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## The Evolution of San Francisco's Plastic-Bag Ban

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## COMMENT

# THE EVOLUTION OF SAN FRANCISCO'S PLASTIC-BAG BAN

"The lady who sells me my lunchtime sandwich and packet of crisps at Sainsbury's and I are helping save the world. She asks if I want a plastic bag for that. And I say no."<sup>1</sup>

### INTRODUCTION

The ubiquity of single-use plastic bags has led to a collective dependency on their free availability that, until recently, has allowed the significant environmental costs incurred in the bags' production and disposal to go unchallenged. In March 2007, the San Francisco<sup>2</sup> Board of Supervisors approved an ordinance largely banning local retailers from providing plastic bags to customers, triggering a deluge of similar ordinances across the nation. San Francisco's approach evolved from a user tax-based plan that was eventually preempted by state law, to an outright ban on large retailers<sup>3</sup> that appears to be capable of withstanding legal challenge.

Every year, 500 billion to 1 trillion plastic bags are used worldwide,<sup>4</sup> including an estimated 180 million bags in San Francisco alone.<sup>5</sup> At a time when progressive environmental initiatives are

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<sup>1</sup> *I Don't Need That Bag, Thanks*, S. WALES EVENING POST, Oct. 27, 2007, at 15, *available at* 2007 WLNR 21226275.

<sup>2</sup> All references to "San Francisco" throughout this comment refer to the City and County of San Francisco.

<sup>3</sup> S.F. ENV'T CODE §§ 1701-1709 (2007), *available at* <http://www.municode.com/content/4201/14134/HTML/ch017.html>.

<sup>4</sup> A.B. 2449 § 1(a)(2), 2005-2006 Gen. Assem., Reg. Sess. (Cal. 2006).

<sup>5</sup> Wyatt Buchanan, *Paper or . . . Canvas? Plastic Bags Are Out*, S.F. CHRON., Nov. 19, 2007, at D1, *available at* 2007 WLNR 22868623.

receiving a chilly reception at the federal level, and as concern for global warming and petroleum dependence serves as a primary impetus of a growing national environmental awareness, plastic bags have emerged as an icon of waste and environmental peril.<sup>6</sup> Reducing or eliminating plastic-bag use has thus become a way to make a statement, and a difference that is noticeable on a local level, while requiring minimal effort from the activist.<sup>7</sup>

Beyond the motivation of such individuals to make a personal statement, many local governments are also mandated by law to reduce waste, including plastic-bag waste, entering their landfills.<sup>8</sup> Various cities and regions charged with meeting waste-reduction goals rely on a range of financial and legal inducements to encourage individuals and retailers to curb their plastic-bag consumption.<sup>9</sup> Such inducements may include mandating fees on plastic bags, or proscribing their use entirely, in favor of a more environmentally friendly bag type.<sup>10</sup>

San Francisco, having set itself the formidable goal of recycling 75% of its waste by 2012 and zero waste by 2020,<sup>11</sup> has served as a legislative laboratory for creating a viable ordinance aimed at reducing plastic-bag consumption.<sup>12</sup> The Board of Supervisors' experiences in passing this legislation, however, was not without its obstacles. The often soap opera-esque battle with commercial interests opposed to restricting bag consumption involved a million-dollar public-relations campaign

<sup>6</sup> See Katharine Mieszkowski, *Plastic Bags Are Killing Us*, SALON, Aug. 10, 2007, [http://www.salon.com/news/feature/2007/08/10/plastic\\_bags/print.html](http://www.salon.com/news/feature/2007/08/10/plastic_bags/print.html).

<sup>7</sup> Sarah Mower, *Attention, Shoppers; If Things Go As Planned, the Latest Bag Craze Will Rid the World of the Tired Debate: Paper or Plastic*, VOGUE, May 2007, at 121-22, 124.

<sup>8</sup> See, e.g., S.F. Dep't of the Env't, Resolution Setting Zero Waste Date, Resolution No. 002-03-COE (Mar. 6, 2003) ("RESOLVED, That the Commission on the Environment adopts a date for achieving zero waste to landfill by 2020 and directs the Department of the Environment to develop policies and programs to achieve zero waste, including increasing producer and consumer responsibility, in order that all discarded materials be diverted from landfill through recycling, composting or other means.")

<sup>9</sup> See, e.g., S.F. Dep't of the Env't, Resolution Setting Zero Waste Date, Resolution No. 002-03-COE (Mar. 6, 2003).

<sup>10</sup> See S.F. Dep't of the Env't, Resolution Setting Zero Waste Date, Resolution No. 002-03-COE (Mar. 6, 2003).

<sup>11</sup> S.F. Dep't of the Env't, Resolution Adopting Zero Waste Goal, Resolution No. 679-02 (Sept. 30, 2002) ("RESOLVED, That the Board of Supervisors adopts a goal for San Francisco of 75% landfill diversion by the year 2010 . . ."); S.F. Dep't of the Env't, Resolution Setting Zero Waste Date, Resolution No. 002-03-COE (Mar. 6, 2003).

<sup>12</sup> See *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 788 (1982) ("Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. . . . Even in the field of environmental protection, an area subject to heavy federal regulation, the States have supplemented national standards with innovative and far-reaching statutes.").

aimed at promoting plastic-bag use,<sup>13</sup> a back-office deal between the Mayor and a grocers' coalition postponing any action on imposing a bag fee,<sup>14</sup> and a virtually unnoticed addition to a then-pending state law that resulted in state preemption of such a fee.<sup>15</sup> By studying the successes and failures of San Francisco's legislative experiment, other cities may avoid potential pitfalls and perhaps create an even stronger law.

Part I of this comment provides an overview of the problems associated with plastic-bag production and disposal and demonstrates the need for reduction. Part II discusses alternatives to plastic bags and steps other countries have taken to reduce plastic-bag consumption. Part III examines in detail San Francisco's attempts to enact legislation to reduce consumption of plastic bags, including the interaction of California state and municipal law. Part IV discusses the comparative merits of various ordinances aimed at plastic-bag reduction and how the lessons learned in San Francisco may be useful to other cities confronted with this or similar problems, particularly when negotiating with the plastic and grocery industries.

## I. THE PLASTIC BAG

### A. PRODUCTION

Plastics are some of the most utilized materials (on a volume basis) in U.S. industrial and commercial life.<sup>16</sup> Traditional polyethylene-based plastic bags<sup>17</sup> are made from ethylene—a gas derived from natural gas—or a component of crude oil that is similar to a natural gas, both of which are products of non-renewable fossil fuels.<sup>18</sup> Plastic grocery and trash

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<sup>13</sup> PowerPoint Presentation, Laurie J. Hansen, Film and Bag Federation, California – Sack the Tax, Apr. 4, 2005, slide 14 (on file with author).

<sup>14</sup> Letter of Agreement between the Mayor of the City and County of San Francisco, as represented by the San Francisco Department of the Environment (DOE), and San Francisco supermarkets operated by Albertsons, Andronicos, Bell Markets, CalMart Supermarket, Cala Foods, Foods Co, Mollie Stone's, and Safeway (effective Nov. 2, 2005) (on file with author).

<sup>15</sup> A.B. 2449, 2005-2006 Gen. Assem., Reg. Sess. (Cal. 2006) (prohibiting local imposition of plastic carryout bag fees).

<sup>16</sup> SOCIETY OF THE PLASTICS INDUSTRY, ABOUT THE INDUSTRY: HISTORY OF PLASTICS, <http://www.plasticsindustry.org/industry/history.htm> (last visited Oct. 30, 2007).

<sup>17</sup> Polyethylene-based plastic bags will be referred to as "plastic bags" throughout this comment unless otherwise distinguished.

