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6 COALITION TO SUPPORT PLASTIC BAG
RECYCLING
7

8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF ALAMEDA

10
11 COALITION TO SUPPORT PLASTIC
BAG RECYCLING, an unincorporated
12 association,

13 Petitioner,

14 v.

15 CITY OF OAKLAND, a municipal
corporation, CITY COUNCIL OF THE
16 CITY OF OAKLAND, collectively and in
their official capacities, and DOES 1
17 through 20 inclusive,

18 Respondents.
19

CASE NO.

**VERIFIED PETITION FOR WRIT OF
MANDATE UNDER THE CALIFORNIA
ENVIRONMENTAL QUALITY ACT
("CEQA") (Code Civ. Proc. §1085;
Pub. Res. Code §21168.5)**

20 Petitioner, COALITION TO SUPPORT PLASTIC BAG RECYCLING, an
21 unincorporated association ("Petitioner"), for its Verified Petition for Writ of Mandate alleges as
22 follows:

23 1. This is an action seeking a writ of mandate to preclude the enforcement of,
24 invalidate, set aside, void or otherwise annul, Oakland Ordinance No. 12818 banning the use of
25 non-biodegradable plastic bags (the "Ordinance"), adopted by Respondent, CITY COUNCIL OF
26 THE CITY OF OAKLAND (the "Council") on July 17, 2007. The Ordinance has the ostensible
27 policy of eliminating the use of plastic shopping bags at certain large retailers. A true and correct
28 copy of the Ordinance is attached hereto as Exhibit A.

1 Ordinance.

2 6. Petitioner is a party beneficially interested in the issuance of the requested writ of
3 mandate, because in accordance with Public Resources Code section 21177(c), Petitioner is an
4 organization formed after the approval of the project to maintain an action against Respondents
5 under CEQA. Petitioner also is beneficially interested because members of Petitioner's
6 association, including Fresh Pak Corporation and Kevin Kelly, complied with Public Resources
7 Code section 21177(b) by timely commenting on the proposed Ordinance and objecting to
8 Respondent's lack of compliance with CEQA. Further, Petitioner is beneficially interested
9 because the environmental impacts of Respondent's Ordinance will extend to areas in which
10 citizens and companies represented by Petitioner own property, do business and/or reside.

11 7. Petitioner's membership is comprised of the following:

12 a. Fresh Pak Corporation. Fresh Pak Corporation is, and was at all times here
13 relevant, a Texas corporation, organized and validly existing under the laws of the State of Texas.
14 Fresh Pak Corporation recycles plastics, including single-use carry out bags commonly provided
15 by retailers to consumers at the point of sale. It procures its materials from Bay Area recyclers,
16 including areas in and near Oakland. It also sent correspondence to Oakland commenting on the
17 adverse impacts of the Ordinance on June 26, 2007 and July 3, 2007.

18 b. Kevin Kelly. Kevin Kelly is an individual. He is, and was at all times here
19 relevant, a tax payer, residing in the City of Oakland. Mr. Kelly sent correspondence to the City
20 of Oakland, dated June 26, 2007, commenting on the adverse impacts of the Ordinance, including
21 the danger posed to the plastic bag recycling process, as well as the detrimental environmental
22 effects from the increased use of paper bags.

23 c. Other members of Petitioner include the following companies: Advance
24 Polybag, Inc.; Crown Poly, Inc.; Elkay Plastics Co., Inc.; Grand Packaging, Inc.; Heritage
25 Plastics, Inc.; Hilex Poly Company, LLC; and Superbag Operating, Ltd.

26 8. Moreover, Petitioner has standing as an association to bring this action, because (i)
27 its members would otherwise have standing to sue on their own behalf; (ii) the interests Petitioner
28 seeks to protect in this lawsuit are germane to the organization's purpose; and (iii) neither the

1 claims asserted herein, nor the relief requested, requires participation of the members in this
2 lawsuit. This action involves public rights, and Petitioner’s objective in bringing this action is
3 that of an interested citizen seeking to procure enforcement of the City’s public duties and its
4 compliance with applicable state and local laws.

