



CITY ATTORNEY DENNIS HERRERA

NEWS RELEASE

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CONTACTS:

- Matt Dorsey for the Office of the City Attorney (415) 554-4662
- Friday Apaliski for the S.F. Department of the Environment (415) 355-3788

Judge upholds S.F.'s plastic bag law, clears way for ban, 10-cent charge starting Oct. 1

Court rejects arguments by plastic bag manufacturers, distributors about inadequate environmental review, state pre-emption

SAN FRANCISCO (Sept. 12, 2012)—A San Francisco Superior Court judge this afternoon upheld the validity of a local ordinance extending San Francisco's ban on non-compostable plastic checkout bags to all retail stores and food establishments, and imposing a 10-cent charge on other bags provided to consumers. The ruling by Judge Teri L. Jackson, which she delivered verbally from the bench this afternoon pending a forthcoming written decision, clears the way for San Francisco to begin enforcing the ordinance, as planned, beginning Oct. 1, 2012.

San Francisco's Checkout Bag Ordinance, approved by the Board of Supervisors and signed into law by Mayor Ed Lee in February, expands on San Francisco's first-in-the-nation prohibition on plastic checkout bags in large supermarkets and retail pharmacies that was first enacted in 2007. The new law will apply to all retailers beginning next month, with retail food establishments, like take-out restaurants, subject to the ban beginning July 1, 2013. All establishments subject to the provisions will also be required to charge customers 10 cents for each single-use paper or compostable plastic bag.

An association of plastic bag manufacturers and distributors identifying itself as "Save the Plastic Bag Coalition" sued San Francisco on Feb. 29, both to halt enforcement and invalidate the law, arguing that the City had not properly complied with provisions of the California Environmental Quality Act, or CEQA, and that the California Retail Food Code preempts such local ordinances because prohibitions on plastic bags for retail food facilities amount to a "health and sanitation standard." The judge rejected those arguments in upholding the law today, but agreed to entertain a motion by the plaintiffs to stay the ruling pending appeal.

"I applaud Judge Jackson for her careful consideration of the issues, and for rejecting arguments by plastic bag manufacturers that clearly misapplied state law," said City Attorney Dennis Herrera. "San Franciscans deserve the same benefit other jurisdictions enjoy from an effective policy that has been shown to reduce the proliferation of single-use bags use by as much as 95 percent. This is good policy, on sound legal footing, and it will help move San Francisco toward its ambitious 'zero waste' goals."

[MORE]

“The continued use of plastic bags pollutes the environment and has been a hurdle for the City in reaching its goal of zero waste,” said Melanie Nutter, Director of San Francisco Department of the Environment. “Today we celebrate the court’s decision supporting the City’s approach to expand the checkout bag ordinance. This is a huge step forward toward reducing plastic bag use as well as all single use bags.”

The case is: *Save the Plastic Bag Coalition v. City and County of San Francisco et al.*, San Francisco Superior Court, Case Number CPF-12-511978.

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1 DENNIS J. HERRERA, State Bar #139669
City Attorney
2 WAYNE SNODGRASS, State Bar #148137
JAMES M. EMERY, State Bar #153630
3 Deputy City Attorneys
San Francisco City Hall, Room 234
4 1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
5 Telephone: (415) 554-4628
Facsimile: (415) 554-4757
6 E-Mail: jim.emery@sfgov.org

7 Attorneys for Respondents
8 CITY AND COUNTY OF SAN FRANCISCO, et al.

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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO
12 UNLIMITED JURISDICTION

13 SAVE THE PLASTIC BAG COALITION,
an unincorporated association,

14 Petitioner,

15 vs.

16 CITY AND COUNTY OF SAN
17 FRANCISCO, a political subdivision of the
State of California and a municipal
18 corporation; SAN FRANCISCO PLANNING
DEPARTMENT, an agency of the City and
19 County of San Francisco; SAN FRANCISCO
DEPARTMENT OF THE ENVIRONMENT,
20 an agency of the City and County of San
Francisco; and DOES 1-100, inclusive,

21 Respondents.
22

Case No. CPF-12-511978

SAN FRANCISCO'S OPPOSITION TO
PETITIONER'S OPENING BRIEF ON THE
MERITS

Hearing Date: August 27, 2012
Hearing Judge: Hon. Teri Jackson
Time: 1:30 p.m.
Place: 503

Date Action Filed: February 29, 2012
Trial Date: August 27, 2012

Attached Documents: Request for Judicial Notice;
Declaration of Wayne Snodgrass

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INTRODUCTION

1
2 The California Legislature has expressly found that plastic bag production causes significant
3 environmental impacts. Each year, it has found, billions of plastic bags end up as litter. Most do not
4 biodegrade, but instead contaminate soil and enter the food chain. The Legislature has stated its desire
5 to encourage consumers and retailers to use reusable bags and to consume fewer single-use bags. (*See*
6 *Stats.* 2006, Ch. 845, at §1, p. 2 [Request for Judicial Notice, filed herewith ("City's RJN"), Exh. G].)

7 In February 2012, San Francisco helped in this effort by enacting its Checkout Bag Ordinance.
8 The Ordinance amends and expands San Francisco's existing ban on noncompostable plastic checkout
9 bags, which San Francisco enacted in 2007 and which currently applies only to large grocery stores
10 and drug store chains. The 2012 Ordinance, which is the subject of this lawsuit, bans single-use
11 noncompostable plastic checkout bags at all retail stores, beginning in October 2012, and requires
12 retailers to impose a 10 cent bag charge when they provide customers a single-use paper or
13 compostable plastic bag. The Ordinance will apply to retail food establishments, such as take-out
14 restaurants, in July 2013. Similar charges on single-use bags in other jurisdictions have reduced
15 single-use bag use by as much as 95%. By substantially reducing all single-use bags, San Francisco
16 will advance its ambitious "zero waste" goal, reducing litter and landfill, while conserving natural
17 resources.

18 Petitioner Save The Plastic Bag Coalition ("Manufacturers") is "a coalition of plastic bag
19 manufacturers and distributors." (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011)
20 52 Cal.4th 155, 160.) Manufacturers have one purpose only – to halt the broad movement to reduce
21 the adverse environmental impact of plastic bags and their litter. Consistent with their statewide
22 litigation strategy, Manufacturers sued to overturn San Francisco's Ordinance, because they perceive it
23 to be against their narrow economic interests.

24 Manufacturers cannot prevail on their CEQA challenge or their preemption challenge.
25 Because the Ordinance will reduce waste, landfill, and litter, it will protect the environment and
26 natural resources. The Ordinance fits squarely within CEQA's Class 7 and Class 8 Categorical
27 Exemptions. Because the Ordinance is an environmental measure, not a health and sanitation
28 measure, California's Retail Food Code does not preempt any portion of it.

1 For these reasons, set forth more fully below, the Court should deny the petition and enter
2 judgment for San Francisco.

3 BACKGROUND

4 In September 2002, San Francisco adopted citywide goals of 75 percent landfill diversion by
5 2010 and zero waste by 2020. (City's RJN, Exh. A.) In 2007, San Francisco enacted its Plastic Bag
6 Reduction Ordinance, which prohibits large supermarkets and retail pharmacies from using
7 noncompostable plastic checkout bags. (*Id.*, Exh. B.) In February 2012, San Francisco enacted its
8 Checkout Bag Ordinance ("2012 Ordinance"), the subject of this lawsuit. (*Id.*, Exh. C.)

9 The 2012 Ordinance extends the plastic bag ban to all retail stores and establishes a 10-cent
10 charge, paid to the retailer, for compliant single-use checkout bags. A compliant single-use checkout
11 bag is a paper bag made with minimum 40% recycled content or a compostable plastic bag. The
12 noncompostable plastic bag ban will apply to retailers, excepting retail food establishments, in October
13 2012, and will apply to retail food establishments beginning in July 2013. (City's RJN, Exh. C.)

14 The 2012 Ordinance is intended to further reduce consumption of plastic bags, which cause
15 litter, foul the marine environment and constitute the largest and most costly contaminant to the City's
16 curbside recycling and composting systems. A key feature of the 2012 Ordinance, which
17 Manufacturers ask this Court to ignore, is the reduction of *all* types of single-use checkout bags.
18 When the 2007 Ordinance became effective, banning noncompostable plastic bags in supermarkets
19 and pharmacy chains, consumption of single use paper bags at these high-volume establishments
20 increased. The 2012 Ordinance will encourage reusable bags at these supermarkets and pharmacy
21 chains, and thereby reduce consumption of single-use paper bags.

22 On November 10, 2011, after reviewing the proposed ordinance and all relevant information,
23 the San Francisco Planning Department issued a Certificate of Determination that the Ordinance was
24 categorically exempt from further environmental review under CEQA. Specifically, Categorical
25 Exemptions Class 7 and Class 8 applied.

26 Class 7 consists of actions taken by regulatory agencies as authorized by state law or
27 local ordinance to assure the maintenance, restoration, or enhancement of a natural
28 resource where the regulatory process involves procedures for protection of the
environment. Examples include but are not limited to wildlife preservation activities

1 of the State Department of Fish and Game. Construction activities are not included in
2 this exemption.

3 Class 8 consists of actions taken by regulatory agencies, as authorized by state [law?]
4 or local ordinance, to assure the maintenance, restoration, enhancement, or protection
5 of the environment where the regulatory process involves procedures for protection of
6 the environment. Construction activities and relaxation of standards allowing
7 environmental degradation are not included in this exemption.

8 (CEQA Guidelines §§15307, 15308.) The categorical exemption determination included a detailed
9 10-page analysis of the environmental impact of plastic and paper single-use bags over their entire
10 life-cycle and the extent to which a single-use bag charge will reduce consumption of all single-use
11 bags. (Administrative Record ("AR") at pp. 000002-000012 [Petitioner's Exh. B].) After considering
12 all the available evidence, the Planning Department concluded that the Ordinance would have no
13 substantial adverse effect on the environment.

14 Single-use plastic bags have known environmental impacts to aesthetics, air quality
15 and GHG emissions, hydrology and water quality, water usage, and biological
16 resources. The proposed project would eliminate single-use plastic bags at "stores"
17 within San Francisco, thereby protecting the environment from the impacts associated
18 with single-use plastic bags. By eliminating single-use plastic bag use at more
19 "stores" covered by the ordinance, the proposed project would result in greater use of
20 single-use paper bags, single-use compostable bags, and reusable bags. Single-use
21 paper bags and compostable bags have greater environmental impacts on air quality
22 and GHG emissions and water usage than single-use plastic bags and reusable bags
23 (or no bag at all) have lesser environmental impacts in all categories than single-use
24 plastic bags. Studies have shown that banning single-use [plastic] bags and imposing
25 a mandatory charge on single-use paper and compostable bags results in an increase
26 in reusable bag and no bag use and a decrease in single-use bag use. Because the
27 proposed project would ban single-use plastic bags and impose a mandatory charge
28 on single-use paper and compostable bags at all "stores" in San Francisco and the
proposed project would include a public education campaign aimed at promoting
reusable bags, the proposed project would protect the environment and not have a
significant impact on the environment.

(AR 000012.)

21 Petitioner submitted comments and objections to the proposed ordinance on November 18,
22 2011 and four pages of additional objections on February 6, 2012. (Petitioner's Exhs. D, E.). The
23 Board of Supervisors conducted five public hearings on the proposed Ordinance: on November 14,
24 2011, November 22, 2011, December 6, 2011, February 7, 2012 and February 14, 2012. (AR 00166-
25 00261.) The Planning Department reviewed all public comments, including petitioner's objections, as
26 well as the Board of Supervisors' amendments to the proposed ordinance, and on February 6, 2012, the
27 Planning Department affirmed its prior Categorical Exemption Determination.

1 EP [the Environmental Planning Division of the San Francisco Planning
2 Department] has reviewed the changes to the Ordinance made by the Board of
3 Supervisors and determined that the changes do not alter the conclusions in the
4 Categorical Exemption Determination. EP has also reviewed the additional
5 comments and materials received from the public [expressly including Stephen
6 L. Joseph on behalf of Save the Plastic Bag] and determined that the materials
7 submitted to not constitute substantial evidence indicating that an
8 Environmental Impact Report would be required for this Ordinance.

9 (AR 004188.)

10 When it enacted the Checkout Bag Ordinance on February 14, 2012, the Board of Supervisors
11 expressly affirmed and adopted the Planning Department's categorical exemption determination, "upon
12 consideration of the whole record, including public testimony." (City's RJN, Exh. C, at p. 1.) Mayor
13 Lee signed the Ordinance into law on February 21, 2012. (*Id.* at p. 12).

14 **ARGUMENT**

15 **I. SAN FRANCISCO PROPERLY INVOKED CEQA'S CATEGORICAL EXEMPTIONS.**

16 Manufacturers assert three CEQA violations. First, Manufacturers contend San Francisco is
17 not a "regulatory agency" within the meaning of the Class 7 and Class 8 Categorical Exemptions.
18 Second, Manufacturers assert the single-use bag fee is a mitigation measure the court must ignore in
19 evaluating whether the Categorical Exemptions apply. Third, Manufacturers insist they presented a
20 fair argument of substantial adverse environmental effects.

21 Manufacturers have unsuccessfully asserted identical claims in neighboring Marin County. In
22 2011, Marin County enacted its regulation banning single-use plastic checkout bags and imposing a
23 five cent charge on single-use paper checkout bags. Like San Francisco, Marin County invoked Class
24 7 and Class 8 Categorical Exemptions. Manufacturers made the identical three arguments in their
25 lawsuit challenging Marin County's ordinance. The Marin County Superior Court rejected each of
26 these arguments and upheld Marin County's regulation. (City's RJN, Exh. D.) Manufacturers' appeal
27 in the Marin case is now fully briefed and awaiting argument. (*Id.*, Exh. E.) For the same reasons that
28 the Marin County Superior Court upheld the Class 7 and Class 8 CEQA Exemptions, this Court should
deny Manufacturers' petition in this case.

1 **A. San Francisco Is A "Regulatory Agency" Entitled To Invoke Categorical**
2 **Exemptions.**

3 Without any supporting authority, Manufacturers assert San Francisco is not a "regulatory
4 agency" eligible to invoke Class 7 and Class 8 Categorical Exemptions, and that these Exemptions do
5 not apply to "legislative acts." (See Petitioner's Opening Brief on the Merits ("Pet. MPA"), at 1:19-25,
6 5:20-6:1, 7:1-10:25.)

7 In a procedurally indistinguishable case, the Court of Appeal upheld the Kings County Board
8 of Supervisors' invocation of the Class 8 Exemption for a local ordinance restricting the application of
9 sewage sludge on agricultural land. (*Magan v. County of Kings* (2002) 105 Cal.App.4th 468.)
10 Likewise, the Marin County Superior Court expressly rejected Manufacturers' identical argument that
11 Class 7 and Class 8 Exemptions were unavailable to the Marin County Board of Supervisors. (See
12 City's RJN, Exh. D.)