<sup>18</sup> RICHARD LINDSAY STOVER, KATHY EVANS & KAREN PICKETT, THE ECOLOGY CENTER, REPORT OF THE BERKELEY PLASTIC TASK FORCE 4 (1996) ("The raw material for all packaging plastics is ethylene. Ethylene is a gas derived from natural gas or from a fraction of crude oil that has a composition similar to natural gas. Both natural gas and crude oil are products of fossil fuels and are therefore not renewable.").

bags are made from [linear] low-density polyethylene, and they required an estimated 3.52 million tons of resin in 1995, constituting about 27.9% of all plastic packaging.<sup>19</sup> Virgin plastic resin production is concentrated among a small number of corporations mainly situated along the gulf coast of the United States.<sup>20</sup>

## B. THE PLASTICS INDUSTRY

The plastics industry is one of the largest remaining manufacturing industries in the nation, with more than 1.4 million plastics workers nationwide, and acts as a powerful lobbying group that directs its efforts toward influencing public policy on issues of concern to the industry.<sup>21</sup> The two largest plastic technology consortiums are the American Plastics Council and the Society of the Plastics Industry, which lobby against legislation that threatens to impose further restrictions upon the industry.<sup>22</sup>

## C. USE

Plastic grocery bags were first introduced in the supermarket industry as an alternative to paper sacks in 1977.<sup>23</sup> As the price of plastic bags fell, their popularity increased dramatically, now making them the choice of 90% of shoppers.<sup>24</sup> Currently, about 100 billion plastic bags are consumed each year in the United States, and their production requires

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<sup>19</sup> RICHARD LINDSAY STOVER, KATHY EVANS & KAREN PICKETT, THE ECOLOGY CENTER, REPORT OF THE BERKELEY PLASTIC TASK FORCE 6 (1996) (Table 1: Plastic Packaging; Resin Market Share; Uses).

<sup>20</sup> RICHARD LINDSAY STOVER, KATHY EVANS & KAREN PICKETT, THE ECOLOGY CENTER, REPORT OF THE BERKELEY PLASTIC TASK FORCE 7 (1996) ("In 1995, for example, three corporations produced 94% of all PET resin.") (citing Doug Smock, *BASF Unveils New Styrenes for Computers, Packaging Films*, PLASTIC WORLD, Vol. 53, Aug. 1995, at 26; Robert D. Leaversuch, *BASF Readies Polymers Slate for Diverse End-Use Markets*, MODERN PLASTICS INT'L, Vol. 72, Aug. 1995, at 69).

<sup>21</sup> Society of the Plastics Industry, Political Action Center, <http://www.bipac.net/page.asp?g=spi&content=startpage> (last visited Oct. 30, 2007).

<sup>22</sup> See RICHARD LINDSAY STOVER, KATHY EVANS, & KAREN PICKETT, THE ECOLOGY CENTER, REPORT OF THE BERKELEY PLASTIC TASK FORCE 8 (1996).

<sup>23</sup> SOCIETY OF THE PLASTICS INDUSTRY, FILM AND BAG FEDERATION, HISTORY OF THE PLASTIC BAG, <http://www.plasticsindustry.org/about/fbf/environment.htm#plasticbaghistory> (last visited Oct. 30, 2007) (the first plastic bags were sandwich bags introduced in 1957).

<sup>24</sup> *Bans turning 'paper or plastic' into a debate: Shoppers may prefer plastic but local entities seek to do away with it*, ASSOCIATED PRESS, Jan. 22, 2008, available at <http://www.msnbc.msn.com/id/22786052/> Katharine (noting that "many grocers report that about 90 percent of their shoppers still ask for plastic"); see also Katharine Mieszkowski, *Plastic Bags Are Killing Us*, SALON, Aug. 10, 2007, [http://www.salon.com/news/feature/2007/08/10/plastic\\_bags/print.html](http://www.salon.com/news/feature/2007/08/10/plastic_bags/print.html).

approximately 12 million barrels of oil.<sup>25</sup> Plastic “T-shirt” bags, the type of bag commonly used as carryout bags<sup>26</sup> in grocery stores, cost grocery stores about two cents each.<sup>27</sup>

#### D. LITTER

Due to the aerodynamic nature of plastic bags, even if properly disposed of, plastic bags often become litter.<sup>28</sup> In addition to the aesthetic and quality-of-life problems raised by plastic bags blowing in the wind or stuck in trees, plastic bags pose a serious threat to various marine animals.<sup>29</sup> Sea birds and turtles often mistake floating bags for tasty jellyfish and ingest them.<sup>30</sup> Many of these animals have been found dead, their stomachs filled with medium-sized plastic items and fragments of plastic bags.<sup>31</sup>

Also, as plastic “photodegrades,” breaking down into increasingly smaller particles, the still-toxic and now easily ingested plastic pieces remain in the marine environment.<sup>32</sup> In some areas, particles of degraded plastic outweigh zooplankton, the first link in the ocean’s food chain, with up to six pounds of plastic present for every single pound of

<sup>25</sup> Katharine Mieszkowski, *Plastic Bags Are Killing Us*, SALON, Aug. 10, 2007, [http://www.salon.com/news/feature/2007/08/10/plastic\\_bags/print.html](http://www.salon.com/news/feature/2007/08/10/plastic_bags/print.html); see also SIERRA CLUB, GROCERY BAGS – PAPER OR PLASTIC?, <http://www.sierraclub.org/bags/> (last visited Apr. 1, 2008) (“When 1 ton of plastic bags is reused or recycled, the energy equivalent of 11 barrels of oil are saved.”).

<sup>26</sup> Plastic carryout bags will be referred to as “plastic bags” throughout this comment. The need for differentiating between plastic carryout bags and other types of plastic bags is that most plastic bag ordinances apply only to plastic bags taken at the grocery checkout, not plastic bags used for produce or to wrap meats. Ordinance 81-07, File No. 070085, App. 4/20/2007, codified as S.F. ENV’T CODE ch. 17 & Sec.1702(c) (2007), available at <http://www.municode.com/content/4201/14134/HTML/ch017.html> (“‘Checkout bag’ means a carryout bag that is provided by a store to a customer at the point of sale.”).

<sup>27</sup> Katharine Mieszkowski, *Plastic Bags Are Killing Us*, SALON, Aug. 10, 2007, [http://www.salon.com/news/feature/2007/08/10/plastic\\_bags/print.html](http://www.salon.com/news/feature/2007/08/10/plastic_bags/print.html).

<sup>28</sup> Letter, Mark Murray, Executive Director, Californians Against Waste to Governor Arnold Schwarzenegger, Re: AB 2449 (Levine) Plastic Bag Waste Reduction and Recycling – Support, Sept. 8, 2006, available at <http://www.cawrecycles.org/node/562/print> (“Plastic bags are non-biodegradable and aerodynamic, contributing a disproportionately large share of the litter problem.”).

<sup>29</sup> ALGALITA MARINE RESEARCH FOUNDATION, PELAGIC PLASTICS (June 27, 2002), [http://www.algalita.org/pelagic\\_plastic.html](http://www.algalita.org/pelagic_plastic.html).

<sup>30</sup> ALGALITA MARINE RESEARCH FOUNDATION, PELAGIC PLASTICS (June 27, 2002), [http://www.algalita.org/pelagic\\_plastic.html](http://www.algalita.org/pelagic_plastic.html).

<sup>31</sup> GREENPEACE INT’L, THE TRASH VORTEX, [http://www.greenpeace.org/international/campaigns/oceans/pollution/trash-vortex?MM\\_URL=http://oceans.greenpeace.org/en/our-oceans/pollution/trash-vortex](http://www.greenpeace.org/international/campaigns/oceans/pollution/trash-vortex?MM_URL=http://oceans.greenpeace.org/en/our-oceans/pollution/trash-vortex) (last visited Mar. 26, 2008).

<sup>32</sup> See A.B. 2449, § 1(a)(3), 2005-2006 Gen. Assem., Reg. Sess. (Cal. 2006).

zooplankton.<sup>33</sup> Marine animals ingest the plastic particles as they would zooplankton and, their bodies having no means to process this synthetic substance, the particles remain in the animals' systems indefinitely, only to be passed on to predators higher up the food chain.<sup>34</sup>

Even more disturbing, a mass of garbage is floating in the Pacific Ocean, estimated by some sources to be the size of Texas and up to 100 feet deep, composed in large part of plastic bags and bottles.<sup>35</sup> This "Eastern Garbage Patch" was formed through the movement of the Northern Pacific Gyre, which acts as a vortex, moving garbage to the central area of the gyre.<sup>36</sup> The gyre pulls the garbage into international waters, where assigning liability for cleanup has thus far proven impossible.<sup>37</sup>

#### E. RECYCLING AND DISPOSAL (IN LANDFILLS)

Most plastic containers, including plastic bags are imprinted with a number inside a triangle of chasing arrows, which became a universal symbol of recyclability in 1988.<sup>38</sup> As a result, the public generally

<sup>33</sup> ALGALITA MARINE RESEARCH FOUNDATION, PELAGIC PLASTICS (June 27, 2002), [http://www.algalita.org/pelagic\\_plastic.html](http://www.algalita.org/pelagic_plastic.html); *We Need a Sea Change*, WESTERN MAIL, Nov. 10, 2007, available at 2007 WLNR 22348057 (zooplankton are one of the first links of the aquatic food chain).