5 9. Respondent, CITY OF OAKLAND (“Oakland” or the “City”), is, and was at all
6 times here relevant, a municipal corporation and a political subdivision of the State of California
7 exercising local government power. The Ordinance is a “project” under CEQA, and Oakland is
8 the “lead agency.” As the lead agency for the project, Oakland is responsible for the preparation
9 of an environmental document that describes the project, and, if necessary, evaluates mitigation
10 measures and/or feasible alternatives to lessen or avoid any significant environmental impacts.

11 10. Respondent, Council, is the legislative body duly authorized under the California
12 Constitution and the laws of the State of California to act on behalf of Oakland. The Council is
13 responsible for complying with CEQA, as well as the California Code of Regulations. (Oakland
14 and the Council are referred to collectively herein as “Respondents.”)

15 11. Petitioner is ignorant of the true names and capacities of DOES named herein as
16 DOES 1 through 20, inclusive, and therefore sues these Respondents by such fictitious names.
17 Petitioner will amend this Petition to allege their true names and capacities when ascertained.
18 Petitioner is informed and believes and thereon alleges that each of these fictitiously named
19 Respondents were, and continue to be, responsible in some manner for the acts or omissions
20 herein alleged.

21 12. Petitioner is informed and believes and thereon alleges that at all times relevant,
22 each Respondent, including the DOE Respondents, were the agents, employees, or partners of
23 each of the other Respondents, and were at all times acting within the purpose and scope of their
24 employment, agency or partnership, or at the direction of the other Respondents.

25 **II. JURISDICTION AND VENUE**

26 13. This Court has jurisdiction over the matters alleged in this Petition pursuant to
27 Code of Civil Procedure section 1085, and/or section 1094.5, and Public Resources Code section
28 21168.5, and/or section 21168.

1 14. Venue is proper in this Court under section 394(a) of the Code of Civil Procedure.

2 **III. FACTUAL AND PROCEDURAL BACKGROUND**

3 15. In 1970 the California Legislature enacted CEQA primarily as a means to require
4 public entities to document and consider the environmental impact of their decisions. Public
5 Resources Code §§21000-01. CEQA applies to all “governmental agencies at all levels” in
6 California, including “local agencies.” *Id.* Oakland is a governmental agency under CEQA and
7 must abide by its mandates.

8 CEQA specifically states that:

9 [I]t is the policy of the state that public agencies should not approve projects as
10 proposed if there are feasible alternatives or feasible mitigation measures
11 available which would substantially lessen the significant environmental effects
12 of such projects, and that the procedures required by this division are intended to
assist public agencies in systematically identifying both the significant effects of
proposed projects and the feasible alternatives or feasible mitigation measures
which will avoid or substantially lessen such significant effects.

13 Pub. Res. Code §21002.

14 16. On July 17, 2007, the Council adopted the Ordinance, which was added to
15 Oakland’s Municipal Code under TITLE 8, HEALTH AND SAFETY. The Ordinance prohibits
16 retail establishments with gross annual sales exceeding \$1,000,000 from providing plastic carry-
17 out bags to customers at the point of sale. The Ordinance encourages the use of “compostable” or
18 “bio-degradable” bags, as well as ordinary paper bags. Oddly, the ordinance endorses the use of
19 paper bags even though the recitals acknowledge that paper bags have an “adverse impact on the
20 environment.” The recitals make no such acknowledgment about the adverse impacts of
21 compostable bags.

22 17. The legal impact of the Ordinance will be to ban the use of carry-out plastic bags
23 only by certain large retailers. There will be no prohibition for the use of plastic bags by other
24 retailers.

