MARGARET MOORE SOHAGI
NICOLE HOEKSMA GORDON

R. TYSON SOHAGI
CHRISTOPHER S. BURT

ALBERT I. HERSON
THOMAS JACOBSON
ALISON L. KRUMBEIN
ANNE C.H. LYNCH
HELENE V. SMOOKLER
PHILIP A. SEYMOUR

OF COUNSEL

THE SOHAGI LAW GROUP
A PROFESSIONAL LAW CORPORATION
11999 SAN VICENTE BOULEVARD, SUITE 150
LOS ANGELES, CALIFORNIA 90049-5136
TELEPHONE (310) 475-5700
FACSIMILE (310) 475-5707
www.sohagi.com

SACRAMENTO OFFICE
1104 CORPORATE WAY
SACRAMENTO, CALIFORNIA 95831
TELEPHONE (916) 395-4491
FACSIMILE (916) 395-4492

December 26, 2013

Justices Haerle, Kline, and Richman
California Court of Appeal
First Appellate District, Division Two
350 McAllister Street
San Francisco, CA 94102

Re: Request for Publication of *Save the Plastic Bag Coalition v. City and County of San Francisco* (December 10, 2013; Case No. A137056)

Dear Justices Haerle, Kline, and Richman:

On behalf of the League of California Cities (the "League") and the California State Association of Counties ("CSAC"), we request that the Court of Appeal First Appellate District publish the opinion in *Save the Plastic Bag Coalition v. City and County of San Francisco* (December 10, 2013; Case No. A137056 [the "Opinion"]) pursuant to Rule 8.1120(a) of the California Rules of Court ("CRC").

I. INTERESTS OF LEAGUE AND CSAC

The League of California Cities is an association of 467 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

II. STANDARDS FOR PUBLICATION

Many California cities and counties have adopted single-use plastic bag bans (typically coupled with a paper bag charge retained by the retail store). However, some of these bans have faced legal challenges from the manufacturers and distributors of plastic bags, including Save the Plastic Bag Coalition ("SPBC") and Hilex Poly Co. LLC. The first of these challenges alleged a violation of the California Environmental Quality Act (CEQA; Pub. Res. Code § 21000 et seq.). (See *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155.) Since the Supreme Court denied the Coalition's Petition for Writ of Mandate in the *City of Manhattan Beach*, public agencies have been subject to an ever changing arena of legal arguments from the plastic bag industry seeking to invalidate local plastic bag bans.

These arguments have included allegations that: (1) paper bag charges were adopted in violation of Article XIII C of the California Constitution, as amended by Proposition 26 (*Schmeer v. County of Los Angeles* (2013) 213 Cal. App. 4th 1310); (2) public agencies violate CEQA by utilizing Categorical Exemptions, such as CEQA Guidelines §§ 15307 and 15308 (*Save the Plastic Bag Coalition v. County of Marin* (2013) 218 Cal.App.4th 209 (*County of Marin*)); (3) plastic bag bans are preempted by Pub. Res. Code § 42240-42257 (A plastic bag recycling program) (*County of Marin* [addressed in the trial court only]); and (4) plastic bag bans that apply to retail food establishments are preempted by Health and Safety Code § 113700 (the Retail Food Code; see cases in Section II(a) below).

While the legal avenues used to challenge single-use plastic bag bans appear to be rapidly shrinking (see *County of Marin*), publication of this decision is vital because it is the first appellate decision to conclude that plastic bag bans are not preempted by the California Retail Food Code and to address SPBC's latest CEQA arguments. As described in greater detail below, we believe the Opinion meets the standards for publication pursuant to CRC, Rule 8.1105(c).

A. Single-Use Plastic Bag Bans That Apply to Retail Food Facilities are not Preempted by the California Retail Food Code (Health and Safety Code § 113700 et seq.)

As this Court is aware, in 2012 the City and County of San Francisco amended their existing Plastic Bag Reduction Ordinance, which eliminated single-use plastic bags. (Slip Opinion at 2). The amendments: (1) expanded the scope of the ordinance to apply the restrictions to all retailers, *including retail food establishments*; and (2) required

retailers to charge customers for checkout bags (typically paper bags). (Slip Opinion at 2.)

