

2 Davis, California 95616
Telephone No.: 916.206.1506
3 Fax No.: 916.443.3912
Email: rzvida@campaignforrecycling.org

4 Attorney for Amicus Curiae
5 CALIFORNIANS AGAINST WASTE

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AUG 19 2011
K. Main
KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: K. Main, Deputy

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF MARIN

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13 SAVE THE PLASTIC BAG COALITION,
14 an unincorporated association,

15 Petitioner,

16 v.

17 COUNTY OF MARIN, a political subdivision
18 of the State of California; MARIN COUNTY
DEPARTMENT OF AGRICULTURE,
19 WEIGHTS & MEASURES, an agency of the
County of Marin; and DOES 1-100, inclusive,

20 Respondents.
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Case No. CIV 1100996

The Hon. Judge M. Lynn Duryee

**CALIFORNIANS AGAINST WASTE'S
AMICUS CURIAE BRIEF IN SUPPORT
OF OPPOSITION TO PETITION FOR
WRIT OF MANDATE UNDER CEQA
AND DECLARATORY JUDGMENT**

Petition Hearing Date: September 13, 2011
Time: 9:00 a.m.
Dept.: L

#395 8-19-11

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION AND BACKGROUND.....1

STANDARD OF REVIEW2

ARGUMENT3

 A. AB 2449 Does Not Preempt the Ordinance Because the Two
 Are Not in Conflict.....3

 1. AB 2449 Does Not Expressly Preempt Local Bag Bans.....4

 2. AB 2449 Does Not Impliedly Preempt Local Bag Bans.....5

 B. The County Properly Relied on Categorical Exemptions to
 CEQA.....8

 1. The Manhattan Beach Decision Supports the County's
 Determination.....9

 2. The County Did Not Need to Prepare an Initial Study Before
 Making its Categorical Exemption Determination.....11

 3. The County Did Not Need to Make Written Findings to
 Support its Categorical Exemption Determination.....12

 4. The County Based its Categorical Exemption Determination
 on Substantial Evidence.....12

 5. Petitioner Does Not Show that an Exception to the
 Exemption Applies.....13

CONCLUSION.....15

TABLE OF AUTHORITIES

Cases

American Financial Services Ass'n, v. City of Oakland
(2005) 34 Cal.4th 1239.....5, 7

Apartment Ass'n of Greater Los Angeles v. City of Los Angeles
(2001) 90 Cal.App.4th 116211, 15

Apartment Ass'n of Los Angeles, Inc. v. City of Los Angeles
(2006) 136 Cal.App.4th 119.....2

Ass'n for Protection etc. Values v. City of Ukiah
(1991) 2 Cal.App.4th 720, 723, 726.....8, 12

Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster
(1997) 52 Cal.App.4th 1165.....13, 14

Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego
(2006) 139 Cal.App.4th 249, 278.13

Baron v. City of Los Angeles
(1970) 2 Cal.3d 535, 541.....7

Big Creek Lumber Co. v. County of Santa Cruz
(2006) 38 Cal.4th 1139.....3, 4

CalBeach Advocates v. City of Solana Beach
(2002) 103 Cal.App.4th 529.....12

Candid Enterprises, Inc. v. Grossmont Union High School Dist.
(1985) 39 Cal.3d 878.....3

Coalition to Support Plastic Bag Recycling v. City of Oakland,
Alameda Superior Court (Super. Ct. Alameda County, 2008, No. RG07-339097.....14

DaFonte v. Up-Right, Inc.
(1992) 2 Cal.4th 593.....4

Davidon Homes v. City of San Jose
(1997) 54 Cal.App.4th 106.....8, 13

Fairbank v. City of Mill Valley
(1999) 75 Cal.App.4th 1243.....13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Green v. State of California
(2007) 42 Cal. 4th 254.....4

In re Portnoy
(1942) 21 Cal.2d 237, 240.....3

Magan v. County of Kings
(2002) 105 Cal.App.4th 468.....11, 12

McDowell & Craig v. City of Santa Fe Springs
(1960) 54 Cal.2d 33.....10

Robins v. County of Los Angeles (1966) 248 Cal.App.2d 1, 8-9.....7

Save the Plastic Bag Coalition v. City of Manhattan Beach
(2011) 52 Cal.4th 155.....passim

Sequoia Park Assoc. v. County of Sonoma
(2009) 176 Cal.App.4th 1270.....6

Sherwin-Williams Co. v. City of Los Angeles (1983) 4 Cal.4th 893.....passim

Surfrider Foundation v. California Coastal Commission
(1994) 26 Cal.App.4th 151.....14

