

**STAFF REPORT**  
**COUNCIL MEETING DATE**  
**August 8, 2011**

**ITEM FOR COUNCIL CONSIDERATION**

Update on litigation and pending legislation regarding banning of single use plastic bags.

Report prepared by: Peter Brown, City Attorney

  
Signature

Reviewed by: Dave Durlinger, City Manager

  
Signature

**STAFF RECOMMENDATION**

Action Item X Non-Action Item   

Direct staff to prepare a report on options related to the scope and content as well as the appropriate environmental clearance likely associated with an ordinance banning the distribution of single use carry-out plastic bags by retailers within the City.

**I. BACKGROUND**

In February 2008, after a presentation by the Santa Barbara City College Sustainability Workshop and public testimony in late 2007, the City Council directed staff to prepare draft regulations banning local businesses from distributing carry-out plastic bags and expanded polystyrene take-out food containers (EPS). In a September 2008 staff report, staff updated the City Council on its progress regarding preparation of draft regulations. Staff reported that many cities that had adopted such bans had relied on exemptions from California Environmental Quality Act (CEQA) to fulfill their environmental review obligations. The update also noted that the Coalition to Support Plastic Bag Recycling had recently initiated lawsuits against similar bans passed by the City of Manhattan Beach and the County of Los Angeles. The lawsuit against the City of Manhattan Beach, *Save the Plastic Bag Coalition v. City of Manhattan Beach*, challenged the City's decision to issue a negative declaration for purposes of the CEQA rather than preparing an environmental impact report (EIR). The September 2008 update also identified a series of alternatives the City could take to a blanket ban, which included enacting a deferred ban to take effect only if state legislation was not passed by 2010, developing a composting program for plastic bags, and contracting with a private company to place plastic bag recycling bins at various locations in the City.

The City Council proceeded with establishing regulations on the use of non-recyclable take-out food containers/EPS. Given the uncertainty surrounding which environmental document was proper to accompany enactment of a plastic bag ban, however, the City Council requested that staff monitor litigation, including the Manhattan Beach litigation, and state legislation pertaining to efforts to regulate the use of plastic bags.

On March 28, 2011, staff provided the City Council with an update on the status of cities' efforts and state legislation aimed at regulating the use of single use and lightweight plastic bags. The staff report indicated that development of regulations pertaining to plastic bags would likely require the preparation, processing and certification of an EIR, noting that several California cities had already chosen to prepare EIR for purposes of CEQA. The report also noted that the California Supreme Court had agreed to hear the City of Manhattan Beach's appeal of the lower court's ruling that it needed to complete and certify an EIR before implementing its plastic bag ban. Staff summarized various pending litigation and state legislation regarding plastic bag regulation. Staff also identified the following possible courses of action that the City could take:

1. Draft local regulations to ban plastic bag use and a supporting EIR.
2. Lobby other agencies in the County, or on the South Coast, to prepare a joint EIR that would cover all agencies in Santa Barbara County and distribute the EIR preparation costs among the participants.
3. Continue with the current position of promoting reusable bags by holding a reusable bag month and supporting education efforts by local organizations.

The California Supreme Court recently issued a decision in *Save the Plastic Bag Coalition v. City of Manhattan Beach* that most likely affects the City's options as identified in March 2011. This staff report discusses the Supreme Court's decision, the reaction of the plastic bag industry and California cities to the decision, and the City's options in light of this new development. The report also describes local action relating to plastic bag regulation and provides an update on pending state legislation regarding plastic bag regulation.

## II. DISCUSSION

### *Save the Plastic Bag Coalition v. City of Manhattan Beach*

In August 2008, an association of plastic bag manufacturers and distributors – the Save the Plastic Bag Coalition (Coalition) – filed a lawsuit challenging the City of Manhattan Beach's preparation of a negative declaration under CEQA in connection with its adoption of a ban on point-of-sale plastic bag distribution. The Coalition claimed the City should have instead prepared an EIR weighing the impacts of its proposed ban on plastic bags. In February 2009, the Los Angeles Superior Court ruled that Manhattan Beach needed to complete and certify an EIR before approval and implementation of its bag ban. In January 2010, a court of appeal agreed with the superior court and also said an EIR, rather than a negative declaration, should have been prepared.

Manhattan Beach's ordinance banned point-of-sale plastic bag distribution, effectively prohibiting retailers from providing plastic shopping bags to customers. The proposed ordinance included a finding that CEQA did not apply because the ban would have no significant effect on the environment (CEQA Guidelines, § 15061(b)(3)) and because it qualified as a regulatory program to protect the environment (CEQA Guidelines, § 15083.) The initial study prepared by the city noted that paper bag replacement in lieu of plastic bags would not be on a one to one basis for various reasons. The study also emphasized the small size of Manhattan Beach's retail sector – 218 businesses, including just two supermarkets, three drug stores, and one Target store that were known to be high volume plastic bag users. The study asserted that any substitution of paper bags for plastic that occurred would not significantly impact landfill capacity since a larger portion of paper bags is recycled than plastic and the city

represented a small portion of regional landfill users. The initial study concluded, based on these considerations, that any increase in the use of paper bags would be relatively small, with minimal impacts on energy use, air quality, water quality, vehicle traffic, and solid waste facilities.

