

STATE OFFICE
3435 Wilshire Blvd., #385
Los Angeles, CA 90010
(213) 251-3688 (ph)
(213) 251-3699 (fx)

LEGISLATIVE OFFICE
1107 9th St., Ste. 601
Sacramento, CA 95814
(916) 446-8062 (ph)
(916) 448-4560 (fx)

REGIONAL OFFICE
369 Broadway, Suite 200
San Francisco, CA 94133
(415) 622-0086 (ph)
(415) 622-0016 (fx)

December 30, 2013

Associate Justice Paul Haerle
California Court of Appeal
First Appellate District
Division Two
350 McAllister Street
San Francisco, CA 94102-7421

Re: Request to publish the Court's opinion in Save the Plastic Bag Coalition v. City and County of San Francisco, No. A137056 (Cal. Ct. App. December 10, 2013).

Dear Associate Justice Haerle:

Environment California Research & Policy Center respectfully requests, pursuant to California Rules of Court, Rule 8.1120, subd. (a), that the Court publish its opinion in Save the Plastic Bag Coalition v. City and County of San Francisco, No. A137056 (Cal. Ct. App. December 10, 2013). Publication is appropriate because the opinion:

- 1) Involves a legal issue of continuing public interest.¹
- 2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions.²

Environment California Research & Policy Center is a statewide, citizen-based environmental advocacy organization working to protect California's air, water, and beautiful places. We investigate problems, craft solutions, educate the public and decision-makers, and help Californians make their voices heard in debates over the quality of our environment and our lives. We have worked for years to keep plastic out of the Pacific Ocean, including plastic bags.³

Plastic bag ban ordinances and the environmental harm caused by plastic bags are issues of great interest and concern to Californians. Likewise, the scope of stores that may be regulated and the appropriate environmental review and analysis for such ordinances under the California

¹ California Rule of Court 8.1105(c)(6).

² *Id.* 8.1105(c)(2).

³ *See, e.g.*, Travis Madsen & Julia Ritchie, Environment California Research & Policy Center, Leading the Way Toward a Clean Ocean (2011) (explaining the need for and success of plastic bag ban laws worldwide).

Environmental Quality Act (CEQA) is a legal issue of continuing public interest statewide. Single-use plastic bags are one of the most common garbage items polluting California⁴ and a direct threat to California wildlife.⁵ Cleaning up and disposing of these bags imposes significant costs on California's local governments.⁶

To date, 90 California cities and counties have banned single-use plastic bags to protect the local environment and remove the bags' financial burden.⁷ Together, these municipalities represent nearly one in three Californians.⁸ A bill to ban plastic bags statewide fell just short of passage in the California State Senate this session.⁹ More local governments across California are considering plastic bag bans or are in the process of enacting them.¹⁰

Each local government developing a plastic bag ban must decide how to proceed under CEQA and which categories of stores to regulate. Two legal ambiguities have complicated this process; this Court's December 10 decision resolved both. First, no appellate court has previously considered whether the Retail Food Code¹¹ preempts applying local plastic bag ordinances to

⁴ Plastic bags are one of the four most common garbage items on California beaches. See Ocean Conservancy, Tracking Trash: 25 Years of Action for the Ocean 72 (2011) (presenting California cleanup data). Plastic bags are eight percent of all garbage volume flowing into San Francisco Bay, EOA, Inc., Preliminary Baseline Trash Generation Rates for San Francisco Bay Area MS4s 10 (2012), and as much as 19 percent of the trash volume flowing out to sea on the Los Angeles River watershed, Los Angeles County Board of Supervisors, Staff Report: An Overview of Carryout Bags in Los Angeles County 24 tbl.5 (2007).