13 Manufacturers' efforts to distinguish the *Magan* case are unpersuasive. (See Pet. MPA, at 9:9-
14 10:25.). Manufacturers erroneously assert that King County enacted its ban on sewage sludge
15 "[p]ursuant to Food and Agriculture Code § 14591." (Pet. MPA, at 9:27.) Section 14591 does not
16 authorize or contemplate local regulation of sewage sludge. To the contrary, section 14591 requires
17 fertilizing manufacturers and distributors to obtain state licenses. In fact, Magan had a state license to
18 perform the exact activity that Kings County prohibited, potentially conflicting with the existing
19 federal and state regulations governing agricultural uses of sewage sludge. San Francisco's 2012
20 Ordinance enhances the preexisting environmental protections the City enacted with its 2007 Plastic
21 Bag Reduction Ordinance.

22 Manufacturers are correct that the Court of Appeal rejected Magan's challenge to the use of a
23 Class 8 Categorical Exemption for a new complex regulatory program, because Magan had failed to
24 provide any legal authority. (*Magan, supra*, 105 Cal.App.4th at p. 477 fn.4.) The Court of Appeal's
25 summary rejection of this argument reflects its frivolous nature. No authority exists to support the
26 argument. Like Magan, Manufacturers in this case have no authority for their novel argument that
27 Class 7 and Class 8 Categorical Exemptions are unavailable to San Francisco when it acts in its
28 regulatory capacity.

1 Manufacturers' "three-level hierarchy" of legislative, regulatory and ministerial government
2 action has no basis in CEQA. (See Pet. MPA, at 7:3-16.) Class 7 and Class 8 Categorical Exemptions
3 apply to actions by "regulatory agencies" that protect natural resources or the environment. (CEQA
4 Guidelines §§15307, 15308.) When an ordinance, like San Francisco's Checkout Bag Ordinance,
5 advances the entity's police powers, the municipality is acting in its regulatory capacity. The
6 California Constitution provides: "A county or city may make and enforce within its limits all local
7 police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const.
8 Art. 11 §7.) The Dictionary confirms the common sense understanding that ordinances, indeed, *are*
9 regulations. An ordinance is "[a]n authoritative law or decree, esp. a municipal regulation." (Black's
10 Law Dictionary (9th ed. 2009) [City's RJN, Exh. F].) Manufacturers' contrary assertions
11 notwithstanding, to recognize that the City and County of San Francisco, acting through its Board of
12 Supervisors and its Mayor, may act as a regulatory agency to enforce its police power, does *not* render
13 any of the text of sections 15307 or 15308 "meaningless, inoperative or redundant."

14 **B. The "Project" Includes The Single-Use Bag Charge.**

15 Manufacturers next assert that the Court must ignore the 10 cent single-use bag charge when
16 evaluating the Categorical Exemption determination. (Pet. MPA, at 12:22-16:16.) In this case,
17 however, the charge is not a mitigation measure, as Manufacturers assert, but an integral part of the
18 "project" itself and therefore belongs in the Categorical Exemption analysis.

19 The CEQA Guidelines define a "project" as "the *whole* of an action, which has a potential for
20 resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect
21 physical change in the environment." (CEQA Guidelines, §15378, subd. (a) [emphasis supplied].) A
22 mitigation measure, by contrast, is a "change" to a "project" for the purpose of minimizing or
23 eliminating adverse environmental effects. (CEQA Guidelines, §15002, subd. (a), §15041, subd. (a).)
24 In this case, San Francisco's Checkout Bag Ordinance is the "project," and the "project" includes both
25 the extension of the existing ban on single-use plastic bags and the 10-cent fee on single-use paper and
26 compostable bags in order to decrease consumption of all types of single-use bags and increase the use
27 of reusable bags. The 10-cent fee is and has always been an integral component of the "whole of the
28 action."

1 In fact, failure to analyze the 2012 Ordinance's single-use bag fee together with the expanded
2 ban on non-compostable plastic would violate CEQA's directive to analyze "the whole of an action,"
3 (CEQA Guidelines, §15378 subd. (a).), and not "chop[] a large project into many little ones."
4 (*Bozung v. Local Agency Formation Comm'n* (1975) 13 Cal.3d 263, 283-84.) The Marin County
5 Superior Court properly recognized that Marin County's five cent bag charge supported the categorical
6 exemption in that case. (City's RJN, Exh. D.)

7 In *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, the Court of Appeal upheld a
8 Class 32 Categorical Exemption (for in-fill development projects) for an affordable housing project
9 against a similar contention that the Categorical Exemption had improperly relied on a mitigation
10 measure. The Court held that a dedicated left turn lane to ease traffic congestion was not a separate
11 mitigation measure, but was an integral component of the affordable housing project.

12 We agree with the trial court that the City did not mitigate the project into qualifying
13 for a categorical exemption. Rather, it properly exercised discretion to find it would
14 not cause a significant traffic impact. As the lower court found, the dedication of a
15 five-foot right-of-way, enabling the City to improve the San Pablo and Ashby
16 Avenues intersection, was not a CEQA mitigation measure for project impacts, but a
17 component of the project that assisted the City with an existing traffic issue.

18 (*Id.* at p. 1352.) Mitigation measures, by contrast, are optional conditions an agency may impose on a
19 project. (*No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 256; *Lincoln Place*
20 *Tenants Ass'n v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 445.)

21 In this case, the single-use bag charge is an essential component of the Ordinance. The
22 Ordinance's goal is to reduce consumption of all types of single-use checkout bags – not simply to
23 replace plastic bags with single-use paper bags. The single-use bag charge was not an optional
24 condition or a suggestion to ameliorate the environmental impacts of the 2012 Ordinance as proposed.¹

25 ¹ Thus, Manufacturers' effort to distinguish *Wollmer* (See Pet. MPA, at 14:4-15:28.) is
26 unpersuasive. As in *Wollmer*, the single-use bag fee in this case addresses an "existing concern." In
27 *Wollmer*, the "existing concern" was traffic congestion at a particular intersection. In this case, the
28 "existing concern" is the proliferation of single-use bags.

29 Manufacturers' reliance on *Salmon Protection & Watershed Network (SPAWN) v. County of*
30 *Marin* (2004) 125 Cal.App.4th 1098, and *Azusa Land Reclamation Co. v. Main San Gabriel Basin*
31 *Watermaster* (1997) 52 Cal.App.4th 1165, is misplaced. In *SPAWN*, the Court of Appeal held that a
32 new home to be built in a designated resource area of critical concern for endangered salmon was not
33 eligible for the Class 3 Categorical Exemption (which exempts small structures, including single
34 family residences). Indeed, mitigation measures could not save the project. CEQA expressly excludes

1 **C. Manufacturers Have Not Met Their Burden To Demonstrate A Reasonable**
2 **Possibility Of Significant Environmental Effects Due To Unusual Circumstances.**

3 Manufacturers argue that the "unusual circumstances" exception to the Categorical Exemptions
4 applies and requires the City to undertake additional CEQA review of the 2012 Ordinance.

5 Manufacturers invoke Guidelines section 15300.2(c), which provides:

6 A categorical exemption shall not be used for an activity where there is a
7 reasonable possibility that the activity will have a significant effect on the
8 environment due to unusual circumstances.

9 (Guidelines §15300.2 subd. (c).)

10 A challenger invoking Guidelines section 15300.2(c) has the burden of proof to establish that
11 the exception applies. (*E.g., Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101
12 Cal.App.4th 786, 795-96; *Apartment Ass'n of Greater Los Angeles v. City of Los Angeles* (2001) 90
13 Cal.App.4th 1162, 1175); *Magan, supra*, 105 Cal.App.4th at pp. 476-77.) The challenger must present
14 evidence establishing a "reasonable possibility" of a "significant effect on the environment," **and** the
15 challenger must establish that the potential adverse environmental effects are "due to unusual
16 circumstances." (*E.g., Santa Monica, supra*, 101 Cal.App.4th at p. 801 ["[W]hether a circumstance is
17 '**unusual**' is judged relative to the **typical** circumstances related to an otherwise typically exempt
18 project."] [emphasis in original]; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1260
19 [Petitioner "made no showing whatsoever of any 'unusual circumstances' surrounding the construction
20 of this small commercial structure giving rise to any risk of 'significant' effects upon the
21 environment."].)

22 from Class 3 Exemptions any project located in a designated resource area of critical concern. (CEQA
23 Guidelines, §15300.2 subd. (a).)

24 In *Azusa*, the court held that the project proponent's plan to reopen a solid waste landfill to
25 deposit 3.2 million tons of solid waste in an unlined sand and gravel pit atop a groundwater basin that
26 supplied drinking water for a million people did not qualify for a Class 1 Categorical Exemption (for
27 existing facilities). Before approving the project, the local water board had concluded "that the landfill
28 was releasing pollutants, that the existing safeguards had not prevented degradation of the
groundwater and were not capable of doing so in the future, that its staff's study indicated that
pollutants from the landfill could adversely affect the groundwater, and that the board did not have
enough data to determine the full extent of the pollutants being released by the landfill." (*Azusa*,
supra, 52 Cal.App.4th at p. 1199.) Under these circumstances, the court rejected the project
proponent's contention "that its proposed mitigation measures, when installed, would prevent further
degradation of the environment." (*Id.*)

1 **1. Manufacturers have not attempted to show that any adverse environmental**
2 **effects of the 2012 Ordinance are "due to unusual circumstances."**

3 Manufacturers have not identified *any* circumstance surrounding the enactment and
4 implementation of San Francisco's 2012 Ordinance that they assert is "unusual" relative to a typical
5 environmentally protective regulation eligible for a Class 7 or Class 8 Categorical Exemption. Nor
6 have Manufacturers established a causal condition between any hypothetically "unusual" circumstance
7 and the alleged risk of environmental harm. For these reasons alone, Manufacturers cannot rely on the
8 "unusual circumstances" exception set forth in Guidelines section 15300.2(c).

9 **2. Manufacturers have not submitted substantial evidence of significant**
10 **adverse environmental effects.**

11 Not only have Manufacturers failed to link any potential environmental harm to an "unusual
12 circumstance." Manufacturers have failed to present substantial evidence that the 2012 Ordinance
13 may cause significant adverse environmental effects. The Court of Appeal's assessment of the *Magan*
14 case applies with full force to this case. As the Court of Appeal itself put it:

15 Let us get this straight: We have a party whose business it is to dump sewage sludge
16 generated in Southern California on agricultural property located in the San Joaquin
17 Valley. His complaint is that the board of supervisors violated environmental laws
18 when it took regulatory action phasing out and ultimately prohibiting this practice.
19 Astoundingly, he alleges there was a reasonable possibility that the board's decision
20 to prohibit the spread of sewage sludge would have an adverse environmental impact.
21 He reasons that, among other things, *not* spreading sewage sludge degrades
22 agricultural land. We, like the trial court, do not buy it. Judgment affirmed.

23 (*Magan, supra*, 105 Cal.App.4th at p. 470 (emphasis in original).) Likewise, in this case,
24 Manufacturers are in the business of making and selling single-use plastic checkout bags, which the
25 state has found cause toxic environmental pollution. Manufacturers argue that San Francisco's 2012
26 Ordinance, designed to discourage all single-use checkout bags and thereby reduce waste and litter,
27 will harm the environment.

28 This Court evaluates San Francisco's Categorical Exemption determination for abuse of
29 discretion.

30 In reviewing an agency's compliance with CEQA in the course of its legislative or
31 quasi-legislative actions, the courts' inquiry shall extend only to whether there was a
32 prejudicial abuse of discretion. Such an abuse is established if the agency has not
33 proceeded in a manner required by law or if the determination or decision is not
34 supported by substantial evidence.

1 (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th
2 412, 426-27 [citations, footnotes and internal quotations omitted].) Substantial evidence means
3 "enough relevant information and reasonable inferences from this information that a fair argument can
4 be made to support a conclusion, even though other conclusions might also be reached" (*Citizens for*
5 *Responsible Equitable Envir. Dev. v. City of San Diego* (2011) 196 Cal.App.4th 515, 522 [citations and
6 internal quotations omitted].)

7 In this case, San Francisco based its determination on a finding that the Ordinance fit within
8 the exemptions provided by Class 7 and Class 8, and therefore would have no significant adverse
9 effect on the environment. (AR 000012.) Further, there was no evidence of any unusual circumstance
10 that might cause a significant environmental effect to trigger the exception of Guidelines §15300.2
11 (*Id.*). This Court should affirm San Francisco's categorical exemption determination if substantial
12 evidence supports it. (*Dehne v. County of Santa Clara* (1981) 115 Cal.App.3d 827, 842.)

13 Where, as here, a challenger contends an exception to the Categorical Exemption applies, the
14 burden shifts. The challenger must produce substantial evidence showing a reasonable possibility of
15 adverse environmental impact sufficient to remove the project from the Categorical Exemption.
16 (*Association for Protection v. City of Ukiah* (1991), 2 Cal.App.4th 720, 728.) Substantial evidence
17 includes "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.
18 Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, or evidence
19 that is clearly inaccurate or erroneous." (*Hines v. Cal. Coastal Cmm'n* (2010) 186 Cal.App.4th 830,
20 856-57 (2010) [citations and internal quotations omitted].)

21 The applicable standard for reviewing the sufficiency of the challenger's factual showing is
22 unsettled.

23 Some courts have relied on cases involving review of a negative declaration, holding
24 that a finding of categorical exemption cannot be sustained if there is a "fair
25 argument" based on substantial evidence that the project will have significant
26 environmental impacts, even where the agency is presented with substantial evidence
to the contrary. Other courts apply an ordinary substantial evidence test . . . , deferring
to the express or implied findings of the local agency that has found a categorical
exemption applicable.

27 (*Hines, supra*, 186 Cal.App.4th at pp. 855-56 [citations and internal quotations omitted].)
28

1 Manufacturers erroneously assert that San Francisco has the burden to refute "to a certainty"
2 the Manufacturers' challenges to the Ordinance. (Pet. MPA, at 6:11-15; 11:25-12:1.) The cases on
3 which Manufacturers rely refute their effort to impose such a high burden on San Francisco. *Banker's*
4 *Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th
5 249 applies the fair argument standard, but the case never states that the agency must refute objections
6 "to a certainty." The court never uses the word and provides no support to Manufacturers' contention.
7 In *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, the court explicitly contradicted
8 Manufacturers. Although an agency invoking the "common sense" exemption must refute objections
9 "to a certainty," categorical exemption claims involve a "different showing." (*Id.* at p. 118.) The court
10 explained:

11 In . . . categorical exemption cases. . . , the agency first conducted an
12 environmental review and based its determination that the project was
13 categorically exempt on evidence in the record. It is appropriate under such
14 circumstances for the burden to shift to a challenger seeking to establish one of
15 the exceptions to produce substantial evidence to support a 'reasonable
16 possibility' that the project will have a significant effect on the environment.

17 In the case of the common sense exemption, however, the agency's exemption
18 determination is not supported by an implied finding by the Resources Agency
19 that the project will not have a significant environmental impact. Without the
20 benefit of such an implied finding, the agency must itself provide the support
21 for its decision before the burden shifts to the challenger. Imposing the burden
22 on members of the public in the first instance to prove a possibility for
23 substantial adverse environmental impact would frustrate CEQA's fundamental
24 purpose of ensuring that government officials make decisions with
25 environmental consequences in mind.

26 (*Id.* at p. 116 [citations and internal quotations omitted].)

