

SAVETHEPLASTICBAG.COM

**OBJECTIONS TO PROPOSED NEGATIVE DECLARATION
AND NOTICE OF INTENT TO FILE LAWSUIT**

To the City of Palo Alto, Planning Department, 250 Hamilton Avenue, Palo Alto, CA 94303.

Project name: Ordinance to reduce single-use plastic checkout bags.

SaveThePlasticBag.com hereby responds to the August 28, 2008 Notice of Intent and Draft Negative Declaration. This document contains the following elements:

- A. Formal objections to the notice of intent to adopt a negative declaration regarding proposed plastic bag ordinance.
- B. Formal request for preparation of Environmental Impact Report (EIR) regarding proposed plastic bag ordinance, pursuant to the California Environmental Quality Act (CEQA).
- C. Notice of intent to file petition for writ of mandate under CEQA to require preparation of EIR regarding proposed plastic bag ordinance.
- D. Notice of intent to file lawsuit challenging validity of proposed plastic bag ordinance, including request for declaratory relief.

ABOUT SAVETHEPLASTICBAG.COM

SaveThePlasticBag.com is an unincorporated association of plastic bag manufactures and distributors. The members include (but are not limited to) Grand Packaging, Inc. (d/b/a Command Packaging) and Crown Poly, Inc. which are manufacturers of plastic bags and Elkay Plastics Co., Inc. which is a distributor of plastic bags. SaveThePlasticBag.com was formerly known as the Save The Plastic Bag Coalition.

Members of the association supply plastic carry-out bags to businesses covered by the proposed ordinance and would be adversely affected by its adoption.

SaveThePlasticBag.com (under its previous name) has filed a lawsuit against the County of Los Angeles challenging its phased ban of plastic bags.

SaveThePlasticBag.com (under its previous name) has also filed a lawsuit against the City of Manhattan Beach challenging the validity of its ordinance banning plastic bags.

Copies of the lawsuits are available at www.savetheplasticbag.com/ReadContent541.aspx.

**LEGAL BASIS FOR OBJECTION TO
PROPOSED NEGATIVE DECLARATION**

14 CCR §15061(b)(3) is known as the “common sense exemption.” It states as follows:

The activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. 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.
[Emphasis added]

The criterion for a negative declaration, that is that there is *no possibility* of significant environmental impact, is not satisfied in this instance.

The issue of the applicability of CEQA to the banning of plastic bags has already been litigated. *Coalition To Support Plastic Bag Recycling v. City of Oakland et al.*, Alameda Superior Court, Case No. RG07-339097 (hereinafter the “Oakland Case”). The City of Oakland passed an ordinance banning plastic bags, citing 14 CCR §15061(b)(3) and §15308 as reasons for not preparing an EIR. The court ruled that the ordinance was invalid as the city could not make the findings required under either section.

In the Oakland Case, the court referred to the Scottish Report and an earlier version of the ULS Report which are discussed in the next section of this document.

The court ruled as follows regarding 14 CCR §15061(b)(3):

The findings of the Scottish report raise a reasonable inference that an outright ban on single-use 100% petroleum plastic bags may result in increased use of paper bags.

This evidence 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....

It is because of this evidence in the record and unanimity of the uncertainty whether paper bags are less (or more) environmentally friendly than plastic bags that the City cannot assert that there is “no possibility” of any significant environmental effect caused by the ban of the 100% petroleum plastic bags.

Having found evidence to support a fair argument regarding the significant adverse effects of the Ordinance claimed by Petitioner, and no evidence that would permit the City to conclude to a certainty that Petitioner's concerns are unfounded, City's reliance on the common sense exemption was an abuse of discretion.

Ruling at 9-10.

The court ruled as follows regarding 14 CCR §15308:

[T]here are exceptions to the categorical exemptions. The City cannot rely on a categorical exemption for a project where there is a "reasonable possibility" that the activity will have a significant effect on the environment due to "unusual circumstances." (CEQA Guidelines § 15300.2(c).) The City's determination whether the ordinance will have a significant effect on the environment is reviewed under the fair argument standard. [Citation] The question is whether "on the basis of the whole record, there was *no* substantial evidence that there would be a significant [environmental] effect." [Citation] [Emphasis in original]

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. [Citation] 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. [Referring to Scottish Report, ULS Report, and other documents.]....

Although City points to evidence in the record that contradicts evidence cited by Petitioner, the court does not address it except to note that none of this evidence negates the evidence cited by petitioner. "If such evidence [supporting a fair argument of significant environmental impact] is found, it cannot be overcome by substantial evidence to the contrary." [Citation]

Ruling at 11-12.

**THE SHIFT TO PAPER BAGS WILL OR MAY RESULT IN A
SIGNIFICANT NEGATIVE ENVIRONMENTAL IMPACT**

Paper bags would not be banned under the proposed ordinance. Therefore, the proposed ordinance is likely to result in an increase in the number of paper bags offered to and accepted by consumers. The manufacture, distribution, and recycling of paper bags may or will result in a significant negative environmental impact. Therefore, the City of Palo Alto cannot meet the standard that there is *no possibility* that the proposed ordinance will cause a significant environmental effect.