<sup>34</sup> ALGALITA MARINE RESEARCH FOUND., PELAGIC PLASTICS (June 27, 2002) [http://www.algalita.org/pelagic\\_plastic.html](http://www.algalita.org/pelagic_plastic.html) (marine animals ingest zooplankton, which remain in their systems because their bodies are not capable of breaking down plastic); Justin Berton, *Continent-Size Toxic Stew of Plastic Trash Fouling Swath of Pacific Ocean*, S.F. CHRON., OCT. 19, 2007, at W8, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/10/19/SS6JS8RH0.DTL> ("The Greenpeace report found that at least 267 marine species had suffered from some kind of ingestion or entanglement with marine debris.").

<sup>35</sup> Interview by Andrea Seabrook with Captain Charles Moore, Algalita Marine Research Foundation, *Navigating the Pacific's 'Garbage Patch'*, National Public Radio All Things Considered (Oct. 28, 2007), available at 2007 WLNR 21257084.

<sup>36</sup> GREENPEACE INT'L., THE TRASH VORTEX, [http://www.greenpeace.org/international/campaigns/oceans/pollution/trash-vortex?MM\\_URL=http://oceans.greenpeace.org/en/our-oceans/pollution/trash-vortex](http://www.greenpeace.org/international/campaigns/oceans/pollution/trash-vortex?MM_URL=http://oceans.greenpeace.org/en/our-oceans/pollution/trash-vortex) (last visited Mar. 26, 2008).

<sup>37</sup> Interview by Andrea Seabrook with Captain Charles Moore, Algalita Marine Research Foundation, *Navigating the Pacific's 'Garbage Patch'*, National Public Radio All Things Considered (Oct. 28, 2007), available at 2007 WLNR 21257084; Justin Berton, *Continent-Size Toxic Stew of Plastic Trash Fouling Swath of Pacific Ocean*, S.F. CHRON., OCT. 19, 2007, at W8, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/10/19/SS6JS8RH0.DTL> ("Chabot said if environmentalists wanted to remove the ocean dump site, it would take a massive international effort that would cost billions. But that is unlikely, he added, because no one country is likely to step forward and claim the issue as its own responsibility.").

<sup>38</sup> RICHARD LINDSAY STOVER, KATHY EVANS & KAREN PICKETT, THE ECOLOGY CENTER, REPORT OF THE BERKELEY PLASTIC TASK FORCE 9 (1996) ("This number appears inside a triangle of chasing arrows as shown below. . . . This usage first appeared in 1988 when the Society of the

assumes that anything stamped with the chasing arrows symbol is recyclable and that local processors can handle these items.<sup>39</sup> Additionally, consumer plastic-bag recycling began through a supermarket on-site collection network in 1990, which requires stores to collect bags and transport them to a recycler at their own cost.<sup>40</sup> After ten years of in-store plastic-bag recycling programs, less than 2% of all plastic bags are currently being recycled in California.<sup>41</sup>

As a side effect of the “chasing arrows” and in-store recycling campaigns, many well-meaning recyclers try to recycle their plastic bags through municipal or county curbside recycling pick-up service.<sup>42</sup> Not only are plastic bags not recyclable through most curbside programs, but plastic bags put into general recycling bins cause additional problems for many of these recycling programs.<sup>43</sup> Recycling programs often do not have the infrastructure for taking the material back—usually due to the conscious decision that these items are either not economically or not environmentally efficient to recycle<sup>44</sup>—and this results in a new category of recycling waste known as “residue.”<sup>45</sup> The bags often become caught in recycling processing equipment, causing recycling sort lines to go offline while waiting for plastic bags to be removed from mechanical gears.<sup>46</sup>

San Francisco’s curbside recycling contractor, Norcal Recycling, spends \$494,000 annually on “classifier” employees given the task of removing non-recyclable materials, including plastic bags, from the

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Plastics Industry . . . appropriated the chasing arrows, a universal symbol of recyclability in the recycling industry.”).

<sup>39</sup> See RICHARD LINDSAY STOVER, KATHY EVANS & KAREN PICKETT, THE ECOLOGY CENTER, REPORT OF THE BERKELEY PLASTIC TASK FORCE 9 (1996).

<sup>40</sup> SOCIETY OF THE PLASTICS INDUSTRY, FILM AND BAG FEDERATION, HISTORY OF THE PLASTIC BAG, <http://www.plasticsindustry.org/about/fbf/environment.htm#plasticbaghistory> (last visited Oct. 30, 2007).

<sup>41</sup> Office of Supervisor Ross Mirkarimi, Issues Summary: Compostable Grocery Bag Legislation 1 (City and County of San Francisco 2007) (on file with author); Letter from Dave Williams, President, BioBag, to Honorable Gavin Newsom, Mayor, City of San Francisco (Mar. 5, 2007) (on file with author).

<sup>42</sup> See Katharine Mieszkowski, *Plastic Bags Are Killing Us*, SALON, Aug. 10, 2007, [http://www.salon.com/news/feature/2007/08/10/plastic\\_bags/print.html](http://www.salon.com/news/feature/2007/08/10/plastic_bags/print.html).

<sup>43</sup> S.F. Recycling, Curbside Recycling Program, Frequently Asked Questions, <http://www.sfrecycling.com/recycleqa.htm#1> (last visited Sept. 16, 2007).

<sup>44</sup> PLASTICS TASK FORCE, ECOLOGY CENTER, SEVEN MISCONCEPTIONS ABOUT PLASTIC AND PLASTIC RECYCLING, <http://www.ecologycenter.org/ptf/misconceptions.html> (last visited Sept. 16, 2007).

<sup>45</sup> RICHARD LINDSAY STOVER, KATHY EVANS & KAREN PICKETT, THE ECOLOGY CENTER, REPORT OF THE BERKELEY PLASTIC TASK FORCE 9 (1996).

<sup>46</sup> S.F. Recycling, Curbside Recycling Program, Frequently Asked Questions, <http://www.sfrecycling.com/recycleqa.htm#1> (last visited Sept. 16, 2007).

recycling streams and \$100,000 annually on clearing machinery jams caused by plastic bags.<sup>47</sup> Berkeley's curbside recycling contractor, the Ecology Center, decided against collecting plastic bags for recycling after conducting a cost/benefit analysis and finding that curbside collection of plastic bags would involve expensive processing and has very limited benefits in reducing environmental impacts and diverting waste.<sup>48</sup>

Because plastic bags can only be "down-cycled"<sup>49</sup> and not truly recycled, plastic bags cannot be recycled into more plastic bags but are made into other plastic products that are not further recyclable.<sup>50</sup> Thus, the stability and durability that makes plastic useful to consumers is also responsible for the harms associated with the persistence of plastic in the environment.<sup>51</sup> Further, plastic can take up to a thousand years to biodegrade.<sup>52</sup>

Legislation requiring plastics manufacturers to use a certain percentage of post-consumer recycled content is another partial answer to the problem of plastics recycling.<sup>53</sup> Such legislation would not be equivalent to reduction or reuse and would not reduce energy use or emissions associated with production, but it would replace virgin materials with reclaimed resources.<sup>54</sup> In California, for example, S.B.

<sup>47</sup> Office of Supervisor Ross Mirkarimi, Fact Sheet: Costs Associated With Paper and Plastic Bags 1 (City and County of San Francisco 2007) (on file with author) (information from Mike Crossetti, San Francisco Recycling & Disposal).

<sup>48</sup> PLASTICS TASK FORCE, ECOLOGY CENTER, SEVEN MISCONCEPTIONS ABOUT PLASTIC AND PLASTIC RECYCLING, <http://www.ecologycenter.org/ptf/misconceptions.html> (last visited Sept. 16, 2007).

<sup>49</sup> TIMOTHY J. KRUPNIK, BERKELEY ECOLOGY CENTER, THE PROBLEM OF PLASTICS IN HAITI: IMPACTS ON HUMAN AND ENVIRONMENTAL HEALTH IN PRODUCTION, USE AND DISPOSAL AND GLOBALIZATION AND WASTE: SOLUTIONS FOR COMMUNITIES (2002), *available at* <http://www.ecologycenter.org/iptf/southamerica/Problemofplasticreport.html> (explaining that because down-cycled products "create secondary, new products that do not displace the need for primary products, the cycle of consumption, resource extraction and industrial waste is not really abated.").

