citation omitted)]); and

-- A "literal construction" of the enactment "will not control when such a construction would frustrate the manifest purpose of the enactment as a whole." (*Arias*, *supra*, 46 Cal.4th at 979.)

As set forth below, each of these analytic steps confirms that Proposition 26's requirements apply only to measures that have the indispensable feature of a true "tax." Whether labeled as a "levy," "charge," or "exaction," the *sine qua non* of a "tax" is that it raises revenue for the government entity involved. That conclusion follows from a contextual analysis of Proposition 26's language, as well as consideration of the arguments in the ballot pamphlet. Even if those sources of Proposition 26's meaning were not dispositive, the consequences of a ruling in Hilex' favor likewise fully supports the conclusion that the 10 cents is not a "tax." If it were a "tax" under Proposition 26, such a ruling would cripple the ability of governmental entities to use their police powers to enact general regulations that, like the Ordinance, implement public policies but indisputably do not raise government revenue. That was not the intent of Proposition 26, and Hilex's hyperliteral reading of the initiative's reference to "levy, charge, or exaction" cannot transmute the 10 cent bag fee into a "tax."

1. When Construed in Context with Its Stated Purpose, It Is Clear that Proposition 26 Only Applies to Revenue Generation Measures.

The trial court's judgment is supported by a well-reasoned analysis of the entirety of Proposition 26's stated purpose and initiative language. The trial court first examined Proposition 26's definition of "tax" using

dictionary definitions, and giving the words their ordinary and usual meaning. (3 JA 703.) Proposition 26 defines a "tax", as set forth in Section 1 of Article XIIIC of the California Constitution, as "any levy, charge, or exaction of any kind imposed by a local government", unless it qualifies for one of seven exceptions. (Cal. Const., art. XIIIC, §1(e).) The words "levy", "charge", "exaction" or "imposed", is not defined.

Looking only at the literal construction of Proposition 26's definition of "tax", Hilex argues that the 10 cents paid by customers under the Ordinance to purchase a paper bag, is a levy, charge or exaction. That is the entirety of Hilex's case, and it demands that the legal inquiry end once Proposition 26's definition of "tax" is construed in light of its ordinary and usual meaning. However, a "literal construction" of an enactment "will not control when such a construction would frustrate the manifest purpose of the enactment as a whole." (*Arias*, *supra*, 46 Cal.4th at 979 (California Supreme Court rejects Petitioner's application of literal construction of plain meaning of an initiative as inconsistent with its purpose as a whole).)

To understand the context of Proposition 26's definition of "tax", the trial court properly looked to the stated manifest purpose of this initiative. (3 JA 704.) The stated manifest purpose of Proposition 26 plainly notes that it is aimed at curbing revenue generating measures by the Legislature and local governments:

> This escalation in taxation does not account for the recent phenomenon whereby the Legislature and local governments have disguised new taxes as "fees" *in order to extract even more revenue from California taxpayers* without having to abide by these constitutional voting requirements. Fees couched as "regulatory" *but which exceed the reasonable costs of actual regulation or are simply imposed to raise revenue for a new program* and are not part of any licensing or permitting program *are actually taxes* and should be subject to the limitations applicable to the imposition of taxes. [Emphasis Added.]

(Section 1, Findings and Declarations of Proposition 26 ("Findings and Declarations"); 3 JA 607.) The text of the exceptions to Proposition 26, which address fees imposed and collected by local government as a quid pro quo for a government-provided benefit, lends further support to the fact that this initiative was aimed at curbing revenue generation measures. (Cal. Const., art. XIIIC, §1(e).)

In light of the stated manifest purpose of Proposition 26, the 10 cents at issue does not have the indispensable feature of a true "tax." Here, the Ordinance does not yield any revenue to the County. Rather, if the 10 cents pricing protocol set forth in the Ordinance works as intended, little to no moneys would be generated.[5] Indeed, larger stores affected by the

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[5] The record demonstrates that requiring customers to explicitly pay for a bag will reduce consumption of both plastic and paper carryout bags. In 2007, IKEA drove down plastic bag consumption by 95 percent when it gave customers a choice of purchasing a plastic bag for five cents or a big blue reusable bag for 59 cents. (6 CR 1577.) In 2009, the District of Columbia imposed a 5 cent fee on all types of disposable carryout bags, and

Ordinance have reported almost a 94 percent drop in bag usage as a result of the Ordinance. (2 JA 289, ¶5.) Hilex is unable to show that any money is returned to the County, that such moneys are deposited with the County, or that such moneys pay for any County program or project.

Given the stated manifest purpose of Proposition 26, it is inconceivable that the 10 cents falls within the initiative's definition of "tax". This is especially true when considering that the examples of taxes set forth in the Findings and Declarations, calls out different types of taxes that actually generate government revenues. (3 JA 607.) The Findings and Declarations note that "California taxes have continued to escalate. Rates for state personal income taxes, state and local sales and use taxes, and a myriad of state and local business taxes are at all-time highs." (*Id.*) Each and every one of these types of taxes are paid to, collected by, and generates revenue for, the various government entities involved. The 10 cents pricing protocol lacks this indispensable "tax" feature of revenue generation.

Proposition 26 is also completely silent on whether the initiative will apply to measures that do not generate any revenue for the government. "Just as the silence of a dog trained to bark at intruders suggests the absence

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(...continued)
drove down carryout bag consumption by 85 percent. (1 CR 52.) Similar charges, taxes and levies imposed on carryout bags in Ireland, Denmark, Australia, and Taiwan, saw varying decreases in bag usage in the range of 44 percent to 95 percent. (1 CR 52-53.)

of intruders, this silence speaks loudly. It is indicative of a lack of voter intent[...]." (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.,* (Oct. 5, 2012, G045878) ___Cal. App. 4th___ [2012 Cal.App. LEXIS 1052], slip op. p. 17, (lack of reference to annexations in Proposition 218 is indicative of a lack of voter intent to affect annexation law.)

2. When Construed in Context With Its Overall Statutory Scheme, It Is Clear that Proposition 26 Only Applies to Revenue Generation Measures.

When the actual language of Proposition 26 is further construed in context with its statutory scheme, it becomes even more abundantly clear that the Ordinance is not subject to Proposition 26. Proposition 26 must be construed in context with the remaining provisions of Proposition 218 and its addition of Article XIIIC to the California Constitution. Case law requires that the plain and ordinary meaning of the statutory language must be "construed in the context of the statute as a whole and the overall statutory scheme." (*Farmers Ins. Co. v. Superior Court,* (2006) 137 Cal.App.4th 842, 851.) In addition, courts are "required to harmonize constitutional language with that of existing statutes if possible. ...[The] implied repeal of statutes by later constitutional provisions is not favored." (*Citizens Assn. of Sunset Beach,* ___Cal. App. 4th___ [2012 Cal. App. LEXIS 1052], slip op., p. 18.) Proposition 26 amended an existing section

in Article XIIIC of the Constitution titled "Voter Approval for Local Tax Levies," and added to Section 1 a definition for "tax" that is to be read in context with the existing definitions in that article, including those for a general and special tax:

> § 1. Definitions
> *As used in this article:*
> (a) "General tax" means any tax imposed for general governmental purposes.
> ...
> (d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.
> (e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:
> ...[Emphasis added.]