Western States Petroleum Ass'n v. Superior Court
(1995) 9 Cal.4th 559.....2

1	Statutes and Regulations	
2	Cal. Pub. Resources Code	
3	Section 21060.5.....	10
4	Section 21080, subd. (c).....	8
5	Section 21080, subd. (d).....	8
6	Section 21082.2, subd. (c).....	12
7	Section 21084, subd. (a).....	9
8	Section 21151, subd. (b).....	10
9	Section 21168.5.....	2, 12
10	Sections 42250-42257.....	<i>passim</i>
11	Section 42250, subd. (e).....	6
12	Section 42254, subd. (a).....	6
13	Section 42254 subd. (b).....	3, 4
14	Stats. 2006, ch. 845,	
15	Section 1.....	6
16	Section 1, subd. (a).....	<i>passim</i>
17	Cal. Code Regs., tit. 14, div. 6, ch. 3 (CEQA Guidelines)	
18	Section 15061, subd. (b).....	8, 9, 11
19	Section 15070.....	8
20	Section 15300.....	8
21	Section 15300.2, subd. (c).....	9, 13
22	Section 15307.....	9
23	Section 15308.....	9
24	Section 15063.....	8
25	Section 15063 subd. (a).....	11
26	Section 15064, subd. (a).....	8
27	Section 15065 subd. (a)(3).....	11
28	Section 15378.....	8
	Marin County Code	
	Section 5.46.010, subd. (c).....	2
	Section 5.46.020.....	1
	Section 5.46.020, subd. (b).....	2, 7
	Section 5.46.020, subd. (c).....	2
	Rules of Court	
	Cal. Rules of Court, rule 8.1115.....	13

1 **INTRODUCTION AND BACKGROUND**

2 Plastic carryout bags are a blight on California’s environment and economy. It is
3 estimated that Californians use nearly 20 billion single-use high density polyethylene (HDPE)
4 grocery bags annually. (Administrative Record (“AR”), Vol. 1, Tab A, p. 2 (Marin County
5 Department of Agriculture Letter).) The production and disposal of these bags have caused
6 significant environmental impacts on the entire world, requiring millions of barrels of oil, and
7 causing the deaths of thousands of marine animals through ingestion and entanglement.
8 (Legislature’s findings in enacting Public Resources Code sections 44250-57, available at Stats.
9 2006, ch. 845, § 1 (hereafter “AB 2449 Findings”), subd. (a)(1).) Most plastic carryout bags do
10 not biodegrade, resulting in the bags breaking down into smaller and smaller toxic pieces that
11 contaminate soil and waterways, and enter the food web where animals accidentally ingest those
12 materials. (*Id.*, subd. (a)(3).)

13 Local governments are often stuck with cleaning up the mess caused by plastic bags. In
14 California, litter cleanup alone requires public agencies to spend upwards of \$375 million annually
15 and \$25 million to dispose of discarded plastic bags. (AR Vol. 1, Tab A, p. 2 (Marin County
16 Department of Agriculture Letter).) In Marin County (hereafter the “County”), 138 million bags
17 are used annually that end up in the County’s landfill or in the waste stream. (*Ibid.*) Because they
18 are so light, plastic bags easily escape out of landfills, and many find their way to the water.
19 Many of the plastic bags that escape out of the landfill or are littered on the County’s streets
20 eventually make their way to the ocean, where they accumulate and are ingested by marine
21 animals. (AR Vol. 1, Tab A, p. 32 (Marin County Hazardous and Solid Waste Management Joint
22 Powers Authority Letter (“It is estimated plastic blown litter is responsible for the death of a
23 million sea birds and 100,000 mammals annually worldwide”).)

24 In an effort to reduce the County’s contribution to this massive problem, it adopted
25 Ordinance No. 3553 (hereafter the “Ordinance”), which prohibits stores in the unincorporated
26 areas of the County from providing single-use plastic carryout bags. (AR Vol. 1, Tab E, pp. 1-5
27 (Marin Ord. No. 3553, adding Ch. 5.46 to the Marin County Code (“Ordinance”), § 5.46.020).)
28 Recognizing that single-use paper bags also are associated with environmental impacts, the

1 Ordinance requires that all paper bags offered at stores in unincorporated areas of the County be
2 made of at least 40 percent postconsumer recycled materials, and requiring consumers to pay a 5-
3 cent fee for their use. (*Id.* at §§ 5.46.010, subd. (c), 5.46.020, subd. (b)(2)(D).) After five years of
4 research, outreach, and review, the County determined that these provisions would dramatically
5 reduce the use of both plastic and paper carryout bags, and increase the use of reusable bags. (AR
6 Vol. 1, Tab E, p. 2 (Ordinance Findings, § 1); AR Vol. 1, Tab A, p. 4 (Letter from Marin County
7 Department of Agriculture).) The County determined that the Ordinance was categorically
8 exempt from CEQA review because it is a regulatory measure designed to protect natural
9 resources and the environment generally, and that the available evidence showed that the
10 Ordinance would have a positive environmental impact. (See AR Vol. 1, Tab D, p. 1 (Letter from
11 County Counsel).)

12 Save the Plastic Bag Coalition, a coalition of plastic bag manufacturers and distributors
13 (hereafter “Petitioner”), now argues that the County could not pass the Ordinance because it was
14 preempted by a state law that was put into place as a way to reduce the use of plastic carryout bags
15 and increase the use of reusable bags – the same reasons the Ordinance was adopted. Petitioner
16 also claims that the County could not rely on categorical exemptions and should have conducted a
17 full CEQA review of the Ordinance before it was adopted. Petitioner is wrong on both counts.