<sup>50</sup> Office of Supervisor Ross Mirkarimi, Issues Summary: Compostable Grocery Bag Legislation 2 (City and County of San Francisco 2007) (on file with author).

<sup>51</sup> *See* GREENPEACE INT'L., THE TRASH VORTEX, [http://www.greenpeace.org/international/campaigns/oceans/pollution/trash-vortex?MM\\_URL=http://oceans.greenpeace.org/en/our-oceans/pollution/trash-vortex](http://www.greenpeace.org/international/campaigns/oceans/pollution/trash-vortex?MM_URL=http://oceans.greenpeace.org/en/our-oceans/pollution/trash-vortex) (last visited Mar. 26, 2008).

<sup>52</sup> Audubon Society of the District of Columbia, Ban Plastic Shopping Bags in Washington, DC, <http://www.dcaudubon.org/plasticbags> (last visited Feb. 6, 2008).

<sup>53</sup> *See* RICHARD L. STOVER, KATHY EVANS, & KAREN PICKETT, THE ECOLOGY CENTER, REPORT OF THE BERKELEY PLASTIC TASK FORCE 7 (1996) (discussing legislation requiring a certain percentage of post-consumer content in plastic packaging in general, including an Oregon law requiring 25% recycled content in plastic containers).

<sup>54</sup> RICHARD L. STOVER, KATHY EVANS, & KAREN PICKETT, THE ECOLOGY CENTER, REPORT

2092 requires 30% reprocessed post-consumer content in plastic trash bags.<sup>55</sup>

## II. PLASTIC BAGS COMPARED TO OTHER TYPES OF BAGS

### A. PAPER BAGS

Plastic bag-use increased dramatically in the 1980s, out of concern for deforestation related to the use of paper bags.<sup>56</sup> In many respects, virgin paper bags are worse for the environment because of more pollution produced, energy consumed, and weight in landfills. More recently, however, paper-bag recycling processes and programs have improved, and trees are viewed by some as a potentially renewable resource.<sup>57</sup> The significantly higher rate of recycling and considerably faster rate of degradation<sup>58</sup> arguably make paper bags a more viable, sustainable option than plastic bags.<sup>59</sup> In 2005, a record 51.5% of the paper consumed in the U.S. was recovered for recycling, and the U.S. paper industry has set a 55% recovery goal by 2012.<sup>60</sup> Additionally, bags made with recycled content require less energy to make, and produce less

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OF THE BERKELEY PLASTIC TASK FORCE 8 (1996) ("Such legislation recognizes that although recycling does not reduce energy use or emissions to the degree that reuse does, mandating recycled content sets forces in motion that will replace virgin material with reclaimed resources...").

<sup>55</sup> CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD, HISTORY OF CALIFORNIA SOLID WASTE MANAGEMENT LAW 1990-1994 (2007) available at: <http://www.ciwmb.ca.gov/Statutes/Legislation/CalHist/1990to1994.htm> (explaining that S.B. 2092 "[r]equired sellers of trash bags in California to certify that they contain specified minimums of recycled postconsumer material: 10 percent by 1/1/93, 30 percent by 1/1/95. Appropriated \$150,000 from the IWMA to the Board for the purposes of administering the program.").

<sup>56</sup> Katharine Mieszkowski, *Plastic Bags Are Killing Us*, SALON, Aug. 10, 2007, [http://www.salon.com/news/feature/2007/08/10/plastic\\_bags/print.html](http://www.salon.com/news/feature/2007/08/10/plastic_bags/print.html).

<sup>57</sup> Katharine Mieszkowski, *Plastic Bags Are Killing Us*, SALON, Aug. 10, 2007, [http://www.salon.com/news/feature/2007/08/10/plastic\\_bags/print.html](http://www.salon.com/news/feature/2007/08/10/plastic_bags/print.html).

<sup>58</sup> Brian A. Joyce, *Sack the Plastic Shopping Bag*, BOSTON GLOBE Nov. 10, 2007, at 9A, ("Under perfect conditions a bag takes a thousand years to biodegrade, and in a landfill, plastic bags decompose even slower. If buried, they block the natural flow of oxygen and water through the soil.").

<sup>59</sup> REUSEABLEBAGS.COM, PAPER BAGS ARE BETTER THAN PLASTIC, RIGHT?, <http://www.reuseablebags.com/facts.php?id=7> (last visited Feb. 7, 2008).

<sup>60</sup> Paperrecycles.org, Frequently Asked Questions About Paper Recycling, <http://www.paperrecycles.org/recycling/faqs/index.html> (last visited Feb. 7, 2008); Mohd Ismail Yunus, *Free But They Cost Us Dearly*, NEW STRAITS TIMES (MALAYSIA), Sept. 19, 2007 (explaining that the cost of producing plastic bags is 25% less than that of producing paper bags, consume 40% less energy to produce, generate 80% less solid waste, produce 70% less atmospheric emissions and release up to 94% less waterborne waste when compared to paper bags).

waste in the manufacturing process, than virgin paper bags.<sup>61</sup> Under San Francisco's plastic-bag ban, paper bags must contain a minimum of 40% high-grade recycled paper, and many stores may opt for 100% recycled paper.<sup>62</sup>

In response to San Francisco's ban, Durobag (one of the biggest bag manufacturers in the world), is now offering handled paper bags made out of 100% recycled materials—60% post-industrial and 40% post-consumer fibers.<sup>63</sup> This bag demonstrates the innovation that can be inspired by placing restrictions upon traditional environment-damaging products, and weakens the plastics industry's argument regarding the comparatively damaging environmental effects of increased paper bag use.<sup>64</sup> Duro Bags that are 100% recycled cost about 7-9 cents per bag.<sup>65</sup>

## B. COMPOSTABLE PLASTIC BAGS

Compostable plastic bags,<sup>66</sup> as opposed to traditional polyethylene-based plastic bags, are made from a polymer derived from vegetable starch.<sup>67</sup> Compostable plastic bags are made of either vegetable starch (hydrodegradable) or starch with petroleum additives (oxo-degradable); starch-based bags without additives are of debatably inferior quality and may break more easily when wet.<sup>68</sup> Compostable plastic bags look and feel much like traditional plastic bags.<sup>69</sup>

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<sup>61</sup> Katharine Mieszkowski, *Plastic Bags Are Killing Us*, SALON, Aug. 10, 2007, [http://www.salon.com/news/feature/2007/08/10/plastic\\_bags/print.html](http://www.salon.com/news/feature/2007/08/10/plastic_bags/print.html).

<sup>62</sup> Wyatt Buchanan, *Paper or . . . Canvas? Plastic Bags Are Out*, S.F. CHRON., Nov. 19, 2007, at D1.

<sup>63</sup> Press Release, Duro Bag, Duro Bag Leads Way With 100% Recycled Paper Handle Bags; Bags Now in Stock (Sept. 4, 2007) *available at* <http://www.durobag.com/innovation/index.html>.

<sup>64</sup> See Interview with Jack Macy, Commercial Zero Waste Coordinator, San Francisco Department of the Environment, in San Francisco, Cal. (Jan. 16, 2007).

<sup>65</sup> See Interview with Jack Macy, Commercial Zero Waste Coordinator, San Francisco Department of the Environment, in San Francisco, Cal. (Jan. 16, 2007).

<sup>66</sup> NOVAMOUNT.COM, COMPOSTABILITY, <http://www.novamont.com/ing/html/prodotto/cosematerbi/compostabile.html> (last visited Feb. 8, 2008) ("If the water content is sufficiently high, the micro-organisms start to consume the nutritional substances, that is, to degrade the organic molecules, producing carbon dioxide, water and heat (biodegradation). At the end of the process, the initial waste is transformed into a substance called compost, which looks and smells like fertile soil, and is sanitised [sic] and stable, insofar as it contains no pathogenic microbes or material that decomposes.").

<sup>67</sup> Letter from Dave Williams, President, BioBag, to Honorable Gavin Newsom, Mayor, City of San Francisco, Cal. (Mar. 5, 2007) (on file with author) (explaining that vegetable starch is derived from vegetables such as corn and potatoes, a renewable resource).

<sup>68</sup> Wikipedia.com, Biodegradable Polythene Film, [http://en.wikipedia.org/wiki/Biodegradable/degradable\\_polythene\\_film](http://en.wikipedia.org/wiki/Biodegradable/degradable_polythene_film) (last visited Feb. 8, 2008).