25 18. Despite Oakland’s ostensible attempt to aid the environment, there is ample
26 evidence that this Ordinance will do the exact opposite. For instance, compostable bags and
27 ordinary plastic bags are nearly indistinguishable, yet they have two very different and
28 incompatible recycling systems. AB 2449, implemented on July 1, 2007, is a statewide mandate

1 to require the recycling of most, if not all, ordinary plastic bags. Oakland's Ordinance operates to
2 frustrate the objective of AB 2449, in that, by endorsing the use of compostable plastic bags, the
3 public will be confused about the recyclable nature of compostable bags. In fact, when the public
4 attempts to recycle compostable bags it will contaminate the plastics recycling process, rendering
5 the otherwise 100% recyclable plastic bags unable to be recycled. Although Respondents
6 modified the Ordinance to attempt to minimize its impact on contamination of Respondents' food
7 scraps and composting program, Respondents' modification did nothing to address the
8 Ordinance's impact on the recycling of plastic bags. As a result the Ordinance will result in a
9 significant amount of unusable recycled plastic that will ultimately be discarded, adding to
10 landfills and defeating the benefit of recycling.

11 19. The Ordinance also will result in adverse environmental impacts as a result of
12 consumers' increased use of other types of bags, especially paper bags. There is not a sufficient
13 supply of compostable bags available to meet the demand created by the Ordinance. As a result,
14 there is substantial evidence in the record that retailers and consumers are likely to utilize
15 significantly more paper bags as a substitute, which was presented to Respondents in the form of
16 documented studies prior to their adoption of the Ordinance. Paper bag use increases greenhouse
17 gas emissions, in that more than 60% of paper grocery bags end up in landfills, decomposing and
18 releasing methane gas. Paper bags consume the same, or more, total non-renewable energy in
19 their life cycle than do ordinary plastic bags. Further, according to the EPA, paper in today's
20 landfills does not degrade or breakdown at a substantially faster rate than plastic does, which is
21 due in large part to the lack of water, light and oxygen.

22 20. By comparison, plastic bags generate 69% less greenhouse gas emissions than un-
23 composted paper bags. Additionally, it takes 91% less energy to recycle a pound of plastic than
24 to recycle a pound of paper.

25 21. The increased use of paper bags will also have an adverse environmental impact
26 on water resources. For instance, the manufacturing of paper bags generates 50 times more water
27 pollutants than the manufacturing of plastic bags.

28 22. In order to afford the fullest possible environmental protection, an analysis of the

1 Ordinance’s potential environmental impacts pursuant to CEQA is appropriate and necessary.
2 Given the adverse impacts to the environment as outlined above, Respondents’ reliance on a
3 categorical or statutory exemption also is inappropriate, as it would evade the intent of the
4 legislature under CEQA. Oakland’s failure to comply with CEQA, including Oakland’s
5 unsubstantiated reliance upon CEQA’s exemptions, necessitates the need for this Court to issue a
6 writ of mandate to preclude the enforcement of, invalidate, set aside, void or otherwise annul the
7 Ordinance.

8 **IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

9 23. On June 26, 2007, Petitioner’s counsel prepared a letter addressed to the
10 Honorable Henry Chang Jr., Vice Mayor and At-Large Council Member of Respondent, the
11 Oakland City Council. That letter outlined Petitioner’s environmental concerns with the
12 Ordinance, in particular the concern that the increased use of “biodegradable” plastic carryout
13 bags will result in contamination of the plastic bag recycling process.

14 24. The June 26, 2007 letter outlined other adverse environmental impacts as well,
15 such as the fact that biodegradable bags are only composted if sent to an industrial or food
16 composting facility, and the purported benefits of those bags will not be attained if they find their
17 way into a landfill. Additionally, the letter outlined the environmental impact that results from
18 increased use of paper bags, such as the greenhouse gas emissions that result from the breakdown
19 of paper bags. The letter also cited the fact that paper bags generate 50 times more water
20 pollutants than plastic bags. Finally, the letter commented on the lack of an applicable exemption
21 under CEQA, as there is substantial evidence supporting a fair argument that Respondents’
22 implementation of the Ordinance would result in significant adverse environmental impacts that
23 would need to be addressed to follow the intent of the Legislature.