18 **STANDARD OF REVIEW**

19 The issue of preemption of a local ordinance by state law is a question of law, and
20 therefore subject to de novo review. (*Apartment Ass’n of Los Angeles, Inc. v. City of Los Angeles*
21 (2006) 136 Cal.App.4th 119, 126.) The standard of review for the issue of whether the County
22 complied with CEQA when it adopted the Ordinance is abuse of discretion. (Pub. Resources
23 Code, § 21168.5; *Western States Petroleum Ass’n v. Superior Court* (1995) 9 Cal.4th 559, 567.)
24 Abuse of discretion will be established if the County’s decision was not supported by substantial
25 evidence. (Pub. Resources Code, § 21168.5.)

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ARGUMENT

A. AB 2449 Does Not Preempt the Ordinance Because The Two Are Not In Conflict

Recognizing the major environmental problems posed by plastic carryout bags, the California Legislature passed AB 2449 in 2006 with the hope of increasing consumers' use of reusable bags. (AB 2449 Findings.) Among other provisions, the statute requires supermarkets and larger stores that provide plastic carryout bags to consumers to maintain recycling bins for those bags. It also requires those stores to make reusable bags available to consumers. (Pub. Resources Code, §§ 42250-57.) The language in AB 2449 preempts local governments from imposing a fee on plastic carryout bags, but does not address local legislation, such as the County's, that ban plastic carryout bags entirely. (Pub. Resources Code, § 42254(b)(2).) Petitioner claims that local bag bans are preempted by AB 2449, but such bans are compatible with the statute and would actually further the Legislature's goals of reducing the amount of plastic bags that are littering the state's streets, entering its waterway, and causing harm to its animals and general environment. (AB 2449 Findings, subd. (a)(1)-(3).)

Article XI, Section 7 of the California Constitution provides that "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." The California Supreme Court has identified three types of conflict that cause preemption: "A conflict exists if the local legislation 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.' " (*Sherwin-Williams Co. v. City of Los Angeles* (1983) 4 Cal.4th 893, 897-898 (*Sherwin Williams*) (quoting *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885).) None of these conflicts exists between AB 2449 and the Ordinance, and thus Petitioner fails to meet its burden of showing preemption. (See *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149 (*Big Creek Lumber*) (party claiming that state law preempts local ordinance has burden of showing preemption).)

First, the Ordinance is not duplicative of AB 2449 because it is not coextensive with it. (*Sherwin-Williams, supra*, 4 Cal.4th at 897 (citing *In re Portnoy* (1942) 21 Cal.2d 237, 240 (finding local legislation to be duplicative of statute when it imposed the same criminal

1 prohibition.) Second, the Ordinance is not contradictory to AB 2449. Local legislation is
2 contradictory to state law when it is inimical thereto. Since the Ordinance “does not prohibit what
3 the statute commands or command what it prohibits,” it is not contradictory to AB 2449.
4 (*Sherwin-Williams, supra*, 4 Cal.4th at p. 902; *Big Creek Lumber, supra*, 38 Cal.4th at p. 1161.)
5 Finally, the area of plastic bag regulation is not fully occupied by general law because AB 2449
6 does not expressly or impliedly preempt local bag bans.

7 **1. AB 2449 Does Not Expressly Preempt Local Bag Bans**

8 State law preempts local legislation when the Legislature has “expressly manifested its
9 intent to ‘fully occupy’ the area,” or if it has impliedly done so. (*Sherwin-Williams, supra*, 4
10 Cal.4th at p. 898.) AB 2449 does not contain any language that expressly preempts, or shows
11 legislative intent to preempt, local bans on plastic bags. Instead, the language in AB 2449
12 preempts local governments from imposing a fee on plastic carryout bags. The language provides:
13 “Unless expressly authorized by this chapter, a city, county or other public agency shall not adopt,
14 implement, or enforce an ordinance, resolution, regulation, or rule to . . . [i]mpose a plastic
15 carryout bag *fee* upon a store that is in compliance with this chapter.” (Pub. Resources Code, §
16 42254, subd. (b)(2) (emphasis added).)¹ A “fee” does not mean a “ban.” (See *Green v. State of*
17 *California* (2007) 42 Cal. 4th 254, 260 (citing *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593,
18 601) (finding that words in a statute must be given their “usual and ordinary meaning,” which
19 controls the court’s interpretation unless the words are ambiguous).) Since this language is clear,
20 Petitioner presumably argues that the Legislature intended to *impliedly* preempt the entire field of
21 plastic bag regulation. In expressly disallowing local fees, however, the Legislature demonstrated
22 that it has the ability to write *express* preemptive language when it wants to do so. The absence of
23 any similar language preempting local bans is notable, and should be taken as evidence that the
24 Legislature intended no such ban.

25 ///

26 ¹ The statute also preempts local governments from requiring a store that is in compliance with
27 AB 2449 to “collect, transport, or recycle plastic carryout bags” or to require auditing or reporting
28 requirements that are in addition to what is required by AB 2449. (Pub. Resources Code § 42254,
subds. (b)(1), (3).)