27 Manufacturers cannot even survive the most favorable "fair argument" standard.
28 Manufacturers identify five ways that they contend San Francisco's 2012 Ordinance will adversely
affect the environment. They assert: (1) single-use paper and compostable bags are worse for the
environment than single-use plastic bags; (2) reusable bags have negative impacts; (3) people may
stop recycling; (4) the Ordinance may increase litter and dog waste on sidewalks; and (5) the 10 cent
charge may not be sufficient to discourage single-use bag use. (Pet. MPA at 2:1-3:24; 11:1-12:25.)
Manufacturers rely exclusively on counsel's "Comments and Legal Objections," that Manufacturers
submitted to the San Francisco Planning Commission. (*See* Pet. MPA, at 2:1-3:24 (citing to

1 Manufacturers' Ex. D.) This document, prepared by counsel, constitutes argument, not evidence.
2 (See *Pala Band of Mission Indians v. County of San Diego* (1998) 68 Cal.App.4th 556, 580 [comment
3 letter from general counsel of project opponents did not constitute substantial evidence under fair
4 argument standard as it consisted almost exclusively of mere argument and unsubstantiated opinion].)

5 **a. Manufacturers have not provided substantial evidence that the**
6 **Ordinance may have significant adverse environmental effects**
7 **resulting from increased consumption of paper and compostable**
8 **carry-out bags.**

9 Manufacturers point to generic "life cycle" studies to assert that substituting paper bags and
10 compostable bags for single-use plastic check-out bags has adverse environmental effects. (AR
11 003918-003924.) Manufacturers fail to acknowledge, however, that the 10-cent fee on single-use bags
12 will reduce *all types* of single-use bags. Particularly at the high-volume supermarkets and chain
13 pharmacies, which are already subject to the 2007 ban on plastic checkout bags, the 2012 Ordinance
14 will directly reduce paper bag consumption in favor of reusable bags. Manufacturers complain that
15 supermarkets and chain pharmacies, as a result of the 2007 Ordinance, now dispense large amounts of
16 single-use paper checkout bags. (AR 003925; 000604-000609 [ULS Report]; 000730-000740 [ULS
17 Report].)

18 The generic "life cycle" studies on which Manufacturers rely do not take into account the
19 conditions present in San Francisco. San Francisco's 2012 Ordinance requires all single-use paper
20 bags to be made from 40% post-consumer paper, so that life cycle analyses assuming use of virgin
21 paper products are inapplicable. San Francisco's mandatory curbside recycling and composting
22 programs are already in place (See S.F. Envir. Code §1903.); as a result, the recycling and composting
23 rate for discarded paper and compostable bags are substantially higher here than the rates typical in
24 other cities. The California Supreme Court expressly cautioned against overreliance on the exact same
25 generic "life cycle" studies on which Manufacturers rely in this case.. (*Manhattan Beach, supra*, 52
26 Cal.4th at pp. 162 [discussing Franklin, Scottish, Boustead and ULS Reports], 175 ["this case serves as
27 a cautionary example of overreliance on generic studies of "life cycle" impacts associated with a
28 particular product"].) As the Supreme Court noted, these "life cycle" studies "could be selectively
used to lend support to proponents of either plastic or paper bags." These studies are "sensitive to and

1 limited by factors such as scope, objectivity, geography, climate, and energy sources," and "can be
2 constructed to carry a specific message by carefully selecting the impacts to examine." (*Id.* at p. 162
3 [quoting comparative analysis of "life cycle" studies prepared by South African Department of Trade
4 and Industry].)

5 To evaluate whether a project is likely to have adverse environmental effects, the approving
6 agency should compare the project to "existing physical conditions" at the time of the evaluation.
7 (*Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2012) 205 Cal.App.4th 552, 566
8 (citing *Communities for a Better Envir. v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310,
9 320-21).) "For purposes of the exception to the categorical exemptions, 'significant effect on the
10 environment' would mean a change in the environment existing at the time of the agency's
11 determination, rather than a change in the environment that existed when CEQA was enacted." (*Bloom*
12 *v. McGurk* (1994) 26 Cal.App.4th 1307, 1315.)

13 Manufacturers' analysis employs the wrong baseline. When they argue that swapping out
14 single-use plastic checkout bags for paper bags and compostable bags may have substantial adverse
15 environmental effects, Manufacturers erroneously assume the 2012 Ordinance will apply against an
16 unregulated baseline.

17 For the large-volume supermarkets and chain pharmacies that are already subject to the 2007
18 ban on plastic checkout bags, the 2012 Ordinance will result in a direct and substantial reduction in
19 *paper* checkout bags, as consumers switch to reusable bags. To the extent the generic "life cycle"
20 studies apply to San Francisco's unique conditions, it is indisputable that the elimination of single-use
21 plastic checkout bags from the smaller retailers and restaurants will benefit the environment by
22 reducing plastic bag litter and contamination of waterways. It is also undisputed that in San Francisco,
23 less than 5% of plastic checkout bags are in fact recycled, while the recycling rate for paper bags is
24 much higher. Furthermore, because of the new 10-cent fee on single-use bags, a substantial portion of
25 consumers at these small retailers will opt for reusable bags instead of paper bags. Any net increase in
26 paper bag use at these small retailers and restaurants will be offset by the substantial reduction in paper
27 checkout bags at high-volume supermarkets and chain pharmacies. The 2012 Ordinance is most likely
28

1 to result in a reduction of paper bag consumption city-wide, in addition to eliminating the
2 environmental harm caused by single-use plastic bags.

3 **b. Manufacturers speculate that consumers will not reuse their**
4 **reusable checkout bags.**

5 Relying on these same generic "life cycle" studies, Manufacturers assert that reusable bags,
6 depending on their type, must be used between 11 and 131 times before they achieve a net
7 environmental benefit compared to single-use plastic bags. Manufacturers, though, acknowledge that
8 reusable polyethylene bags achieve an environmental benefit after just 3 uses. (AR 003927.)
9 Manufacturers speculate that San Franciscans will not in fact reuse their reusable bags. When they
10 apply their life-cycle calculations, Manufacturers ignore that many consumers already have reusable
11 bags on hand for other household uses. Manufacturers also ignore the fact that at supermarkets and
12 chain pharmacies, reusable bags will be replacing paper checkout bags, not plastic bags.

13 **c. Manufacturers speculate that without access to free single-use paper**
14 **checkout bags, San Franciscans will discontinue curbside recycling.**

15 Manufacturers' assertion that the 2012 Ordinance will cause San Franciscans to divert
16 recyclables into the landfill waste stream is pure conjecture. Manufacturers provide no evidence
17 whatsoever to support their assertion. (See AR 003944.) This argument contradicts Manufacturers'
18 assertion above that the 2012 Ordinance will result in a flood of paper checkout bags. San Francisco's
19 mandatory curbside recycling program provides curbside bins for every household. (See S.F. Envir.
20 Code §1903.) Consumers will continue to receive paper checkout bags when they forget to bring
21 reusable bags to the store. There is no basis for Manufacturers' conjecture that the 2012 Ordinance
22 will interfere substantial in San Francisco's existing curbside recycling program.

23 **d. Manufacturers speculate that San Franciscans will litter more and**
24 **stop cleaning up after their dogs.**

25 Manufacturers assert that without free paper and plastic single-use checkout bags, San
26 Franciscans will litter their paper check-out bags on the street, will toss small litter like candy
27 wrappers on the sidewalk, and will stop cleaning up after their dogs. Again, Manufacturers provide no
28 supporting evidence, only speculation. The YouTube video that Manufacturers urge the Court to view
was recorded by counsel, showing the curb gutter outside the Trader Joe's store on Mason Street in the

1 Marina neighborhood of San Francisco. (Declaration of Stephen Joseph, filed July 2, 2012, ¶ 34.) At
2 that time, Trader Joe's dispensed no plastic bags. The video shows leaves in the gutter, a Starbucks
3 cup and one single-use paper checkout bag. Of course plastic bags were not prominent in the gutter
4 litter. Trader Joe's was not at the time dispensing them, and the wind blows them into the water.
5 Plastic bags don't typically rest in the gutter. The 2012 Ordinance, with its 10-cent charge for paper
6 single-use checkout bags, can only be expected to further reduce consumption of paper checkout bags
7 at supermarkets like the Marina Trader Joe's.

8 Manufacturers complain that litter bins in high traffic areas overflow. According to
9 Manufacturers, this is an existing problem, long before the 2012 Ordinance has taken effect. (AR
10 003945.) There is no connection between this small litter problem and the 2012 Ordinance. A CEQA
11 challenger must establish a causal connection between the challenged action and the potential adverse
12 environmental impact. (*Surfrider Found. v. California Coastal Comm'n* (1994) 26 Cal.App.4th 151,
13 156.) Likewise, Manufacturers complain that dog waste in the street is an existing problem. (AR
14 003949.) Their assertion that the unavailability of free single-use plastic check out bags will
15 exacerbate the existing excrement problem on City streets lacks any factual basis. Manufacturers
16 provide no evidence whatsoever. (See AR 003948.) It is more likely that resourceful and responsible
17 dog owners will obtain "suitable container[s] or other suitable instrument[s]" from numerous available
18 alternative sources to comply with the Health Code.

19 **e. Manufacturers speculate that the 10-cent fee may be ineffective to**
20 **encourage use of reusable checkout bags.**

21 There is no factual basis for Manufacturers' conjecture that the 2012 Ordinance's 10 cent
22 single-use bag charge is too low to encourage use of reusable checkout bags. Refuting Manufacturers'
23 conjecture, a 5 cent fee in Washington D.C. resulted in an 81% reduction in single-use bags. (AR
24 000006-000007.) The experience of Washington D.C., which like San Francisco attracts many
25 tourists, belies Manufacturers' speculation that a single-use bag fee will be ineffective in San
26 Francisco. Studies from other jurisdictions show that fees on single-use bags of 5-25 cents per bag
27 have reduced all single-use bag consumption by 50-95%. (AR 000005-000007.)
28

1 Manufacturers assert that Los Angeles County's EIR constitutes "substantial evidence that San
2 Francisco's proposed ordinance may result in significant negative environmental impacts." (AR
3 003927.) To the contrary, Los Angeles' vast size and population makes the indirect impacts of its
4 plastic bag ban, such as greenhouse gas emissions, much more significant than San Francisco.
5 Furthermore, San Francisco's "baseline" for evaluating environmental impact includes the existing
6 2007 ban on plastic bags at high-volume supermarkets and chain pharmacies. The 2012 Ordinance
7 will result in a direct reduction of paper bags (not plastic bags) at these locations, making Los Angeles'
8 analysis of environmental impact entirely inapplicable to San Francisco.

9 Such argument by counsel, speculation, and conjecture are no substitute for substantial
10 evidence. Manufacturers have not met their burden.

11 **D. The *Manhattan Beach* Case Fully Supports San Francisco's Reliance On
12 Categorical Exemptions.**

13 Manufacturers misconstrue the *Manhattan Beach* case. (See Pet. MPA, at pp. 4:3-5:13.) In
14 that case, the Supreme Court upheld Manhattan Beach's plastic bag ban, even though Manhattan
15 Beach had not prepared the EIR that Manufacturers demanded. Manufacturers lost that case.

16 Manufacturers' reliance on dictum in the *Manhattan Beach* opinion is unwarranted. Indeed,
17 the Court mused that "the analysis would be different" if a larger jurisdiction imposed a plastic bag
18 ban "which might precipitate a significant increase in paper bag consumption." (*Manhattan Beach*,
19 *supra*, at p. 174.) Manufacturers similarly rely on footnote 10 in *Manhattan Beach*. In that footnote,
20 the Court restated Manufacturers' assertion that "the movement to ban plastic bags is a broad one,
21 active at all levels of government where an appropriately comprehensive environmental review will be
22 required." (*Id.* at p. 174 fn. 10.) Indeed, Los Angeles County, with its 10 million residents, which was
23 the direct subject of the Court's observation in footnote 10, has prepared an EIR supporting its plastic
24 bag ban.

25 The premise of the Supreme Court's dictum in *Manhattan Beach* is entirely absent in San
26 Francisco. In view of San Francisco's baseline conditions, which include the existing 2007 ban on
27 plastic bags at high-volume supermarkets and chain pharmacies, the 2012 Ordinance will further
28 reduce paper bag consumption, not increase it. This Court must evaluate San Francisco's reliance on

1 Categorical Exemptions on the record of this case, not based on the Supreme Court's dictum in an
2 entirely different case, which involved a city with no existing ban.

3 Manufacturers' observation that many local governments are preparing EIRs to support their
4 local plastic bag bans is irrelevant. (*See* Pet. MPA, at 16:17-17:24.)² That Manufacturers have
5 managed to intimidate another jurisdiction with other baseline conditions into preparing an EIR does
6 not affect the application of CEQA and its Guidelines on San Francisco's appropriate reliance on
7 Categorical Exemptions in this case.

8 **II. STATE LAW DOES NOT PREEMPT SAN FRANCISCO'S CHECKOUT BAG**
9 **ORDINANCE.**

10 Manufacturers claim that the California Retail Food Code (Cal. Health & Safety Code §113700
11 *et seq.*; hereinafter "CRFC") expressly preempts San Francisco's Ordinance. The CRFC expressly
12 preempts only *health and sanitation* standards for retail food facilities – that is, standards to help
13 ensure that food purchased at restaurants and grocery stores is clean, safe, and unadulterated. The
14 Ordinance is not a health and sanitation standard. It was not adopted to promote food safety. Instead,
15 as Manufacturers concede, "the *purpose* of the San Francisco Ordinance is environmental." (Pet.
16 MPA at 5:25-26 [emphasis in original].)

17 That the Ordinance restricts the choices available to restaurants, among many types of retail
18 establishments, does not make it a *health and sanitation* standard. The Legislature has enacted
19 statutes that prohibit restaurants from serving certain kinds of food – not to promote food safety, but
20 rather to protect ecological resources and prevent animal cruelty. Those statutes are codified outside
21 of the CRFC, and even outside of the Health and Safety Code – and they, like the Ordinance, are not
22 *health and sanitation* standards. The state ban on foie gras in restaurants, for example, is not a *health*
23 *and sanitation* standard. Thus, the fact that a law affects a restaurant's service of food does not make
24 it a *health and sanitation* standard.

27 _____
28 ² The decisions of other local entities is also outside the administrative record and therefore
should not be considered in evaluating the sufficiency of Manufacturers' CEQA petition.

1 Environmental laws simply are not the same thing as health and sanitation laws. San
2 Francisco's Ordinance is an environmental measure, not a food safety measure. It imposes
3 environmental standards, not health and sanitation standards. It is not preempted.

4 **A. Relevant Factual and Legal Background.**

5 **1. Overview of California's Retail Food Code.**

6 The California Legislature enacted the CRFC in 2006. The CRFC's purpose is to ensure the
7 purity of retail food: it aims "to safeguard public health and provide to consumers food that is safe,
8 unadulterated, and honestly presented through adoption of science-based standards." (Health & Safety
9 Code §113703.) The CRFC's legislative history confirms that it is a "food safety law," enacted to
10 reduce "foodborne illness" and "ensur[e] safe food." (See 4/26/05 letter from sponsor of SB 144 to
11 Senate Health Committee Members and attached SB 144 Analysis at p. SP-2 [City's RJN, Exh. J].)