<sup>69</sup> See Wikipedia.com, Biodegradable Polythene Film, [http://en.wikipedia.org/wiki/Biodegradable/degradable\\_polythene\\_film](http://en.wikipedia.org/wiki/Biodegradable/degradable_polythene_film) (last visited Feb. 8, 2008);

Compostable plastic bags have already replaced traditional plastic bags for collection of yard waste in many American cities, but had until recently become too cost-prohibitive to use as grocery bags.<sup>70</sup> Compostable plastic bags are accepted in many city curbside green bin compost programs (including San Francisco's program), and to decompose properly they must be disposed of in curbside compost bins rather than the garbage bin.<sup>71</sup> Studies show that availability of compostable plastic bags would likely increase residential composting in cities with curbside residential recycling programs by reducing the "ick factor" associated with collecting food scraps, because the whole bag could be thrown in the compostables bin.<sup>72</sup> Also, since compostable plastic bags are for the most part functionally similar to traditional plastic bags, they can be conveniently re-used within households just as traditional plastic bags often are, as small garbage bags or to pick up after family pets.<sup>73</sup>

In fact, they are so similar to traditional plastic bags that clear labeling of compostable bags is essential to distinguish between bag types in the compost stream.<sup>74</sup> Currently, compostable plastic bags cost grocery stores about 9-14 cents per bag for the equivalent of a plastic carryout bag.<sup>75</sup> Price points for certified compostable plastic bags are expected to decline more significantly as volumes increase and new technology advances, making them more economical.<sup>76</sup>

### C. HOW OTHER COUNTRIES HAVE APPROACHED THE PROBLEM

As the first U.S. city to successfully enact a plastic-bag-reduction ordinance, San Francisco looked overseas for inspiration.<sup>77</sup> The Republic

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S.F. ENV'T CODE §§ 1701-1709 (2007).

<sup>70</sup> See Letter from Dave Williams, President, BioBag, to Honorable Gavin Newsom, Mayor, City of San Francisco, Cal. (Mar. 5, 2007) (on file with author).

<sup>71</sup> Office of Supervisor Ross Mirkarimi, Issues Summary: Compostable Grocery Bag Legislation 1 (City and County of San Francisco 2007) (on file with author).

<sup>72</sup> Office of Supervisor Ross Mirkarimi, Issues Summary: Compostable Grocery Bag Legislation 1 (City and County of San Francisco 2007) (on file with author).

<sup>73</sup> Wyatt Buchanan, *17-cent Fee On Bags OK'd By Environmental Panel*, S.F. CHRON., Jan. 26, 2005, at B4.

<sup>74</sup> Office of Supervisor Ross Mirkarimi, Issues Summary: Compostable Grocery Bag Legislation 1 (City and County of San Francisco 2007) (on file with author).

<sup>75</sup> Katharine Mieszkowski, *Plastic Bags Are Killing Us*, SALON, Aug. 10, 2007, [http://www.salon.com/news/feature/2007/08/10/plastic\\_bags/print.html](http://www.salon.com/news/feature/2007/08/10/plastic_bags/print.html) (estimating compostable bags cost grocery stores 9-14 cents).

<sup>76</sup> Letter from Dave Williams, President, BioBag, to Honorable Gavin Newsom, Mayor, City of San Francisco, Cal. (Mar. 5, 2007) (on file with author).

<sup>77</sup> Katharine Mieszkowski, *Plastic Bags Are Killing Us*, SALON, Aug. 10, 2007, [http://www.salon.com/news/feature/2007/08/10/plastic\\_bags/print.html](http://www.salon.com/news/feature/2007/08/10/plastic_bags/print.html).

of Ireland provides the most talked about and probably most successful example.<sup>78</sup> Ireland began charging 19 cents for each single-use plastic bag taken at the checkout in 2002, reducing consumption by 95% and raising millions of dollars for environmental programs.<sup>79</sup> In 2001, Taiwan instituted a 3-cent fee and reduced single-use bag consumption by 69%.<sup>80</sup> In 2002, floods caused by plastic bags choking drainage systems led Bangladesh to ban plastic bags entirely.<sup>81</sup>

### III. REGULATION OF PLASTIC BAGS IN CALIFORNIA AND SAN FRANCISCO

#### A. CALIFORNIA'S FIRST FAILED ATTEMPT AT BAG REGULATION: ASSEMBLY BILL 586

On February 13, 2003, California State Assembly Member Paul Koretz introduced Assembly Bill (A.B.) 586, the "Litter and Marine Debris Reduction and Recycling Act."<sup>82</sup> This bill would have imposed a 2-cent fee on all non-exempt disposable plastic bags and cups provided by retailers in California, with the money collected being put into a state clean-up fund.<sup>83</sup> The expansive<sup>84</sup> fee, proposed by the Assembly Natural Resources Committee, faced fierce opposition by the plastics industry and business groups, and never made it out of committee.<sup>85</sup>

#### B. HISTORY OF SAN FRANCISCO PLASTIC-BAG REGULATION EFFORTS

On November 23, 2004, San Francisco's Commission on the

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[www.salon.com/news/feature/2007/08/10/plastic\\_bags/print.html](http://www.salon.com/news/feature/2007/08/10/plastic_bags/print.html).

<sup>78</sup> Katharine Mieszkowski, *Plastic Bags Are Killing Us*, SALON, Aug. 10, 2007, [http://www.salon.com/news/feature/2007/08/10/plastic\\_bags/print.html](http://www.salon.com/news/feature/2007/08/10/plastic_bags/print.html).

<sup>79</sup> Margie Wylie, *Bangladesh Bans Polyethylene Bags Countries Take Action to Lessen Plastic-Bag Pollution*, MOBILE REG., Oct. 24, 2004, at E1.

<sup>80</sup> Margie Wylie, *Bangladesh Bans Polyethylene Bags Countries Take Action to Lessen Plastic-Bag Pollution*, MOBILE REG., Oct. 24, 2004, at E1.

<sup>81</sup> Margie Wylie, *Bangladesh Bans Polyethylene Bags Countries Take Action to Lessen Plastic-Bag Pollution*, MOBILE REG., Oct. 24, 2004, at E1.

<sup>82</sup> A.B. 586, 2003-2004 Gen. Assem., Reg. Sess., (Cal. 2004).

<sup>83</sup> A.B. 586, 2003-2004 Gen. Assem., Reg. Sess., (Cal. 2004).

<sup>84</sup> Legislative Counsel's Digest for A.B. 586, 2003-2004 Gen. Assem., Reg. Sess., (Cal. 2004) (providing for a fee for "every retail seller who sells or provides a disposable bag or disposable cup in this state. . .").

<sup>85</sup> See Roger Renstrom, *Calif. Plastics Industry Seeks Balance*, PLASTICS NEWS, June 16, 2003, at 4.

Environment (“Commission”)<sup>86</sup> met to discuss whether to recommend a plastic-bag fee on grocery bags provided by retailers to shoppers in the city.<sup>87</sup> The discussion regarding such a potential fee was a continuation of the conversation surrounding A.B. 586.<sup>88</sup> The Commission’s proposal was based on the 2002 Ireland law instituting a 19-cent (15 Euro cent) charge for each single-use bag taken at the checkout.<sup>89</sup> Citing the need for more time to strengthen and improve the plan before urging the Board of Supervisors to adopt the fee into law, the Commission postponed its decision until January 2005.<sup>90</sup> San Francisco Mayor Gavin Newsom said that he would take the Commission’s fee proposal under review, and Supervisor-elect Ross Mirkarimi, co-founder of the California chapter of the Green Party,<sup>91</sup> announced his intention to pursue the fee proposal when he took office that January.<sup>92</sup> Supervisor Mirkarimi called the proposed bag fee a “sensible user fee” aimed at changing people’s patterns by encouraging responsibility for promoting a more sustainable environment.<sup>93</sup>

On January 25, 2005, the Commission voted unanimously to recommend that San Francisco charge a 17-cent fee for each single-use plastic or paper grocery bag used, to be levied directly upon individual

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<sup>86</sup> The San Francisco Commission on the Environment is an advisory board that makes policy suggestions to San Francisco’s elected officials. [sfenvironment.org](http://www.sfenvironment.org), [http://www.sfenvironment.org/our\\_policies/](http://www.sfenvironment.org/our_policies/) (last visited Mar. 17, 2008).