Petitioners sought to invalidate the 2012 amendments, alleging the application of the ordinance to retail food facilities was preempted by the California Retail Food Code, which Petitioners alleged "...fully occupies the field of law that the 2012 ordinance purports to regulate." (Slip Opinion at 20-23.) This Court discussed and applied the standard of review for preemption and concluded that a single-use plastic bag ban was not preempted by the California Retail Food Code. In reaching this conclusion, this Court noted:

> The 2012 ordinance does not establish health or sanitation standards for retail food establishments. Instead, it regulates the use of single-use checkout bags in its jurisdiction by (1) precluding stores from providing single-use non compostable plastic bags; (2) requiring a fee for the provision of any other type of single-use bag; and (3) establishing a community outreach program to encourage reusable bags. The fact that these restrictions apply to all retail stores in the City and thus include retail food facilities does not alter their fundamental nature: the 2012 ordinance regulates single use checkout bags, not food safety. Thus, we conclude that the 2012 ordinance is not preempted by the Retail Food Code. (Slip Opinion at 22.)

No other published decision has applied the rules of preemption to single-use plastic bag bans. Therefore, the League and CSAC believe the Opinion meets the standards for publication pursuant to CRC, Rule 8.1105(c)(2) ["Applies an existing rule of law to a set of facts significantly different from those stated in published opinions."]. Furthermore, the Opinion is also worthy of publication because the Opinion "[i]nvolves a legal issue of continuing public interest." (CRC, Rule 8.1105(c)(6).)

As described above in Section II, public agencies have been faced with an ever changing arena of legal arguments from the makers and distributors of plastic bags. SPBC has sued at least three public agencies alleging that their plastic bag bans are preempted by the California Retail Food Code. The preemption issue was also raised in *Save the Plastic Bag Coalition v. City of Santa Cruz et al.* (Santa Cruz Superior Court Case No. CV174811; Filed August 2, 2012.). The *City of Santa Cruz* Petition[1] alleged:

[1] *Save the Plastic Bag Coalition v. City of Santa Cruz et al.* Petition available online at: http://plasticbaglaws.org/wordpress/wp-content/uploads/2011/10/lit_Santa-Cruz-City_Complaint.pdf

> The definition of 'restaurants' in the Ordinance is narrower than the definition of 'food facilities' in § 113789. Therefore, the Ordinance is preempted and invalid as it bans plastic bags at some 'food facilities' that are not included in the definition of 'restaurants' in the Ordinance, including but not limited to bakeries and grocery or convenience store food counters or delicatesens. Therefore, the Ordinance intrudes into an area that the State of California has reserved to itself and is invalid. (Petition ¶ 76)

The City of Santa Cruz ultimately settled by amending its ordinance.[2] The Staff Report for the amendments noted that "While our current ordinance exempts restaurants, the [SPBC] sought further clarification in the definitions. The proposed language would add to the definition of 'Retail establishment'."[3]

Similarly in *Save the Plastic Bag Coalition v. City of Carpinteria et al.* (Santa Barbara Superior Court Case No. 1385674; Filed March 20, 2012) the Petition[4] alleged:

> The Ordinance is invalid as it is preempted and prohibited by the California Retail Food Code…the Ordinance is invalid as it bans plastic bags at restaurants and other "food facilities" as defined by § 113 789. The Ordinance intrudes into an area that the State of California has reserved to itself. (Petition ¶¶ 4, 44.)

The City of Carpinteria filed a demurrer which was overruled by the Superior Court. The Superior Court's Ruling[5] concluded:

> In order to state a cause of action for declaratory relief, plaintiff must allege a justiciable controversy. The court concludes that plaintiff has alleged a substantial controversy as to whether the Ordinance is in some part preempted by the Retail Food Code. Plaintiff has therefore adequately alleged a cause of action for declaratory relief and the City's demurrer will be overruled."