24 25. Respondents’ response to the June 26, 2007 letter was inadequate. Rather than
25 investigating and addressing the obvious environmental concerns raised in the letter, Council
26 members Nancy Nadel and Jean Quan prepared a Supplemental Agenda Report, dated July 3,
27 2007, with a very brief and incomplete section addressing CEQA. The report offers little more
28 than a conclusory statement that the Ordinance is exempt from CEQA, as outlined in Paragraph

1 (8) of the report:

2 Although not legally required to articulate the basis for concluding
3 that a project is exempt from CEQA, the City hereby finds and
4 determines that this Ordinance is exempt from CEQA. Specifically,
5 the basis for the exemptions include, without limitation, the
6 following (each providing a separate and independent basis and
7 when viewed collectively providing an overall basis for an
8 exemption): (1) Common-Sense Exemption (CEQA Guidelines
section 15061(b)(3)); (2) actions by regulatory agencies for
protection of natural resources (CEQA Guidelines section 15307);
(3) actions by regulatory agencies for protection of the environment
(CEQA Guidelines section 15307(*sic*)); and/or projects consistent
with a general plan (CEQA Guidelines section 15183).

9 26. Furthermore, Respondents' Supplemental Agenda Report, and accompanying
10 modifications to the Ordinance failed to address any of Petitioners' concerns regarding
11 contamination of the recycling stream or increased adverse environmental impacts resulting from
12 the increased use of other types of bags, including compostable and paper bags. Respondents
13 amended the language of the Ordinance to "require" rather than "encourage" markings that
14 differentiate compostable bags from ordinary plastic bags. This does not reduce the adverse
15 impact on plastics recycling and the ensuing environmental impact on the environment.
16 Respondents' basis for requiring the markings is to support Waste Management's "food scraps
17 and yard trimmings composting program," which utilizes "pickers" on the line to ensure that
18 ordinary plastic bags do not get composted. These pickers could easily isolate the relatively few
19 plastic bags that may be mixed with this material. In contrast to the material collected in Waste
20 Managements' food scraps and yard trimmings program, the material collected for the plastic bag
21 recycling program includes substantial quantities of bags, which quantity renders it infeasible to
22 segregate compostable bags from non-compostable bags.

23 27. Petitioner's counsel submitted a July 3, 2007 reply letter to Respondent's
24 Supplemental Agenda Report to put Respondents on notice that the Supplemental Agenda Report
25 did not adequately respond to Petitioner's concerns and that Oakland failed to comply with
26 CEQA.

27 28. In response, On July 17, 2007, Respondents ignored the comments, approved the
28 Ordinance, and filed a Notice of Exemption (hereinafter "NOE"). A true and correct copy of the

1 NOE is attached hereto as Exhibit B. The NOE reasserted the same exemptions from the
2 Supplemental Agenda Report:

3 **Reasons why project is exempt:** All the following provide a
4 separate and independent basis for an exemption and when
5 reviewed collectively provide an overall basis for exemption: The
6 project will have positive environmental effects and no possibility
7 of significant adverse effects (15061(b)(3)). The project is
8 consistent with the Land Use and Transportation Element EIR for
which an EIR was certified, as well as consistent with other general
plan elements, and there are no project specific effects which are
peculiar to the project or its site (15183). The project is designated
to protect both the environment (15308) and natural resources
(15307).

9 29. Petitioner has no plain, speedy or adequate remedy at law, and will suffer
10 irreparable harm, in that if enforcement of the Ordinance is not immediately enjoined: (1)
11 Petitioner will not be able to preserve the integrity of the plastic bag recycling program, forcing
12 immeasurable non-biodegradable waste into landfills and a further waste of non-renewable
13 energy; and (2) the citizens represented by Petitioner will suffer the effect of the increased
14 greenhouse gas emissions, water quality, and other adverse environmental impacts resulting from
15 the increased use of paper and other types of bags.

16 30. Thus, it is necessary for this Court to provide provisional and permanent remedies
17 to Petitioner by means of an injunction and a writ of mandate to prevent Oakland, and each of its
18 agents, officers, employees, representatives, duly elected officials, and all persons acting in
19 concert or participating with it, from implementing and/or enforcing the Ordinance.