⁵ Over 15 percent of garbage-entangled animals found during a 2010 worldwide beach cleanup were caught in plastic bags. Ocean Conservancy, Tracking Trash: 25 Years of Action for the Ocean 35 (2011). Sea turtles can mistake plastic bags for jellyfish, a favorite food. One third of all leatherback sea turtles are estimated to have plastic in their stomachs, most often a plastic bag. Nicholas Mrosovsky et al, Leatherback Turtles: The Menace of Plastic, 58 Marine Pollution Bulletin 287, 288 (2009) (summarizing over 370 autopsies).

⁶ Communities in California and other West Coast states spend an average of \$13 per resident per year cleaning up the kind of garbage that becomes marine debris, including plastic bags. Barbara Healy Stickel et al., The Cost to West Coast Communities of Dealing with Trash, Reducing Marine Debris 1, 17 (2012). In addition, plastic bags pose unique burdens to local infrastructure like the City of Sacramento's solid waste transfer facility. Workers must shut down the facility's machines six times per day to remove plastic bags caught in the machinery. Steve Harriman, City of Sacramento, Staff Report: Single-Use Plastic Bag Ordinance 4 (2013), available at <http://www.cityofsacramento.org/generalservices/solid-waste-recycling/Reusablebag.cfm>.

⁷ For the current list, see Appendix A.

⁸ Id.

⁹ See S.B. 405, 2013 Leg., Reg. Sess. (Cal. 2013).

¹⁰ See, e.g., Brian Bullock, SB County Supervisors Move Forward with Plastic Bag Ordinance, Lompoc Record (July 4, 2013) http://www.lompocrecord.com/news/local/govt-and-politics/sb-county-supervisors-move-forward-with-plastic-bag-ordinance/article_af943b3e-e465-11e2-ab99-0019bb2963f4.html; Ashley Gebb, Sit-Lie Ordinance, Plastic Bag Ban, City Budget on Chico Council Agenda for Tuesday, Chico Enterprise-Record (May 20, 2013), http://www.chicoer.com/news/ci_23280421/sit-lie-ordinance-plastic-bag-ban-city-budget; Cecilio Padilla, Sacramento Plastic Bag Ban Passes Committee, Council Vote Up Next, KTXL Fox 40 (May 28, 2013), <http://www.fox40.com/2013/05/28/sacramento-plastic-bag-ban-passes-committee-council-vote-up-next>; Kathryn Reed, S. Tahoe Council to Vote Again on Plastic Bag Ban, Lake Tahoe News (June 11, 2013), <http://www.laketahoenews.net/2013/06/s-tahoe-council-to-vote-again-on-plastic-bag-ban>; Tom Sakash, Council Considering Plastic Bag Ban for All Businesses in Town, Davis Enterprise (July 3, 2013), <http://www.davisenterprise.com/local-news/city/council-considering-plastic-bag-ban-for-all-businesses-in-town>; Brett Wilkison, Sonoma County Supervisors Support Plastic Bag Ban, Santa Rosa Press-Democrat (June 18, 2013), <http://www.pressdemocrat.com/article/20130618/ARTICLES/130619561>.

¹¹ Health & Saf. Code, § 113703 et seq.

restaurants. This left local governments uncertain as to the extent of their authority to protect the environment and city budgets by banning plastic bags. Second, San Francisco is by far the largest local government to adopt a plastic bag ban using CEQA's categorical exemptions. This has left many large jurisdictions uncertain as to the appropriate CEQA procedures to follow.

In the absence of judicial guidance, these uncertainties led to numerous lawsuits. Local governments relying on categorical exemptions¹² and negative declarations,¹³ among others,¹⁴ have faced legal challenges to their plastic bag ban ordinances under CEQA. The threat of industry litigation has prevented, delayed, or limited the scope of plastic bag bans in some jurisdictions.¹⁵