(Cal. Const., art. XIIIC § 1; 3 JA 608.) Significantly, the added definition of "tax" was inserted into existing Article XIIIC, and did not create a wholly new article or section in the California Constitution. Article XIIIC was added to the California Constitution by Proposition 218 when it was passed by voters in 1996, and among other things, placed voter approval requirements on special and general taxes imposed by local jurisdictions. (Cal. Const., art. XIIIC §§ 1-2; 2 JA 246.) Section 1 of Article XIIIC defines special and general taxes, while Section 2 of Article XIIIC requires that "all taxes imposed by any local government shall be deemed to be either general taxes or special taxes". (Cal. Const., art. XIIIC § 2(a).) General taxes must be submitted to the electorate for majority approval,

while special taxes must be approved by a two-thirds vote. (Cal. Const., art. XIIIC §§ 2(b); (d).)

While Proposition 26 defines any non-excluded "levy, charge, or exaction of any kind imposed by a local government" as a tax, unfortunately for Hilex, the inquiry does not end there. As the trial court noted, "In enacting Proposition 26, the electorate must be deemed to be aware of the legislative and judicial context of the enacted measure, including the rest of Proposition 218." (3 JA 704.) Hilex agrees with the trial court on this point, acknowledging in its Opening Brief that the "state's voters are presumed to have read and understood" changes to the California Constitution. (*See* Opening Brief, p. 41; *Amador Valley Joint Union High Sch. Dist. v. SBE*, (1978) 22 Cal.3d 208, 243-244.)

Proposition 26 did not eliminate the requirement that "all taxes imposed by any local government shall be deemed to be either general taxes or special taxes". (Cal. Const., art. XIIIC §2(a).) The trial court noted in its ruling that:

> Proposition 218 requires that 'all taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Art. XIII C, §2(a). Proposition 218 also still defines a 'general tax' as 'any tax imposed for general governmental purposes' (Art. XIII C, §1(a)), and a 'special tax' as 'any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund. (Art. XIII C, §1(d)). California law recognizes locally enacted taxes as consisting of either general taxes or special taxes. (*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.. App. 4th 1178, 1187 ("Proposition 218 does

> not permit a local tax to be considered some kind of hybrid. Rather it requires that local taxes be deemed either general taxes or special taxes." (*citing* art. XIII C, § 2(a).)

(3 JA 704.) As such, the definition of "tax" in Proposition 26 must still be read in conjunction with the current definitions of general or special tax as contained in the California Constitution, and is not a newly independent category of "tax".

If Proposition 26 created a newly independent category of "tax", and "effectuated a re-set of the definition of a tax at the local level" as Hilex suggests,[6] then Proposition 26 would have modified Proposition 218 and the California Constitution accordingly. It would have removed from the California Constitution, the definition of special and general tax set forth in Article XIIIC, §1. It did not. It would have also removed the requirement that all local taxes be deemed either general or special taxes as set forth in art. XIIIC, §2(a). It did not. The only conclusion is that the voters

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[6] On this issue, Hilex cannot have it both ways. On the one hand, it argues that in light of the recent passage of Proposition 26, the County cannot rely on prior tax cases that are helpful in determining what a special or general tax is. But on the other hand, Hilex relies on the same pre-Proposition 26 case law in support of its arguments. (*See* Hilex's use of *Howard Jarvis Taxpayers Assn. v. City of Roseville*, (2003) 106 Cal.App.4th 1178 on p. 38 of Opening Brief.) Further, while Hilex relies on *Silicon Valley Taxpayers' Assn., Inc. ("SVTA") v. Santa Clara County Open Space Authority* (2008), 44 Cal.4th 431 as authority for its assertion that all pre-Proposition 26 cases are rendered meaningless, a review of *SVTA* indicates that the court did also look at case law prior to the enactment of the initiative at issue in ruling against defendants. (*Id.* at 455.)

understood and intended that when they added the definition of "tax" to Article XIII C, §1, that it would be read in line with the definition of special tax and general tax and its related requirements as set forth in the Constitution and applicable case law. Indeed, statutes must be read "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (*Farmers Ins. Co. v. Superior Court,* (2006) 137 Cal.App.4th 842, 851.)

The 10 cents pricing protocol in the Ordinance does not impose a tax of any kind. The essential nature of a tax is to raise revenue for the government, while "the primary purpose of a fee is to cover the expense of providing a service or of the regulation and supervision of certain activities." (84 CJS, Taxation, §3, p. 36.) This understanding is consistent with the United States Supreme Court's recent decision noting that "the essential feature of any tax…produces at least some revenue for the government". (*Nat'l Fed'n of Indep. Bus.,* 132 S. Ct. at 2594.) This understanding is also consistent with case law in this State dating as far back as 1862, holding that taxes raise money for public purposes. (*Perry v. Washburn,* (1862) 20 Cal. 318, 350 ("A tax is a charge upon persons or property to raise money for public purposes[. . . .]").

The High Court's observation that a tax raises revenue for the government is also consistent with the California Constitution's definition for a special tax, which contemplates that moneys will be spent for a special

purpose, or "that its proceeds are earmarked or dedicated in some manner to a specific project or projects." (*Neecke v. City of Mill Valley,* (1995) 39 Cal. App.4th 946, 956.) The revenue generation concept is also consistent with the definition of a general tax, where funds are deposited into a general fund and are available for use for any of the jurisdiction's legitimate functions and are allocated during the general budgeting process in light of changing priorities and conditions. (*Howard Jarvis Taxpayers' Assn. v. City of Roseville,* (2003) 106 Cal.App.4th 1178, 1183.)

There are no post-Proposition 218 or 26 tax cases (or any other tax cases for that matter) that have found a government measure to be a tax where there was no revenue generation for the government. All tax cases to date reflect challenges to measures where the government collected the revenues and actually spent such revenues for general or special purposes. Hilex has never been able to cite any authority whatsoever in support of its argument that a "tax" can be found where there is no revenue generation for the government, with the trial court noting that Hilex "cite[s] no constitutional provision, statute or case for this rather remarkable proposition." (3 JA 704.)