1 **2. AB 2449 Does Not Impliedly Preempt Local Bag Bans**

2 There is no evidence that the Legislature intended to impliedly preempt local bag bans.

3 The Supreme Court has defined three indicia of intent to describe when a local ordinance is
4 impliedly preempted by state legislation. A court may find implied preemption where:

- 5 (1) [T]he subject matter has been so fully and completely covered by
6 general law as to clearly indicate that it has become exclusively a matter of
7 state concern;
8 (2) the subject matter has been partially covered by general law couched in
9 such terms as to indicate clearly that a paramount state concern will not
10 tolerate further or additional local action; or
11 (3) the subject matter has been partially covered by general law, and the
12 subject is of such a nature that the adverse effect of a local ordinance on the
13 transient citizens of the state outweighs the possible benefit to the locality.

14 (*Sherwin-Williams, supra*, 4 Cal.4th at pp. 897-898.) When considering these tests, courts
15 look to the whole purpose and scope of the legislative scheme. (See *American Financial*
16 *Services Ass’n, v. City of Oakland* (2005) 34 Cal.4th 1239, 1252 (*American Financial*)).

17 None of these indicia of intent is present here and, in fact, the purpose and scope of AB
18 2449 would be furthered by a decrease in plastic bag use.²

19 First, the subject matter has not been so fully and completely covered by the state as to
20 become exclusively a matter of statewide concern. The statute defines a very limited scope of
21 what the Legislature believed to be “statewide concern” in this area. It specifies only three areas:

22 _____
23 ² Indeed, in enacting AB 2449, the Legislature found:

- 24 (1) On a global level, the production of plastic bags has
25 significant environmental impacts each year, including the use of
26 over 12 million barrels of oil, and the deaths of thousands of
27 marine animals through ingestion and entanglement.
28 (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.

(AB 2449 Findings, subd. (a).)

- 1 (1) Requiring a store to collect, transport, or recycle plastic carryout bags.
- 2 (2) Imposing a plastic carryout bag fee upon a store.
- 3 (3) Requiring a store to conduct auditing or reporting with regard to plastic carryout bags.

4 (Pub. Resources Code, § 42254, subd. (a).) A plastic bag ban is not included in this
5 statutory scheme.

6 Nevertheless, Petitioner argues that the “scheme” of AB 2449 would be defeated by
7 plastic bag bans because stores would not be required to provide plastic bag recycling
8 collection bins to consumers. (Petitioner Opening Brief, p. 14.) Yet, if the Legislature had
9 deemed these collection bins so important as to merit a preemption of the entire field of
10 plastic bag regulation, the Legislature would have required *every* store to provide the
11 recycling bins, not just those stores that provide plastic carryout bags. Instead, the
12 Legislature chose to narrowly describe a subset of stores that are subject to AB 2449 and
13 allow for stores to voluntarily take themselves out of the statute’s requirements if those
14 stores chose not to provide plastic carryout bags to consumers.³ (See Pub. Resources
15 Code, § 42250, subd. (e).) AB 2449 was concerned with reducing the amount of plastic
16 bags in the waste stream, and increasing consumers’ use of reusable bags. (AB 2449
17 Findings.) The statute’s goals are, therefore, furthered as more stores stop providing
18 plastic carryout bags altogether, and the use of plastic bags decrease around the state.⁴

19 There is also no evidence suggesting that the language of AB 2449 indicates that the state
20 interest will not tolerate additional local input. (See *Sherwin-Williams, supra*, 4 Cal.4th at p. 898;
21 *Sequoia Park Assoc. v. County of Sonoma* (2009) 176 Cal.App.4th 1270, 1297-1298 (*Sequoia*).)
22 Petitioner cites to the Governor’s signing statement as evidence of legislative intent to preempt,

23
24 ³ For example, United Markets in Marin voluntarily stopped offering their customers plastic bags.
25 The store offered reusable bags even though they were not technically required to do so under AB
26 2449, and found that consumers increasingly used reusable bags rather than plastic or paper. (AR
27 Vol. 1, Tab D, p. 13.)

28 ⁴ Indeed, the County found that, even with these recycling bins, less than 5 percent of the 19
billion plastic bags that are used annually in California are actually recycled. (Ordinance, § 1
(Findings).)⁴ A bag ban is much more effective at reducing the amount of plastic bags in the
waste stream. (See generally AR Vol. 1 (evidence provided by County in approving Ordinance).)

1 but that statement has no bearing on this Court. (*American Financial, supra*, 34 Cal.4th 1239,
2 1264 (in considering preemption challenge, Court found that it “may not consider such
3 postenactment events as a Governor’s signing statement”).) The statement is ambiguous anyway,
4 where the Governor simply provides that the bill “precludes locals from implementing more
5 stringent local requirements.” The Governor was likely referring to the preemption on local
6 governments instituting fees on plastic bags, not bans.