In 2005, the Scottish Government issued a full environment impact assessment on the effects of a proposed plastic bag levy (the “Scottish Report”). A copy of the Scottish Report is available at www.scotland.gov.uk/Resource/Doc/57346/0016899.pdf.

The Scottish Report compared plastic and paper bags and made the following findings:

[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).

[Note: 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.]

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 contains the following comparison of the environmental metrics of plastic bags and paper bags. The lightweight plastic bag has been given a score of 1 in all categories as a reference point. The report states:

A score greater than 1 indicates that another bag ('bag for life' or paper) makes more contribution to the environmental problem than a lightweight plastic bag *when normalised against the volume of shopping carried*. A score of less than 1 indicates that it makes less

of a contribution, i.e. it has less environmental impact than a lightweight plastic bag.” [Emphasis added]

Indicator of environmental impact	HDPE bag lightweight	Paper bag single use
Consumption of non-renewable primary energy	1.0	1.1
Consumption of water	1.0	4.0
Climate change (emission of greenhouse gases)	1.0	3.3
Acid rain (atmospheric acidification)	1.0	1.9
Air quality (ground level ozone formation)	1.0	1.3
Eutrophication of water bodies	1.0	14.0
Solid waste production	1.0	2.7
Risk of litter	1.0	0.2

Scottish Report at page 23.

In March 2008, ULS issued an updated “Review Of Life Cycle Data Relating To Disposable, Compostable, Biodegradable, And Reusable Grocery Bags.” A copy of the report is available at <http://use-less-stuff.com>. ULS made the following findings which are contained in the report:

- A. Plastic bags generate 39% less greenhouse gas emissions than uncomposted paper bags, and 68% less greenhouse gas emissions than composted paper bags. The plastic bags generate 4,645 tons of CO2 equivalents per 150 million bags; while uncomposted paper bags generate 7,621 tons, and composted paper bags generate 14,558 tons, per 100 million bags produced.
- B. Plastic bags consume less than 6% of the water needed to make paper bags. It takes 1004 gallons of water to produce 1000 paper bags and 58 gallons of water to produce 1500 plastic bags.
- C. Plastic grocery bags consume 71% less energy during production than paper bags. Significantly, even though traditional disposable plastic bags are produced from fossil fuels, the total non-renewable energy consumed during their lifecycle is up to 36% less than the non-renewable energy consumed during the lifecycle of paper bags and up to 64% less than that consumed by biodegradable plastic bags.

- D. Using paper sacks generates almost five times more solid waste than using plastic bags.
- E. 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.

ULS Report at pages 3-4.

The ULS report concludes as follows:

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.

ULS Report at pages 5.

Based on the Scottish and ULS Reports and common sense, it is clear that a prohibition on the distribution of plastic carry-out bags in Palo Alto would result in an increase in the number of paper carry-out bags that would have significant negative environmental impacts. Consequently, the City of Palo Alto cannot meet the standard that there is *no possibility* that the proposed ordinance will cause a significant environmental effect.

Palo Alto's small size and the fact that a limited number of stores would be affected are irrelevant to the determination. The proposed ordinance is part of a statewide movement to ban or impose fees on plastic bags. Its potential impact must be evaluated and judged as part of the statewide movement and in conjunction with similar or related initiatives and ordinances in other cities and counties and proposed statewide legislation.

**A SHIFT TO REUSABLE BAGS MAY OR WILL RESULT IN A
SIGNIFICANT NEGATIVE ENVIRONMENTAL IMPACT**

The City of Palo Alto has indicated that it hopes that consumers will switch to reusable bags. The City has done no analysis of the environmental impacts of reusable bags. A shift to reusable bags may have a significant negative environmental impact. Therefore, the City of Palo Alto cannot

meet the standard that there is no possibility that the proposed ordinance will cause a significant environmental effect.

CEQA OBJECTION

Based on the foregoing and the documents provided herewith, SaveThePlasticBag.com objects to the proposed negative declaration and the city's findings and determinations under 14 CCR §15061(b)(3).

REQUEST FOR ENVIRONMENTAL IMPACT REPORT

SaveThePlasticBag.com requests and demands that the City of Palo Alto prepare an EIR, pursuant to CEQA. An EIR will determine the environmental impacts of a shift to paper bags and reusable bags.

The City Manager's Report and the Notice of Intent to Adopt a Negative Declaration contain myths and misinformation about plastic bags. They are anti-plastic bag advocacy documents based on incorrect allegations and gross exaggerations commonly found on various websites. The plastic bag industry is entitled to a good faith, objective and accurate assessment of the environmental impacts.

An editorial in the London Times published on March 8, 2008 stated:

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

The City of Palo Alto has accepted such misinformation without proper investigation.