20 **V. ATTORNEY'S FEES**

21 31. Petitioner brings this action under Code of Civil Procedure section 1021.5, and
22 other applicable laws, which entitle Petitioner to an award of attorney's fees in actions to enforce
23 an important right affecting the public interest, such as the CEQA violation here in question.

24 32. In addition to section 1021.5, or in the alternative, Petitioner brings this action on
25 the basis of Government Code section 800, which entitles Petitioner to an award of attorney's
26 fees to overturn Respondents' arbitrary and capricious approval of the Ordinance.

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1 **SOLE CAUSE OF ACTION**

2 **(Abuse of Discretion – CEQA, Public Resources Code §§21000 *et seq.*)**

3 33. Petitioner realleges and incorporates herein, as if set forth in full, each and every
4 allegation contained in Paragraphs 1 through 32 of this Petition, and further alleges as follows:

5 34. Respondents have abused their discretion and failed to act in a manner required by
6 CEQA with respect to the Ordinance, because they have failed to adequately address, analyze, or
7 otherwise consider the environmental impacts, necessary or foreseeable mitigation measures, or a
8 reasonable range of alternatives to the Ordinance. Petitioner further alleges that the specifically
9 articulated CEQA exemptions cited by Respondents in the July 3, 2007 Supplemental Agenda
10 Report and the NOE are inapplicable, arbitrarily applied, and a further abuse of discretion
11 intended to evade the intent of the legislature under CEQA.

12 35. Public Resources Code section 21168.5 governs the standard of review of
13 Oakland’s decision that approval of the Ordinance was exempt from environmental review under
14 CEQA Guidelines. Under section 21168.5, the standard of review is whether the agency has
15 abused its discretion. “Abuse of discretion” exists if Respondents fail to proceed in a manner
16 required by law, or if its decision was not supported by substantial evidence.

17 36. Respondents abused their discretion by relying upon exemptions without
18 substantial evidence in the record to support their decision to do so. The exemptions relied upon
19 by the City include: (i) the “common sense” exemption under section 15061(b)(3) of the CEQA
20 Guidelines; (ii) the categorical exemption of “actions by regulatory agencies for the protection of
21 natural resources” under section 15307 of the CEQA Guidelines; (iii) the categorical exemption
22 of “actions by regulatory agencies for protection of the environment” under section 15308 of the
23 CEQA Guidelines; and (iv) the statutory exemption of “projects consistent with the general plan”
24 under section 15183 of the CEQA Guidelines.

25 **A. Oakland Offers No Substantial Evidence To Support Its Conclusion That the**
26 **Adoption of the Ordinance Will Have No Significant Impact On the Environment**

27 37. Respondents abused their discretion by concluding that the adoption of the
28 Ordinance was exempt from CEQA under section 15061(b)(3) of the CEQA Guidelines, because

1 there was no substantial evidence in light of the whole record to support that conclusion.

2 38. The July 3, 2007 Supplemental Agenda Report and the NOE found that the
3 adoption of the Ordinance was exempt from further environmental review under section
4 15061(b)(3) of the CEQA Guidelines. That generic section exempts from CEQA review
5 activities covered by “the general rule that CEQA applies only to projects, which have the
6 potential for causing a significant effect on the environment.” This section can only be used in
7 very narrow circumstances that do not apply here.

8 39. In the case at hand, the Council, not the public, has the burden of proof to
9 demonstrate that its decision to approve the Ordinance will not have a significant impact on the
10 environment.

11 40. The Council provides no facts or reasoning to support its conclusion that there is
12 not even a possibility that a significant environmental effect would be caused by the Council’s
13 approval of the Ordinance. In fact, there is substantial evidence to suggest the contrary. As
14 outlined above, Petitioner provided comments prior to Oakland’s enactment of the Ordinance
15 outlining the specific adverse environmental impacts if the Ordinance were implemented.
16 Respondents ignored this and other substantial evidence in the record, and abused their discretion
17 by arbitrarily relying upon this exemption.