7 Lastly, any adverse effect of the Ordinance on the state interest is not greater than what
8 local benefits derive from the Ordinance. (*Sherwin-Williams, supra*, 4 Cal.4th at p. 898; *Sequoia,*
9 *supra*, 176 Cal.App.4th at p. 1298.) Again, the state and local interests are congruous here. A
10 plastic bag ban means fewer plastic carryout bags entering into the waste stream where they harm
11 animals and the environment. Petitioner claims that the Ordinance may increase paper bag usage,
12 which would defeat the goals of AB 2449 to encourage reusable bag use. (Petitioner Opening
13 Brief p. 15.) Petitioner argues that AB 2449 mandates stores that provide plastic carryout bags to
14 make reusable bags available, but that the stores will not be required to provide reusable bags if
15 they no longer provide plastic carryout bags. (*Ibid.*) However, the Ordinance permits stores to
16 make reusable bags available in lieu of paper bags and, realistically, most stores will likely
17 continue to do so.⁵ (Ordinance, § 5.46.020, subd. (b)(2); see, e.g., AR Vol. 1, Tab D, p. 13 (Letter
18 from United Markets describing how stores continue to provide reusable bags even though they no
19 longer provide plastic carryout bags).)

20 Because AB 2449 does not preempt local bag bans, the Ordinance is valid. (See *Baron v. City*
21 *of Los Angeles* (1970) 2 Cal.3d 535, 541 (citing *Robins v. County of Los Angeles* (1966) 248
22 Cal.App.2d 1, 8-9) (if a state’s preemption of the field is not complete, local supplemental
23 legislation is permitted to the extent that it covers phases of the subject which have not been
24 covered by state law).)

25 ///

26 ///

27 ⁵ In addition, the County has provided reusable bags to its residents. (AR Vol. 1, Tab D, p. 12
28 (Marin County Hazardous and Solid Waste Management Joint Powers Authority Letter).)

1 **B. The County Properly Relied on Categorical Exemptions to CEQA**

2 Petitioner claims that if the Ordinance is not preempted by state law, then the County was
3 required to comply with CEQA as it was considering the Ordinance. Before complying with
4 CEQA, an agency can determine whether any statutory or categorical exemptions apply to the
5 project it is considering.⁶ (Cal. Code Regs., tit. 14, div. 6, ch. 3 (“CEQA Guidelines”), § 15061,
6 subds. (b)(1), (b)(2).) Another available exemption is the so-called “common sense” exemption,
7 which applies “[w]here it can be seen with certainty that there is no possibility that the activity in
8 question may have a significant effect on the environment[.]” (CEQA Guidelines, § 15061, subd.
9 (b)(3).) If any one of these exemptions applies, the agency is not required to comply with CEQA.
10 (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 113 (*Davidon Homes*) (where an
11 agency finds a project categorically exempt from CEQA, no further environmental review is
12 necessary); *Ass’n for Protection etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 726
13 (*Ukiah*) (“Where a project is categorically exempt, it is not subject to CEQA requirements and
14 may be implemented without any CEQA compliance whatsoever.” (Citations omitted).) If no
15 exemption applies to a project, then the agency must comply with CEQA.

16 Where an agency has determined that a proposed project is not subject to any exemption from
17 CEQA, an agency typically first prepares an initial study as the first step in its effort to comply
18 with CEQA. (See Pub. Resources Code, § 21080, subd. (c); CEQA Guidelines, § 15063.) If,
19 based on the initial study, the agency determines that there is no substantial evidence that the
20 proposed project may have a significant effect on the environment, then the agency must adopt a
21 negative declaration. (Pub. Resources Code, § 21080, subd. (c); CEQA Guidelines § 15070.) If,
22 on the other hand, the agency determines that there is substantial evidence in the whole record that
23 supports a fair argument that significant effects may occur from the proposed project, the agency
24 must prepare an Environmental Impact Report (“EIR”). (Pub. Resources Code, § 21080, subd.
25 (d); CEQA Guidelines, § 15064, subd. (a); see *Davidon Homes, supra*, 54 Cal.App.4th at p. 113
26 (describing three-tier process).)

27 ⁶ This review process is only subject to activities that are deemed “projects” pursuant to CEQA
28 Guidelines, section 15378.

1 Here, the County found that two categorical exemptions – Class 7 and Class 8 -- applied to the
2 Ordinance.⁷ (AR Vol. 1, Tab E, p. 6 (Notice of Exemption).) These exemptions permit actions
3 taken by agencies to maintain, protect, or restore natural resources to avoid CEQA review.⁸ Both
4 exemptions require that there be a regulatory process, such as an ordinance, that involves
5 procedures for protection of the environment. (CEQA Guidelines, §§ 15307, 15308.) Here, the
6 County legitimately invoked both of these exemptions, and no “exception” to the exemptions
7 applies to the Ordinance.⁹ As a result, the County did not need to comply with CEQA, and thus
8 was not required to conduct an Initial Study or prepare an EIR.

9 **1. The *Manhattan Beach* Decision Supports the County’s Determination**

10 Petitioner makes several arguments to the effect that, based on the recent California
11 Supreme Court decision in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52
12 Cal.4th 155 (hereafter “*Manhattan Beach*”), the County could not consider a categorical
13 exemption for its plastic bag ban. Petitioner is wrong. The *Manhattan Beach* decision supports
14 the County’s position.

