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January 12, 2009

City of Santa Monica  
1685 Main Street  
Santa Monica, CA 90401

Attention:

1. Mayor and City Council  
Sent via fax: (310) 458-1621  
Sent via e-mail: council@smgov.net
2. Director, Office of Sustainability and the Environment - Dean Kubani  
Sent via fax: (310) 393-1279  
Sent via e-mail: environment@smgov.net, dean-kubani@ci.santa-monica.ca.us
3. City Attorney, Marsha Jones Moutrie  
Sent via fax: (310) 395-6727  
Sent via e-mail: attorney@smgov.net

RE: Proposed plastic bag ordinance; CEQA demand; legal objections;  
notice of intent to file lawsuit

Dear Mayor, City Council, Director, and City Attorney:

I represent SaveThePlasticBag.com (“STPB”), an association of plastic bag manufacturers and related businesses. The subject of this letter is the City of Santa Monica (the “City”) draft ordinance to prohibit certain businesses from provided their customers with plastic bags and imposing a fee on paper bags. The proposed ordinance is scheduled for public comments and first reading on January 13, 2009.

STPB hereby objects to the proposed ordinance under the California Environmental Quality Act (CEQA), as the City has failed to prepare an Environmental Impact Report (EIR). STPB will file an action for writ of mandate in the Superior Court

in the event that the City fails to comply with the strict requirements of CEQA, including but not limited to preparation of an EIR.

STPB has already filed lawsuits against Los Angeles County and the City of Manhattan Beach for failing to prepare EIRs before banning plastic bags. The cases are pending in the Los Angeles Superior Court.

*On December 18, 2008, the Los Angeles Superior Court granted STPB's motion for preliminary injunction against the City of Manhattan Beach after determining that STBP is likely to succeed on the merits. A copy of the court's ruling is attached hereto.*

### **Background**

Every manufactured product has a negative environmental impact. Plastic bags are no exception. The difference between plastic bags and other products is that plastic bags have been singled out for intense and unprecedented scrutiny and are being held to a standard of environmental perfection that no manufactured product could ever satisfy.

Plastic bags are as environmentally benign as any product available today. They have a tiny impact compared to other products and activities. However, this has not prevented them from becoming a negative symbol for some environmental activists and politicians who have become obsessed with eliminating them from the marketplace.

Plastic bags have also been caught up in a broader "all plastic is evil" sentiment propagated by extremists, which is simplistic, unrealistic and absurd.

Myths and misinformation about plastic bags pervade the Internet. They have found their way into city and county reports, because staffs have failed to check facts. The staff reports are accepted as true by well-meaning politicians and members of the public who rely on the reports.

A London Times editorial states:

Many of those who have demonized plastic bags have enlisted scientific study to their cause. By exaggerating a grain of truth into a larger falsehood, they spread misinformation and abuse the trust of their unwitting audiences.

[www.timesonline.co.uk/tol/comment/leading\\_article/article3508113.ece](http://www.timesonline.co.uk/tol/comment/leading_article/article3508113.ece)

STPB's primary objective is to provide the *true facts* about plastic bags to decision-makers and the public, thereby dispelling the myths and misinformation. STPB has created an information website at [www.savetheplasticbag.com](http://www.savetheplasticbag.com). The website cites

only to studies prepared by governmental organizations and independent environmental groups. No plastic industry studies are cited.

Despite STPB's best efforts to disseminate the facts, we are finding that many lawmakers and their staffs are still hearing only what they want to hear, including myths and misinformation, and persistently disregarding or refusing to believe any information that interferes with their preconceived views about plastic bags. This is called "confirmation bias." See [http://en.wikipedia.org/wiki/Confirmation\\_bias](http://en.wikipedia.org/wiki/Confirmation_bias).

For example, the preamble to the proposed ordinance includes the following statement:

WHEREAS, plastic bags are a significant source of marine debris and are hazardous to marine animals and birds which often confuse single use plastic carry out bags for a source of food. The ingestion of these bags can result in reduced nutrient absorption and death to birds and marine animals.