Hilex cannot show that the Ordinance imposes a special or general tax, and this is fatal to its case. That is why it devotes no more than two sentences in its 52-page Opening Brief to address whether the ten cent pricing protocol is a special or general tax. (*See* Opening Brief, p. 35.)

Here, the Ordinance does not yield any revenue to the County. While Hilex claims that the County program is to promote reusable bags, it is uncontroverted that the County receives no money from the 10 cents to fund or pay for this alleged "program". Merely asserting that some regulation has the effect of furthering a policy goal of the County, does not itself transform a regulation into a tax measure if there is no revenue generation.

Further, to the extent that Hilex asserts that the stores are generating revenues to further the County's governmental purposes, that is wrong as well. The 10 cents wholly benefits the stores in reimbursing them for the reasonable average cost of a paper bag. (6 CR 1505, 1570; 3 JA 460.) The stores, in their discretion, determine how they will spend the monies collected towards the cost for compliance with the Ordinance (i.e. salaries of its employees, operating costs, material costs), the recovery of actual costs for providing paper bags, or for costs associated with any educational materials or campaign encouraging the use of reusable bags, *if any.* (Ord. §12.85.040D; 3 JA 460-461.)

The Court should uphold the trial court's ruling denying Hilex's request to apply Proposition 26 to the Ordinance. To do otherwise, would not advance the voters' intent (even when liberally construed)[7] of

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[7] Hilex erroneously relies on a number of cases, including *Silicon Valley Taxpayers' Assn., Inc. ("SVTA") v. Santa Clara County Open Space Authority* (2008), 44 Cal.4th 431 and *Shaw v. People ex rel. Chiang,* (2009)

preventing the government from extracting "even more revenue from California taxpayers" or raising "revenue for a new program". (Findings and Declarations; 3 JA 607.) "A construction or conclusion plainly not contemplated by the legislature [or here by the People] should not be given to a statute if it can be avoided. When a statute is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity and the other consisting of sound sense and wise policy, the former should be rejected and the latter adopted." (*Cal. Insur. Guarantee Association v. Workers' Compensation Appeals Board*, (2003) 112 Cal.App.4th 358, 367.)

The trial court also correctly relied on *California Insurance Guarantee*, which repeats the law that is well settled in this State that statutes are to be interpreted consistently with the voter's intent to avoid absurd results. Hilex fails to show how *California Insurance Guarantee* is inapplicable, or that the trial court erred by relying on this case. In fact, the

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(...continued)
175 Cal.App.4th 577, stating that the court must construe provisions liberally in protecting the will of the people. The County does not dispute that general principle. The "will of the people" as clearly expressed in the language of Proposition 26 and related ballot materials was to rein in revenue generation measures. Contrary to Hilex's claim that the "will of the people" was to apply Proposition 26 to measures where there is no revenue generation for the government, the trial court properly considered Proposition 26's language in context, as interpreted based on settled principles of statutory construction. Hilex's reliance on *Independent Energy Producers Assn. v. McPherson*, (2006) 38 Cal.4th 1020, is also misplaced. This case has nothing to do with the issues at hand, addressing primarily the right of voters to put initiatives on the ballot.

County notes that even the cases cited by Hilex against the County on this issue, wholly support the trial court's decision and reiterate the identical proposition as in *California Insurance Guarantee*.[8]

3. The Ballot Materials and Related Indicia of Voters' Intent Confirm that Proposition 26 Applies Only to Measures that Raise Government Revenue.

The trial court did not simply rely on its "own conjecture and several snippets of language in the ballot pamphlet" (*see* Hilex' Opening Brief, p. 42) when determining that Proposition 26 does not apply to the Ordinance. The trial court did not ignore the plain meaning of Proposition 26, and properly looked to ascertain the intent of the initiative measure given Hilex's hyperliteral reading of "tax". If Proposition 26's definition of "tax" is not evaluated in the context of its statutory scheme, it is overbroad and vague. The words "levy", "charge", "exaction" or "imposed" as used in Proposition 26, is also not otherwise defined. If the statutory language reveals an ambiguity or is susceptible to more than one reasonable

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[8] In Hilex's case, *Prof. Engineers in Calif. Gov't v. Kempton,* (2007) 40 Cal.4th 1016, 1037, the California Supreme Court did note that, "In interpreting a constitution's provisions, a court's paramount task is to ascertain the intent of those who enacted it. In interpreting a constitution's provisions, the court turns first to the language of the initiative, giving the words their ordinary meaning. The initiative's language must also be construed in the context of the statute as a whole and the initiative's overall scheme." *See* also, Hilex's cases, *Vitkievicz v. Valverde,* (2012) 202 Cal. App.4th 1306, 1311, *Nazari v. Ayrapetyan,* (2009) 171 Cal.App.4th 690, 695, and *Mora v. Hollywood Bed & Spring,* (2008) 164 Cal.App.4th 1061, 1068-1069.

interpretation, courts can consider "other indicia of the voters' intent, such as the analyses and arguments contained in the official ballot pamphlet." (*Farmers Ins. Co.,* supra, 137 Cal.App.4th at 851; *Prof. Engineers in Calif. Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1037.)

a. The Proponents of Proposition 26 Intended to Curb Revenue Generation Measures.

The initiative's own proponents envisioned that Proposition 26 would apply to curbing revenue generation and spending, with the ballot materials replete with extensive references to these goals. The proponents of Proposition 26 argued:

> State politicians already raised taxes by $18 billion. Now, *instead of controlling spending* to address the budget deficit, they're using this gimmick to increase taxes even more! [Emphasis added.]

(3 JA 605). Proponents equally targeted local politicians and their uncontrolled spending, stating that:

> Local politicians play tricks on voters by disguising taxes as fees so they don't have to ask voters for approval. *They need to control spending*, not use loopholes to raise taxes! *It's time to hold them accountable for runaway spending*... [Emphasis added.]

(Id.) The proponents of the measure go on to state that politicians want "*more taxpayer money for the politicians to waste, including on lavish public pensions*" and that Proposition 26 "simply stops the runaway fees

politicians pass to *fund ineffective programs*."[9] [Emphasis added.] (*Id.* at 605.) All of this certainly suggests that even the proponents of Proposition 26 had intended to target revenue generation measures.

The proponents of Proposition 26 also stated in the ballot materials for this measure that they wanted to "close the loophole" allegedly created by the California Supreme Court's ruling in *Sinclair Paint Co. v. SBE,* (1997) 15 Cal.4th 866, which allowed regulatory fees to be imposed or increased by a majority vote of each house of the Legislature or a majority vote of a local governing body. (3 JA 605; 602.) However, a review of *Sinclair Paint* indicates that the regulatory fee at issue in that case actually generated revenue for the State—revenues were *collected* and *spent* by the government on a *government program*. These features are completely absent from the County's Ordinance. In *Sinclair Paints*, the Legislature imposed a fee on paint manufacturers that made products containing lead. The State collected and spent the money on the State's program to screen children at risk for lead poisoning, to follow up on their treatment, and to identify the sources of lead contamination responsible for the poisoning. (*Sinclair Paint Co.,* 15 Cal.4th at 870-872.)