15 In *Manhattan Beach*, the Supreme Court upheld a city’s ordinance banning plastic bags

16
17 ⁷ At times, Petitioner appears to confuse the “common sense exemption” found at CEQA
18 Guidelines, section 15061(b)(3) with the categorical exemptions, which are found starting at
19 section 15300 of the CEQA Guidelines. (Petitioner Opening Brief, pp. 7, 10.) The County only
20 found that Class 7 and Class 8 categorical exemptions applied and did not make any findings as to
21 a “common sense” exemption. (AR Vol. 1, Tab E, p. 6 (Notice of Exemption).) Thus, any
22 reference to the “common sense exemption” is irrelevant.

23 ⁸ Categorical exemptions are descriptions of types of projects that the Resources Agency Secretary
24 has determined do not have a significant effect on the environment. (See Pub. Resources Code, §
25 21084, subd. (a); Article 19 of CEQA Guidelines, commencing with section 15300.) Class 7
26 exemptions consist of “actions taken by regulatory agencies as authorized by state law or local
27 ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the
28 regulatory process involves procedures for protection of the environment.” (CEQA Guidelines, §
15307.) Class 8 exemptions are similar, consisting of “actions taken by regulatory agencies, as
authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or
protection of the environment where the regulatory process involves procedures for protection of
the environment.” (CEQA Guidelines, § 15308.)

⁹ In some instances, agencies cannot rely on ostensibly available categorical exemptions because
of the existence of “exceptions” to the exemptions. These exceptions are set forth in section
15300.2 of the CEQA Guidelines. One such exception applies “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, subd. (c) [emphasis added].)

1 where the city complied with CEQA by adopting a negative declaration instead of completing a
2 full EIR.¹⁰ Petitioner had argued that the city was required to complete a full EIR based on the
3 same “life cycle” reports Petitioner is submitting here. (Petitioner Opening Brief, p. 3 (citing
4 Franklin, Scottish, Boustead, and ULS Reports; *Manhattan Beach, supra*, 52 Cal.4th at pp. 163-
5 164 (discussing same reports).) The Court found those reports unconvincing because they did
6 not present evidence tailored to the city. The Court found the evidence to be too generic and too
7 divorced from the reality of the on-the-ground situation in any California community. As the
8 Court discussed, EIRs are required only for those aspects of a project likely to have *significant*
9 environmental effects *in the area that will be affected by the proposed project* (the “project area”).
10 (Pub. Resources Code, §§ 21060.5, 21151, subd. (b); *Manhattan Beach, supra*, 52 Cal.4th at p.
11 173.) Petitioner does not offer any evidence showing that County residents will switch from
12 using plastic bags to paper bags, and that this switch will result in significant environmental
13 impacts. Indeed, as the Supreme Court found in *Manhattan Beach*:

14 While some increase in the use of paper bags is foreseeable, and the
15 production and disposal of paper products is generally associated
16 with a variety of negative environmental impacts, no evidence
17 suggests that paper bag use *by Manhattan Beach consumers* in the
 wake of a plastic bag ban would contribute to those impacts in any
 significant way.

18 (*Manhattan Beach, supra*, 52 Cal.4th at p. 176 (emphasis added).)¹¹

19 To get around this, Petitioner claims that the Ordinance will result in cumulative impacts

20 ¹⁰ The Court did not consider categorical exemptions in *Manhattan Beach*, and so Petitioner is
21 wrong when it claims that, if categorical exemptions could apply to local bag bans, the Court
22 would have “said so” in its decision. (Petitioner Opening Brief, p. 12; *Manhattan Beach, supra*, 52
23 Cal.4th at pp. 163, 165 (city relied on negative declaration, not categorical exemption); see
McDowell & Craig v. City of Santa Fe Springs (1960) 54 Cal.2d 33, 38 (“It is elementary that the
24 language used in any opinion is to be understood in the light of the facts and the issue then before
25 the court. Further, cases are not authority for propositions not considered.” (Citations omitted).)

26 ¹¹ Petitioner reads much into the Supreme Court’s footnote where it states: “It would be pointless
27 to require the city [of Manhattan Beach] to prepare an EIR on the additional impacts of paper bag
28 use by its fewer than 40,000 residents, and ridiculous to ask it to evaluate the effects of a possible
countywide ban before acting locally.” (*Manhattan Beach, supra*, 52 Cal.4th at p. 175, fn. 10.)
The Ordinance applies to the County’s *unincorporated* areas, which includes only 40 retail stores.
(AR Vol. 1, Tab E, p. 1 (Ordinance Findings).) But regardless, Petitioner still needs to show that
the Ordinance is likely to have *significant* environmental effects in the *project area*, and it does
not do that.

1 that would trigger an EIR. (Petitioner Opening Brief, p. 12.) Yet, cumulative impacts do not
2 trigger an EIR unless the *project* at issue will have an incremental impact that is “cumulatively
3 considerable.” (See CEQA Guidelines, § 15065(a)(3).) Again, Petitioner offers no evidence
4 showing that the Ordinance will have such an impact. Other jurisdictions’ plastic bag bans or
5 EIRs are irrelevant to this question as they do not present evidence tailored to the County.