12 To promote its food safety goals, the CRFC addresses innumerable aspects of how food must
13 be stored, handled, cooked, and cleaned up at restaurants, supermarkets, and other "retail food
14 facilities," and how such food facilities must be run in order to ensure proper sanitation and
15 cleanliness. The CRFC's articles bear such titles as "Employee Knowledge," "Employee Health,"
16 "Time Temperature Relationships," "Toilet Facilities," "Lighting," "Water," and "Linens." The CRFC
17 exhaustively "specifies, to the degree and minute, the temperatures at which various foods must be
18 stored and cooked, to the hour, how long food contact surfaces may go between cleanings, and, to the
19 inch, how large food preparation sinks must be." (*California Grocers Assn. v. City of Los Angeles*
20 (2011) 52 Cal.4th 177, 189 fn. 3 [citations omitted].)

21 **a. The CRFC regulates conduct by food facilities, not their customers.**

22 The CRFC regulates conduct of a "food facility," which it defines as "an operation that stores,
23 prepares, packages, services, vends, or otherwise provides food for human consumption at the retail
24 level[.]" (Health & Safety Code §113789(a).) However, the CRFC specifically defines a food facility
25 to *exclude* "a private home." (*Id.*, §113789(c)(2).)) The statute thus addresses what restaurants and
26 grocery stores may do— not what private persons, including restaurant and grocery store customers,
27 may do.
28

1 **b. The CRFC does not require any restaurant or other food facility to**
2 **use any bags at all, or to use plastic bags.**

3 Notably, the CRFC does not require or forbid a restaurant, or other food facility, from using
4 any particular type of checkout bag. In fact, the CRFC does not require a food facility to use checkout
5 bags at all. Thus, a restaurant or other food facility does not violate the CRFC if it serves food –
6 including solid food, drinks, or even hot soup – to a customer without using a checkout bag of any
7 kind; or using only bags made out of paper or compostable plastic, or reusable bags.

8 Many restaurants, of course, use paper, not plastic, checkout bags. Others, such as McDonald's
9 and Starbucks, do not use any bag at all to hold hot beverages purchased by their customers; instead,
10 they secure the beverage cups or containers in a cardboard carrying tray. (Declaration of Wayne
11 Snodgrass, filed herewith, ¶¶ 3,4.) Just as the CRFC does not require any restaurant to use plastic
12 bags, many restaurants do not use such bags.

13 **2. Other cities also prohibit restaurants from using plastic checkout bags.**

14 Manufacturers assert that "[a]ll other cities and counties with plastic bag bans have exempted
15 restaurants." (Pet. MPA at 20:14.) That would not be legally relevant, even it were true; but it is not
16 true.³ Manufacturers effectively ask this Court to hold that the CRFC preempts not only San
17 Francisco's Ordinance as applied to restaurants, but also the plastic bag ordinances adopted by
18 multiple other cities, as they apply to restaurants.

19 Manufacturers' preemption theory is even more far-reaching than that. Their theory would also
20 mean that dozens of local ordinances throughout the state that affect food service at restaurants, in
21 addition to plastic bag bans, also would be invalid. Many California cities prohibit restaurants from
22 using takeout food containers made from expanded polystyrene, also commonly known as
23

24 ³ In fact, other California cities besides San Francisco have acted to protect the environment
25 and reduce litter by prohibiting restaurants from using plastic checkout bags. For example, the City of
26 Malibu, since 2008, has mandated that "[n]o affected retail establishment, *restaurant*, vendor or
27 nonprofit vendor shall provide plastic bags ... to customers." (Malibu Mun. Code §9.28.020.A [City's
28 RJN, Ex. H] [emphasis added].) Similarly, the Marin County city of Fairfax, since at least 2008, has
mandated that "[a]ll stores, shops, eating places, food vendors and retail food vendors shall provide
only the following as checkout bags to customers: recyclable paper bags, or reusable bags," and has
defined the term "food vendor" to include "any restaurant." (Fairfax Mun. Code §§ 8.18.040.A
[prohibition], 8.18.030[definition of "food vendor"] [*Id.*, Ex. I].)

1 "styrofoam," to improve environmental quality and reduce litter.⁴ Under Manufacturers' preemption
2 theory, because such local ordinances enacted by cities throughout California affect the manner in
3 which restaurants may legally serve prepared food to their customers, they are all preempted by the
4 CRFC.

5 **B. General State Law Preemption Principles.**

6 Article XI, Section 7 of the California Constitution authorizes each city to "make and enforce
7 within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with
8 general laws." (*Id.*) This Constitutional police power gives cities and counties "plenary authority to
9 govern, subject only to the limitation that they exercise this power within their territorial limits and
10 subordinate to state law. Apart from this limitation, the police power of a county or city under this
11 provision is as broad as the police power exercisable by the Legislature itself." (*Candid Enters., Inc.*
12 *v. Grossmont Union H.S. Dist.* (1985) 39 Cal.3d 878, 885 [citation, brackets and ellipses omitted].)
13 Because a city's police power arises directly from the Constitution, the Court, on this preemption
14 inquiry, does not ask whether the Legislature has *given* San Francisco the power to enact the
15 Ordinance. Instead, the Court asks "whether the Legislature has taken away the City's constitutional
16 power" to do so, by enacting state legislation with which the City's law conflicts. (*California Rifle &*
17 *Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1310.)

18 There are four distinct ways in which a local ordinance can conflict with state law and thus be
19 preempted. Preemption exists "if the ordinance [1] duplicates, [2] contradicts, or [3] enters an area
20 fully occupied by general law, either expressly or [4] by legislative implication." (*Big Creek, supra*,
21 38 Cal.4th at p. 1150.)

22 Manufacturers argue only express preemption, claiming that the Ordinance is preempted
23 because the CRFC "expressly occupies the whole field." (Pet. MPA at 22:2-13.) Express preemption

24 _____
25 ⁴ For example, the City of Fremont prohibits restaurants, as well as other food vendors, from
26 providing food to customers in hinged clamshell containers, plates, cups, or other tableware made
27 from expanded polystyrene. (Fremont Mun. Code §4-210101(a) [City's RJN, Exh. K].) The City of
28 Newport Beach imposes almost exactly the same prohibition. (Newport Beach Mun. Code
§6.05.020(a) [*Id.*, Exh. L].) So does the City of Palo Alto. (Palo Alto Municipal Code §5.30.020(a)
[*Id.*, Exh. M].) A list of California cities and counties that prohibit expanded polystyrene food
container use by food establishments, from Alameda to West Hollywood, can be accessed at
http://www.cawrecycles.org/issues/plastic_campaign/polystyrene/local.

1 occurs only "when the Legislature has expressly manifested its intent to fully occupy" the field in
2 which the local ordinance regulates. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th
3 1139, 1150; *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 860-61.)⁵

4 **C. The Court Must Presume That The CRFC Does Not Expressly Preempt The**
5 **Ordinance, And Manufacturers Have The Burden Of Showing That It Does.**

6 California courts enforce a "presumption *against* preemption," and place the burden of
7 showing that state law preempts a local ordinance on the party claiming preemption. (*Big Creek,*
8 *supra*, 38 Cal.4th at p. 1150 [emphasis added].) The "presumption against preemption" applies to all
9 types of preemption claims, including claims of express preemption such as this one. (*Id.*, at pp. 1149-
10 1150.) In analyzing Manufacturers' express preemption claim, this Court must begin with the position
11 that San Francisco's 2012 Ordinance is valid. Manufacturers have the burden of showing that the
12 Ordinance is preempted. If Manufacturers do not carry their burden, the Court must reject their
13 preemption claim. California's "presumption against preemption" is especially strong in areas that are
14 traditionally subject to local regulation and in which local interests vary. Courts must be "particularly
15 reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a
16 significant local interest to be served that may differ from one locality to another." (*Id.*; see also *Great*
17 *Western, supra*, 27 Cal.4th at pp. 866-67.) Similarly, "when local government regulates in an area over
18 which it traditionally has exercised control ... California courts will presume, absent a *clear indication*
19 of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute." (*Big*
20 *Creek, supra*, 38 Cal.4th at p. 1149 [first emphasis added].)

21 ⁵ **Duplication** exists when a local ordinance "is coextensive" with a state law – that is, when
22 the ordinance prohibits "precisely the same acts" as the state law prohibits. (*Great Western, supra*, 27
23 Cal.4th at pp. 860, 865.) **Contradiction** exists when a local law "mandate[s] what state law expressly
24 forbids," or "forbid[s] what state law expressly mandates" (*id.*, at pp. 860, 866) – in other words, when
25 it is impossible to comply with both the local ordinance and the state law. And **implied preemption**
26 exists only when the Legislature has impliedly manifested its intent to fully occupy the field in which
27 the local ordinance regulates, in light of recognized indicia of legislative intent. (*Big Creek, supra*, 38
28 Cal.4th at p. 1150; *Great Western, supra*, 27 Cal.4th at p. 860-61.) Implied preemption will not found
unless "(1) the subject matter has been so fully and completely covered by general law as to clearly
indicate that it has become exclusively a matter of state concern; (2) the subject matter has been
partially covered by general law couched in such terms as to indicate clearly that a paramount state
concern will not tolerate further or additional local action; or (3) the subject matter has been partially
covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance
on the transient citizens of the state outweighs the possible benefit to the locality." (*Great Western,*
supra, 27 Cal.4th at p. 861.)

1 The 2012 Ordinance is a refuse control and environmental protection measure. It addresses
2 matters of strong local concern, regulating in a field in which cities have long regulated. (*See, e.g.,*
3 *Waste Resource Technologies v. Dept. of Public Health* (1994) 23 Cal.App.4th 299, 304 [noting
4 longstanding "substantial body of law" upholding municipal police power "to legislate on the issue of
5 refuse"]. Cities routinely adopt such laws: indeed, multiple California cities restrict merchants,
6 including restaurants, from dispensing plastic carryout bags much as the Ordinance does. (Petition at
7 ¶¶ 107-111.) Manufacturers thus face a particularly heavy burden of showing the Ordinance is
8 preempted.

9 **D. The CRFC Does Not Expressly Preempt The Ordinance.**

10 **1. The CRFC expressly preempts only "health and sanitation standards."**

11 To determine whether a state law expressly preempts a local ordinance, the Court asks what
12 type of local ordinance the Legislature has said it wants to preclude. "Express field preemption turns
13 on a comparative statutory analysis: What field of exclusivity does the state preemption clause define,
14 what subject matter does the local ordinance regulate, and do the two overlap?" (*California Grocers*
15 *Assn., supra*, 52 Cal.4th at p. 188.) "[E]xpress preemption turns on whether the field the Legislature
16 has occupied ... encompasses the [local] ordinance." (*Big Creek, supra*, 38 Cal.4th at p. 1152.)

17 This principle is important, because it means that a local ordinance is not expressly preempted
18 merely because it overlaps *in some manner* with *some part* of a state statutory scheme. Instead, to be
19 expressly preempted, the local ordinance must specifically overlap with the state statutory scheme's
20 *express preemption clause*. This makes perfect sense: express preemption is a question of legislative
21 intent, and "the words the Legislature chose" to put in the express preemption clause are "the best
22 indicators of its intent" about precisely what field it wanted to occupy. (*Big Creek, supra*, 38 Cal.4th at
23 p. 1152.) If the ordinance is not the kind of law described in the express preemption clause – in other
24 words, if it does not overlap with the express preemption clause – then there is no express preemption.

25 To determine whether the CRFC expressly preempts San Francisco's Ordinance, therefore, the
26 Court must examine the CRFC's express preemption clause. It is found at Health and Safety Code
27 Section 113705, which "clear[ly] and precise[ly]" defines "the regulatory field it reserves for the
28

1 state." (*California Grocers Assn., supra*, 52 Cal.4th at p. 189.) Health and Safety Code Section
2 113705 shows that the Legislature has occupied only the field of **health and sanitation standards**:

3 [I]t is the intent of the Legislature to occupy the whole field of **health and**
4 **sanitation standards for retail food facilities**, and the standards set forth in this
5 part and regulations adopted pursuant to this part shall be exclusive of all local
6 **health and sanitation standards relating to retail food facilities**.

7 (Health & Safety Code §113705 [emphases added] ["Section 113705"].)⁶ Thus, a local law is not
8 expressly preempted merely because it imposes *some* type of rule or standard for retail food
9 establishments. Instead, the CRFC expressly "preempts only those [local laws] that establish '**health**
10 **and sanitation** standards' for retail food establishments." (*California Grocers Assn., supra*, 52 Cal.4th
11 at p. 191 [emphasis added].)

12 **2. San Francisco's Ordinance does not constitute or impose any "health and**
13 **sanitation standards."**

14 San Francisco's Ordinance is not a "health and sanitation standard," and does not establish such
15 standards. Therefore, it is not expressly preempted. This is clear for several reasons.

16 **a. The plain text of the CRFC and the Ordinance.**

17 First and foremost, the plain text of Section 113705 makes it clear that rather than preempting
18 all local standards for retail food facilities, the CRFC expressly preempts only "**health and sanitation**
19 standards" for such facilities. The Legislature included the words "health and sanitation" within
20 Section 113705 for a reason, and this Court cannot simply ignore those statutory words; instead, it
21 must give them full effect and meaning. The CRFC does not define its terms "health" and
22 "sanitation," but the ordinary meanings of both words clearly relate to cleanliness and purity – in this
23 context, the cleanliness and purity of food and of a retail food establishment in which food is stored,
24 prepared and served. Thus, a "health and sanitation standard" is a standard that helps ensure, or is
25 enacted to promote, cleanliness and purity of food prepared and sold in a retail food facility.

26 This interpretation is bolstered by the CRFC's legislative purpose. The Legislature enacted the
27 CRFC "to safeguard public health and provide to consumers food that is safe, unadulterated, and
28

⁶ Manufacturers persist in misleading the Court as to Section 113705's title, which they claim is
"Legislative Intent To Preempt Local Standards." (Pet. MPA at 22:7.) In fact, as the City already
pointed out in its demurrer papers, Section 113705 is entitled "Legislative Finding and Declaration."

1 honestly presented through adoption of science-based standards." (Health & Safety Code §113703.)
2 The CRFC's central purpose is to reduce the chances of contamination and food-borne illness, and
3 ensure that the food consumers purchase at restaurants and grocery stores is clean, safe and pure.
4 Given this undisputed statutory purpose, it is entirely logical that the Legislature wanted to prevent
5 cities from enacting their own food safety laws that imposed their own standards for cleanliness and
6 purity, since such local laws could lead to reduced cleanliness and greater food contamination in retail
7 food facilities, and thereby undercut the Legislature's food safety goals.

8 The Ordinance obviously does not address food cleanliness or purity. It says nothing at all
9 about adulteration of food, contamination, spoilage, or any other topic connected to health or
10 sanitation in relation to food and food facilities.