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[9] Needless to say, the County receives no portion of the 10 cents from the Ordinance to waste on lavish public pensions, to fund ineffective programs, or to engage in runaway spending.

b. The Legislative Analysis Confirms that Proposition 26 Applies to Revenue Generation Measures.

The Legislative Analysis prepared by the Attorney General also notes Proposition 26's impact on revenue generation, where there will be "*decreased state and local government revenues and spending* due to the higher approval requirements for new revenues", and "the measure would have the effect of increasing the number of *revenue proposals* subject to the higher approval requirements ..." and "make it more difficult for state and local governments to pass new laws that *raise revenues*." [Emphasis added.] (3 JA 601; 604.) Further,

> *"Given the range of fees and charges that would be subject to the higher approval threshold for taxes, the fiscal effect of this change could be major. Over time, we estimate that it could reduce government revenues and spending statewide by up to billions of dollars annually* compared with what otherwise would have occurred." [Emphasis added.]

(Id. at 604.)

Figure 2 in the Legislative Analysis also notes that as a result of Proposition 26, "...more state *revenue proposals* would require approval by two-thirds of each house of the Legislature and more *local revenue proposals* would require local voter approval." [Emphasis added.] (3 JA 602.)

Figure 3 in the Legislative Analysis also illustrates the types of fees that would be impacted by Proposition 26, all of which generate revenue for the government and is spent directly by the government for programs:

> "Oil Recycling Fee
> *The state imposes* a regulatory fee on oil manufacturers *and uses the funds for:*
> • Public information and education programs.
> ...
> Hazardous Materials Fee
> *The state imposes* a regulatory fee on businesses that treat, dispose of, or recycle hazardous waste *and uses the funds for:*
> • Clean up of toxic waste sites.
> ...
> Fees on Alcohol Retailers
> *Some cities impose* a fee on alcohol retailers *and use the funds for:*
> • Code and law enforcement.
> ..." [Emphasis added.]

(Id. at 603.) Here, the County isn't receiving or collecting any revenue, and is not using the 10 cents to pay for any government program.

Indeed, as demonstrated above, applying Proposition 26 to the 10 cent pricing protocol for paper bags would be inconsistent with the voters' purpose of curbing revenue generating measures, even when liberally construed. Regardless of whether the Proposition 26 definition of "tax" is ambiguous or not, the measure must be construed in a manner that is consistent with its manifest purpose. "Despite the general rule that ambiguity is a condition precedent to interpretation, the literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in the light of the statute's legislative history, appear from its provisions considered as a whole." (*Calif. Insur. Guarantee Assoc.,* 112 Cal.App.4th at 363 (courts look to consistency with legislative intent as considerations in construing statutes despite the literal

meaning of certain provisions).) In construing a statute, "The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." (*Id.* at 366-367.)

4. Hilex's Hyperliteral Reading of Proposition 26 is Unreasonable and Severely Curtails the Valid Exercise of Police Power When There is An Arguable Economic Impact on the Public.

To the extent there remains at this juncture, any ambiguity when Proposition 26 would apply, "consideration should [also] be given to the consequences that will flow from a particular interpretation." (*Outfitter Properties, LLC v. Wildlife Conservation Bd.,* (2012) 207 Cal.App.4th 237, 245 (citation omitted)]). Policy considerations and case law suggest that Proposition 26 should be given an interpretation that is true to its purpose, yet consistent with the ability of local government to govern effectively pursuant to its police powers. Viewed this way, taxes or fees for purposes of Proposition 26 should be interpreted as impositions yielding an actual revenue stream received by the government.

The Ordinance here does not yield such revenue to the County, and hence, is not a tax measure but a good faith exercise of the police power. As with the sale of any other product, the moneys generated from the sale of paper bags is retained entirely by the stores for cost reimbursement, and would only be charged if stores chose to offer paper bags to its customers, and its customers chose to buy such bags. (Ord. § 12.85.040.)

To adopt Hilex's hyperliteral reading of "tax", would subject every government action that results in an arguable economic impact on a third party to a voter approval requirement, even when there is no revenue generation whatsoever for the government. If the 10 cents is a "tax" under Proposition 26, such ruling would cripple the ability of governmental entities to use their police powers to enact general regulations that, like the Ordinance, implement public policy and further a legitimate governmental purpose, but do not raise government revenue.

In advancing its hyperliteral reading of "tax", Hilex seeks to substantially rewrite the constitutional provision and case law on when a local jurisdiction can properly exercise its police powers. (Cal.Const., Article XI, §7.) The effect of Hilex's proposed interpretation of Proposition 26 would "make a far-reaching change in the fundamental governmental structure or the foundational power of its branches as set forth in the Constitution." (*Strauss v. Horton,* (2009) 46 Cal.4th 364, 444.) If such an interpretation is applied, it would result in an impermissible constitutional limitation to a local jurisdiction's police power, which "should not be lightly limited." (*San Diego County Veterinary Medical Assn. v. County of San Diego,* (2004) 116 Cal.App.4th 1129, 1134-1135.)

B. The Challenged Ordinance is a Good Faith Exercise of the County's Police Powers, and All Presumptions Favor Its Validity.

The trial court was correct in finding that the Ordinance was adopted pursuant to the County's police powers. (3 JA 696–707.) A county may use its police powers to do " 'whatever will promote the peace, comfort, convenience, and prosperity' of [its] citizens ..., [and these powers] should 'not be lightly limited.' " (*San Diego County Veterinary Medical Assn.,* 116 Cal.App.4th at 1134-1135; *Waste Resource Technologies v. Department of Public Health,* (1994) 23 Cal.App.4th 299, 310.) Thus, a county's constitutional authority to engage in a challenged activity will generally "be upheld if 'it is reasonably related to promoting the public health, safety, comfort, and welfare, and if the means adopted to accomplish that promotion are reasonably appropriate to the purpose. [Citations.]' (*Sunset Amusement Co. v. Board of Police Commissioners,* (1972) 7 Cal.3d 64, 72.) When a county's action "is challenged as not being a valid exercise of police power, all presumptions favor its validity, and it will be upheld unless its unconstitutionality clearly and unmistakably appears." (*Community Memorial Hospital v. County of Ventura,* (1996) 50 Cal.App.4th 199, 206.)