Public agencies, such as the City of Chico, also continue to be threatened with litigation from SPBC. On April 16, 2013 the City of Chico proposed the adoption of a

---

[2] Santa Cruz Ordinance No. 2013-03 available online at: http://www.cityofsantacruz.com/Modules/ShowDocument.aspx?documentid=30601

[3] Santa Cruz Agenda Report (January 22, 2013) available online at: http://sire.cityofsantacruz.com/sirepub/cache/2/z2sk5dzplgxyha25dnndpqrt/37062861221201302185459 2.PDF

[4] *City of Carpinteria* Petition available online at: http://plasticbaglaws.org/wordpress/wp-content/uploads/2012/03/lit_Carpenteria_Complaint.pdf

[5] *City of Carpinteria* Demurrer Ruling available online at: http://plasticbaglaws.org/wordpress/wp-content/uploads/2012/03/lit_CA_Carpinteria_Demurrer-Decision.pdf

plastic bag ban.[6] The City received over 800 pages of materials from SPBC, including a letter dated April 11, 2013, which specifically incorporated by reference their arguments from *Save the Plastic Bag Coalition v. City and County of San Francisco.* This letter specifically noted that this case and the *County of Marin* case were pending in the Court of Appeal and that the City of Chico should "...wait until one of those appeals is decided..." An email from Stephen Joseph on behalf of SPBC to the City of Chico a year earlier (April 18, 2012) also specifically stated:

> California cities and counties may not ban or restrict plastic bags at restaurants or other food facilities. Any such bans or restrictions are preempted and prohibited by the California Retail Food Code. See attached memo. Save the Plastic Bag Coalition objects to any ordinance that would ban or restrict plastic bags at restaurants or other food facilities.

SPBC's website, as of December 26, 2013, also still includes a memorandum[7] addressed to "California cities and counties" which threatens to sue every city that adopts a plastic bag ban applicable to retail food facilities. This memorandum states:

> The California Retail Food Code preempts any local regulation or ban of plastic bags at restaurants and other "food facilities." Save The Plastic Bag Coalition ("STPB") will sue ***every*** city or county that adopts an ordinance that bans, restricts, limits, or requires a charge for plastic bags at any restaurant or "food facility." (Emphasis in the Original)

The California Retail Food Code preemption issue represents a clear legal issue of continuing public interest. Numerous public agencies have been forced to spend significant time and money to address the lawsuits and administrative arguments raised by SPBC. Publication of this case would finally settle the issue of preemption and avoid wasting additional judicial resources and public funds. We therefore respectfully request the Court of Appeal publish the Opinion.

B. Single Use Paper Bag Fees are Appropriately Considered in the Context of a CEQA Categorical Exemption

Like many other plastic bag ordinances throughout the State, the San Francisco amendments incorporated a 10-cent fee for single use paper bags or compostable bags.

---

[6] City of Chico May 21, 2013 Agenda Report (Item 4.2)and April 16, 2013 Agenda Report (Item 4.1): Available online at: http://chico-ca.granicus.com/MetaViewer.php?view_id=2&clip_id=394&meta_id=33088

[7] SPBC October 31, 2012 memorandum available online (as of December 26, 2013) at: http://savetheplasticbag.com/UploadedFiles/STPB%20restaurant%20bag%20memo.pdf

(Slip Opinion at 3 and 18.) At the outset of drafting the San Francisco ordinance, the City issued a report which noted:

> By eliminating single-use plastic bag use at more 'stores' covered by the ordinance, the proposed project would result in greater use of single-use paper bags, single-use compostable bags and reusable bags. Single-use paper bags and compostable bags have greater environmental impacts on air quality and GHG emissions and water usage than single-use plastic bags and reusable bags (or no bag at all) have lesser environmental impacts in all categories than single-use plastic bags. Studies have shown that banning single-use bags and imposing a mandatory charge on single-use bag use of paper and combustible bags results in an increase in reusable bag and no bag use and a decrease in single-use bag use. (Slip Opinion at 3.)