The London Times is one of the most respected newspapers in the world. No one would seriously suggest that it has pro-business or anti-environmental bias. On March 8, 2008, the London Times published a report entitled: "Series of blunders turned the plastic bag into global villain." The report states as follows:

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

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

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

In a postscript to the correction they admitted that the original Canadian study had referred to fishing tackle, not plastic debris, as the threat to the marine environment. Regardless, the erroneous claim has become the keystone of a widening campaign to demonise plastic bags.”

A marine biologist from Greenpeace told The Times: “It’s very unlikely that many animals are killed by plastic bags,” he said. “The evidence shows just the opposite.” A marine biologist from the British Natural History Museum told The Times: “I’ve never seen a bird killed by a plastic bag.”

[www.timesonline.co.uk/tol/news/environment/article3508263.ece](http://www.timesonline.co.uk/tol/news/environment/article3508263.ece).

In response to the London Times report, the embarrassed British Government minister charged with eliminating plastic bags wrote to The Times stating:

We have never said that plastic bags were a leading cause of death in marine animals, though general plastic waste does make a contribution.... They are a potent *symbol* of our throwaway society and public opinion recognizes this. Of course, these bags contribute only a small part of the waste that leads to climate-changing emissions, but we need to change the small things as well as the large and to work with the grain of public opinion. [Emphasis added.]

[www.timesonline.co.uk/tol/news/environment/article3508263.ece](http://www.timesonline.co.uk/tol/news/environment/article3508263.ece)

As the British Government acknowledges, ideological symbolism and pandering to public opinion, not truth and environmental protection, are driving the anti-plastic bag campaign.

Even Heal the Bay has been forced to backtrack and admit that it is *speculating* about whether plastic bags are killing any marine mammals. (Heal the Bay is a group based in Santa Monica that advocates the banning of plastic bags.) Sarah Abramson, Director of Coastal Resources at Heal the Bay has admitted as follows:

When we conduct an autopsy on an animal, it’s difficult to figure out what plastic killed it, but going off of the statistics we have from the amount of high amount of plastic bags found during beach clean-ups and the large number that wind up in catch basins, it’s fair to say a good percentage of the plastic debris marine life are consuming is from plastic bags.

[www.easyreadernews.com/story.php?StoryID=20033752](http://www.easyreadernews.com/story.php?StoryID=20033752)

Misleading people and getting them excited and agitated about the effects of plastic bags on marine life is unfair and irresponsible.

STPB is determined to ensure that lawmakers arrive at their decisions about plastic bags with the benefit of accurate and comprehensive factual information. We strongly encourage the Mayor and Council Members to visit our website at [www.savetheplasticbag.com](http://www.savetheplasticbag.com) to learn the true facts about plastic bags.

### **An American manufacturing industry and jobs under threat**

85% of plastic bags used in the United States are manufactured in the United States. Approximately 4,000 employees in the United States, including in California, manufacture plastic bags. *When lawmakers take action to eliminate plastic bags, they eliminate American jobs.* These are jobs held by real people with real families who are routinely ignored by California politicians.

All lawmakers, including the Santa Monica City Council, have a profound responsibility to *all* the people of this nation and to our manufacturing industries. They cannot ignore the effects of their actions beyond the City's borders.

Destroying American jobs based on myths and misinformation would be irresponsible and tragic. Doing so just when we are facing the worst economic crisis since the Great Depression would be heartless. The thousand of American workers who manufacture plastic bags are not at fault for wanting to support themselves and their families.

Most reusable bags are made in China, including those sold by Trader Joe's, Safeway and Whole Foods. It is incredible that any public official in this country would even think about exporting American jobs without doing *due diligence*. However, that is exactly what is happening.

For the protection of American jobs, it is imperative that the Santa Monica City Council recognizes that it has a duty to take special care in their fact-finding and decision-making about plastic bags. It must take care to ensure that prejudice and passion against plastic bags, and the desire to satisfy local environmental activists who are obsessed with plastic bags, do not blind them to the truth and the real world consequences of their actions.