In response to the initial study, the Coalition cited to several studies that concluded the “life cycle” (*i.e.*, manufacture, distribution and recycling) of paper bags has a greater environmental impact than the life cycle of plastic bags. The Coalition asserted that these studies established a reasonable possibility that increased paper bag use would have a significant negative impact on the environment, requiring preparation of a full EIR. The city countered with a staff report citing other studies asserting that various life cycle studies yielded different results that could be selectively used to support the proponents of either plastic or paper bags. The city council proceeded to adopt the ordinance on July 15, 2008. The ordinance included findings regarding the city’s interest as a coastal city in protecting the marine environment and the ill effects of plastic bags that make their way into the ocean where, because they do not biodegrade, they pose hazards to marine life.

In an unanimous decision, the California Supreme Court concluded that substantial evidence and common sense supported Manhattan Beach’s determination that its ordinance would have no significant environmental effect. The court said even if the life cycle of paper bags entailed more negative environmental consequences than the plastic bag life cycle, the city acted within its discretion in concluding that its ordinance would have no significant effect because CEQA “does not demand an exhaustive comparative analysis of relative environmental detriments for every alternative course of action.” As to local impacts, the Court went on to say that a detailed study was not required to conclude that the increased vehicle traffic and related effects stemming from delivery of paper bags was minimal. The court also found the initial study’s reference to the anticipated potential impact to the regional landfill from paper bag disposal was sufficient to address the local impacts flowing from increased disposal of paper bags.

With regard to the potential life cycle impacts that might be felt outside the city, the court said an agency is not required to conduct an exhaustive analysis of all conceivable impacts that a project may have outside its geographical boundaries. It noted that less detail on such impacts would be required where, for example, those effects are indirect as compared with effects within the project boundary, or where they are difficult to predict with any accuracy. The impacts of Manhattan Beach’s ordinance outside the city, the court concluded, were both indirect and difficult to predict. Accordingly, the city was entitled to evaluate these broader environmental impacts at a reasonably high level of generality. Citing the city’s small population (less than 40,000) and retail sector (fewer than 220 establishments), the court said the increase in paper bag production following a change from plastic to paper bags was “insubstantial” and that city properly concluded the city’s ban would have only a “miniscule contributive effect” on the broader environmental impacts. The court also noted that because of Manhattan Beach’s small size, even the cumulative effects would be negligible. By contrast, the analysis would be different for a ban on plastic bags by a larger governmental body – for example, Los Angeles County with a population of 10 million – because it might lead to a significant increase in paper bag production. This decision affirmed the substantial discretion afforded public agencies across California when determining whether a CEQA project will have a potentially significant environmental effect.

As a small coastal city with a small retail sector, smaller in population and retail sector compared to Manhattan Beach, the City of Carpinteria seems to fit well within the reasoning adopted by the Court in this decision. Accordingly, if the City adopted a point of sale distribution ban of plastic bags by retailers, environmental review under CEQA at a level less than an EIR would seem to be appropriate.

### Plastic Bag Industry Response to *STPBC v. Manhattan Beach*

In a press release issued the same day as the Supreme Court's decision, the Save the Plastic Bag Coalition announced it was delighted with the decision, indicating it will continue to demand EIRs. The press release asserted that in 2011, the cumulative impacts of the shift to paper bags has reached critical mass. The Coalition characterized the *STPBC v. Manhattan Beach* decision as requiring EIRs for plastic bag bans in (1) larger cities and counties and (2) small cities based on cumulative impacts. The press release also celebrated the Court's decision that the Coalition has legal standing to challenge CEQA decisions and that "under certain circumstances businesses can challenge 'green' projects that may do more harm than good to the environment."

### Cities' Responses to *STPBC v. Manhattan Beach* and Existing Plastic Bag Bans

At the time the decision was issued, several cities in California had already adopted or were well on their way to adopting plastic bag bans, and a number were considering such bans. In Marin County, the Supreme Court's decision has encouraged advocates of a ban that they will be able to gain enactment of plastic bag bans in the County's cities and towns. A committee of six Marin County cities and towns have been exploring potential bans in recent months and are emboldened by the decision. The City of San Rafael was scheduled to discuss a plastic bag ban at its August 1 meeting.

Other cities and counties with plastic bag bans already in the works are proceeding with their plans. On July 1, 2011, the County of Los Angeles' ordinance, for which an EIR was prepared after a lawsuit was filed, went into effect for all large stores in the unincorporated areas of the county.