6 Finally, it is worth noting that the Ordinance will have less of an impact than the ordinance
7 considered in *Manhattan Beach*. The ordinance at issue in *Manhattan Beach* imposed a ban on
8 plastic bags with no provision for a fee on paper bags. (See *Manhattan Beach, supra*, 52 Cal.4th
9 at p. 165.) As noted by the County, a five-cent fee on paper bags has been found to discourage the
10 use of paper bags. (AR Vol. 1, Tab B, p. 3 (Marin County Department of Agriculture Letter).)
11 Thus, the County’s ordinance will have even less of an environmental impact than the ordinance
12 the Supreme Court considered and upheld in *Manhattan Beach*.

13 **2. The County Did Not Need to Prepare an Initial Study Before Making its**
14 **Categorical Exemption Determination**

15 Petitioner wrongly claims that the County violated CEQA simply by not conducting an
16 initial study before its categorical exemption determination. (Petitioner Opening Brief, p. 8.)
17 CEQA Guidelines section 15063, subdivision (a), provides that, “[f]ollowing preliminary review,
18 the Lead Agency shall conduct an initial study to determine if the project may have a significant
19 effect on the environment.” (Emphasis added.) It is well established that part of that preliminary
20 review includes an assessment of whether a categorical exemption applies. (See CEQA
21 Guidelines, § 15061, subd. (b)(2).) In *Apartment Association of Greater Los Angeles v. City of*
22 *Los Angeles* (2001) 90 Cal.App.4th 1162, 1167-1173 (*Apartment Ass’n of Greater Los Angeles*),
23 for example, the Second District Court of Appeal held that, where the City of Los Angeles based
24 its determination on substantial evidence that a code enforcement program was categorically
25 exempt from CEQA, the City was not required to perform an initial study. Here, similarly, since
26 substantial evidence supported the County’s categorical exemption finding, the County was not
27 required to perform an initial study before making its determination.

28 ///

1 **3. The County Did Not Need to Make Written Findings to Support its Categorical**
2 **Exemption Determination**

3 Petitioner also wrongly suggests that the County was required to make written findings for
4 its categorical exemption determination. (Petitioner Opening Brief, p. 10.) The California Courts
5 of Appeal have held that no written findings are required where the agency’s categorical
6 exemption determination is reviewable under Public Resources Code section 21168.5. (*Ukiah*,
7 *supra*, 2 Cal.App.4th at p. 731; *CalBeach Advocates v. City of Solana Beach* (2002) 103
8 Cal.App.4th 529, 540.) There is no dispute that Public Resources Code section 21168.5 applies
9 here, and therefore the County was not required to make written findings. (See Petitioner Opening
10 Brief, p. 7.)

11 **4. The County Based its Categorical Exemption Determination on Substantial**
12 **Evidence**

13 The County based its Class 7 and Class 8 categorical exemptions determination on
14 substantial evidence. (See *Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 474 (*Magan*)
15 (substantial evidence standard applies to categorical exemption determinations); *Davidon Homes*,
16 *supra*, 105 Cal.App.4th at 115 (“[A]n agency’s finding that a particular proposed project comes
17 within one of the exempt classes necessarily includes an implied finding that the project has no
18 significant effect on the environment. On review, an agency’s categorical exemption determination
19 will be affirmed if supported by substantial evidence that the project fell within the exempt
20 category of projects.”) (Citations omitted).) Substantial evidence consists of facts, reasonable
21 assumptions predicated on facts, and expert opinion supported by facts. (Pub. Resources Code, §
22 21082.2, subd. (c).) The County spent five years to determine how best to decrease its residents’
23 use of single-use carryout bags and, after much research and deliberation, found that a ban on
24 plastic bags with a fee on paper bags would best accomplish its goals of reducing the County’s
25 contribution of plastic and paper waste to landfills, reducing oil consumption and greenhouse gas
26 emissions in general, and reducing the mountain of plastic and paper litter in the environment that
27 causes harm to marine wildlife. (AR Vol. 1, Tab A, pp. 1-8 (Marin County Department of
28 Agriculture Letter; *id.*, Tab E, p. 6 (Notice of Exemption); see generally AR Volume 1 for

1 evidence relied on by County in passing the Ordinance.)

2 **5. Petitioner Does Not Show that an Exception to the Exemption Applies**

3 As noted earlier in footnote 9, the CEQA Guidelines provide exceptions to categorical
4 exemptions that would render an otherwise exempt project subject to CEQA. Petitioner claims
5 that the “unusual circumstances” exception in Guidelines section 15300.2(c) applies here.
6 (Petitioner Opening Brief, p. 9; CEQA Guidelines, § 15300.2, subd. (c).) That exception provides
7 that, where there is a reasonable possibility that the activity in question will have a significant
8 effect on the environment due to unusual circumstances, a lead agency cannot rely on a categorical
9 exemption. (CEQA Guidelines, § 15300.2, subd. (c).) However, Petitioner fails to show that
10 there are “unusual circumstances” that would warrant this exception. (See *Davidon Homes, supra*,
11 54 Cal.App.4th at p. 115 (where agency establishes project is within an exempt class, burden to
12 show exemption fails because it falls within one of the exceptions listed in Guidelines section
13 15300.2 is on party challenging the exemption; see also *Magan, supra*, 105 Cal.App.4th at p. 475
14 (County’s finding that ordinance comes within categorical exemption necessarily includes an
15 implied finding that ordinance would have no significant effect on the environment).)