<sup>87</sup> S.F. Dep’t of the Env’t, Nov. 23, 2004 APPROVED Minutes, [http://www.ci.sf.ca.us/site/sfenvironment\\_page.asp?id=29249](http://www.ci.sf.ca.us/site/sfenvironment_page.asp?id=29249); Charlie Goodyear, *San Francisco 17-Cent Surcharge Proposal Left Hanging For a While*, S.F. CHRON., Nov. 24, 2004, at B2.

<sup>88</sup> Wyatt Buchanan, *17-cent Fee on Bags OK’d By Environment Panel*, S.F. CHRON., Jan. 26, 2005, at B.4 (noting opponents stopped the California Legislature from adopting a similar fee and discussing addressing opponents concerns including the effect on the poor); Margie Wylie, *Bangladesh Bans Polyethylene Bags Countries Take Action to Lessen Plastic-Bag Pollution*, MOBILE REG., Oct. 24, 2004 at E1.

<sup>89</sup> *Fee for Grocery Bags? San Francisco Weighs Idea*, MSNBC NEWS SERVICE, Jan. 26, 2005, available at <http://www.msnbc.msn.com/id/6870442/>; Joe Truini, *San Francisco Close to Bag Tax: San Francisco’s Proposed Landmark Environmental Program Has the Entire Nation Abuzz, but Industry Groups Want the City To Bag It*, WASTE NEWS, Jan. 31, 2005 at 1.

<sup>90</sup> S.F. Dep’t of the Env’t, Nov. 23, 2004 APPROVED Minutes, [http://www.ci.sf.ca.us/site/sfenvironment\\_page.asp?id=29249](http://www.ci.sf.ca.us/site/sfenvironment_page.asp?id=29249) (voting “4:3 to continue the item.”); S.F. Dep’t of the Env’t, Jan. 25, 2005 APPROVED Minutes [http://www.sfgov.org/site/sfenvironment\\_page.asp?id=29623](http://www.sfgov.org/site/sfenvironment_page.asp?id=29623) (“Further Resolved, that a Scope Committee be formed to insure the success and completeness of the nexus study and report back to the Commission at the next Commission meeting.”); Charlie Goodyear, *San Francisco 17-Cent Surcharge Proposal Left Hanging For a While*, S.F. CHRON., Nov. 24, 2004, at B2.

<sup>91</sup> Sfgov.org, Supervisor Ross Mirkarimi District Five, [http://www.sfgov.org/site/bdsupvrs\\_page.asp?id=29087](http://www.sfgov.org/site/bdsupvrs_page.asp?id=29087) (last visited Feb. 13, 2008).

<sup>92</sup> Suzanne Herel, *San Francisco Weighs Price of Plastic Bags*, SUN HERALD (BILOXI, MISS.), Nov. 21, 2004, at B1.

<sup>93</sup> Suzanne Herel, *San Francisco Weighs Price of Plastic Bags*, SUN HERALD (BILOXI, MISS.), Nov. 21, 2004, at B1.

shoppers.<sup>94</sup> Proceeds from the proposed fee would have been divided between the city's supermarkets to pay for environmental programs including collection of used bags and training programs to educate employees about how to use plastic bags more efficiently, and programs sponsored by San Francisco's Environment Commission.<sup>95</sup> The next step for the proposal, after recommendation, would have been introduction and adoption into law by the Board of Supervisors.<sup>96</sup>

That same week, Mayor Newsom and Supervisor Mirkarimi introduced a resolution requesting a more detailed study of single-use bag consumption in San Francisco to include the amount of money the city was spending to collect and dispose of paper and plastic bags.<sup>97</sup> The study would quantify the exact amount of San Francisco's resources spent on single-use bag-related problems, how many bags were used annually, and what amount per bag could be justified as a fee.<sup>98</sup> The study was expected to be completed in April 2005.<sup>99</sup>

#### C. THE PLASTIC-BAG INDUSTRY'S RESPONSE AND NEGATIVE PUBLIC OPINION

Immediately thereafter, a coalition of plastic-bag industry groups began to mount a campaign against the potential plastic-bag fee, which was referred to within the industry as "sack the tax."<sup>100</sup> Privately, this coalition proposed a \$700,000 public-relations budget for the "sack the tax" campaign for the remainder of 2005 (before the ordinance was officially introduced).<sup>101</sup> Proposed fundraisers included the Plastic Bags Alliance (PBA), American Plastics Council (APC), other plastic-bag industry groups, and resin suppliers.<sup>102</sup> The coalition studied the public's views on plastic bags and plastic-bag manufacturers, finding consistent consumer opposition to a fee across demographic and geographic groups,

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<sup>94</sup> Joe Truini, *San Francisco Close to Bag Tax*, WASTE NEWS Jan. 31, 2005, at 1.

<sup>95</sup> Joe Truini, *San Francisco Close to Bag Tax*, WASTE NEWS Jan. 31, 2005, at 1.

<sup>96</sup> Joe Truini, *San Francisco Close to Bag Tax*, WASTE NEWS Jan. 31, 2005, at 1.

<sup>97</sup> Lisa Leff, *Paper or Plastic? Both May Cost 17 Cents*, PHILA. INQUIRER, Jan. 27, 2007, at C2.

<sup>98</sup> Lisa Leff, *Paper or Plastic? Both May Cost 17 Cents*, PHILA. INQUIRER, Jan. 27, 2007, at C2.

<sup>99</sup> Lisa Leff, *Paper or Plastic? Both May Cost 17 Cents*, PHILA. INQUIRER, Jan. 27, 2007 at C02.

<sup>100</sup> PowerPoint Presentation, Laurie J. Hansen, Film and Bag Federation, California – Sack the Tax, Apr. 4, 2005, slide 1 (on file with author).

<sup>101</sup> PowerPoint Presentation, Laurie J. Hansen, Film and Bag Federation, California – Sack the Tax, Apr. 4, 2005, slide 14 (on file with author).

<sup>102</sup> PowerPoint Presentation, Laurie J. Hansen, Film and Bag Federation, California – Sack the Tax, Apr. 4, 2005, slide 14 (on file with author).

and a neutral public view of plastic-bag manufacturers.<sup>103</sup> Notably, the coalition found that “[v]oters think responsibility for increasing plastic-bag recycling lies with the individual – not the plastic-bag manufacturers, the supermarket, not the city government.”<sup>104</sup>

The proposed public-relations campaign aimed at promoting plastic-bag use and slanting the perception of the public in favor of plastic-bag manufacturers.<sup>105</sup> The campaign sought to create an image of the manufacturers as sensitive to the environment and as proponents of plastic-bag recycling programs, rather than as culpable “scapegoats.”<sup>106</sup> The campaign included setting up a website for the general public devoted to promoting plastic-bag use<sup>107</sup> and recycling,<sup>108</sup> and a second website aimed more specifically at defeating the plastic-bag fee in San Francisco.<sup>109</sup>

By May 2005, the San Francisco Department of the Environment (“DOE”)’s study was complete, though not yet publicly available.<sup>110</sup> Information had leaked that the number of single-use plastic bags consumed annually in San Francisco was estimated at closer to 150 million, up from an initial estimate of 50 million.<sup>111</sup> Public opinion of the proposed 17-cent tax was not favorable and there was discussion of a lesser tax,<sup>112</sup> in part because the cost to dispose of bags would be divided among more bags than previously thought.<sup>113</sup> Negative public opinion

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<sup>103</sup> Larry Kamer, Manning Selvage & Lee, San Francisco Bag Tax Proposal Campaign Update, slide 4, Apr. 3, 2005 (on file with author).

<sup>104</sup> Larry Kamer, Manning Selvage & Lee, San Francisco Bag Tax Proposal Campaign Update, slide 2-5, Apr. 3, 2005 (on file with author).

<sup>105</sup> Larry Kamer, Manning Selvage & Lee, San Francisco Bag Tax Proposal Campaign Update, slide 3-9, Apr. 3, 2005 (on file with author).

<sup>106</sup> Larry Kamer, Manning Selvage & Lee, San Francisco Bag Tax Proposal Campaign Update, slide 3-9, Apr. 3, 2005 (on file with author).

<sup>107</sup> Larry Kamer, Manning Selvage & Lee, San Francisco Bag Tax Proposal Campaign Update, slide 10-11, Apr. 3, 2005 (on file with author).

<sup>108</sup> plasticbagrecycling.org, <http://www.plasticbagrecycling.org> (last visited Mar. 17, 2008).

<sup>109</sup> <http://www.bagtaxalternatives.com> is a site that is no longer available and cannot be found using the cache function of the major search engines.