### **Public opinion**

The public wants free plastic bags. A poll was conducted by Fairbank, Maslin, Maulin and Associates through a telephone survey of California registered voters between June 28 and July 2, 2008. The sample population was 700 and the margin of

error +/- 3.7 %. According to the poll, 58% of Californians opposed a proposed 25 cent tax on plastic bags. More than two-thirds of those polled in Los Angeles and San Diego opposed a tax. The Fairbank poll and other polls on plastic bags can be viewed at [www.savetheplasticbag.com/ReadContent650.aspx](http://www.savetheplasticbag.com/ReadContent650.aspx).

### **The negative environmental impacts of paper bags**

In 2005, the “Scottish Government” issued an environmental impact assessment on the effects of a proposed plastic bag levy in Scotland (the “Scottish Report”). A copy is provided with the e-mail transmission of this letter. It can be downloaded at [www.scotland.gov.uk/Resource/Doc/57346/0016899.pdf](http://www.scotland.gov.uk/Resource/Doc/57346/0016899.pdf) The Scottish Report states:

Page vi: If only plastic bags were to be levied..., then studies and experience elsewhere suggest that there would be some shift in bag usage to paper bags (which have worse environmental impacts).

Page 31: [A] paper bag has a more adverse impact than a plastic bag for most of the environmental issues considered. Areas where paper bags score particularly badly include water consumption, atmospheric acidification (which can have effects on human health, sensitive ecosystems, forest decline and acidification of lakes) and eutrophication of water bodies (which can lead to growth of algae and depletion of oxygen).<sup>1</sup>

Page 31: Paper bags are anywhere between six to ten times heavier than lightweight plastic carrier bags and, as such, require more transport and its associated costs. They would also take up more room in a landfill if they were not recycled.

The Scottish Report (at page 23) contains the following comparison of the environmental metrics of plastic bags and paper bags. The report takes into account the fact that a paper bag holds more than a plastic bag. According to the report, paper bags result in:

- 1.1 times more consumption of nonrenewable primary energy than plastic bags.
- 4.0 times more consumption of water than plastic bags.
- 3.3 times more emissions of greenhouse gases than plastic bags.

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<sup>1</sup> “Eutrophication” means the process by which a body of water becomes rich in dissolved nutrients, thereby encouraging the growth and decomposition of oxygen-depleting plant life and resulting in harm to other organisms.

- 1.9 times more acid rain (atmospheric acidification) than plastic bags.
- 1.3 times more negative air quality (ground level ozone formation) than plastic bags.
- 14.0 times more water body eutrophication than plastic bags.
- 2.7 times more solid waste production than plastic bags.

The Alameda County Superior Court relied upon the Scottish Report in making its decision to invalidate the Oakland plastic bag ban ordinance.

In March 2008, ULS ([www.use-less-stuff.com](http://www.use-less-stuff.com)) issued a “Revised Analysis of Life Cycle Assessment (LCA) Relating to Grocery Bags” (the “3-08 ULS Report”) analyzing the environmental impact of paper bags. The 3-08 ULS Report is incorporated herein by reference. A copy is provided with the e-mail transmission of this letter. It can be downloaded at [www.use-less-stuff.com](http://www.use-less-stuff.com). It includes the following findings:

- Plastic bags generate 39% less greenhouse gas emissions than uncomposted paper bags, and 68% less greenhouse gas emissions than composted paper bags.
- Plastic bags consume less than 6% of the water needed to make paper bags.
- Plastic bags consume 71% less energy during production than paper bags.
- Paper sacks generate almost five times more solid waste than using plastic bags.
- After four or more uses, reusable plastic bags are superior to all types of disposable bags -- paper, polyethylene and compostable plastic -- across all significant environmental indicators.

The 3-08 ULS Report concludes as follows (at page 5):

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

The Alameda County Superior Court also relied upon an earlier version of the ULS report in making its decision to invalidate the Oakland plastic bag ban ordinance.

**Banning or imposing a fee on plastic bags would increase paper bag usage, even if a fee is imposed on paper bags**

In 2007, the City of San Francisco passed an ordinance banning non-compostable plastic carryout bags in supermarkets and grocery stores with more than \$2 million in annual sales and chain pharmacies. The ordinance requires the use of paper bags, compostable plastic bags, or reusable bags.