16 Review of an “unusual circumstances” exception requires two distinct inquiries: (1)
17 whether the project presents unusual circumstances; and (2) whether there is a reasonable
18 possibility of a significant effect on the environment due to the unusual circumstances. (*Banker’s*
19 *Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139
20 Cal.App.4th 249, 278.) The first part of this inquiry, whether the circumstances are “unusual,” is a
21 particularly important question. For, if there is no need for a challenger to demonstrate that
22 circumstances are indeed ‘unusual,’ then it will be very easy for opponents to defeat reliance on
23 categorical exemptions altogether. (See *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th
24 1243, 1260 (“[I]n the absence of any evidence of unusual circumstances nullifying the grant of a
25 categorical exemption, there can be no basis for a claim of exception under Guidelines section
26 15300.2(c).”))

27 The question of whether a project is “unusual” is a matter of law and requires another two-
28 pronged test. (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52

1 Cal.App.4th at 1165,1206-1207).) A project will meet this part of the exception if: (a) there are
2 circumstances that differ from the general circumstances of the projects covered by a particular
3 categorical exemption, and (b) those circumstances create an environmental risk that does not exist
4 for the general class of exempt projects. (*Id.* at p. 1207.) Petitioner claims that the Ordinance is
5 “unusual” because it will shift consumer use from plastic to paper bags but does not present any
6 supporting evidence, and thus fails to meet either part of the two-pronged test. (See Petitioner
7 Opening Brief, p. 9.)

8 Petitioner relies on a Superior Court case that found a shift in consumer use to paper bags
9 as an unusual circumstance that qualified for the exception in Guidelines section 15300.2(c).
10 (Petitioner Opening Brief, p. 9; *Coalition to Support Plastic Bag Recycling v. City of Oakland,*
11 *Alameda Superior Court* (Super. Ct. Alameda County, 2008, No. RG07-339097) (*City of*
12 *Oakland*), reproduced at AR Vol. 2, Tab 46 .) That case is not citable precedent. (Cal. Rules of
13 Court, rule 8.1115.) Yet, even if it were, the case has no bearing on the issues before this Court
14 because it relied heavily on evidence that the California Supreme Court later deemed too
15 speculative. (*City of Oakland, supra*, at AR Vol. 2, Tab 46, pp. 11-12 (persuaded by “life cycle”
16 studies); *Manhattan Beach, supra*, 52 Cal.4th at p. 176 (finding that same life cycle studies
17 provided uncertain data and “must be kept in proper perspective and not allowed to swamp the
18 evaluation of actual impacts attributable to the project at hand”).) In addition, the Oakland
19 ordinance differed from the ordinance here in that there was no deterrent to paper bag use. In
20 contrast, the Ordinance here imposes a 5-cent fee on paper bags as a “price signal to help shift
21 consumers to reusable bags.” (AR Vol. 1, Tab 1, p. 4 (Marin County Department of Agriculture
22 Letter).)

23 Petitioner argues that a 5-cent fee will not be enough of a deterrent from paper bag use. As
24 evidence, Petitioner cites to EIRs from other jurisdictions that found a 10-cent fee was necessary
25 to motivate consumers to use reusable bags. (Petitioner Opening Brief, pp. 5-6.) However,
26 Petitioner fails to cite to any evidence showing that consumers in the County, the “project area,”
27 would switch to paper bags unless a higher fee was required by the Ordinance. (See *Surfrider*
28 *Foundation v. California Coastal Commission* (1994) 26 Cal.App.4th 151, 156 (finding that, for

1 exception to nullify a categorical exemption, the “unusual circumstances” must be *causally*
2 *connected* to the project under review.) Without evidence tailored to the County, Petitioner has
3 nothing but speculation, and speculation does not merit an exception to categorical exemptions.
4 (See *Apartment Ass’n of Greater Los Angeles, supra*, 90 Cal.App.4th 1162, 1175-1176 (finding
5 that speculative nature of experts’ predictions did not constitute substantial evidence necessary to
6 invoke exception to categorical exemption).) Indeed, as the Supreme Court found in *Manhattan*
7 *Beach*: “The actual increase in paper bag use as a result of the ordinance is *necessarily uncertain*,
8 given that some percentage of local residents may be expected to turn to the city’s favored
9 alternative, reusable bags.” (*Manhattan Beach, supra*, 52 Cal.4th at p. 175 (emphasis added).)

10 Petitioner does not meet its burden of showing that the circumstances of the Ordinance are
11 “unusual,” so there is no need to evaluate the second part of the exception, whether there is a
12 reasonable possibility of a significant effect on the environment due to the unusual circumstances.
13 Since the County based its categorical exemption determinations on substantial evidence, and
14 because Petitioner fails to show that there is any exception to the County’s categorical exemption
15 determinations, full CEQA review of the Ordinance is not warranted.

16 **CONCLUSION**

17 For the foregoing reasons, the Ordinance is valid and the County’s categorical exemption
18 determination should be upheld.

19
20 Respectfully Submitted,

21 DATED: August 17, 2011

RACHEL VIDA

22
23 By: *Rachel Vida*

24 Rachel Vida
25 Attorney for Amicus Curiae
26 CALIFORNIANS AGAINST WASTE
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