SPBC alleged that the 10-cent fee constituted an unlawful mitigation measure and could not be taken into account in determining whether the Categorical Exemptions apply. (Slip Opinion at 18.) This Court disagreed, noting that the "fee was, from the very beginning, an integral part of the overall project designed to help the San Francisco environment, i.e., it was clearly a significant part of the ordinance from its inception." (Slip Opinion at 19.)

As this Court is aware, several cases have addressed whether a project component constitutes an impermissible mitigation measure in the context of a Categorical Exemption, or an integral part of the project description which can be considered when issuing an Exemption. (Slip Opinion at 17-20; *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329.) In reaching the conclusion in this Opinion that the fee was appropriately considered in the context of a Categorical Exemption, the Court noted that it was "…part of the ordinance from its inception." This holding creates a more definitive rule of law and consequently "advances a new…clarification…of a provision of a…statute," and "applies an existing rule of law to a set of facts significantly different from those stated in published opinions," and is therefore worthy of publication. (CRC, Rule 8.1105(c)(4).)

This portion of the Opinion also "[i]nvolves a legal issue of continuing public interest." (CRC, Rule 8.1105(c)(4).) Private applicants have been incorporating environmentally beneficial components into their projects, such as LEED certification, solar panels, bioswales (on-site water infiltration), LED lighting, etc. This Opinion suggests that if these components are an integral aspect of a project from its inception, they may be considered when issuing a Categorical Exemption. Such a rule is also rooted

in sound public policy, as it incentivizes incorporation of environmentally beneficial actions and reduces development costs and environmental review.

Furthermore, in an email to the City of Chico, dated April 11, 2013, SPBC included a "NOTICE OF INTENT TO LITIGATE" and CEQA objections, in which SPBC alleged:

> ...The City of Chico is not permitted to rely on the proposed 10-cent paper bag fee as a basis for claiming an exemption. A public agency is not permitted to evaluate any aspect of a project as part of an exemption determination. In Salmon Protection & Watershed Network v. County of Marin, the court stated: "Mitigation measures may support a negative declaration but not a categorical exemption." STPB objects to the City of Chico's evaluation of the impact of a10-cent fee as part of its categorical exemption determination."

Publication of this case would avoid wasting additional judicial resources and public funds on litigating this issue again.

C. San Francisco Appropriately Relied Upon Categorical Exemptions to Comply with CEQA.

The Opinion should also be published because it advances a new interpretation, clarification, or construction of an existing statute. (California Rules of Court, Rule 8.1105, subdivision (c)(4).) The Opinion provides important guidance regarding the application of the categorical exemptions in sections 15307 and 15308 of the CEQA Guidelines. As explained in the Opinion, a Categorical Exemption is based on a finding by the Resources Agency that a class or category of projects does not have a significant effect on the environment. (CEQA Guidelines, § 15300; Slip Opinion, p. 8.) The exemptions in sections 15307 and 15308 of the CEQA Guidelines (referred to as "Class 7" and "Class 8" exemptions) establish exemptions from CEQA for "actions taken by regulatory agencies as authorized by state law or local ordinance" either "to assure the maintenance, restoration, or enhancement of a natural resource" in the case of a Class 7 exemption or "to ensure the maintenance, restoration, enhancement, or protection of the environment" in the case of a Class 8 exemption. (Slip Opinion, p. 8.) A categorically exempt project is not subject to CEQA, and no further environmental review is required. (CEQA Guidelines, § 15300; Opinion, p. 7.)

The Opinion's discussion regarding whether the City of San Francisco qualifies as a "regulatory agency" for the purpose of the Class 7 and Class 8 categorical exemptions is particularly helpful. (Opinion, pp. 11-13.) The term "regulatory agency," as the term is

used in CEQA Guidelines sections 15307 and 15308, is not defined by statute. Additionally, relevant published case law discussing whether a county or city can qualify as a "regulatory agency" is limited. Earlier this year, Division Three of this Court in *County of Marin* upheld the determination that an ordinance banning certain retail businesses from dispensing plastic bags was exempt from CEQA review under the Class 7 and Class 8 categorical exemptions. In coming to this conclusion, the Court stated that "the county here exercised the regulatory powers afforded to it by the California Constitution." (*County of Marin,* 218 Cal.App.4th at 227.) "Although ordinances are always 'legislative' in character," the Court observed that "they also may constitute 'regulations'." (Id.)