To determine the impact of the ordinance, ULS observed store and customer bag usage in San Francisco. A total of 25 retail stores were visited from September 14 to 17, 2008. Stores were walked through, store personnel were questioned, checkout activities were observed, and customers' bagging preferences were reviewed.

ULS found that all food chains affected by the ordinance had switched to paper bags only. ULS also found that "very few people" brought reusable bags to the store -- no more than in other cities. ULS concluded as follows in a report issued in September 2008 entitled "Report on Field Trip to San Francisco to Assess Plastic Bag Ban" (the "9-08 ULS Report"):

If reducing environmental impact is the objective of the Ordinance, results to date do not indicate it will be successful. First, little use of reusable bags was observed. Second, the replacement of plastic by paper and the return to double bagging may actually increase environmental impact, as many peer reviewed lifecycle studies indicate that paper bags use more energy, produce more waste, and generate more greenhouse gas emissions than do plastic bags.

The 9-08 ULS Report can be downloaded (including photographs) at [www.use-less-stuff.com](http://www.use-less-stuff.com). A copy (minus photographs) is provided with the e-mail transmission of this letter. It is incorporated herein by reference.

While the City *hopes* that imposing a "Green Fee" on paper bags would encourage consumers to use reusable bags, there is no way of knowing at this stage whether the plan will. There is certainly a *possibility* that paper bag usage would increase.

**The environmental impact of reusable bags**

If plastic bags are banned and paper bags are subjected to a fee, then a boost in reusable bag usage may occur. Like any other manufactured product, reusable bags have a negative environmental impact. However, the City is acting as if reusable bags have no negative environmental impact whatsoever, which is insupportable and unrealistic.

Most reusable bags are manufactured in China. An EIR is necessary to determine the following:

- Metrics of consumption of nonrenewable energy to produce reusable bags. (An article in the *Wall Street Journal* (An Inconvenient Bag, Sep 26, 2008) states: “Many of the cheap, reusable bags that retailers favor are produced in Chinese factories and made from nonwoven polypropylene, a form of plastic that requires about 28 times as much energy to produce as the plastic used in standard disposable bags and eight times as much as a paper sack, according to Mr. Sterling, of Natural Capitalism Solutions.”)
- Metrics on emissions of greenhouse gases in the production of reusable bags.
- Metrics on consumption of water to produce reusable bags.
- Metrics on creation of acid rain (atmospheric acidification) in the production of reusable bags.
- Metrics on creation of negative air quality in the production of reusable bags
- Metrics on water pollution or eutrophication in the production of reusable bags.
- Metrics on the consumption of nonrenewable energy to transport reusable bags. (Most reusable bags are made in China and have to be shipped to the United States and then transported by truck. Reusable bags are more voluminous and heavier than plastic bags, thereby requiring more diesel fuel to transport.)
- Metrics on the reusability of plastic carryout bags for bin liners, pet waste and other uses, which are not uses for “reusable” bags.
- Recyclability of reusable bags. (Most reusable bags are made from nonwoven polypropylene, which is not recyclable.)
- Metrics on solid waste production caused by disposal of plastic bags.
- Metrics on the extent to which reusable bags are actually reused. (The above-mentioned *Wall Street Journal* article referenced above states: “Earlier this year, KPIX in San Francisco polled 500 of its television viewers and found that more than half -- 58% -- said they almost never take reusable cloth shopping bags to the grocery store.”<sup>2</sup>

### CEQA

CEQA requires the preparation of an EIR before any ordinances or other “projects” are adopted that *may* have a significant negative effective on the environment. The law is designed to ensure that accurate environmental information is presented to (i)

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<sup>2</sup> STPB is highly averse to relying on newspaper reports for environmental data. However, the *Wall Street Journal* article shows the need for a Life Cycle Analysis on reusable bags, rather than an automatic (and clearly erroneous) assumption that reusable bags have no significant environmental impact.

lawmakers before they make their decisions and (ii) citizens who will be able to judge the actions of their representatives based on an EIR.