An EIR would establish the following facts:

- A. Approximately 85% of plastic bags used in the United States are made in the United States. These bags are not made out of oil. They are made of ethane which is a waste product from domestically produced natural gas. If the ethane is not used to make plastic bags, it will have to be burned off. The statement in the City Manager's Report that 12 million barrels of oils are used to make plastic bags is untrue.
- B. The statement in the City Manager's Report that plastic bags kill thousands of marine mammals is untrue. The London Times has exposed this as a myth based on a typographical error. The report on which the myth is based mentioned discarded nets, not plastic bags. See www.savetheplasticbag.com/ReadContent609.aspx.

- C. The marine debris issue has been grossly exaggerated. A 24 hour 50 mile trawl by an environmental organization in the North Pacific Gyre produced only enough plastic to fill the palm of a hand. See www.savetheplasticbag.com/ReadContent684.aspx.
- D. Plastic bags are fully recyclable. Special plastic bag recycling bins have been installed in large supermarkets and retail stores throughout California since 2007. Virtually all of the plastic bags deposited in those bins are actually recycled.
- E. Plastic bags do not clog up landfills. According to the California Integrated Waste Management Board, plastic bags (including retail bags) use up 0.4% of landfill space. See www.ciwmb.ca.gov/Publications/LocalAsst/Extracts/34004005/ExecSummary.pdf.
- F. It is an advantage that plastic bags do not decompose in landfills because they do not produce methane or other greenhouse gases. In contrast, decomposing paper in landfills produces methane which is a greenhouse gas with 23 times the heat trapping power of CO₂. See www.environmentalpaper.org/stateofthepaperindustry/confirm.htm.
- G. The statement in the City of Palo Alto's Environmental Checklist Form that "plastic litter collection for beaches, state highways, cities and counties costs the State of California \$303.2 million each year" is untrue. That is the cost of clearing up all litter throughout the state, not just plastic bags. See www.savetheplasticbag.com/ReadContent606.aspx.

Taxing or banning plastic carryout bags will result in the direct loss of approximately 4,000 American jobs, including in California. In addition, there will be thousands of resin and distribution company job losses. Destroying an American manufacturing industry based on myths and misinformation is irresponsible, absurd, and tragic. Most reusable bags are made in China, including those sold by Trader Joe's, Safeway and Whole Foods.

On September 11, 2008, the largest producer of plastic bags, Hilex Poly, announced that it was shutting down its Mount Olive plant and firing 160 workers as a result of the reduction in orders for plastic bags. See <http://www.bizjournals.com/triangle/stories/2008/09/08/daily38.html>.

FURTHER OBJECTIONS

SaveThePlasticBag.com further objects to the proposed ordinance on the following grounds:

1. Pursuant to California Public Resources Code §§42250-42257 (also known as "AB 2449"), stores (as defined in §42250(e)) are required to install special recycling bins for plastic bags. AB 2449 was intended to address and constitute the state's solution to the perceived problems of plastic carry-out bags, including but not limited to recycling, litter, marine debris, and environmental sustainability issues. It occupies the field and preempts any potential city or county action to address those issues by enacting a plastic bag ban. AB 2449 contains no provision permitting a city or county to ban plastic bags. AB 2449

only reserves the right of cities and counties to adopt, implement, and enforce laws governing curbside or drop off recycling programs for plastic bags. §42250(c).

2. California cities and counties have no right or authority to ban a product simply because it is not recycled to a degree deemed satisfactory by the city or county.
3. California cities and counties have no right or authority to ban a product simply because the product sometimes becomes litter.
4. California cities and counties have no right or authority to ban a product simply because the product sometimes becomes marine debris.
5. A California city or county has no right or authority to ban plastic bags on environmental grounds. Other cities and counties may decide to pass laws banning paper bags rather than plastic bags. This would result in a patchwork of competing and conflicting environmental schemes that would cancel each other out and defeat the purposes of such laws. Assuming that it is not exclusively a federal matter under the Commerce Clause, only the California Legislature can enact a ban.

Each of the above objections is a separate and independent ground.

NOTICE OF INTENT TO FILE LAWSUIT

In the event that the city adopts the proposed ordinance, SaveThePlasticBag.com and/or some or all of its members intend to file a lawsuit challenging its validity. The grounds would include (but may not be limited to) the points and objections stated herein.

Specifically, SaveThePlasticBag.com and/or some or all of its members would file a petition for writ of mandate under CEQA to require preparation of an EIR. As part of the lawsuit, a request would be made for a judicial declaration that any such ordinance would be invalid.

We would request attorney's fees pursuant to Code of Civil Procedure § 1021.5.

NO WAIVERS

No arguments or objections are waived. All rights are reserved.

REQUEST FOR FUTURE NOTICES

Pursuant to 14 CCR §15070(b), I request that you mail or fax to me any future notice of intent to adopt a negative declaration or mitigated negative declaration under CEQA, and all other future CEQA-related notices.

Dated: September 17, 2008

STEPHEN L. JOSEPH

A handwritten signature in black ink, appearing to be 'S. L. Joseph', with a long horizontal line extending to the right from the top of the signature.

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