<sup>110</sup> Suzanne Herel, *San Francisco Grocery Store Bag Fee Lacks Public Support Supervisors Ponder Lower Charge, Other Ways to Reduce Use*, S.F. CHRON., May 13, 2005, at B1.

<sup>111</sup> Suzanne Herel, *San Francisco Grocery Store Bag Fee Lacks Public Support Supervisors Ponder Lower Charge, Other Ways to Reduce Use*, S.F. CHRON., May 13, 2005, at B1.

<sup>112</sup> AP, *City's Proposal To Charge Grocery Stores Fee for Bags Receives Negative Reaction*, SAN JOSE MERCURY NEWS, May 14, 2005, at 3B.

<sup>113</sup> Suzanne Herel, *San Francisco Grocery Store Bag Fee Lacks Public Support Supervisors Ponder Lower Charge, Other Ways to Reduce Use*, S.F. CHRON., May 13, 2005, at B1; Office of Supervisor Ross Mirkarimi, Fact Sheet: Costs Associated With Paper and Plastic Bags (County of San Francisco 2007) (on file with author) (information from Mike Crossetti, San Francisco Recycling & Disposal).

was based in part on the potential economic impact on low- and fixed-income residents, as well as a surprising number of dog owners concerned with not having easy access to free plastic bags to pick up after their companions.<sup>114</sup>

#### D. THE LETTER OF AGREEMENT

On November 2, 2005, with the DOE's plastic-bag study yet to be released and before a bag fee ordinance could be introduced, Mayor Newsom executed a Letter of Agreement ("the Agreement") with the grocers' coalition, suspending the issue pending a voluntary plan to reduce plastic-bag use by 10 million bags in one year,<sup>115</sup> down from the then-current usage of between 50 and 150 million bags per year.<sup>116</sup> The Agreement included provisions requiring participating grocery stores to report 2005 and 2006 bag use statistics to third parties to determine baseline bag usage and monitor progress.<sup>117</sup> The voluntary reduction was to be achieved through methods that may have included "bagger retraining, selling reusable bags, and internal employee education," as well as creating a recycling convenience zone in grocery stores similar to those developed for beverage containers in A.B. 2020.<sup>118</sup> The Agreement was "made possible by local stores' willingness to pursue innovative measures to reduce consumption and disposal of checkout bags."<sup>119</sup> The Agreement also required that San Francisco attempt to establish a

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<sup>114</sup> Suzanne Herel, *San Francisco Grocery Store Bag Fee Lacks Public Support Supervisors Ponder Lower Charge, Other Ways to Reduce Use*, S.F. CHRON., May 13, 2005, at B1.

<sup>115</sup> Letter of Agreement between the Mayor of the City and County of San Francisco, as represented by the San Francisco Department of the Environment (DOE), and San Francisco supermarkets operated by Albertsons, Andronicos, Bell Markets, CalMart Supermarket, Cala Foods, Foods Co, Mollie Stone's, and Safeway (effective Nov. 2, 2005) (on file with author).

<sup>116</sup> Suzanne Herel, *San Francisco Grocery Store Bag Fee Lacks Public Support Supervisors Ponder Lower Charge, Other Ways to Reduce Use*, S.F. CHRON., May 13, 2005, at B1.

<sup>117</sup> Letter of Agreement between the Mayor of the City and County of San Francisco, as represented by the San Francisco Department of the Environment (DOE), and San Francisco supermarkets operated by Albertsons, Andronicos, Bell Markets, CalMart Supermarket, Cala Foods, Foods Co, Mollie Stone's, and Safeway (effective Nov. 2, 2005) (on file with author).

<sup>118</sup> Letter of Agreement between the Mayor of the City and County of San Francisco, as represented by the San Francisco Department of the Environment (DOE), and San Francisco supermarkets operated by Albertsons, Andronicos, Bell Markets, CalMart Supermarket, Cala Foods, Foods Co, Mollie Stone's, and Safeway (effective Nov. 2, 2005) (on file with author); A.B. 2020, 1985-1986 Gen. Assem., Reg. Sess., (Cal. 1986) (A.B., also known as "The Bottle Bill" is a state recycling law that requires in-store recycling programs for beverage containers").

<sup>119</sup> Letter of Agreement between the Mayor of the City and County of San Francisco, as represented by the San Francisco Department of the Environment (DOE), and San Francisco supermarkets operated by Albertsons, Andronicos, Bell Markets, CalMart Supermarket, Cala Foods, Foods Co, Mollie Stone's, and Safeway (effective Nov. 2, 2005) (on file with author).

curbside recycling program for plastic bags and, with the help of the local stores party to the Agreement, initiate a broad civic education campaign encouraging management and recycling of plastic bags by local residents.<sup>120</sup> Most significantly, the Agreement included a provision that the Mayor and the DOE would not pursue a fee on checkout bags during the term of the Agreement and “while parties to this Agreement continue to demonstrate meaningful progress toward increased reduction in consumption of checkout bags and recycling of these bags.”<sup>121</sup>

The grocers did not materially honor the agreement to submit bag-use data, and no grocery store had submitted bag-usage data for 2005 or 2006 by the initial December 2006 deadline.<sup>122</sup> On January 30, 2007, after extending the deadline for submission of data three times, Safeway was the lone supermarket chain that made any attempt to comply with the city’s reporting requirements.<sup>123</sup> However, Safeway’s numbers could not be released by the third party charged with collecting the data, as dissemination of data collected from a single party would have breached the confidentiality provision of the Agreement.<sup>124</sup> Without verifiable bag-usage data, any progress toward the Agreement’s goal of reducing plastic-bag use by 10 million bags could not be quantified.<sup>125</sup> The Agreement had served as merely a delaying tactic for the grocers.

#### E. STATE PREEMPTION: ASSEMBLY BILL 2449<sup>126</sup>

In the interim, Governor Arnold Schwarzenegger had signed California State Assembly Bill (A.B.) 2449, the “Plastic Bag and Litter

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<sup>120</sup> Letter of Agreement between the Mayor of the City and County of San Francisco, as represented by the San Francisco Department of the Environment (DOE), and San Francisco supermarkets operated by Albertsons, Andronicos, Bell Markets, CalMart Supermarket, Cala Foods, Foods Co, Mollie Stone’s, and Safeway (effective Nov. 2, 2005) (on file with author).

<sup>121</sup> Letter of Agreement between the Mayor of the City and County of San Francisco, as represented by the San Francisco Department of the Environment (DOE), and San Francisco supermarkets operated by Albertsons, Andronicos, Bell Markets, CalMart Supermarket, Cala Foods, Foods Co, Mollie Stone’s, and Safeway (effective Nov. 2, 2005) (on file with author).

<sup>122</sup> Letter from Jared Blumenfeld, Director, Department of the Environment, City and County of San Francisco to Tim James, California Grocer’s Association (Jan. 3, 2007) (on file with author).

<sup>123</sup> Letter from Jared Blumenfeld, Director, Department of the Environment, City and County of San Francisco to Honorable Mayor Gavin Newsom, Mayor of San Francisco (Jan 30, 2007) (on file with author).

<sup>124</sup> Letter from Jared Blumenfeld, Director, Department of the Environment, City and County of San Francisco to Tim James, California Grocer’s Association (Jan. 8, 2007) (on file with author).

<sup>125</sup> Letter from Jared Blumenfeld, Director, Department of the Environment, City and County of San Francisco to Tim James, California Grocer’s Association (Jan. 3, 2007) (on file with author).

<sup>126</sup> A.B. 2449, 2005-2006 Gen. Assem., Reg. Sess. (Cal. 2006). Although A.B. 2449 has since been codified into California state law, *see* CAL. PUB. RES. CODE §§ 42250-42257 (Westlaw 2008), it will be referred to by its bill number throughout this comment.