In *People v. County of Kern* (1974) 39 Cal. App. 3d 830, 842, the court stated:

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

### **The Oakland lawsuit**

In July 2007, the City of Oakland adopted an ordinance banning plastic bags. A coalition of plastic bag manufacturers (including three STPB members) filed a petition for writ of mandate against the City of Oakland, because the city had failed to prepare an EIR pursuant to CEQA. *Coalition To Support Plastic Bag Recycling v. City of Oakland, et al.*, Alameda Superior Court, Case No. RG07-339097.

In May 2008, the Alameda Superior Court issued a writ of mandate invalidating the Oakland ordinance. It found that there was a *possibility* that the ordinance would have a significant environmental impact, because paper may be worse for the environment and banning of plastic bags might result in increased paper bag usage.

The court referred to the Scottish Report findings that a plastic bag levy would result in a shift to paper bags and that paper bags are worse for the environment than plastic bags. The court concluded that the findings of the Scottish Report “raise a reasonable inference that an outright ban on [plastic bags] may result in increased use of paper bags.” The court ruled:

This evidence [the Scottish Report] is sufficient to defeat the assertion of the “common sense exemption” because, with such evidence as part of the record, the City cannot meet the standard that there is no possibility that the Ordinance will cause a significant environmental effect.

The decision was not appealed and the Oakland ordinance has been revoked.

A copy of the Alameda Superior Court decision can be viewed at [www.savetheplasticbag.com/ReadContent541.aspx](http://www.savetheplasticbag.com/ReadContent541.aspx). As a result of the court’s ruling, the Oakland ordinance was repealed.

### **The Los Angeles County lawsuit**

In January 2008, Los Angeles County adopted a program to reduce the number of plastic bags by 30% by 2010 and 65% by 2013. The failure to achieve either goal will trigger an ordinance banning plastic bags.

In July 2008, STPB filed a petition for a writ of mandate to invalidate the program. *Save The Plastic Bag Coalition v. County of Los Angeles, et al*, Los Angeles Superior Court, Case No. BS115845. The ground for the petition is that the county failed to prepare an EIR.<sup>3</sup>

The case is pending. Copies of the primary documents filed by STPB in the case can be viewed at [www.savetheplasticbag.com/ReadContent541.aspx](http://www.savetheplasticbag.com/ReadContent541.aspx).

### **The Manhattan Beach lawsuit**

In July 2008, the City of Manhattan Beach adopted an ordinance banning plastic bags. In August 2008, STPB filed a petition for a writ of mandate. *Save The Plastic Bag Coalition v. City of Manhattan Beach, et al*, Los Angeles Superior Court, Case No. BS116362. The ground for the petition is that the city failed to prepare an EIR prior to adopting the ordinance.

The case is pending. Copies of the primary documents filed by STPB in the case can be viewed at [www.savetheplasticbag.com/ReadContent541.aspx](http://www.savetheplasticbag.com/ReadContent541.aspx).

As noted above, on December 18, 2008 the court granted STPB's motion for preliminary injunction against Manhattan Beach. The court ruled that STPB is "likely to succeed on the merits of its claim that an EIR is required in the circumstances of this case." The court noted that STPB had cited studies regarding the environmental impact of the Manhattan Beach plastic bag ban ordinance that conflicted with the City of Manhattan Beach's environmental conclusion. The court stated that the "solution required by CEQA in such cases is to publicly air the dispute between the experts by ordering an EIR, rather than ignoring or suppressing the existence of such a dispute." A copy of the court's ruling is attached hereto.

### **CEQA exemptions claimed by the City**

In the Memorandum from Dean Kubani to the Mayor and City Counsel recommending that the City Council introduce the proposed ordinance for first reading, Mr. Kubani states:

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<sup>3</sup> STPB filed the lawsuits in the name of Save The Plastic Bag Coalition, an alternative name that it uses for litigation purposes.