Ambiguity as to whether the retail food code preempts banning plastic bags in restaurants has caused hardship for other cities. On March 12, 2012, Carpinteria banned plastic bags in all stores, including restaurants. The Save the Plastic Bag Coalition filed suit, arguing that the Retail Food Code preempted Carpinteria from banning plastic bags in restaurants. The trial court overruled Carpinteria's demurrer.¹⁶ The city, a community of only 13,040 people, concluded that it could not afford to litigate the merits and settled with the Save the Plastic Bag Coalition.¹⁷ Carpinteria amended its ordinance to exempt restaurants and paid the Coalition \$11,500 in attorney's fees.¹⁸

This Court's opinion provides an invaluable CEQA roadmap for local governments seeking to protect their local environment from plastic bag pollution. By doing so, it addresses a legal issue

¹² E.g., Save the Plastic Bag Coalition v. County of Marin, No. A133868 (Cal. Ct. App. June 25, 2013); Save the Plastic Bag Coalition v. San Luis Obispo Integrated Waste Mgmt. Auth., No. CV 120078 (San Luis Obispo Super. Ct., Oct 1, 2012); Save the Plastic Bag Coalition v. City and County of San Francisco, No. CPF 12-511978 (San Francisco Super. Ct. Sept. 20, 2012).

¹³ E.g., Save the Plastic Bag Coalition v. City of Manhattan Beach, 52 Cal.4th 155 (Cal. 2011); Pet. for Writ of Mandate, Save the Plastic Bag Coalition v. City of Santa Cruz, No. CV 174811 (Santa Cruz Super. Ct. Aug. 2, 2012), vacated Mar. 13, 2013; Pet. for Writ of Mandate, Save the Plastic Bag Coalition v. City of Palo Alto, No. 1-09-CV-140463 (Santa Clara Super. Ct. Apr. 10, 2009), dismissed Sept. 8, 2009.

¹⁴ For other CEQA lawsuits involving plastic bag bans, see Pet. for Writ of Mandate, Save the Plastic Bag Coalition v. City of Long Beach, No. BS 132500 (Los Angeles Super. Ct. June 9, 2011), dismissed Oct. 17, 2011; Pet. for Writ of Mandate, Save the Plastic Bag Coalition v. County of Los Angeles, No. BS 115845, slip op. at 8-9 (Los Angeles Super. Ct. May 3, 2010) (dismissed as unripe).

¹⁵ See, e.g., Letter from Steven Joseph, Counsel, Save the Plastic Bag Coalition, to Mike Anderson, Mayor, City of Lafayette (May 13, 2013) (included as Appendix B) (threatening to sue the City of Lafayette if the city enacted a plastic bag ban without preparing and certifying an EIR); Ashley Gebb, Legal Action Threatened if Chico Adopts Plastic Bag Ban, Chico Enterprise-Record (April 15, 2013), http://www.chicoer.com/ci_23026877/legal-action-threatened-if-chico-adopts-plastic-bag ("Save the Plastic Bag Coalition objects to the ordinance's adoption without prior preparation and certification of an environmental impact report."). Lafayette declined to proceed with a plastic bag ban. See Plastic Bag Ban, City of Lafayette, <http://www.ci.lafayette.ca.us/index.aspx?page=426> (last visited July 8, 2013).

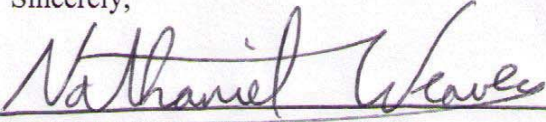
¹⁶ Final Decision on Demurrer, Save the Plastic Bag Coalition v. City of Carpinteria, No. 1385674 (Santa Barbara Super. Ct. May 15, 2012).

¹⁷ Nich Welsh, Carpinteria Settles Bag Ban Lawsuit, Santa Barbara Independent (June 26, 2012), <http://www.independent.com/news/2012/jun/26/carpinteria-settles-bag-ban-lawsuit>.