1. The Ordinance Furthers a Number of Legitimate Governmental Purposes.

Carryout media, which consisted mostly of inexpensive plastic bags prior to the adoption of the Ordinance, was perceived by customers to be a "free" good, when in fact it is not free at all. (6 CR 1511; 1570.) The cost of the plastic bags were passed on to the customer by the retailer, and were borne again by the taxpayer when local governments spend money to address negative environmental impacts associated with their use. (3 JA 521-522.) The Legislature, which passed AB 2449 (2006) requiring recycling of plastic bags (codified at Public Resources Code §§42250 – 42257), declared the following regarding plastic bags:

> (1) On a global level, the production of plastic bags has significant environmental impacts each year, including the use of over 12 million barrels of oil, and the deaths of thousands of marine animals through ingestion and entanglement.
>
> (2) Each year, an estimated 500 billion to 1 trillion plastic bags are used worldwide, which is over one million bags per minute, and of which billions of bags end up as litter each year.
>
> (3) Most plastic carryout bags do not biodegrade which means that the bags break down into smaller and smaller toxic bits that contaminate soil and waterways and enter into the food web when animals accidentally ingest those materials.

The California Supreme Court, in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 163, noted similar, if not identical

findings by Manhattan Beach's City Council when it upheld Manhattan Beach's ordinance banning plastic bags.

Not surprisingly, these findings are not inconsistent with the Board's own findings on why it chose to adopt the Ordinance to ban plastic bags. The Board's goals in adopting the Ordinance, in order of importance, include "(1) litter reduction, (2) blight prevention, (3) coastal waterways and animal and wildlife protection, (4) sustainability (as it relates to the County's energy and environmental goals), and (5) landfill disposal reduction." (*Id.*)

The Board, in exercising its police powers, was looking to "substantially reduce the operational cost and environmental degradation associated with the use of plastic carryout bags in the County, particularly the component of the litter stream composed of plastic bags, and reduce the associated government funds used for prevention, clean-up, and enforcement efforts." (3 JA 476; 521.) The County's FEIR demonstrates that plastic bag litter contributes to increased overall litter cleanup costs for California public agencies, who spend more than $375 million each year for litter prevention, cleanup, and disposal. (3 JA 521-522.) The Los Angeles County Flood Control District alone exhausted $24 million in 2008–2009. (*Id.*)

Significantly, Hilex does not challenge and has never challenged the validity of the governmental objectives served by the Ordinance.

2. The County Can Properly Legislate Pricing Pursuant to Its Police Powers.

In light of the governmental objectives set forth above, the County can require stores to separately charge for and price paper bags at 10 cents. The County's power to legislate pricing pursuant to its police powers is well established:

> . . . *It is now settled California law that legislation regulating prices* or otherwise restricting contractual or property rights *is within the police power if its operative provisions are reasonably related to the accomplishment of a legitimate governmental purpose* ([citations omitted]) and that the existence of an emergency is not a prerequisite to such legislation ([citations omitted]). [Emphasis added.]

(Birkenfeld v. Berkeley (1976) 17 Cal.3d. 129, 158.) The California Supreme Court reached the *Birkenfeld* conclusion when upholding rent control measures by a local jurisdiction, by relying in part on the United States Supreme Court case, *Nebbia v. New York,* (1934) 291 U.S. 502. *Nebbia* upheld a legislature's power to fix minimum and maximum pricing for milk in the public interest. As the High Court held in *Nebbia v. New York:*

> *[There] can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.* So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, *a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.* The courts

> are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. [Emphasis added.]

(Nebbia, 291 U.S. at 537.) Indeed, the County has the power to legislate and regulate the use of carryout bags and the pricing of paper bags, so long as the policy has a "reasonable relation to a proper legislative purpose." (*Birkenfeld,*17 Cal.3d. at 158, citing *Nebbia,* 291 U.S. at 537.) As briefed extensively herein, the Board has a number of legitimate governmental purposes it is advancing by adopting the Ordinance, of which Hilex does not challenge as improper purposes.

The record before the Board evidences the impacts from plastic bags, reflects the goal of litter reduction and environmental protection, forecasts the impacts if a wholesale change from plastic to paper bags occurs (including on GHG emissions), and projects the environmental benefits of reusable bags. (6 CR 1470-1478.) As the record demonstrates, these are proper legislative purposes that are neither arbitrary nor discriminatory, but were fashioned to address litter and environmental concerns.

Hilex struggled before the trial court in distinguishing *Birkenfeld* and *Nebbia*. Hilex suggested that these cases be strictly limited to rent control measures and the broad exercise of a state legislature's police powers as compared to that of a local government. However, it is illogical for Hilex to

take the position that local jurisdictions can regulate the price of rent under its police powers between two private parties contracting for private property, but cannot regulate the manner, use, and price of a 10 cent paper bag. Also, a local jurisdiction's exercise of the police power is as broad as the police power exercisable by the legislature itself, subject only to displacement by general state law. (Cal.Const., art. XI § 7; *Birkenfeld,* 17 Cal.3d. at 140.) There is no state law here that displaces the County's police power regulating the use of carryout bags. Finally, Hilex cites no authority for the proposition that *Birkenfeld* and *Nebbia* cases have been, or should be limited in its application, in the manner suggested by Helix. To the contrary, both *Birkenfeld* and *Nebbia* have been used by California courts to analyze a broad number of legislative enactments in California for services, goods, real estate, and a number of other ordinances, both at the state and local levels in California.

3. The Ten Cents Pricing Protocol Serves Several Purposes, Some of which Benefit the Shopper While Furthering Legitimate Governmental Objectives.

The Ordinance's 10 cent pricing protocol for paper bags also provides customers with a *choice* of whether to incur an additional cost, while furthering legitimate governmental purposes. Prior to the adoption of the Ordinance, 96 percent of transactions at traditional stores (those that

account for the largest volume of grocery sales[10]), involved the use of plastic bags. (6 CR 1506.) The remaining 4 percent of transactions was evenly split between paper bags and reusable bags. (*Id.*) The typical price range for a plastic bag runs between $0.005 to $0.03 per bag, and customers were paying for these "free" plastic bags as a hidden cost in the price of their groceries. (6 CR 1505; 1511; 1570.) While plastic bags were perceived to be "freely" given before the ban, in actuality, it was costing customers anywhere from $3.25 to $18.00 per person annually (separate and apart from the gigantic environmental cost associated with their use). (6 CR 1511; 1570.)