The City's action to adopt an ordinance that prohibits retail establishments from providing single-use plastic carry out bags and regulates the use of paper carry out bags is exempt from the provisions of the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines, Section 15061(b)(3) [project is exempt when it can be determined with certainty that there is no potential for causing a significant effect on the environment], Section 15307 (Class 7) [action by regulatory agency to assure the maintenance, restoration, or enhancement of a natural resource where regulatory process involves procedures for the protection of the environment] and Section 15308 (Class 8) [action is taken by regulatory agency to assure the maintenance, restoration, enhancement, or protection of the environment where regulatory process involves procedures for the protection of the environment]. The proposed ordinance is specifically designed to significantly reduce or eliminate the use of single-use plastic and paper bags, and to encourage a major shift to the use of reusable bags by consumers. Implementation of this ordinance will likely result in the reduction of tens of millions of single-use bags and the associated environmental impacts related to their manufacture, transportation, use and disposal. The current unregulated and unrestricted use of these products causes significant adverse environmental impacts to the City of Santa Monica, to local beaches, to the marine environment, and to wildlife, and causes the depletion of natural resources and the unnecessary filling of limited landfill capacity.

As drafted the ordinance will replace environmentally harmful products by encouraging the use of reusable products. All of the alternative products are currently available for use.

The City of Oakland relied on §15061(b)(3) and §15038 *and lost the case*. (§15037 is the same as §15038 in that it is a categorical exemption that is subject to the exception in §15300.2(c)(3).) It is surprising that Santa Monica is planning to take the same course of action as Oakland regarding CEQA exemptions.

**The City may not rely upon the claimed CEQA exemptions**

CEQA §15061(b)(3), known as the “common sense exemption,” states: “Where it can be seen *with certainty* that there is *no possibility* that the activity in question may

have a significant effect on the environment, the activity is not subject to CEQA.”

In *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, the Court of Appeal stated (at 117):

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

In *County Sanitation District No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, the court held as follows:

At 1558: We hold County was required to prepare an EIR under CEQA. This is because CEQA requires the preparation of an EIR whenever substantial evidence supports a fair argument that an ordinance will cause potentially significant adverse environmental impacts.

At 1579: California courts, including the Fifth Appellate District, routinely describe the fair argument test as a low threshold requirement for the initial preparation of an EIR that reflects a preference for resolving doubts in favor of environmental review....

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

A logical deduction from the formulation of the fair argument test is that, if substantial evidence establishes a reasonable possibility of a significant environmental impact, then the existence of contrary evidence in the administrative record is not adequate to support a decision to dispense with an EIR. Guidelines, §15064, subd. (f)(1); *League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904-905.

127 Cal.App.4th at 1579-80. *See also, Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337, 1348 (“If such evidence [supporting a fair argument of significant environmental impact] is found, it cannot be overcome by substantial evidence

to the contrary.”); *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 (“[E]vidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact.”)

Like Oakland, the City cannot rely on §15061(b)(3) as a reason for not preparing an EIR. There is substantial evidence in the record, including the Scottish Report, the 3-08 ULS Report, and the 9-08 ULS Report, that supports a “fair argument” that (i) single use paper bags are more environmentally damaging than single use plastic bags; and (ii) paper bag usage will increase. The City has not satisfied the requirement of showing with certainty that there is *no possibility* that the Ordinance will have a significant environmental effect.

In the Oakland case, the Alameda Superior Court noted that CEQA §15300.2(c)(3) contains an exception to the categorical exemptions (including Class 7 §15307 and Class 8 §15308) when there is a “reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” The court further noted that this is reviewed under the “fair argument” standard. *Citing, Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 264, 265. The court ruled that the question is whether “on the basis of the whole record, there was no substantial evidence that there would be a significant [environmental] effect.” *Citing, Azusa Land Reclamation Company v. Main San Gabriel Basin Watermaster* (1997) 42 Cal.App.4th 1165, 1202 (emphasis in original Azusa opinion). The court concluded as follows:

A shift in consumer use from one environmentally damaging product to another constitutes an “unusual circumstance” of an activity that would otherwise be exempt from review under CEQA as activity undertaken to protect the environment. (See, e.g., *Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 474.) The court also finds that substantial evidence in the record supports at least a fair argument that single use paper bags are more environmentally damaging than single use plastic bags. [Citing Scottish Report and ULS Report.] (Exh. B at 11-12)

Public Resources Code §21080(c)(2) and CEQA §15064(f) provide that an agency may not rely upon conclusory assertions. CEQA §15064(f) states as follows:

Argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous, or evidence that is not credible, shall not constitute substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

The City is relying on conclusory assertions, which is not permitted. Moreover, the City has not even prepared an Initial Study an attempt to support the claimed exemptions. (Even if it prepares an Initial Study, the City will be unable to provide substantial evidence that there is *no possibility* of negative environmental impact.)