11 Instead, the Ordinance addresses *environmental preservation* and *litter control*, promoting
12 goals such as litter reduction, wildlife conservation, and waste diversion. (See Pet. MPA, at 5:25-26
13 [conceding environmental purpose of Ordinance].) To reduce the number of single-use carryout bags
14 (particularly noncompostable plastic bags) in the City's waste stream, and thus to help San Francisco
15 meet its landfill diversion goals and otherwise improve environmental quality and reduce litter
16 problems, the Ordinance bars retail stores of all kinds from using noncompostable plastic carryout
17 bags – while allowing retailers to provide their customers, for a small charge, with carryout bags made
18 of paper or compostable plastic, or with reusable carryout bags. The Ordinance's environmental goals
19 focus entirely on conditions found outdoors, not conditions within or on the premises of retail food
20 facilities.⁷

21
22
23 ⁷ That San Francisco's Ordinance was enacted for purposes entirely distinct from those that
24 underlie the CRFC is a further indication that the Ordinance is not preempted. A local ordinance is not
25 preempted by a state statute "if the purpose of the statute[] is sufficiently distinct from that of" the
26 local ordinance. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 149 [local charter amendment
27 regulating permissible grounds for eviction of residential tenants, and forbidding landlords from
28 recovering possession of units on expiration of residential tenancy, was not preempted by state
unlawful detainer statutes because "[t]he purpose of the unlawful detainer statutes is *procedural*,"
while city charter amendment's purpose was *substantive*] [emphasis added]; see *Rental Housing Assn.
of Northern Alameda County v. City of Oakland* (2009) 171 Cal.App.4th 741, 753 [explaining that in
Birkenfeld, "[t]he Supreme Court held that the unlawful detainer statutes and Berkeley's charter
amendments did not conflict because they each served separate purposes ..."].)

1 In sum, the Ordinance has no connection with the purity and safety of food served from a retail
2 food establishment. It does not constitute or establish "health and sanitation standards."

3 **b. The California Grocers Association decision.**

4 Second, the California Supreme Court's *California Grocers Assn.* decision shows that the
5 Ordinance does not constitute or establish "health and sanitation standards." That case involved a Los
6 Angeles ordinance that imposed certain worker retention requirements on grocery stores; for example,
7 for 90 days after a grocer store changed owners, the store could not discharge its nonmanagerial
8 employees who had worked at the store for at least six months before the change, except for cause.
9 (*Id.*, 52 Cal.4th at p. 187.) The Supreme Court held that the Los Angeles ordinance did not create
10 "health and sanitation standards," and thus did not regulate within the area that Section 113705
11 reserved for the state, because it "imposes no substantive food safety standards." (*Id.* at p. 189.) The
12 local ordinance, the Court explained, "regulates employment not food safety," while Health and Safety
13 Code Section 113705 "regulates food safety, not employment." (*Id.* at p. 189.) Thus, "[t]he face of
14 the Ordinance ... discloses no incursion into the exclusive realm [of health and sanitation standards]
15 reserved for the state by Health and Safety Code section 113705." (*Id.*)

16 The Court emphasized that only laws that regulated within the field that Health and Safety
17 Code Section 113705 reserved to the State would be expressly preempted. The CRFC, it explained,
18 "does not preempt all laws that have as their purpose the promotion of food health and safety; it
19 preempts **only those that establish 'health and sanitation standards' for retail food**
20 **establishments[.]**" (*Id.* at p. 191 [emphasis added].) Because Los Angeles' ordinance did not establish
21 any health and sanitation standards, it was not preempted.

22 The Supreme Court's conclusion with respect to Los Angeles' law applies with equal force
23 here. Because San Francisco's Ordinance does not mention or have any connection to food purity,
24 safety and cleanliness, and does not regulate food safety at all, "[t]he face of the Ordinance ...
25 discloses no incursion into the exclusive realm reserved for the state by Health and Safety Code
26 section 113705." (*California Grocers Assn.*, *supra*, 52 Cal.4th at p. 189.)

1 restrict the food that restaurants can serve their customers. Those other statutes are not "health and
2 sanitation" standards, because they promote legislative goals other than food safety. For example:

- 3 • After July 1, 2012, no California restaurant may sell any product that "is the result of force
4 feeding a bird for the purpose of enlarging the bird's liver beyond normal size." (Health &
5 Safety Code §25982.) This statute bars restaurants from selling duck or goose liver, known as
6 "foie gras." The Legislature enacted this prohibition not because of concerns about the safety
7 or purity of duck and goose liver, but because it concluded that force-feeding of birds is
8 unacceptably cruel. (*See* "Historical and Statutory Notes" to Health & Safety §25980 [signing
9 statement].)
- 10 • After January 1, 2013, no restaurant in California may sell food made from shark fins (such as
11 shark fin soup). (Cal.Fish & Game Code §2021(b), (e).) The Legislature enacted this
12 prohibition based upon its findings that shark hunting and shark finning are harmful to the
13 ocean ecosystem. (*See* Stats. 2011, ch. 524 [City's RJN, Exh. N].)

14 These statutes overlap with the CRFC, because they, like the CRFC, restrict the specific kinds
15 of food that restaurants are allowed to serve. But as their codification outside of the CRFC reflects,
16 they are not "health and sanitation standards for retail food facilities." Why? Because the nature and
17 purpose of these statutes, like the Ordinance, is not to promote food safety or purity. Instead, these
18 statutes concern animal cruelty and ecological preservation, respectively. Just as these state statutes
19 overlap with the CRFC but are not "health and sanitation standards," so too, the Ordinance overlaps
20 with the CRFC but is not thereby a "health and sanitation standard for retail food facilities."

21 **3. AB 2449 shows that the Legislature did not intend the CRFC to occupy the**
22 **field of checkout bag regulations.**

23 As the City has previously explained, in September 2006 – just a few months after it had
24 enacted the CRFC – the Legislature enacted a different statute, AB 2449, which – in addition to stating
25 that the Legislature wished to discourage plastic bag use and to promote use of reusable bags –
26 amended the Public Resources Code to expressly preempt local ordinances "[i]mpos[ing] a plastic
27 carryout bag fee upon a store," specifically including a supermarket. (Pub.Res.Code §42254(b)(2); *see*
28 Stats. 2006, Ch. 845, at §2, pp. 3-4 [City's RJN, Exh. G].) The legal principle is clear: when the

1 Legislature enacts one statutory scheme, and then later enacts another, separate statutory scheme
2 addressing a related subject, the fact that the Legislature believed it necessary *in its second statutory*
3 *scheme* to expressly preempt local laws on that subject shows that the Legislature had not already
4 preempted local laws on that subject in its earlier enactment. (*Bronco Wine Co. v. Jolly* (2004) 33
5 Cal.4th 943, 989 [holding that "if Congress ... by enactment of the FAA Act in 1935, already had
6 generally preempted state regulation of wine labels, there would have been no need for any express
7 preemption clause or preemption regulation with respect to the 1988 health warnings for wine
8 labels"].) In this case, if Manufacturers were correct that the Legislature expressly preempted local
9 supermarket plastic checkout bag ordinances by enacting the CRFC *in April 2006*, then it would have
10 been entirely unnecessary for the Legislature, *in September 2006*, to expressly preempt local
11 ordinances imposing a fee on supermarkets' use of plastic carryout bags.

12 Manufacturers offer no coherent rebuttal to this point. They assert that AB 2449 "was
13 protective" of plastic bags – but entirely ignore the lessons that AB 2449 teaches about the
14 Legislature's understanding of which regulatory fields it had, and had not, already occupied via the
15 CRFC. Manufacturers also make the irrelevant observation that AB 2449 will sunset before the
16 Ordinance becomes applicable to restaurants. Nonetheless, the salient point remains: the fact that the
17 Legislature saw a need, in September 2006, to expressly preempt plastic carryout bag fees, shows that
18 the Legislature did not believe that the earlier-enacted CRFC had preempted ordinances regulating
19 supermarkets' and other retail food facilities' use of plastic carryout bags. Or, to state the point slightly
20 differently: the Legislature's enactment of AB 2449 in September 2006 is powerful evidence that the
21 CRFC does not have the preemptive reach that Manufacturers claim it does, and does not preempt
22 local environmental measures that regulate retail food facilities' use of plastic checkout bags.

23 **4. Manufacturers' other arguments fail to show preemption.**

24 Manufacturers offer several other arguments, but none come close to meeting their burden of
25 showing that the CRFC expressly preempts San Francisco's Ordinance.

26 First, Manufacturers insist that reusable bags, and paper and compostable checkout bags, raise
27 "health and sanitation issues." (Pet. MPA at 18:3-20:12.) These claims find no support in the record.
28

- 1 • Manufacturers observe that "[o]ne lady was severely burned removing hot soup from a Subway
2 bag" (*id.* at 18:25), but they offer no evidence about what that bag was made of, or that the
3 injury was the fault of the bag's composition. Manufacturers also cite the well-known
4 McDonald's coffee burn victim (*id.* at 18:27-19:1), but they offer no evidence that any bag, of
5 any kind, was involved in that incident.
- 6 • With regard to compostable plastic bags, Manufacturers note that one supplier of such bags
7 advises against using its bags to hold hot liquids. (*Id.* at 19:6.) But Manufacturers point to no
8 regular plastic bag manufacturers who urge that plastic bags be used to transport hot liquids.
9 And it is undisputed that many restaurants do not use bags of any kind to hold hot liquids, but
10 instead use cardboard drink trays.
- 11 • Manufacturers point to a single incident in Oregon in which several people contracted
12 norovirus after eating store-bought cookies which were in a reusable bag. But they offer no
13 evidence that the bag was the source of the norovirus, or that even if it was, that occurred
14 ***because it was a reusable bag.*** (An airborne virus can "aerosolize" onto any bag, including a
15 single-use bag.)

16 The Legislature, in enacting the CRFC, chose ***not*** to require that restaurants, or other retail
17 food facilities, use checkout bags of any kind. It also chose ***not*** to require that all checkout bags that
18 are used be made of plastic. Equally important, the Legislature has determined that it is California's
19 policy to promote and encourage the use of reusable bags, and discourage use of single-use checkout
20 bags. This Court must respect, and cannot second-guess, those legislative choices – which further
21 undermine Manufacturers' express preemption claim.

22 Second, Manufacturers continue to distort the *California Grocers Assn.* opinion, claiming it
23 held that the purpose of a local ordinance is not "relevant" to preemption analysis. (Pet. MPA at 24:1-
24 21.) To the contrary, the Supreme Court clearly explained that a local ordinance's purpose may be
25 "relevant to state preemption analysis," as part of "a nuanced inquiry" into express preemption, so
26 long as the court does not look to the ordinance's "[p]urpose ***alone***" and consider nothing else. (*Id.*,
27 52 Cal.4th at p. 190.) The Court specifically endorsed several earlier decisions that had looked to the
28 purposes of the ordinances at issue to conclude that those ordinances were not preempted. (*Id.*, 52

1 Cal.4th at pp. 190-192.) The Court did not overrule or call into question any prior preemption cases as
2 placing too much reliance on an ordinance's purpose. Thus, *California Grocers* expressly **affirmed**
3 that courts may, as part of their overall preemption analysis, consider the purpose of a challenged local
4 ordinance.

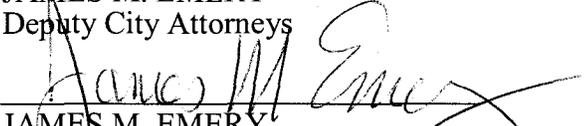
5 In this case, the Court hardly needs to inquire into the legislative purpose underlying San
6 Francisco's Ordinance. The Ordinance's text makes clear that it is an environmental and litter control
7 measure, and that it does not regulate food safety or impose health and sanitation standards for retail
8 food facilities. The Ordinance's legislative history merely confirms those points. Thus, *California*
9 *Grocers* supports the City, not Manufacturers, and further shows that San Francisco's Ordinance is not
10 expressly preempted.⁸

11 CONCLUSION

12 For the foregoing reasons, the Court should deny the petition and enter judgment for San
13 Francisco.

14 Dated: August 2, 2012

15 DENNIS J. HERRERA
16 City Attorney
17 WAYNE SNODGRASS
18 JAMES M. EMERY
19 Deputy City Attorneys

20 By: 

21 JAMES M. EMERY
22 Attorneys for Respondents
23 CITY AND COUNTY OF SAN FRANCISCO, et al.

24 ⁸ Manufacturers wisely do not argue other types of preemption. The Ordinance does not
25 regulate within any field the Legislature has occupied by implication. "The Legislature's preemptive
26 action in specific and expressly limited areas weighs against an inference that preemption by
27 implication was intended elsewhere" (*Big Creek, supra*, 38 Cal.4th at p. 1157), and implied preemption
28 also will not be found "when the Legislature has expressed its intent to permit local regulations." (*Id.*;
see also Health & Safety Code §§ 113709, 113816 [CRFC provisions permitting local regulations].)
The Ordinance also does not contradict the CRFC, because it "does not prohibit what [the CRFC]
commands or command what [the CRFC] prohibits." (*Sherwin-Williams Co. v. City of Los Angeles*
(1993) 4 Cal.4th 893, 902.) The CRFC does not require a retail food facility to use any carryout bag at
all, much less a noncompostable plastic bag. And the Legislature has expressly stated its desire "to
encourage the use of reusable bags by consumers and retailers and to reduce the consumption of
single-use bags." (Stats. 2006, Ch. 845, at §1(b) [findings accompanying AB 2449, enacted just
months after the enactment of CRFC] [City's RJN, Exh. G].) Finally, the Ordinance does not duplicate
the CRFC.

1 **STEPHEN L. JOSEPH (SBN 189234)**
2 350 Bay Street, Suite 100-328
3 San Francisco, CA 94133
4 Telephone: (415) 577-6660
5 Facsimile: (415) 869-5380
6 E-mail: savetheplasticbag@earthlink.net

7 Attorney for Petitioner
8 **SAVE THE PLASTIC BAG COALITION**

SUMMONS ISSUED

FILED
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County of San Francisco

FEB 29 2012

CLERK OF THE COURT

BY: *Elias Butt*
Deputy Clerk

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF SAN FRANCISCO

12 SAVE THE PLASTIC BAG COALITION,
13 an unincorporated association,
14
15 Petitioner,

16 v.

17 CITY AND COUNTY OF SAN FRANCISCO,
18 a political subdivision of the State of California)
19 and a municipal corporation; SAN FRANCISCO)
20 PLANNING DEPARTMENT,)
21 an agency of the City and County of San)
22 Francisco; SAN FRANCISCO)
23 DEPARTMENT OF THE ENVIRONMENT,)
24 an agency of the City and County of San)
25 Francisco; and DOES 1-100, inclusive,)

26 Respondents.

Case No. **CPF-12-511978**

) **CEQA Case**

) **VERIFIED PETITION FOR WRIT OF**
) **MANDATE UNDER THE CALIFORNIA**
) **ENVIRONMENTAL QUALITY ACT;**
) **COMPLAINT FOR INVALIDATION OF**
) **ORDINANCE BASED ON STATE RETAIL**
) **FOOD CODE PREEMPTION; REQUEST**
) **FOR DECLARATORY AND INJUNCTIVE**
) **RELIEF**

27 Petitioner, SAVE THE PLASTIC BAG COALITION, alleges as follows:

28 **PARTIES AND JURISDICTION**

1. Petitioner SAVE THE PLASTIC BAG COALITION is an unincorporated association.
2. Respondent CITY AND COUNTY OF SAN FRANCISCO (the "City") is a political subdivision of the State of California and a municipal corporation.

1 3. Respondent SAN FRANCISCO PLANNING DEPARTMENT (the "Planning
2 Department") is a department and agency of the CITY AND COUNTY OF SAN FRANCISCO.

3 4. Respondent SAN FRANCISCO DEPARTMENT OF THE ENVIRONMENT
4 (the "Environment Department") is a department and agency of the CITY AND COUNTY OF
5 SAN FRANCISCO.