Prior to the recent *County of Marin* decision, there was only one published case where a court considered the application of a Class 7 or Class 8 categorical exemption by a city or county. In *Magan v. County of Kings* (2002) 105 Cal.App.4th 468 (*Magan*), the court upheld the County of Kings' use of the Class 8 exemption for an ordinance regulating the application of sewage sludge on agricultural property. As the Opinion notes, however, the court in *Magan* upheld the categorical exemption without considering whether the ordinance was a regulatory action within the meaning of CEQA Guidelines section 15308. (Id., at p. 477; Opinion, p. 12.) Nonetheless, the Opinion clarifies "that the ordinances in both *Magan* and *County of Marin* are both examples of a county exercising regulatory powers afforded to it by the California Constitution." (Opinion, p. 12.)

Even after *County of Marin* and *Magan* there remains limited case law addressing whether it would be appropriate for a city or county to utilize either of the exemptions. The use of the Class 7 and Class 8 exemptions by local agencies makes sense given that the text of the exemptions refers to "local ordinances," to which only local agencies would be subject, not state regulatory agencies. In expressly rejecting the "assumption that a legislative body like the City cannot perform a regulatory function[,]" the Opinion clarifies that local agencies can use these exemptions and operate in a regulatory capacity. (Slip Opinion, p. 11.) With publication of the Opinion, the Court's interpretation and application of the Class 7 and Class 8 exemptions will further add to the limited body of existing law and provide much needed guidance on this subject. Because proposals similar to the ordinance at issue in the Opinion are emerging in cities and counties throughout the State, the need to clarify CEQA Guidelines sections 15307 and 15308 is significant.

The Opinion also provides helpful guidance regarding what qualifies as substantial evidence under the fair argument standard. Here, citing arguments made by its attorney during the administrative process, the petitioner contended that the "unusual

circumstances" exception applied; thus the city was precluded from relying on a categorical exemption. (Opinion, p. 16; CEQA Guidelines, § 15300.2, subd. (c).) The Opinion is particularly helpful because it affirms that factual claims must be supported by evidence in the record, and unsupported theories, such as those that may be advanced by a challenger's attorney, do not constitute substantial evidence. The "unusual circumstances" exception is often raised in challenges to an exemption determination. Although there is currently a split in authority regarding the standard of review governing a factual question as to whether the unusual circumstances exception applies, the Opinion's discussion of this exception and the fair argument standard provides a cogent explanation and provides further guidance regarding its application -- at least until the California Supreme Court determines and rules on which standard of review applies.

For all of the reasons described above, we therefore respectfully request that the Court of Appeal publish the Opinion.

Very truly yours,

R. TYSON SOHAGI (SBN 254235)

W:\C\999\001\00279908.DOCX

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 11999 San Vicente Boulevard, Suite 150, Los Angeles, California 90049.

On December 26, 2013, I served true copies of the following document(s) described as **REQUEST FOR PUBLICATION OF *SAVE THE PLASTIC BAG COALITION V. CITY AND COUNTY OF SAN FRANCISCO*** on the interested parties in this action as follows:

☒ BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with The Sohagi Law Group, PLC's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on December 26, 2013, at Los Angeles, California.

Cheron J. McAleece
Printed Name

Signature

SERVICE LIST

Stephen Laurence Joseph 11693 San Vicente Blvd. Suite 150 Los Angeles, CA 90049	**Plaintiff and Appellant** **Save the Plastic Bag Coalition**
James Moxon Emercy Office of City Attorney City Hall – Room 234 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102	**Defendant and Respondent** **City & County of San Francisco; San Francisco Planning Department; San Francisco Department of the Environment**
Office of the Attorney General P.O. Box 944255 Sacramento, CA 94244-2550	**The People (Information Only)**