CEQA §15064.7(a) states that an agency may develop “thresholds of significance.” A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant. CEQA §15064.7(a) The City has not developed and did not cite any such thresholds of significance.

In this letter, STPB has provided substantial evidence of a negative environmental impact if the ordinance is adopted. STPB has made a “fair argument” that such an impact will occur. For the reasons stated by the Alameda Superior Court, the City of Santa Monica cannot rely on CEQA §15061(b)(3), §15307 or §15308 as the basis for not preparing an EIR.

### **Cumulative effects**

CEQA §15065(3) states that an EIR must be prepared if “the project has possible environmental effects that are individually limited but cumulatively considerable.”

CEQA §15065(3) states that “cumulatively considerable” means that the “incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.”

CEQA §15355 defines “cumulative impacts” as “two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.”

CEQA §15355(b) states that “[c]umulative impacts can result from individually minor but collectively significant projects taking place over a period of time.”

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

At 114: Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. [Footnote] One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear

insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

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

The court stated that the agency must “focus on the combined effects of these impacts.” 103 Cal.App.4th at 121.

Based on the foregoing, in determining whether the common sense or any other exemption applies, the City of Santa Monica is required by law to view its own proposal in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects, including but not limited to the following:

- The San Francisco plastic bag ban ordinance adopted in 2007
- The City of Malibu plastic bag ban ordinance adopted in 2008
- The Los Angeles County single use bag reduction program adopted in 2008
- The City of Manhattan Beach plastic bag ban ordinance adopted in 2008
- The proposed plastic bag fee being considered by Santa Clara County
- The proposed plastic bag ban or fee being considered by the City of San Jose
- All other plastic bag ordinances and projects that are being considered or that have been adopted in California and outside California

The City has not prepared a cumulative impact analysis and STPB therefore objects.

### **Demand for EIR**

STPB is concerned about the environmental impact of the proposed ordinance. The City’s violation of CEQA involves public rights. STPB is an interested citizen seeking to procure enforcement of the City’s public duties and its compliance with applicable state and local laws. In addition, some of the members of STPB supply plastic bags to such businesses in the Santa Monica and would lose sales if a plastic bag ban or fee ordinance is adopted.

STPB objects to the failure to prepare an EIR. STPB demands that an EIR be prepared pursuant to CEQA, prior to the adoption of any ordinance or program regarding plastic bags. It is indisputable that the proposed ordinance may have a significant negative effect on the environment.

In the event that no EIR is prepared, then STPB hereby asserts a continuing objection pursuant to California Public Resources Code §21177. STPB will file a petition for a writ of mandate in the Superior Court.

**Attorney's fees**

In the event that STPB files any legal proceedings, STPB will request attorney's fees pursuant to California Code of Civil Procedure §1021.5 and Government Code §800.

In *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, the court stated:

[L]itigation brought to enforce the provisions of CEQA and compliance with planning and zoning laws has been held to involve important rights affecting the public interest, and the private attorney general theory as codified in Code of Civil Procedure section 1021.5 applies to such suits. (*Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 994.) Whether or not the County acted in good faith is irrelevant; Code of Civil Procedure section 1021.5 was intended to encourage public interest litigation by providing compensation to successful counsel. (See *Serrano v. Unruh* (1982) 32 Cal.3d 621.)

**Conclusion**

Pursuant to CEQA §15072(b), I request that you mail to me any future notice of intent to adopt a negative declaration or mitigated negative declaration under CEQA.

I request that this letter, the Scottish Report, the 3-08 ULS Report and the 9-08 ULS Report be made part of the administrative record on the proposed ordinance.

STPB is interested in opening a constructive dialog with the City. If there is any interest on the City's part, please let me know.

All rights are reserved.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen L. Joseph", with a long horizontal line extending to the right from the top of the signature.

Stephen L. Joseph