6 5. Petitioner seeks a judgment and writ of mandate to set aside, void, annul, and
7 repeal San Francisco Ordinance No. 33-12 (the "Ordinance"). The Ordinance bans plastic
8 carryout bags ("plastic bags") at retail stores, restaurants, and other food establishments, and
9 requires that consumers pay a 10-cent fee for each paper carryout bag ("paper bag") and each
10 compostable carryout bag ("compostable bag"). A true and correct copy of the Ordinance is
11 attached hereto as Exhibit A.

12 6. The Ordinance was finally adopted by the Board of Supervisors on February 14,
13 2012.

14 7. The Ordinance takes effect for all retail stores except food establishments on
15 October 1, 2012. It takes effect for food establishments on July 1, 2013.

16 8. The First Cause of Action herein alleges violation of the California
17 Environmental Quality Act ("CEQA").

18 9. The Ordinance is a "project" that is subject to CEQA.

19 10. The Planning Department is the lead agency for the project, responsible for
20 compliance with CEQA, including but not limited to preparation of an Environmental Impact
21 Report ("EIR").

22 11. The City and the Planning Department violated CEQA by claiming that the
23 Ordinance is exempt from CEQA and failing to complete an EIR prior to adopting the
24 Ordinance.

25 12. The claim of exemption contradicts and violates the California Supreme Court's
26 express ruling that EIRs "will be required" before plastic bag bans may be adopted in cities
27 such as San Francisco. (*Save The Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52
28 Cal.4th 155, 174, n.10.)

1 and other members of Petitioner market, sell, distribute, and supply plastic bags and plastic
2 reusable bags to retail stores, restaurants, and food establishments in San Francisco, including
3 bags that are banned by the Ordinance.

4 24. At all times relevant to the allegations herein and at present, Petitioner's counsel
5 Stephen L. Joseph has been a resident of San Francisco and a member of Petitioner.

6 25. Petitioner was formed in 2008 and exists for the purpose of responding to
7 environmental misinformation about plastic bags and ensuring that the environmental impacts
8 of banning plastic bags are made known to decision-makers and the public. Petitioner maintains
9 a website at www.savetheplasticbag.com.

10 26. Petitioner seeks to promote and enforce the informational purposes of CEQA in
11 this action, as set forth in CEQA Guidelines § 15002. Ascertaining the true facts about the
12 environmental impacts of projects and disclosing those true facts to decision-makers and the
13 public are within the zone of interests that CEQA is intended to preserve and protect.

14 27. The question in this action is one of public right and the object of this action is to
15 enforce a public duty in the public interest.

16 28. Petitioner is interested as a citizen in having the public duties and purposes in
17 CEQA enforced. Petitioner has a continuing commitment to the subject matter of the public
18 rights being asserted.

19 29. Petitioner is also interested in protecting the interests of its members, including
20 preventing their products from being unlawfully and invalidly banned.

21 30. Petitioner has standing as an association to bring this action, because (i) its
22 members would otherwise have standing to sue on their own behalf; (ii) the interests Petitioner
23 seeks to protect herein are germane to the organization's purpose; and (iii) neither the claims
24 asserted herein, nor the relief requested, require participation of the members in this lawsuit.

25 31. As to the First and Second Causes of Action herein, Petitioner has beneficial and
26 citizen standing. Such standing was confirmed by the California Supreme Court in *Save The*
27 *Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166-171.

28

1 **STATEMENT OF FACTS**

2 32. On November 10, 2011, the Planning Department issued a Certificate of
3 Determination asserting that the proposed Ordinance was categorically exempt under CEQA
4 Guidelines §§ 15307 and 15308. A true and correct copy thereof is attached hereto as Exhibit B.

5 33. On November 16 and 18, 2011 and February 6, 2012, Petitioner submitted
6 objections to the proposed Ordinance to the Planning Department, the Board of Supervisors,
7 and the City Attorney (the "Objections"). True and correct copies of the Objections are attached
8 hereto as Exhibits C, D, and E respectively and incorporated herein by reference. Petitioner also
9 submitted therewith 137 documents in support of the Objections.

10 34. The Objections were timely submitted prior to the first reading of the Ordinance
11 by the Board of Supervisors which occurred on February 7, 2012.

12 35. In the Objections, Petitioner objected to the assertion of categorical exemptions.

13 36. In the Objections, Petitioner made a "fair argument" that the Ordinance may
14 have a significant negative effect on the environment.

15 37. In the Objections, Petitioner demanded that the City and the Planning
16 Department prepare and certify an EIR before adopting the Ordinance.

17 38. No CEQA Initial Study or EIR was prepared and no CEQA Negative
18 Declaration was adopted.

19 39. In the Objections, Petitioner also objected to the Ordinance based on California
20 Retail Food Code preemption.

21 40. None of the Respondents substantively responded to the Objections at any time.

22 41. In the Ordinance, the Board of Supervisors and the City expressly affirmed and
23 adopted the Certificate of Determination.

24 42. All of the objections to the Ordinance stated herein were asserted in the
25 Objections.

26 43. All of the evidence cited herein is part of the administrative record.

27 44. All of the Objections are hereby reasserted to the extent that they support the
28 First and Second Causes of Action herein.

1 **THE CITY AND THE PLANNING DEPARTMENT REFUSED TO COMPLY WITH**
2 **THE SUPREME COURT'S DECISION IN THE MANHATTAN BEACH CASE**

3 45. The California Supreme Court ruled in July 2011 that cities and counties larger
4 than the City of Manhattan Beach “will be required” to prepare EIRs before banning plastic
5 bags and that such projects “should not be allowed to escape review.” (*Manhattan Beach*,
6 *supra*, 52 Cal.4th 155, 174, n.10.)

7 46. The population of San Francisco in 2010 was 805,235, meaning that it is
8 approximately 24 times larger than the City of Manhattan Beach.

9 47. In addition, San Francisco hosted approximately 15.9 million visitors and
10 tourists in 2010.

11 48. Based on the decision of the Supreme Court in *Manhattan Beach*, the City or the
12 Planning Department was required to prepare an EIR before adopting the Ordinance.

13 **THE CITY AND THE PLANNING DEPARTMENT WERE NOT**
14 **ENTITLED TO RELY ON THE CATEGORICAL EXEMPTIONS**

15 49. The City and Planning Department could not rely on the categorical exemptions
16 in CEQA Guidelines §§ 15307 and 15308. Those sections read as follows:

17 **§ 15307. ACTIONS BY REGULATORY AGENCIES FOR**
18 **PROTECTION OF NATURAL RESOURCES**

19 Class 7 consists of actions taken by regulatory agencies as authorized by
20 state law or local ordinance to assure the maintenance, restoration, or
21 enhancement of a natural resource where the regulatory process involves
22 procedures for protection of the environment. Examples include but are
23 not limited to wildlife preservation activities of the State Department of
24 Fish and Game. Construction activities are not included in this
25 exemption.

26 **§ 15308. ACTIONS BY REGULATORY AGENCIES FOR**
27 **PROTECTION OF THE ENVIRONMENT**

28 Class 8 consists 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.
Construction activities and relaxation of standards allowing
environmental degradation are not included in this exemption.

1 50. The categorical exemptions in §§ 15307 and 15308 only apply to “regulatory
2 agencies.” The Board of Supervisors is not a regulatory agency. It is a legislative agency.

3 51. The categorical exemptions in §§ 15307 and 15308 only apply to regulatory
4 actions that are “authorized by” a preexisting state law or local ordinance. There was no
5 preexisting state law or local ordinance that “authorized” the Ordinance in this case.

6 52. The categorical exemptions in §§ 15307 and 15308 only apply when there is a
7 preexisting “regulatory process [that] involves procedures for protection of the environment.”
8 There was no such preexisting “regulatory process” in this case.

9 53. According to the California Natural Resources Agency, which issues the CEQA
10 Guidelines:

11 Statutory exemptions are descriptions of *types* of projects for which the
12 California Legislature has provided a *blanket* exemption from CEQA
procedures and policies.

13 (<http://ceres.ca.gov/ceqa/flowchart/exemptions/index.html>, italics added.)

14 54. The Supreme Court ruled that comprehensive environmental review “will be
15 required” for cities and counties larger than the City of Manhattan Beach and that such projects
16 “should not be allowed to escape review.” (*Manhattan Beach, supra*, 52 Cal.4th 155, 174,
17 n.10.) Therefore, there is no *blanket* exemption for this *type* of project.

18 55. The City and the Planning Department misused the categorical exemptions in §§
19 15307 and 15308 to avoid CEQA’s procedures and environmental review.

20 **THE CITY AND THE PLANNING DEPARTMENT WERE NOT**
21 **PERMITTED TO RELY ON THE 10-CENT PAPER AND COMPOSTABLE**
22 **BAG FEE AS A BASIS FOR ASSERTING CATEGORICAL EXEMPTIONS**

23 56. The Planning Department claimed in the Certificate of Determination that it
24 could rely on the categorical exemptions, because a fee on paper and compostable bags might
25 offset the greater negative impacts of paper and compostable bags. Paper and compostable bags
26 are significantly worse for the environment than plastic bags, as alleged below.

27 57. The City and Planning Department were not permitted to rely on the paper and
28 compostable bag fee in determining whether the categorical exemptions applied. In *Azusa Land*
Reclamation Co. v. Main San Gabriel Basin Watermaster (1997) 52 Cal.App.4th 1165, the

1 court stated: "Appellants cannot escape the law by taking a minor step in mitigation and then
2 find themselves exempt from the exception to the exemption." (*Id.* at 1200.) In *Salmon*
3 *Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, the court
4 stated: "[T]he County erred in relying upon mitigation measures to grant a categorical
5 exemption from CEQA.... If a project may have a significant effect on the environment, CEQA
6 review must occur, and only then are mitigation measures relevant.... The County made a
7 premature and unauthorized environmental evaluation at the preliminary stage of considering
8 eligibility for a categorical exemption." (*Id.* at 1107-08.)

9 **EVEN IF THE FEE COULD BE A BASIS FOR RELYING**
10 **ON CATEGORICAL EXEMPTIONS, THERE IS NO**
11 **CERTAINTY THAT A 10-CENT FEE IS HIGH ENOUGH**

12 58. In the Objections, without waiving the point that the paper and compostable bag
13 fee could not be used to determine whether the categorical exemptions in §§ 15307 and 15308
14 were applicable, Petitioner produced substantial evidence that a 10-cent paper and compostable
15 bag fee would not eliminate the reasonable possibility of significant negative environmental
16 impact caused by increased paper and compostable bag usage.

17 59. A 10-cent fee is, or may be, far too low to act as an effective incentive to
18 promote the use of reusable bags. No one will carry a reusable bag with them for unplanned
19 impulse buying. Very few people will carry a reusable bag to Macy's or other department stores
20 to save a dime. Very few people will carry a large reusable bag to purchase one or two small
21 items such as earrings or a watch or a snack from Union Square or Chinatown. Very few
22 tourists will carry reusable bags when they visit Fisherman's Wharf and tour the city.

23 60. In the original draft ordinance, the City was planning to increase the paper and
24 compostable bag fee to 25 cents on July 1, 2014. The Certificate of Determination is expressly
25 based on the assumption that the fee would increase to 25 cents on July 1, 2014. The fee in the
26 Ordinance as adopted is 10 cents with no increase. Therefore, the City and the Planning
27 Department based their decision to claim categorical exemptions on the wrong level of fee.

28 61. In the Certificate of Determination, the Planning Department conceded that it
could not be certain that even a 25-cent fee would be high enough. It stated therein as follows:

1 Because the Expansion of the Plastic Bag Reduction Ordinance would
2 not allow single-use plastic bags and other single-use bags and
3 eventually charge for all single-use bags, including recycled-content
4 paper and compostable bags, at “stores”, it is difficult to determine the
5 effects on user choice from these studies. Additional studies have
6 projected consumer behavior from fees on single-use plastic and paper
bags fees, but these projections have not been verified with actual
consumer behavior following the implementation of the single-use
plastic and paper bag fees.

7 **PETITIONER MADE A FAIR ARGUMENT, THEREBY**
8 **DEFEATING THE CATEGORICAL EXEMPTIONS**
9 **ASSUMING THAT THEY COULD BE RELIED UPON**

10 62. Even if the City and Planning Department could assert the categorical
11 exemptions in §§ 15307 and 15308, CEQA Guidelines § 15300.2(c) states that such exemptions
12 are unavailable in the following situation:

13 Significant effect. A categorical exemption shall not be used for an
14 activity where there is a reasonable possibility that the activity will have
a significant effect on the environment due to unusual circumstances.

15 63. If a member of the public such as Petitioner makes a “fair argument” that there is
16 a possibility that the project may have a significant negative effect on the environment, the
17 categorical exemptions in §§ 15307 and 15308 may not be relied upon by the agency. (*Banker’s*
18 *Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139
19 Cal.App.4th 249, 264-267.) Under the fair argument standard, “[i]f legitimate questions can be
20 raised about whether the project might have a significant impact and there is any dispute about
21 the possibility of such an impact, the agency cannot find with certainty that a project is
22 exempt.” The agency “must refute that claim to a certainty before finding that the exemption
23 applies.” (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 117-118, emphasis
24 added.) Guidelines § 15064(f)(1) states: “[I]f a lead agency is presented with a fair argument
25 that a project may have a significant effect on the environment, the lead agency shall prepare an
26 EIR even though it may also be presented with other substantial evidence that the project will
27 not have a significant effect.”

1 **Fair argument regarding increased number of paper and compostable bags**

2 64. In the Objections, Petitioner made a “fair argument” based on substantial
3 evidence that the Ordinance may have a significant negative effect on the environment as a
4 result of increased numbers of paper and compostable bags.

5 65. Petitioner produced substantial evidence that paper and compostable bags are far
6 worse for the environment than plastic bags, including the Franklin Report, the Scottish Report,
7 the Boustead Report, the British Report, the ULS Report, and the Los Angeles County EIR on
8 banning plastic bags.

9 66. The Scottish Report includes findings that the life cycle of paper bags results in:

- 10 • 3.3 times *more* emissions of greenhouse gases than plastic bags;
- 11 • 1.1 times *more* consumption of nonrenewable primary energy than plastic bags;
- 12 • 4.0 times *more* consumption of water than plastic bags;
- 13 • 1.9 times *more* acid rain than plastic bags;
- 14 • 1.3 times *more* negative air quality than plastic bags;
- 15 • 14.0 times *more* water body eutrophication than plastic bags; and
- 16 • 2.7 times *more* solid waste production than plastic bags.

17 67. The Scottish Report also includes the following finding:

18 [A] paper bag has a more adverse impact than a plastic bag for most of
19 the environmental issues considered. Areas where paper bags score
20 particularly badly include water consumption, atmospheric acidification
21 (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).