¹⁸ Id.

of continuing public interest involving facts significantly different from those stated in published opinions. For the foregoing reasons, Environment California Research & Policy Center respectfully requests publication of this Court's opinion of December 10, 2013 in Save the Plastic Bag Coalition v. City and County of San Francisco, No. A137056. Thank you for your consideration.

Sincerely,

A handwritten signature in dark ink that reads "Nathaniel Weaver". The signature is written in a cursive style with a long horizontal stroke underneath the name.

Nathaniel Weaver (SBN 289038)

Oceans & Preservation Advocate

Environment California Research & Policy Center

Cc: Presiding Justice J. Anthony Kline, Associate Justice James Richman

Appendix A

Local plastic bag bans in California

Jurisdiction	Pop. (2010)	Jurisdiction	Pop. (2010)
Alameda (city)	73,812	Menlo Park	32,026
Alameda County (uninc'd)	141,266	Mill Valley	13,903
Albany	18,539	Millbrae	21,532
Arcata	17,231	Monterey (city)	27,810
Arroyo Grande	17,252	Morgan Hill	37,882
Atascadero	28,310	Morro Bay	10,234
Belmont	25,835	Mountain View	74,066
Berkeley	112,580	Newark	42,573
Brisbane	4,282	Oakland	390,724
Burlingame	28,806	Ojai	7,461
Calabasas	23,058	Pacifica	37,234
Campbell	39,349	Palo Alto	64,403
Capitola	9,918	Pasadena	137,122
Carmel-by-the-Sea	3,722	Paso Robles	29,793
Carpinteria	13,040	Piedmont	10,667
Colma	1,792	Pismo Beach	7,655
Culver City	38,883	Pittsburg	63,264
Cupertino	58,302	Pleasanton	70,285
Daly City	101,123	Portola Valley	4,353
Dana Point	33,351	Redwood City	76,815
Davis	65,622	Richmond	103,701
Dublin	46,036	San Bruno	41,114
East Palo Alto	28,155	San Carlos	28,406
El Cerrito	23,549	San Francisco (city & cnty.)	805,235
Emeryville	10,080	San Jose	945,942
Fairfax	7,441	San Leandro	84,950
Fort Bragg	7,273	San Luis Obispo (city)	45,119
Foster City	30,567	San Luis Obispo County (uninc'd)	118,118
Fremont	214,089	San Mateo (city)	97,207
Glendale	191,719	San Mateo County (uninc'd)	61,222
Grover Beach	13,156	San Pablo	29,139
Half Moon Bay	11,324	Santa Barbara (city)	88,410
Hayward	144,186	Santa Clara County (uninc'd)	89,960
Huntington Beach	189,992	Santa Cruz (city)	59,946
Laguna Beach	22,723	Santa Cruz County (uninc'd)	129,739
Livermore	80,968	Santa Monica	89,736
Long Beach	462,257	Solana Beach	12,867
Los Altos	28,976	South Lake Tahoe	21,403
Los Angeles (city)	3,792,621	South San Francisco	63,632
Los Angeles County (Uninc'd)	1,127,877	Sunnyvale	140,081
Los Gatos	29,413	Truckee	16,180
Malibu	12,645	Ukiah	16,075
Manhattan Beach	35,135	Union City	69,516

Marin County (Uninc'd)	67,427	Watsonville	51,199
Mendocino County (uninc'd)	59,156	West Hollywood	34,399
Total population w/ bag ban	11,895,936		
State Population	37,253,956		
Percentage w/ bag ban	32%		

Appendix B

From: Stephen L. Joseph [REDACTED]
Sent: Monday, May 13, 2013 2:34 PM
To: Anderson_Mike; Tatzin, Don; Andersson, Brandt; Mitchell, Mark; Reilly, Traci; Robbins, Joanne
Subject: CEQA objections to carryout bag ordinance

TO THE CITY OF LAFAYETTE:

1. NOTICE OF INTENT TO LITIGATE. We object to the adoption of a carryout bag ordinance or any ordinance banning plastic bags without the prior preparation and certification of an EIR. While the West Contra Costa Integrated Waste Management Authority has prepared an EIR, the EIR does not cover the City of Lafayette. We will file a petition for writ of mandate in Superior Court if no EIR is prepared covering the City of Lafayette. We will request that the court invalidate the ordinance. We will also request an award of costs.
2. CATEGORICAL EXEMPTIONS ONLY AVAILABLE FOR PRE-AUTHORIZED REGULATORY ACTIONS: The categorical exemptions in CEQA Guidelines sections 15307 and 15308 do not apply to legislative actions such as plastic bag ordinances. The categorical exemptions only apply to "regulatory" actions by "regulatory" agencies that are "authorized by state law or local ordinance." There is no existing state law or local ordinance authorizing any plastic bag ban. STPB objects to a claim of categorical exemption for what is clearly a legislative and non-regulatory action.
3. CATEGORICAL EXEMPTIONS ONLY AVAILABLE IF ENVIRONMENTAL PROCESS EXISTS: CEQA Guidelines Sections 15307 and 15308 only apply "where the regulatory process involves procedures for protection of the environment." There is no such "regulatory process" involving "procedures for the protection of the environment" in this instance. The City of Lafayette would be attempting to exempt itself from the only such environmental protection process, namely CEQA itself. STPB objects to a claim of exemption in the absence of any regulatory process involving procedures for the protection of the environment.
4. PAPER BAG FEE CANNOT BE CONSIDERED IN EXEMPTION DETERMINATION: The City of Lafayette would not be permitted to rely on a proposed paper bag fee as a basis for claiming an exemption. A public agency is not permitted to evaluate any aspect of a project as part of an exemption determination. In *Salmon Protection & Watershed Network v. County of Marin*, the court stated: "Mitigation measures may support a negative declaration but not a categorical exemption." STPB objects to an evaluation of the impact of a paper bag fee as part of a categorical exemption determination.
5. INVOKING OF EXCEPTIONS TO CATEGORICAL EXEMPTIONS. The proposed ordinance may result in significant negative cumulative environmental impacts based on unusual circumstances, because a 10-cent (or other fee) fee is not high enough to act as an effective deterrent to paper bag usage. STPB invokes CEQA Guidelines Sections 15300.2(b) and 15300.2(c). If the City Council elects to move forward with an ordinance, we will provide full documentary evidence for our "fair argument," as we have with other cities and counties.

Appendix B

6. SUPREME COURT RULING: The Supreme Court has ruled that CEQA environmental review "will be required" for small cities as "cumulative impacts should not be allowed to escape review when they arise from a series of small-scale projects." (Save The Plastic Bag Coalition v. City of Manhattan Beach.) The City of Lafayette would be one of a series of small and large scale projects.

7. A NEGATIVE DECLARATION WOULD NOT SUFFICE. The proposed ordinance may result in significant negative cumulative environmental impacts due to the worse environmental impacts of paper bags and underused reusable bags. Therefore, an EIR must be prepared. If the City Council elects to move forward with an ordinance, we will provide full documentary evidence for our "fair argument," as we have with other cities and counties.

8. RESERVATION OF RIGHTS: Any statement or objection above is not intended to waive any other objections. No waivers of any kind are intended. All rights are reserved.

9. CONCLUSION: The campaign against plastic bags is based on misinformation. We recommend that you watch our six-minute movie at www.plasticbagmovie.com and that you will show it at the Council meeting.

10. MAILING LIST: Please place me on the mailing list for all CEQA and other notices regarding any proposed carryout bag ordinance. Please confirm that I am on the mailing list. Thank you.

Regards,

Stephen L. Joseph, Counsel
SAVE THE PLASTIC BAG COALITION

[REDACTED]
Los Angeles, CA 90049

Phone: [REDACTED]

Website: [REDACTED]

E-mail: [REDACTED]
[REDACTED]