18 **B. Respondents’ Reliance Upon the Categorical Exemptions, Including Sections 15307**
19 **and 15308, is Improper Because There was a Reasonable Possibility That the**
20 **Ordinance Would Have a Significant Effect on the Environment**

21 41. Section 15307 of the CEQA Guidelines categorically exempts from CEQA review
22 “actions taken by regulatory agencies as authorized by state or local ordinance to assure the
23 maintenance, restoration, or enhancement of a natural resource where the regulatory process
24 involves procedures for protection of the environment.” CEQA Guidelines §15307. Section
25 15308 of the CEQA Guidelines categorically exempts from CEQA review “actions taken by
26 regulatory agencies, as authorized by state or local ordinance, to assure the maintenance,
27 restoration, enhancement, or protection of the environment where the regulatory process involves
28 procedures for protection of the environment.” *Id.* §15308.

1 42. However, where, as here, there is not substantial evidence that adoption of the
2 Ordinance falls within the scope of a categorical exemption, and where, as here, there is evidence
3 in the record that approval of the Ordinance falls within an exception to the categorical
4 exemptions, the agency cannot rely on the exemptions. *Save Our Carmel River v. Monterey*
5 *Peninsula Water Management District*, 141 Cal.App.4th 677 (2006); *International*
6 *Longshoreman's and Warehouseman's Union v. Board of Supervisors of San Bernardino County*,
7 116 Cal.App.3d 265 (1981).

8 43. In determining whether a project meets the requirements of a categorical
9 exemption, courts apply the rule that exemptions must be narrowly construed and that the scope
10 of the exemption should not be unreasonably expanded. No categorical exemption applies to
11 Oakland's adoption of the Ordinance, because a reasonable possibility exists that the Ordinance
12 will cause significant adverse impacts on the environment.

13 44. As discussed in more detail above, Respondents' arbitrary and unsubstantiated
14 conclusion that the Ordinance meets these exemptions is an abuse of discretion, and unsupported
15 by the evidence. As a result, adoption of the Ordinance was not exempt and Respondents have
16 failed to comply with CEQA.

17 **C. Oakland Inappropriately Relied On Statutory Exemption Section 15183**

18 45. Section 15183 provides a partial statutory exemption for development projects that
19 are consistent with general plans, community plans, or zoning actions for which EIRs have been
20 prepared. The general plan, for which an EIR was approved, did not foresee the specific
21 environmental impacts from implementation of this Ordinance. In particular, the significant
22 adverse effects on the environment, discussed above, were not envisioned in the general plan.
23 Accordingly, this exemption is inapplicable to the Ordinance.

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VI. PRAYER FOR RELIEF

WHEREFORE, Petitioner prays for:

1. A peremptory or alternative writ of mandate directing:
 - a) Oakland and the Council to rescind, invalidate, set aside, void or otherwise annul, the Ordinance for failing to comply with CEQA;
 - b) Oakland and the Council to comply with CEQA with respect to the Ordinance, including the preparation of a legally adequate EIR;
 - c) A stay of all action under the Ordinance, including its enforcement, by Oakland and the Council pending final resolution of this action;
2. For preliminary and permanent injunctive relief;
3. For reasonable attorneys fees;
4. For costs of this suit incurred herein; and
5. For other such further relief as the Court may deem just and proper.

DATED: August __, 2007

DOWNEY BRAND LLP

By: _____
MICHAEL N. MILLS
Attorneys for Petitioner
COALITION TO SUPPORT
PLASTIC BAG RECYCLING

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VERIFICATION

STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

I, Wendy Lee Bogdan, declare:

I am an attorney at law duly admitted and licensed to practice before all courts of this State and I have my professional office at Downey Brand LLP, 555 Capitol Mall, Tenth Floor, Sacramento, California 95814-4686.

I am one of the attorneys of record for Petitioner, COALITION TO SUPPORT PLASTIC BAG RECYCLING, in the above-entitled matter.

The representatives for Petitioner are absent from the county in which I have my office and for that reason I am making this verification on their behalf.

I have read the foregoing VERIFIED PETITION FOR WRIT OF MANDATE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT and know the contents thereof.

I am informed and believe that the matters stated therein are true and, on that ground, I allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Sacramento, California on this ____ day of August, 2007.

Wendy Lee Bogdan