22 68. The Boustead Report is a comprehensive life cycle assessment of the
23 environmental impacts of the types of plastic, paper, and compostable carryout bags used in the
24 United States. It takes into account that a paper bag holds more than a plastic bag and applies an
25 adjustment factor of 1 paper bag = 1.5 plastic bags. The Boustead Report findings are as
26 follows:

Carrying Capacity of paper and plastic bags equivalent to 1000 paper bags	Paper bags (30% recycled fiber)	Compostable bags	Plastic bags
Total Energy Used (MJ)	2622	2070	763
Fossil Fuel Use (kg)	23.2	41.5	14.9
Municipal Solid Waste (kg)	33.9	19.2	7.0
Greenhouse Gas Emissions (CO ₂ Equiv. Tons)	0.08	0.18	0.04
Fresh Water Usage (Gal)	1004	1017	58

69. The Boustead Report analyzes paper bags with 30% post-consumer recycled content. The Ordinance requires that paper bags have 40% post-consumer recycled content. An additional 10% of recycled content would not result in a 10% improvement in environmental impacts. Even if an extra 10% of recycled content decreased all environmental impacts of paper bags by a full 10%, paper bags are still far worse than plastic bags in every environmental category. For example, instead of consuming 2622 megajoules of total energy, 1000 paper bags would consume 2360 megajoules. Plastic bags with the same carrying capacity consume only 763 megajoules.

70. The ULS Report concluded as follows regarding compostable bags:

By definition, composting and biodegradation release carbon dioxide (CO₂), a greenhouse gas, into the atmosphere, increasing the potential for climate change. For example, composted paper produces approximately twice the CO₂ emissions produced by non-composted paper.

71. Los Angeles County completed and certified an EIR before it banned plastic and compostable bags. It determined in its EIR that even imposing a 10-cent fee on paper bags, requiring that paper bags be made of at least 40 percent post-consumer material, and promoting and distributing reusable bags would not ensure that there would be no significant negative environmental impacts caused by its ordinance. The EIR contains a section entitled "Significant Unavoidable Adverse Impacts That Cannot Be Mitigated To Below The Level Of Significance" which states:

1 Based on a conservative analysis, [Los Angeles] County has determined
2 that cumulative indirect GHG emissions resulting from implementation
3 of the recommended ordinances will have the potential to result in
4 significant unavoidable impacts even with implementation of mitigation
5 measure GHG-1, which will be expected to reduce significant adverse
6 impacts to GHG emissions to the maximum extent feasible.
7 Consequently, in accordance with Section 15093 of the State CEQA
8 Guidelines, a Statement of Overriding Considerations has been prepared
9 (see Section IX of this document) to substantiate the County's decision
10 to accept this potential unavoidable adverse environmental effect
11 because it is outweighed by the potential benefits afforded by the
12 recommended ordinances.

13 72. In November 2010, the Los Angeles County Board of Supervisors adopted a
14 Statement of Overriding Considerations to enable it to pass its plastic bag ban ordinance,
15 notwithstanding the findings in the EIR.

16 73. Even Heal the Bay, which is a leading campaigner for the banning of plastic
17 bags, agrees that paper bags cause significant negative environmental impacts. In 2008, Heal
18 the Bay told the City of Manhattan Beach as follows:

19 As the most ubiquitous alternative to plastic, paper bags are themselves
20 fraught with environmental impacts. The production of paper bags
21 contributes to natural resource depletion, greenhouse gas emissions and
22 additional waterborne wastes from the pulping and paper making
23 process.

24 **Fair argument regarding increased number of reusable bags**

25 74. In the Objections, Petitioner made a "fair argument" based on substantial
26 evidence that the Ordinance may have a significant negative effect on the environment as a
27 result of increased numbers of reusable bags.

28 75. The overwhelming majority of reusable bags used in California are made of
polypropylene or cotton.

76. The United Kingdom Government's Environment Agency prepared a life cycle
assessment of plastic, paper, and reusable bags. The study includes the finding that a cotton
reusable bag must be used at least 131 times before it offsets its greater negative environmental
impacts compared to a plastic bag, assuming that plastic bags are never reused as bin-liners. If
40.3% of plastic bags are reused as bin-liners, which the study found to be the average figure

1 based on its survey, a cotton reusable bag must be used at least 173 times before it offsets its
2 greater greenhouse gas impacts compared to a plastic bag. The study finds that the global
3 warming impact of a cotton reusable bag “is more than ten times that of any other carrier bag.”

4 77. Los Angeles County in its EIR determined that each and every polypropylene
5 and cotton reusable bag distributed in Los Angeles County must be used at least 104 times
6 before it offsets its greater negative environmental impacts compared to a plastic bag.

7 78. If a consumer receives two reusable bags and discards one without using it, the
8 other bag must be used at least 208 times to offset the negative environmental impacts
9 compared to a plastic bag.

10 79. The fact that a reusable bag can be used 104 or more times does not mean that it
11 will be used that many times, especially as reusable bags become filthy and unhygienic after far
12 fewer uses than that.

13 80. The overwhelming majority of consumers do not clean their reusable bags and
14 replace rather than wash them. The University of Arizona asked consumers how often they
15 wash their reusable bags. The responses indicate that 97% of consumers do not regularly wash
16 reusable bags.

17 81. Polypropylene, cotton, and PET reusable bags are not recyclable at all. All such
18 reusable bags must be disposed of in landfills. In Australia, unused and underused reusable bags
19 are piling up in landfills at a rapid rate.

20 82. In contrast, plastic bags are readily recyclable if they are deposited in plastic bag
21 recycling bins that are located at all supermarkets and large drug stores in California. (Pub. Res.
22 Code §§ 42250-57.) All bags deposited in such bins must be recycled. (Pub. Res. Code
23 §§42252(c).) There are many recycling companies that buy plastic bags deposited in the bins,
24 including Trex, AERT, and Hilex.

25 **Fair argument regarding loss of plastic bags for reuse**

26 83. In the Objections, Petitioner made a “fair argument” based on substantial
27 evidence that the Ordinance may have a significant negative effect on the environment as a
28 result of the loss of plastic bags for reuse.

1 **SAN FRANCISCO IS A SPECIAL CASE BECAUSE**
2 **IT RECEIVES A HUGE NUMBER OF VISITORS AND TOURISTS**

3 91. The City and the Planning Department failed to address or take into account the
4 impacts of visitors and tourists.

5 92. As alleged above, San Francisco received 15.9 million visitors in 2010,
6 including hotel guests, those staying with friends and relatives, those staying in
7 accommodations outside the City but whose primary destination was San Francisco, and
8 regional visitors driving in or arriving by BART or ferry for the day, including commuters.
9 During the tourist season, visitors from all over the world flock to Fisherman's Wharf, North
10 Beach, Chinatown, and Union Square. When they come to San Francisco, they buy all kinds of
11 items. In addition, millions of people are expected to visit San Francisco for the America's Cup
12 in 2013.

13 93. The City proposes to penalize tourists for not carrying reusable bags as they tour
14 San Francisco.

15 94. It is unreasonable to expect tourists to carry reusable bags with them all the time.

16 95. Reusable bags (except polyethylene reusable bags) are not recyclable. To the
17 extent that visitors and tourists purchase reusable bags, they are likely to use them once or only
18 a few times before they leave. San Francisco will be flooded with millions of underused non-
19 recyclable environment-unfriendly reusable bags that tourists throw in the trash in their hotel
20 rooms and other places. All of those reusable bags will go to landfills.

21 96. 10 cents is such a low fee for a visitor or tourist that it is likely that the
22 overwhelming majority (perhaps over 98%) will choose to pay the fee. As paper and
23 compostable bags are far worse for the environment than plastic bags, that will cause significant
24 environmental harm.

25 **GREENHOUSE GAS EMISSIONS MUST BE CALCULATED**

26 97. Under CEQA Guidelines § 15064.4, the City or the Planning Department was
27 required in an Initial Study or EIR to "make a good-faith effort, based to the extent possible on
28 scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas
emissions resulting from a project." The City and the Planning Department violated CEQA by

1 failing to comply with said requirement regarding paper, compostable, and reusable bags. In
2 contrast, the Los Angeles County EIR includes comprehensive greenhouse gas calculations.

3 **CUMULATIVE IMPACTS MUST BE ASSESSED**

4 98. Environmental review must be based on cumulative impacts, taking into account
5 adopted and pending plastic bag bans in other cities and counties. The Supreme Court
6 confirmed in *Manhattan Beach* that “cumulative impacts should not be allowed to escape
7 review when they arise from a series of small-scale projects.” (*Manhattan Beach, supra*. 52
8 Cal.4th at 174, n.10.) The City and the Planning Department violated CEQA by refusing and
9 failing to make a cumulative impact assessment.

10 **THE CITY AND ITS CITIZENS NEED AN EIR**

11 99. As stated in CEQA Guidelines § 15002, the purposes of CEQA are to:

- 12 • Inform governmental decision makers and the public about the potential,
13 significant environmental effects of proposed activities.
- 14 • Identify the ways that environmental damage can be avoided or significantly
15 reduced.
- 16 • Prevent significant, avoidable damage to the environment by requiring changes
17 in projects through the use of alternatives or mitigation measures when the
18 governmental agency finds the changes to be feasible.
- 19 • Disclose to the public the reasons why a governmental agency approved the
20 project in the manner the agency chose if significant environmental effects are
21 involved.

22 100. Such alternatives would include (without limitation) (i) more effective litter
23 cleanup; and (ii) requiring more stores to install plastic bag recycling bins, greatly improving
24 signage, and educating consumers to use them.

25 101. As stated in CEQA Guidelines § 15003(e), an EIR “will enable the public to
26 determine the environmental and economic values of their elected and appointed officials thus
27 allowing for appropriate action come election day should a majority of the voters disagree.”
28

1 102. The City and the Planning Department simply brushed aside the legitimate
2 environmental concerns raised by Petitioner, without even responding.

3 103. The City and the citizens are entitled to an informative environmental review, in
4 accordance with CEQA.

5 104. Alameda County, Los Angeles County, the City of Santa Monica, and the City
6 of San Jose prepared and certified EIRs before banning plastic bags. Petitioner has not legally
7 challenged any certified EIR. There is no justification whatsoever for San Francisco to exempt
8 itself from preparing its own EIR.

9 105. Even Heal the Bay, which is a major proponent of banning plastic bags,
10 criticized San Francisco for not preparing an EIR when it adopted a more limited ban of plastic
11 bags at large stores in 2007. Heal the Bay said that San Francisco's failure to prepare an EIR
12 prior to the 2007 ban was a "huge mistake."

13 **HEALTH AND SAFETY CONCERNS REGARDING**
14 **BANNING PLASTIC BAGS AT RESTAURANTS**

15 106. Effective July 1, 2013, the Ordinance bans plastic bags at restaurants and other
16 food establishments.

17 107. All other jurisdictions, except one, that have banned plastic bags have exempted
18 restaurants, including Alameda County, Los Angeles County, Marin County, Santa Clara
19 County, Santa Cruz County, the City of Long Beach, the City of San Jose, and the City of Santa
20 Monica.

21 108. The City of Santa Monica explained its restaurant exemption as follows:

22 Restaurants and other food vendors may provide single-use plastic
23 carryout bags to customers only for the transportation of take-out food
24 and liquids intended for consumption off of the food provider's
25 premises. This exemption is included as a public health safeguard based
26 on input from restaurant owners who expressed concern that some hot
27 and liquid foods could leak from take-out containers and potentially
28 cause paper bags to weaken and fail.

(http://www.smgov.net/uploadedFiles/Departments/OSE/Business/Bag_Ban_Summary.pdf)

29 109. The City of San Jose explained its restaurant exemption in its plastic bag ban as
30 follows:

1 [Environment Code - Checkout Bags; Checkout Bag Charge]

2

3 **Ordinance amending the San Francisco Environment Code by: 1) amending**

4 **Section 1702, to extend the restrictions on checkout bags from supermarkets and**

5 **chain pharmacies to all retail establishments and food establishments in the City, and**

6 **clarify terms; 2) adding Section 1703.5, to require stores to add a checkout bag charge**

7 **of 10 cents, ~~rising to 25 cents~~, if they provide a customer with a checkout bag;**

8 **3) amending Section 1704, to provide for outreach and education for stores and**

9 **customers; 4) setting an operative date of October July 1, 2012; and, 5) 4) making**

10 **environmental findings.**

11

12 NOTE: Additions are *single-underline italics Times New Roman*;

13 deletions are *strike-through italics Times New Roman*.

14 Board amendment additions are double-underlined;

15 Board amendment deletions are ~~strikethrough normal~~.

16 Be it ordained by the People of the City and County of San Francisco:

17 Section 1. Environmental Findings. The Planning Department has determined that the

18 actions contemplated in this ordinance comply with the California Environmental Quality Act

19 (Cal. Pub. Res. Code §§ 21000 et seq.), and, on November 10, 2011, issued a Categorical

20 Exemption Determination for the proposed amendments under CEQA Guidelines Classes 7

21 and 8 (14 Cal. Code Regs. §§ 15307 and 15308). Said determination is on file with the Clerk

22 of the Board of Supervisors in File No. 101055 and is incorporated herein by reference. In

23 approving this ordinance, and upon consideration of the whole record, including public

24 testimony, the Board hereby affirms and adopts the Categorical Exemption Determination.

25 / / /

1 Section 2. Findings.

2 1. The City and County of San Francisco has adopted citywide goals of 75 percent
3 landfill diversion by 2010 and zero waste by 2020.

4 2. The broad use of single-use checkout bags and their typical disposal creates an
5 impediment to achievement of San Francisco's landfill diversion goals.

6 3. Plastic checkout bags are difficult to recycle and contaminate material that is
7 processed through San Francisco's recycling and composting programs.

8 4. Single-use checkout bags create significant litter problems in San Francisco's
9 neighborhoods, and also litter parks, community beaches, sewer systems, and the San
10 Francisco Bay.

11 5. The production and disposal of single-use checkout bags has significant
12 environmental impacts, including the contamination of the environment, the depletion of
13 natural resources, use of non-renewable polluting fossil fuels, and the increased clean-up and
14 disposal costs.

15 6. Of all single-use checkout bags, plastic checkout bags have the greatest impacts on
16 litter and marine life.

17 7. Governments in several countries have placed fees on bags, including the Republic
18 of Ireland, which achieved a 90 percent decrease in the use of single-use plastic checkout
19 bags due to the fee.

20 8. Studies document that banning plastic checkout bags and placing a mandatory
21 charge on paper checkout bags will dramatically reduce the use of both types of bags and
22 increase customers' use of reusable bags.

23 9. Reusable bags are readily available with numerous sources and vendors for these
24 bags. Many stores in San Francisco and throughout the Bay Area already offer reusable bags
25 for sale at a price as low as 25 cents.

1 Section 3. The San Francisco Environment Code is hereby amended by amending
2 Sections 1702 and 1704, and adding Section 1703.5, to read as follows:

3 **SEC. 1702. DEFINITIONS.**

4 For the purposes of this Ordinance, the following words shall have the following
5 meanings:

6 (a) "ASTM Standard" means the American Society for Testing and Materials (ASTM)'s
7 International Standard Specification for Compostable Plastics D6400 ~~standard D6400 for~~
8 ~~compostable plastic~~, as that standard may be amended from time to time.