If a ban on plastic bags were in place, and customers still perceived that paper bags were "freely" given out in place of banned plastic bags, the cost of groceries would increase to account for the increase in paper bag usage. Indeed, a representative from the California Grocers Association noted that the most immediate impact of a potential plastic bag ban would be the higher cost to retailers of paper bags versus plastic bags, which in turn would be passed on to customers. (6 CR 1507.) Being more expensive at an average cost of 10 cents per paper bag (6 CR 1570),

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[10] Traditional stores include most large supermarket chains like Albertsons, Bristol Farms, Food 4 Less, Gelson's, Pavilions, Ralphs, and Vons, who prior to the adoption of the Ordinance, typically provided plastic bags as the first choice to a customer. The remaining volume of grocery sales are at non-traditional stores, like Trader Joe's.

customers could have expected to see an increase in the price of the products they purchased due to the additional hidden cost of paper bags being included. Paper bags run anywhere between $0.05 to $0.23 per bag, with an average cost per bag of 10 cents. (6 CR 1505; 1570.)

The 10 cents pricing protocol is a regulation imposed under the County's police power that governs the pricing and manner in which the cost of paper bags is communicated to the public. The 10 cents pricing protocol allows customers to "explicitly assume the cost of the paper bags, thus relieving retailers of the need to pass the cost on directly." (6 CR 1507.) If the customer makes the monetary decision not to purchase a paper bag, there are environmental benefits that are associated with that decision as well. If customer's increase the frequency of their use of reusable bags, the County's objectives, including reducing operational cost and environmental degradation, litter reduction, and coastal waterways and animal and wildlife protection, will be furthered.

Hilex, however, makes much of the fact that the Ordinance furthers the County's purpose of enhancing the environment, reducing litter and decreasing litter clean-up costs. The County does not dispute this, given that the Board can indeed properly exercise its police powers to further legitimate governmental objectives—that is after all, the hallmark of a proper exercise of the police power. (*See San Diego County Veterinary Medical Assn.,* 116 Cal.App.4th at 1134-1135.)

Further, Hilex's objection to the perceived economic impacts of the Ordinance is an attempt to invite this Court to weigh the economic wisdom of the Board's policy decision in adopting the Ordinance. No sooner than at page two of its Opening Brief, does Hilex characterize as bad economic policy, the Board's decision to regulate plastic and paper bags as having the economic affect of requiring customers to "pay twice for the same bag" while conferring on retailers a financial windfall. This is not a proper basis for appeal and would invite this Court to evaluate whether the Ordinance embodies sound economic policies. That judgment is instead entrusted to the Board of Supervisors for the County of Los Angeles.

This Court need not go outside the limited nature of its inquiry. (*Nat'l Fed'n of Indep. Bus. v. Sebelius,* (2012) 132 S. Ct. 2566, 2577 ["We do not consider whether the Act embodies sound policies. That judgment is left entrusted to the Nation's elected leaders."); (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization,* (1978) 22 Cal.3d 208, 219 ["We do not consider or weigh the economic or social wisdom or general propriety of the initiative."]); (*Naismith Dental Corp. v. Board of Dental Examiners* (1977), 68 Cal.App.3d 253, 263 ["It is not our province to weigh the desirability of the social or economic policy underlying the statute or to question its wisdom; they are purely legislative matters."])

Hilex should just step aside and let markets, competition, and pricing adjust for the changed business environment.

C. Even if the Ordinance Is Found to Impose a Tax, It Would Fall Within An Exemption Contained in Proposition 26.

While it was not required to reach this issue given its ruling that Proposition 26 does not apply to the Ordinance, the trial court also found that to the extent that affected stores are said to indirectly generate revenue for the County, then the "specific benefit or privilege" exception in Proposition 26 would apply. (*Id.* at 706; Cal. Const., art. XIIIC, §1(e)(1).) In ruling in the County's favor on this issue, the trial court noted that Hilex failed to timely and properly brief why Section 1(e)(1) did not apply, in order for the County and the trial court to assess the merits of its argument.[11] (*Id.* at 707.) The trial court found that "Petitioners do not

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[11] The trial court properly found for the County on this issue. First, the trial court found that the County produced substantial evidence showing that the 10 cents pricing protocol for paper bags is otherwise exempt under Proposition 26, and that 10 cents represents the average reasonable cost for a paper bag. (3 JA 706.) Given the County's evidentiary showing, Appellants then had the burden of presenting contrary evidence. (Cf., *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 850-851 (holding that once party moving party demonstrates its right to summary judgment, burden shifts to opposing party to submit evidence creating triable issues of fact).) Hilex failed to do so.

In addition, the trial court correctly concluded that Appellants waived their argument that Section 1(e)(1) did not apply, given that Appellants had the initial burden in their Opening Brief to place at issue the question of whether the exception applied due to its assertion that some customers get bags for free. (*Save Sunset Strip Coalition v. City of W. Hollywood,* (2001) 87 Cal.App.4th 1172, 1181, n.3; *Reichardt v. Hoffman,* (1997) 52 Cal.App.4th 754, 764.) Yet, Hilex did not address the substance of this Section 1(e)(1) assertion until its Reply, and even then, it did so in a very terse and conclusory manner.

show how the exemption is inapplicable based on the mere fact that the Ordinance does not require certain person receiving welfare benefits to pay for their paper bags." (*Id.*)

Hilex continues to maintain in its appeal that the County is "imposing"[12] the charge for purposes of Proposition 26, but Hilex must carry its argument through to its logical conclusion. If its true that the County is imposing the charge by using retail stores as the County's agent,

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(...continued)

Hilex's failure to properly raise and brief this issue is particularly inexcusable, given that it knew beforehand what position the County would take before any briefing occurred before Judge Chalfant in Department 85. After all, by virtue of the briefing that occurred before Judge Rico in Department 17, Hilex knew that the County was taking the position that the Section 1(e)(1) exception applied. Still, when it came time to brief the issues anew before Judge Chalfant, Hilex devoted just a few words in their Reply to whether the exception applied. (*See* 3 JA 707.) The trial court is correct in finding that Hilex had waived this issue, and that it had also failed to properly brief the issue in its Reply. (*Id.*)

[12] Hilex makes much of the California Board of Equalization's Special Notice. (3 JA 259). The Notice is irrelevant to this matter, and was issued in June 2011 *after* the passage of Proposition 26 and after the adoption of the Ordinance at issue, and therefore is not probative of how Proposition 26 or the Ordinance should be applied, and cannot be used as evidence of the intent of the drafters of Proposition 26 or of the voters who passed the initiative. Paper bags are sold to a customer by the store, and whether the BOE determines it is subject to sales tax or not, does not undermine the County's position that the paper bags are sold to the customer for ten cents. There are thousands of items that are sold to customers everyday in grocery and food stores that are *not* subject to sales tax under the BOE's sales and use tax regulations, including milk, bread, lottery tickets, etc. Just because sales tax is not imposed on these items, does not alter the fact that these items are actually sold to customers by a store, and that customers pay the store directly for those items.

then it follows that the County has conferred a specific privilege to the ultimate payor —the right to buy and use paper bags. As such, the Ordinance is excluded from a voter approval requirement under Section 1(e)(1) [the "benefit or privilege" exclusion] of article XIIIC of the California Constitution. Section 1(e)(1) excludes from the new definition of "tax";

> A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to be the local government of conferring the benefit or granting the privilege.