On August 1, the City of Long Beach's plastic bag ban took effect for larger stores. In addition to banning single use plastic bags, the ordinance also places a 10 cent minimum price requirement on distribution of paper bags. Approximately 2,000 smaller stores are not yet required to follow the ban, but 66 major stores no longer offer plastic bags. The ban will become effective for smaller stores beginning in 2012.

In southern California, Calabasas, Malibu and Santa Monica have also adopted plastic bag bans. In northern California, Fairfax, Oakland, Palo Alto, San Francisco, San Jose, Santa Clara County and Marin County have adopted plastic bag bans. Implementation of the ban has not yet occurred in all jurisdictions.

### Local Legislation and Efforts

In recent months, the City of Santa Barbara has considered whether to ban distribution of single use plastic bags within the city or to take some other action. After the most recent discussion in mid-July, the Santa Barbara City Council voted to take a voluntary reduction and education approach. Under the approved proposal, major supermarkets and produce dispensers are required to offer their customers reusable tote bags at affordable prices, post signs inside and outside their premises stating such bags are available, and train their employees to encourage customers to switch to reusable bags. For the past three years, the City of Santa Barbara has encouraged such efforts and initiated a public relations campaign, entitled "Where's Your Bag," that is designed to encourage the use of tote bags.

Beginning in April, the Albertsons grocery store in Carpinteria eliminated all bags – plastic and paper – from their store, asking customers either to bring their own bag or purchase one at the checkout register. The local Albertsons is one of a few grocery stores in that chain to have gone "bagless" recently.

### State Legislation

During the first part of the 2011-2012 Regular Session of the California Legislature, two bills were introduced regarding the regulation and/or ban of single use plastic bags and reusable

bags – Assembly Bill 298 and Senate Bill 915. Since the February 2011 staff report on this issue, there has been some progress on these bills.

### **AB 298**

Assembly Bill 298 would prohibit reusable bag manufacturers from selling or distributing reusable bags in California that are designed or intended to be sold or distributed at a store unless they meet the following requirements: (a) are made of a material that can be cleaned or disinfected; (b) are free of heavy metals in toxic amounts; and (3) have the guidelines for the cleaning and disinfection of the bag printed on the bag or on a tag attached to the bag. On April 28, this bill passed out of the Assembly to the Senate, where it is currently in the Senate Committee on Environmental Quality. Because the bill met the June 3rd deadline for passing out of its house origin, if it receives Senate approval by September 9th and subsequent gubernatorial approval, the bill could become effective beginning January 1, 2012.

### **SB 915**

Senate Bill 915, as amended, would require a specified percentage reduction in plastic bag use by a specified deadline, establish mandatory levels of recycled content in plastic bags, and mandate establishment of a stakeholder working group to develop strategies for increasing plastic bag recycling and obtaining funding for increased consumer awareness. The bill was amended in the Senate Committee on Environmental Quality to remove the provision suspending local plastic bag ordinances and prohibiting local governments from taking certain actions regarding plastic bags. At the author's request, the May 2 hearing on the bill was cancelled and there has been no activity on the bill since then. The bill did not meet the June 3 deadline for passing out of its house origin and therefore will not be considered again until January 2012.

### City's Options

The City's strategy to date has been to promote the use of reusable bags. It has done this by providing financial support to Carpinteria Beautiful's efforts to distribute 5,000 reusable bags in 2009, as well as providing public education on the importance of using reusable bags. In light of the uncertainty surrounding the appropriate environmental review to be conducted in connection with enactment of single use carry-out plastic bag regulations, the City Council has not directed staff to draft regulations banning plastic bag use in the City.

The *Save the Plastic Bag Coalition v. City of Manhattan Beach* decision has provided guidance on the appropriate level for environmental review to accompany a plastic bag ban in a small, coastal city. Accordingly, the City has a new option available regarding the course of action to take: Draft an ordinance banning point of sale distribution of single-use plastic bags within the City and prepare the appropriate environmental clearance. Given the direction provided by the *STPBC v. Manhattan Beach* decision, the City would appear to be on strong ground if it models its findings after those contained in the Manhattan Beach ordinance.

Should the City Council determine to pursue this option and develop a local ordinance for consideration, the first step would be to request that City staff research the various components of local regulations, e.g., regulating all single-use bags or just plastic, regulating all stores, or just large retailers, etc., and how these components could affect environmental review. Staff is recommending that the City Council request this type of report, which would allow it to establish the parameters for the draft regulations and to formally initiate the municipal code amendment.

The initiation and development of an ordinance regulating the distribution of single-use plastic bags is not a part of this year's work program. Should the City Council concur with the Staff recommendation to prepare a report on regulatory options and environmental review for such an ordinance, it will also need to be determined whether the matter should be taken up this year or as a part of the 2012 work plan.

### III. LEGAL

Under the reasoning of the *Save the Plastic Bag Coalition v. City of Manhattan Beach* decision, the City would likely need to prepare an initial study and negative declaration in order to meet the environmental review requirements of CEQA for enacting an ordinance regulating plastic bags.