9 (b) "Compostable Plastic Bag" means a plastic Checkout Bag bag that ~~(1)~~ conforms to at
10 least the minimum standards of California labeling law (Public Resources Code Section 42355 et
11 seq.), and meets ~~which requires meeting the~~ current ASTM D6400 Standard Specifications for
12 compostability; ~~(2) is certified and is~~ labeled as meeting the ASTM Standard by a recognized
13 third-party independent verification entity, such as the Biodegradable Product Institute, and is
14 labeled "Compostable" on both sides of the bag either in green color lettering that is at least one inch
15 in height, or as otherwise specified, or within a green color band that is at least one inch in height in
16 order to be readily and easily identifiable. ~~;(3) conforms to requirements to ensure that the renewable~~
17 ~~based product content is maximized over time as set forth in Department of the Environment~~
18 ~~regulations; (4) conforms to requirements to ensure that products derived from genetically modified~~
19 ~~feedstocks are phased out over time as set forth in Department of the Environment regulations; and (5)~~
20 ~~displays the phrase "Green Cart Compostable" and the word "Reusable" in a highly visible manner on~~
21 ~~the outside of the bag.~~

22 (c) "Checkout Bag bag" means a carryout bag that is provided by a store to a customer
23 ~~at the point of sale.~~ "Checkout Bag" does not include:

24 (1) Bags used by consumers inside stores to: (A) package loose bulk items, such as
25 fruit, vegetables, nuts, grains, candy, cookies, or small hardware items; (B) contain or wrap frozen

1 foods, meat, or fish, whether prepackaged or not; (C) contain or wrap flowers, potted plants, or other
2 items where damage to a good or contamination of other goods placed together in the same
3 bag dampness may be a problem; or (D) contain unwrapped prepared foods or bakery goods; or,

4 (2) Bags provided by pharmacists to contain prescription drugs; or,

5 (3) (2) Newspaper bags, door-hanger bags, laundry-dry cleaning bags, or bags sold in
6 packages containing multiple bags intended for use as garbage, pet waste, or yard waste bags.

7 (d) "Department" means the Department of the Environment.

8 (e) "Director" means the Director of the Department of the Environment.

9 (f) "Food Establishment" means a "food preparation and service establishment" as defined in
10 Health Code Section 451 and permitted under Health Code Section 452. "Highly visible manner"
11 means (1) for compostable plastic bags, displaying both of the following in green lettering contrasting
12 with the bag's background color that is at least two inches high: (i) the phrase "Green Cart
13 Compostable" either on the front and back of the bag together with a solid green band at least one-
14 half inch thick circling the circumference of the bag, or repeatedly, as a band of text or text alternating
15 with solid stripe, circling the circumference of the bag, and (ii) the word "Reusable" displayed on the
16 front and/or back of the bag; and (2) for recyclable paper bags, displaying the words "Reusable" and
17 "Recyclable" on the front and/or back of the bag in blue lettering contrasting with the bag's
18 background color that is at least two inches high, and (3) for both compostable plastic bags and
19 recyclable paper bags, as otherwise required by Department of the Environment regulations.

20 (g) "Person" means an individual, trust, firm, joint stock company, corporation,
21 cooperative, partnership, or association.

22 (h) "Pharmacy" means a retail use where the profession of pharmacy by a pharmacist licensed
23 by the State of California in accordance with the Business and Professions Code is practiced and
24 where prescriptions (and possibly other merchandise) are offered for sale, excluding such retail uses
25 located inside a hospital.

1 (h) ~~(f)~~ "Recyclable" means material that can be sorted, cleansed, and reconstituted
2 using San Francisco's available recycling collection programs for the purpose of using the
3 altered form in the manufacture of a new product. Recycling does not include burning,
4 incinerating, converting, or otherwise thermally destroying solid waste.

5 (i) ~~(g)~~ "Recyclable Paper Bag" means a paper *Checkout Bag bag* that meets all of the
6 following requirements: (1) is 100 % recyclable, using the standards for San Francisco's
7 available curbside recycling collection program; (2) contains no old growth fiber; (3) ~~(2)~~ is
8 ~~made of 100% recycled content, including recyclable overall and~~ contains a minimum of 40%
9 post-consumer recycled content, and the Department may modify the requirements for
10 recycled content by regulation adopted after a public hearing and at least 60 days' notice,
11 based upon environmental benefit, cost, and market availability; and (4) ~~(3)~~ is labeled
12 displays the word ~~words "Reusable" and "Recyclable" on the front and/or back of the bag in blue~~
13 ~~lettering contrasting with the bag's background color, in lettering that is at least one inch in~~
14 ~~height~~ in a highly visible manner on the outside of the bag; and, (4) ~~is labeled with the name of~~
15 ~~the manufacturer, the location (country) where manufactured, and the percentage of~~
16 ~~post-consumer recycled content in an easy-to-read size font.~~

17 (j) ~~(h)~~ "Reusable Bag" means a *Checkout Bag bag* with handles that is specifically
18 designed and manufactured for multiple reuse and meets all of the following requirements:

19 (1) Has a minimum lifetime capability of 125 or more uses carrying 22 or more pounds
20 over a distance of at least 175 feet;

21 (2) Is capable of being washed so as to be cleaned and disinfected at least
22 100 times hot water machine-washable;

23 (3) If made of plastic, is at least 2.25 mils thick and contains at least 60 percent
24 recycled content, including a minimum of 30 percent post-consumer recycled content;
25

1 (4) Meets the standards of the California Toxics in Packaging Prevention Act (Cal.
2 Health & Safety Code §§ 25214.11-25214.26), as amended, or any successor legislation;

3 (5) Meets any standards for minimum recycled content established by
4 regulation adopted by the Department after a public hearing and at least 60 days' notice,
5 based upon environmental benefit and market availability.

6 (6) Garment bags that meet the above criteria shall be considered reusable
7 even if they do not have handles.

8 ~~(5) Is labeled "Reusable" on the front and/or back of the bag in lettering at least~~
9 ~~one inch in height; and,~~

10 ~~(6) Has printed on the bag, or on a tag that is permanently affixed to the bag,~~
11 ~~the name of the manufacturer, the country where the bag was made, and the percentage of~~
12 ~~post-consumer recycled material used, if any, in the manufacture of the bag.~~

13 ~~(k) (4) "Store" means the following:~~

14 ~~(1) Until July 1, 2013, "Store" shall mean a retail establishment located within the~~
15 ~~geographical limits of the City and County of San Francisco. A "retail establishment" includes~~
16 ~~any public commercial establishment engaged in the sale of personal consumer or household items to~~
17 ~~the customers who will use or consume such items. that meets either of the following requirements:~~

18 ~~(2) Beginning July 1, 2013, "Store" shall also include any Food Establishment located~~
19 ~~within the geographical limits of the City and County of San Francisco.~~

20 ~~(1) Is a full line, self-service supermarket with gross annual sales of two million dollars~~
21 ~~(\$2,000,000), or more, and which sells a line of dry grocery, canned goods, or nonfood items and some~~
22 ~~perishable items. For purposes of determining which retail establishments are supermarkets, the City~~
23 ~~shall use the annual updates of the Progressive Grocer Marketing Guidebook and any computer~~
24 ~~printouts developed in conjunction with the guidebook; or~~

1 ~~(2) Is a retail pharmacy with at least five locations under the same ownership within the~~
2 ~~geographical limits of San Francisco.~~

3
4 **SEC. 1703.5. CHECKOUT BAG CHARGE.**

5 **(a) Imposing a Checkout Bag Charge.**

6 (1) Beginning October July 1, 2012, no Store shall provide a Recyclable Paper Bag or
7 Reusable Bag to a customer at the point of sale, unless the Store charges the customer a Checkout Bag
8 Charge of at least ten cents (\$0.10) per bag.

9 (2) Beginning October July 1, 2013, no Store, including a Food Establishment, shall
10 provide a Compostable Plastic Bag to a customer at the point of sale, unless the Store charges the
11 customer a Checkout Bag Charge of at least ten cents (\$0.10) per bag.

12 ~~(3) Beginning July 1, 2014, no Store, including a Food Establishment, shall~~
13 ~~provide a Recyclable Paper Bag, Reusable Bag, or Compostable Plastic Bag to a customer at~~
14 ~~the point of sale, unless the Store charges the customer a Checkout Bag Charge of at least~~
15 ~~twenty-five cents (\$0.25) per bag.~~

16 (3) (4) No Food Establishment shall be required to charge its customers a
17 Checkout Bag Charge for a bag provided for a customer's left-over food from sit-down
18 restaurant dining.

19 (b) Controller's Report. After January 2013 2012, and not later than January 2014,
20 the Controller shall perform an assessment and review of the economic impacts on
21 businesses, both large and small, of the 10 cent Checkout Bag Charge, and attempt to
22 forecast how that impact might change when the Charge increases to 25 cents. Based on
23 such assessment and review, the Controller shall submit an analysis to the Board of
24 Supervisors. The analysis shall be based on criteria deemed relevant by the Controller, but
25

1 should include a survey of whether and how the Checkout Bag Charge specifically has
2 impacted businesses' profits and losses.

3 (c) ~~(b)~~ Checkout Bag Charge to be Separately Stated on Receipt. The amount charged
4 pursuant to subsection (a) shall be separately stated on the receipt provided to the customer at the time
5 of sale and shall be identified as the Checkout Bag Charge. Any other transaction fee charged by the
6 Store in relation to providing a Checkout Bag shall be identified separately from the Checkout Bag
7 Charge.

8 (d) ~~(c)~~ Exemptions.

9 (1) A Store shall not charge the Checkout Bag Charge required under subsection (a)
10 where providing a Checkout Bag to a customer as part of a transaction paid for in whole or in
11 part through to a customer participating in the Special Supplemental Food Program for Women,
12 Infants, and Children (Article 2 (commencing with Section 123275) of Chapter 1 of Part 2 of Division
13 106 of the Health and Safety Code), or a customer participating in the State Department of Social
14 Services Food Stamp Program.

15 (2) A Store shall not charge the Checkout Bag Charge required under
16 subsection (a) for a Reusable Bag which meets the requirements of this Chapter and which is
17 distributed to a customer without charge during a limited duration promotional event, not to
18 exceed 12 seven days per year.

19 (e) ~~(d)~~ Waivers. Any owner or operator of a Store may petition the Director of the Department
20 of the Environment for a full or partial waiver of the requirements of this Section, for a period of up
21 to one year, if the owner or operator can (1) demonstrate that application of this Section would
22 create undue hardship or practical difficulty for the Store not generally applicable to other
23 stores in similar circumstances, or (2) establish that the business as a whole cannot, under the
24 terms of this Section, generate a return that is commensurate with returns on investments in
25

1 other enterprises having corresponding risks and is sufficient to attract capital a fair rate of
2 return on investment under the terms of this Section.

3 (f) (e) *Violations. Violations of this Section may be punished under the provisions of*
4 *Section 1705. Collection of the Checkout Bag Charge shall not excuse any violation of any other*
5 *provisions of this Chapter 17.*

6
7 **SEC. 1704. OUTREACH AND IMPLEMENTATION.**

8 The Department's responsibilities for implementing this Chapter include conducting
9 outreach to stores, providing multi-lingual information to educate store employees and
10 customers, and making available lists of vendors who sell Recyclable Paper, Compostable
11 Plastic, or Reusable Bags.

12 The Director, after a public hearing, may adopt and may amend guidelines, rules,
13 regulations and forms to implement this Chapter Ordinance.

14
15 Section 4. Additional Uncodified Provisions.

16 (a) Operative Date. The provisions of this ordinance shall be operative on October
17 July 1, 2012, except as specifically provided otherwise in ~~Section 1703.5(a)(2) and (3).~~

18 (b) General Welfare. In adopting and implementing this ordinance, the City and
19 County of San Francisco is assuming an undertaking only to promote the general welfare. It is
20 not assuming, nor is it imposing on its officers and employees, an obligation for breach of
21 which it is liable in money damages to any person who claims that such breach proximately
22 caused injury.

23 (c) Conflict with State or Federal Law. This ordinance shall be construed so as not to
24 conflict with applicable federal or State laws, rules or regulations. Nothing in this ordinance
25 shall authorize any City agency or department to impose any duties or obligations in conflict

1 with limitations on municipal authority established by State or federal law at the time such
2 agency or department action is taken.

3 (d) Severability. If any of the provisions of this ordinance or the application thereof to
4 any person or circumstance is held invalid, the remainder of those provisions, including the
5 application of such part or provisions to persons or circumstances other than those to which it
6 is held invalid, shall not be affected thereby and shall continue in full force and effect. To this
7 end, the provisions of this ordinance are severable.

8 (e) Amendments. In enacting this Ordinance, the Board intends to amend only those
9 words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation, charts,
10 diagrams, or any other constituent part of the Environment Code that are explicitly shown in
11 this legislation as additions, deletions, Board amendment additions, and Board amendment
12 deletions in accordance with the "Note" that appears under the official title of the legislation.

13
14 APPROVED AS TO FORM:
15 DENNIS J. HERRERA, City Attorney

16
17 By:


18 THOMAS J. OWEN
19 Deputy City Attorney



City and County of San Francisco

Tails Ordinance

City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

File Number: 101055

Date Passed: February 14, 2012

Ordinance amending the San Francisco Environment Code by: 1) amending Section 1702 to extend the restrictions on checkout bags from supermarkets and chain pharmacies to all retail establishments and food establishments in the City and County of San Francisco, and clarify terms; 2) adding Section 1703.5 to require stores to add a checkout bag charge of 10 cents, if they provide a customer with a checkout bag; 3) setting an operative date of October 1, 2012; and 4) making environmental findings.

November 14, 2011 City Operations and Neighborhood Services Committee - AMENDED, AN AMENDMENT OF THE WHOLE BEARING SAME TITLE

November 14, 2011 City Operations and Neighborhood Services Committee - RECOMMENDED AS AMENDED

November 22, 2011 Board of Supervisors - AMENDED, AN AMENDMENT OF THE WHOLE BEARING SAME TITLE

Ayes: 11 - Avalos, Campos, Chiu, Chu, Cohen, Elsbernd, Farrell, Kim, Mar, Mirkarimi and Wiener

November 22, 2011 Board of Supervisors - CONTINUED AS AMENDED ON FIRST READING

Ayes: 11 - Avalos, Campos, Chiu, Chu, Cohen, Elsbernd, Farrell, Kim, Mar, Mirkarimi and Wiener

December 06, 2011 Board of Supervisors - AMENDED, AN AMENDMENT OF THE WHOLE BEARING NEW TITLE

Ayes: 11 - Avalos, Campos, Chiu, Chu, Cohen, Elsbernd, Farrell, Kim, Mar, Mirkarimi and Wiener

December 06, 2011 Board of Supervisors - CONTINUED AS AMENDED ON FIRST READING

Ayes: 7 - Chiu, Chu, Cohen, Elsbernd, Farrell, Kim and Wiener
Noes: 4 - Avalos, Campos, Mar and Mirkarimi

February 07, 2012 Board of Supervisors - AMENDED, AN AMENDMENT OF THE WHOLE BEARING SAME TITLE

Ayes: 10 - Avalos, Chiu, Chu, Cohen, Elsbernd, Farrell, Kim, Mar, Olague and Wiener
Excused: 1 - Campos

February 07, 2012 Board of Supervisors - PASSED ON FIRST READING AS AMENDED

Ayes: 10 - Avalos, Chiu, Chu, Cohen, Elsbernd, Farrell, Kim, Mar, Olague and Wiener
Excused: 1 - Campos

February 14, 2012 Board of Supervisors - FINALLY PASSED

Ayes: 11 - Avalos, Campos, Chiu, Chu, Cohen, Elsbernd, Farrell, Kim, Mar, Olague and Wiener

File No. 101055

I hereby certify that the foregoing Ordinance was FINALLY PASSED on 2/14/2012 by the Board of Supervisors of the City and County of San Francisco.


Angela Calvillo
Clerk of the Board


Mayor


Date Approved