Hilex cannot have it both ways—it cannot argue on the one hand that the County is imposing the charge, and then argue on the other hand that the County is conferring no benefit or privilege in return for the 10 cents. The trial court agreed, noting that this "argument is disingenuous." (3 JA 706.)

The benefit conferred and privilege granted by the County to the customer is the right to purchase and use paper bags to carry home items purchased at the point of sale. This is particularly true if one considers that an option available to the County at any time is to ban paper bags outright rather than to allow for their purchase at the point of sale. Hilex's counsel acknowledged at the writ hearing that the County could take away paper bags by banning them. (RT 18:25-19:1.)

Moreover, the 10 cents charged by the store is the actual reasonable cost of providing the paper bag. Based on the record, it was determined that a 10 cent charge on paper bags allowed stores to recover the reasonable cost of providing a paper bag. (3 JA 706.)

Research conducted by Public Works in the Staff Report "An Overview of Carryout Bags in Los Angeles County," indicates that the average cost per bag of paper carryout bags is 10 cents, with a reasonable range being between 5 and 23 cents, depending on whether the bags have handles, the minimum percentage of recycled content, the quality of the bag, whether advertising is printed on the bag, and other factors. (6 CR 1550; 1570.)

The Master Environmental Assessment ("MEA") on Single-Use and Reusable Bags (March 2010) prepared by Green Cities California, estimates a similar range of costs for paper carryout bags of 15 to 25 cents per bag. (3 JA 460.) The County's "*Economic Impact Analysis Report --- Proposed Ban on Plastic Carryout Bags in Los Angeles County*" prepared by AECOM, found that paper bags sold for between 5 and 15 cents per bag. (6 CR 1505-1506.) These ranges are also consistent with prior proposed state law, AB 87 (2009), which would have placed a 25 cent charge on plastic carryout bags and allowed retailers to retain five to seven cents of the charge to recover their own costs of implementation. (3 JA 461.) In

addition, proposed AB 68 (2009) would have allowed stores to keep 10 cents for paper bags. (3 JA 461.)

D. Even if the Ordinance Were Found to Run Afoul of Proposition 26, the Plastic Bag Ban Is Severable.

Hilex's request to invalidate the entire Ordinance, which most importantly bans plastic bags, should be summarily rejected. While Hilex disputes whether the 10 cents is an improper tax under Proposition 26, they do not dispute that the County has the power to ban plastic bags pursuant to its police powers.

As a matter of law, a court:

> *...must uphold ordinances if possible, construing them in a manner preserving their validity.* To this end, [the court] will invalidate, strike down, or find preempted only those portions that are clearly unconstitutional or preempted by statute, and save the portions that are not, as long as they can accomplish one or all of the legitimate material purposes of the law. [Emphasis Added.]

(First Presbyterian Church of Berkeley v. City of Berkeley, (1997) 59 Cal. App.4th 1241, as modified on denial of reh'g, (Jan. 7, 1998).) Case law requires a presumption of validity for the plastic bag ban portion of the Ordinance, which accomplishes a number of independent purposes, including reducing plastic bag litter. While Hilex seizes on bits and pieces from the Board's 1400+ page record and of out-of-context testimony from County employees in an attempt to show that the Board would not have acted on one without the other, this effort is ultimately misplaced. If paper

bags had posed the same litter problem as plastic bags do, the Board would have considered banning them as well.

1. The Ordinance Contains a Severability Clause.

The Ordinance contains a severability cause, where the Board expressly declared the following when it enacted the Ordinance:

> If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid by a decision of any court of competent jurisdiction, that decision will not affect the validity of the remaining portions of the ordinance. The Board of Supervisors hereby declares that it would have passed this ordinance and each and every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of this ordinance would be subsequently declared invalid.

(Ord. §12.85.09.) The presence of a severability clause establishes a presumption in favor of severance. (*California Redevelopment Association v. Ana Matosanto*, (2011) 53 Cal.4th 231, 270-271 citing *Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 331 ["Although not conclusive, a severability clause normally calls for sustaining the valid part of the enactment "].) While *California Redevelopment Association* involved a more express severability clause, it reaffirms the well-settled law in this state that the presence of a severability clause establishes a presumption in favor of severance. (*Id.* at 270.)

When an ordinance contains a severability clause, an invalid provision is severable if it is grammatically, functionally, and volitionally separable. (*Gerken v. Fair Political Practices Com.,* (1993) 6 Cal. 4th 707,

714-716.) The California Supreme Court applied this criteria in *California Redevelopment Association, ibid,* when determining that the Assembly Bill at issue in that case may be severed and enforced independently:

> [T]he invalid provision must be grammatically, functionally, and volitionally separable... Grammatical separability, also known as mechanical separability, depends on whether the invalid parts 'can be removed as a whole without affecting the wording' or coherence of what remains. Functional separability depends on whether 'the remainder of the statute 'is complete in itself ... Volitional separability depends on whether the remainder 'would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute.' " *Id.* at 271 [Internal Citations omitted.]

2. The Ordinance Is Grammatically and Functionally Severable.

It is undisputed that the 10 cent provision on paper bags can easily be grammatically separated from the remaining Ordinance to preserve the ban on plastic bags. Section 12.85.040 of the Ordinance, which sets forth the 10 cent pricing protocol, would be the only section that would need to be stricken if the 10 cents were found to be an invalid tax.[13]

As for functional severability, the Ordinance is "complete in of itself" and capable of enforcement even if Section 12.85.040 is removed. The remaining ordinance provisions banning plastic bags from the unincorporated areas is unaffected by the removal of the 10 cent paper bag

[13] Sections 12.85.040 (E) and (F) would not need to be stricken. Section 12.85.060 would also remain unchanged, given a store could voluntarily choose to charge for paper bags.

provision. (Ord. §12.85.020.) The operative dates for the Ordinance are also unaffected by the removal of Section 12.85.040. (Ord. §12.85.070.) The plastic bag ban enforcement provisions are also not materially altered, rendered meaningless, or hindered in any way. (Ord. §12.85.080.)

3. The Ordinance is Volitionally Severable.

Regarding volitional severability, the legislative record of the Board conclusively establishes that the Board would have acted to ban plastic bags regardless of whether it had the authority to require stores to charge the 10 cents on paper bags. The issue for volitional severability "is whether a legislative body, *knowing that only part of its enactment would be valid*, would have preferred that part to nothing, or would instead have declined to enact the valid without the invalid. [Emphasis Added]." (*California Redevelopment Assn.,* 53 Cal.4th at 273.) The proper focus of this analysis is whether the Board would have still banned plastic bags, had it *known* that it could not legally require the 10 cent pricing protocol for paper bags. The CEQA record strongly evidences that it would have still done so.

Significantly, the CEQA record evidences that the Board expressly rejected the "No Project Alternative" in the FEIR (no ban on plastic bags), because it would not accomplish any of the County's goals. (3 JA 529-530.) The Board specifically noted:

> The No Project Alternative would not assist in reducing the Countywide consumption of plastic carryout bags, would not result in a reduction of plastic carryout bag litter that blights

> public spaces and marine environments, and would not reduce the County's, cities', and Flood Control District's costs for prevention, clean-up, and enforcement efforts to reduce litter in the County. The No Project Alternative would not increase public awareness of the negative impacts of plastic carryout bags and the benefits of reusable bags. In addition, the No Project Alternative would not assist in reducing Countywide disposal of plastic carryout bags in landfills.

(3 JA 529.) The Board has already established that it will refuse to do nothing. Further, in all Alternatives studied in the FEIR, banning plastic bags was always considered as an option by the Board. (3 JA 505-506; 527-528.)

Hilex is quick to note, however, that the Board rejected Alternative 3 (ban on plastic bags only) in November 2010, and that this is evidence that the Board would not have otherwise acted to ban plastic without imposing a fee on paper. This is not the correct factual analysis required for volitional severability. The key question is whether the Board would have adopted the plastic bag ban anyway, if had "foreseen the partial invalidation" of the Ordinance. (*California Redevelopment Assn.,* 53 Cal.4th at 273.) The Board did not select Alternative 3 (ban on plastic bags only), because at the time it took its discretionary action in November 2010, the Board believed there was nothing preventing it from selecting Alternative 5 (ban plastic bags and require ten cents for paper bags). If the Board had *known* that it could not legally require the ten cents for paper bags, and that this provision in the Ordinance would be invalidated, it would still have acted to ban

plastic bags. The Board's decision to reject the No Project Alternative, which is to do nothing and leave plastic bag usage unregulated, is significant to the volitional severability analysis.

The CEQA record reflects the Board's numerous objectives of reducing consumption of plastic bags, and the litter and clean-up costs associated with their use. (3 JA 459; 477; 521.) Every one of these objectives would be furthered by a ban on plastic bags alone. The legislative record also reveals that the Board was most concerned with the negative impacts resulting from plastic bag litter. Given the lightweight nature of plastic bags and its tendency to become air-borne, it is easily littered throughout the County causing urban blight and clogging systems designed to channel storm water runoff. (3 JA 521-522, 523-524.) Plastic bag litter contributes to increased overall litter cleanup costs for the County, Caltrans, and other public agencies. (*Id.*) California public agencies spend more than $375 million each year for litter prevention, cleanup, and disposal. The Los Angeles County Flood Control District alone exhausted $24 million in 2008–2009. (*Id.*)

Littered plastic bags also make their way into the marine environment, where they pose a threat to seabirds, sea turtles, and marine mammals that feed at or near the ocean surface. (3 JA 481-503; 537-539.) The ingestion of plastics, including plastic bags, is a threat to the endangered leatherback, green, loggerhead and olive ridley turtles, and

numerous other animals, which have the potential to be found off the Southern California coast. (3 JA 489-495; 538-539.)

Hilex's further attempt to say that the Board would not have otherwise acted because a plastic bag ban would increase paper bag usage and greenhouse gas impacts, is also misplaced. The CEQA record indicates that the Board overrode this concern based on economic, environmental, and public policy considerations when it adopted its Findings of Fact and Statement of Overriding Considerations ("FOFSOC"), due to the negative impacts of plastic bag litter being a much more significant issue for the Board. (3 JA 533-541.) The Board's FOFSOC conclusively states that a plastic bag ban:

> ...will assist the County in meeting all six of its basic objectives, which aim to reduce plastic carryout bag use and the associated litter that is found throughout the County; ... will help to reduce the costs associated with plastic carryout bag litter, and this consideration alone outweighs and overrides the one adverse effect identified in the EIR; ...will help to reduce the amount of litter in the County attributable to plastic carryout bags and the associated costs to government for litter prevention, cleanup, and enforcement efforts;... will help to reduce the environmental impacts associated with plastic carryout bag use, and this consideration alone outweighs and overrides the one adverse environmental effect identified in the EIR.

(*Id.*) The weight of the record indicates that the Board would have acted to ban plastic bags, regardless of its ultimate decision regarding paper bags.

4. The Equities Favor Severability of the Ordinance.

To strike down the remaining portion of the Ordinance so the County can vote again on banning plastic bags when it has already done so, would lead to mass confusion of the public and needlessly undo the work expended to date on educating the public and stores about the Ordinance requirements. The Ordinance was adopted by the Board almost two years ago on November 23, 2010, and has been implemented at 67 large stores and in approximately 870 small stores in the unincorporated area. (3 JA 288, ¶3.) The Ordinance is hugely successful in reducing single bag use by almost 94% in the large stores affected by the first phase of the Ordinance. (3 JA 289, ¶5.) Staff has spent significant efforts and resources in educating the public about the Ordinance and working with stores in implementation, of which none of these efforts were paid for by the 10 cents. (*Id.* at ¶¶ 2-4, 6.)

This entire time, Hilex had full knowledge of the County's actions and sat on the sidelines waiting almost a year after the Board acted to file a lawsuit. Philip Rozenski, Hilex Poly's Director of Marketing and Sustainability, acknowledges that Hilex Poly closely monitored the County's proceedings related to the Ordinance, was "very familiar with the history and background of the Ordinance", and knew it passed by a 4-1 vote at the Board. (1 JA 69,¶¶ 2-3.) When the suit was filed, at no time did

Hilex seek a temporary restraining order or a preliminary injunction. Hilex should not be rewarded for delaying.

VI.

CONCLUSION

The County of Los Angeles respectfully urges that the judgment be affirmed.

DATED: October 12, 2012

Respectfully submitted,

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CERTIFICATE OF WORD COUNT PURSUANT TO RULE 8.360

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DATED: October 12, 2012

Respectfully submitted,

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DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

Esther Ramirez states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 648 Kenneth Hahn Hall of Administration, 500 West Temple Street, County of Los Angeles, State of California; that I am readily familiar with the business practice of the Los Angeles County Counsel for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business.

That on October ___, 2012, I served the attached **RESPONDENT'S BRIEF**, upon Interested Parties by depositing copies thereof, enclosed in a sealed envelope and placed for collection and mailing on that date following ordinary business practices in the United States Postal Service, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 12, 2012, at Los Angeles, California.

Esther Ramirez