Reduction Act,” into law on September 30, 2006, encouraging the recycling of plastic bags.<sup>127</sup> The focus of A.B. 2449 is to mandate that California grocery stores create an in-store recycling program for plastic grocery bags (which had been voluntary), implement a public education program regarding plastic-bag recycling, and provide reuseable bags to customers at cost.<sup>128</sup> The law also requires that plastic-bag manufacturers develop educational materials to encourage reduction, reuse, and recycling of plastic bags, and make those materials available to participating stores affected by the statute.<sup>129</sup> As part of a legislative compromise to gain adoption of the recycling provisions, the bill had been amended to include language preempting local agencies in California from adopting fees and additional recycling requirements on retailers affected by A.B. 2449.<sup>130</sup>

The purported reasoning behind this provision of A.B. 2449 was that requiring a store to collect, transport, or recycle plastic bags, and to audit or report such bags, as well imposing a plastic-bag fee on stores, were “matters of statewide interest and concern.”<sup>131</sup> Due to this statewide concern, A.B. 2449 provides that cities and other public agencies “shall not adopt, implement, or enforce an ordinance, regulation, or rule” to require stores in compliance with A.B. 2449 to go beyond the state’s plastic-bag recycling program, require additional auditing, or impose a plastic-bag carryout fee.<sup>132</sup> The San Francisco Board of Supervisors passed a resolution urging the San Francisco DOE to write a letter to the bill’s sponsor expressing the City’s support for A.B. 2449, but opposing any pre-emptive language.<sup>133</sup>

Other opponents of A.B. 2449 went further, accusing it of defeating past steps toward reduction and of being “crafted to allow plastic-bag manufacturers to continue to sell their polluting product without restraint

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<sup>127</sup> A.B. 2449, 2005-2006 Gen. Assem., Reg. Sess. (Cal. 2006), 2006 Cal. Legis. Serv. Ch. 845 (Westlaw) (operative July 1, 2007).

<sup>128</sup> Fact Sheet, AB 2449 (Levine) Plastic Bag Litter and Waste Reduction, Californians Against Waste, *available at* [http://www.cawrecycles.org/issues/current\\_legislation/ab2449\\_06](http://www.cawrecycles.org/issues/current_legislation/ab2449_06).

<sup>129</sup> A.B. 2449 § 2, 2005-2006 Gen. Assem., Reg. Sess. (Cal. 2006) (enacting CAL. PUB. RES. CODE § 42253 (Westlaw 2008)).

<sup>130</sup> Fact Sheet, AB 2449 (Levine) Plastic Bag Litter and Waste Reduction, Californians Against Waste, *available at* [http://www.cawrecycles.org/issues/current\\_legislation/ab2449\\_06](http://www.cawrecycles.org/issues/current_legislation/ab2449_06) (last visited Oct. 21, 2007).

<sup>131</sup> A.B. 2449 § 2, 2005-2006 Gen. Assem., Reg. Sess. (Cal. 2006).

<sup>132</sup> A.B. 2449 § 2, 2005-2006 Gen. Assem., Reg. Sess. (Cal. 2006).

<sup>133</sup> S.F. Board of Supervisors, Resolution urging San Francisco’s elected officials in Sacramento to support AB 2449, mandating statewide recycling of checkout bags at grocery stores, and oppose language that would pre-empt the right of local jurisdictions to institute fees or other requirements to promote waste reduction, Resolution No. 0460-06 (July 25, 2006) (on file with author).

or any form of responsibility for the environmental consequences.”<sup>134</sup> Due to A.B. 2440’s provision prohibiting local fees, and because the remainder of its language was thought to have little effect on curtailing the amount of plastic going into oceans or landfills, a small contingent of opponents encouraged Governor Schwarzenegger to veto A.B. 2449.<sup>135</sup> Despite this symbolic resistance, A.B. 2449 passed, and locally imposed plastic-bag fees became illegal.<sup>136</sup>

Thus, just months after being released from the fruitless grocers’ Agreement that had disallowed any action in pursuit of a fee on checkout bags, and while awaiting the report from the DOE to determine the proper amount for the fee, San Francisco was precluded from pursuing a user fee indefinitely.<sup>137</sup> With the plastic-bag fee ordinance no longer an option, Supervisor Mirkarimi and others in support of reducing plastic-bag use within San Francisco had to go back to the drawing board and consider alternatives.

#### F. SAN FRANCISCO CIRCUMVENTS STATE LAW: THE PLASTIC-BAG REDUCTION ORDINANCE

On January 23, 2007, Supervisor Mirkarimi introduced the Plastic Bag Reduction Ordinance (“Ordinance”).<sup>138</sup> Since a fee-based ordinance was no longer an option, the newly proposed Ordinance called for a total ban on all traditional plastic carryout bags in San Francisco, making mandatory the use of compostable plastic, recyclable paper and/or reuseable checkout bags by large grocery stores located in the City and County of San Francisco and providing civil penalties for violations.<sup>139</sup> After a well-attended public hearing and much public comment, the Ordinance was approved 10-1 by the San Francisco Board of Supervisors and signed into law by Mayor Newsom on April 20, 2007.<sup>140</sup>

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<sup>134</sup> Bring Your Own [Blog], *AB 2449 hijacked, call Arnold today!*, available at <http://byotalk.blogspot.com/2006/09/ab-2449-hijacked-call-arnold-today.html> (last visited Oct. 21, 2007).

<sup>135</sup> Bring Your Own [Blog], *AB 2449 hijacked, call Arnold today!*, available at <http://byotalk.blogspot.com/2006/09/ab-2449-hijacked-call-arnold-today.html> (last visited Oct. 21, 2007).

<sup>136</sup> A.B. 2449, 2005-2006 Gen. Assem., Reg. Sess. (Cal. 2006), 2006 Cal. Legis. Serv. Ch. 845 (Westlaw) (operative July 1, 2007).

<sup>137</sup> See A.B. 2449, 2005-2006 Gen. Assem., Reg. Sess. (Cal. 2006).

<sup>138</sup> S.F. ENV’T CODE §§ 1701-1709 (2007), Mike Verespej, *San Fran’s Plans Skirt State*, PLASTICS NEWS, Jan. 29, 2007, at 1.

<sup>139</sup> S.F. ENV’T CODE § 1703 (2007).

<sup>140</sup> S.F. ENV’T CODE § 1706 (2007); City and County of San Francisco Board of Supervisors

The Ordinance applies to grocery stores within San Francisco with gross annual sales of two million dollars or more.<sup>141</sup> The Ordinance was scheduled to take effect as to applicable supermarkets on November 20, 2007, six months from the effective date<sup>142</sup> and expand to include retail pharmacy chains one year from the effective date.<sup>143</sup>

Initial industry objections related to the merits of compostable plastic bags (including the inability of compostable bags to biodegrade in cold waters), the harms caused by increased use of alternatives to plastic bags, and the difficulty in distinguishing between compostable and traditional plastic bags, specifically the problem of contaminated plastic-bag recycling program streams.<sup>144</sup> San Francisco's Ordinance, however, deals directly with these foreseeable objections.<sup>145</sup>

The Ordinance relies upon the American Society for Testing and Materials (ASTM) International Standard D6002 for compostable plastic.<sup>146</sup> This standard is periodically amended, thus releasing the Ordinance from the need for constant revision to comply with evolving standards.<sup>147</sup> Recyclable paper bags are specifically defined by the Ordinance regarding the minimum percentage of post-consumer recycled content, the materials used and thickness of reuseable bags.<sup>148</sup> Each bag type is also required to be labeled in a "highly visible manner."<sup>149</sup> These distinctions are particularly important because the potential contamination of the plastic-bag recycling stream, caused by the difficulties associated with identifying bag type, is a major argument put forth by opponents of the Ordinance.<sup>150</sup>

San Francisco chose a gradual implementation of the Ordinance,

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Regular Meeting, Mar. 27, 2007, *available at* [http://www.sfgov.org/site/bdsupvrs\\_page.asp?id=58075](http://www.sfgov.org/site/bdsupvrs_page.asp?id=58075).

<sup>141</sup> S.F. ENV'T CODE § 1702(h)(1) (2007) (stores added to the official list based on information available in the annual update of the State of California Progressive Grocer Marketing Guidebook).

<sup>142</sup> S.F. ENV'T CODE § 1706 (2007).

<sup>143</sup> S.F. ENV'T CODE § 1702(h)(2) (2007) ("with at least five locations under the same ownership within the geographical limits of San Francisco").

<sup>144</sup> Mike Verespej, *San Fran's Bag Plans Skirt State*, PLASTICS NEWS, Jan. 29, 2007, at 1, *available at* 2007 WLNR 1948840.

<sup>145</sup> See S.F. ENV'T CODE §§ 1701-1709 (2007).

<sup>146</sup> S.F. ENV'T CODE § 1702 (2007); see American Society for Testing & Materials (ASTM) International, Standards Worldwide, <http://www.astm.org> (last visited Apr. 1, 2008).

<sup>147</sup> S.F. ENV'T CODE § 1702(a) (2007).

<sup>148</sup> S.F. ENV'T CODE §§ 1702(j)-(k) (2007).

<sup>149</sup> S.F. ENV'T CODE § 1702(f) (2007).

<sup>150</sup> Mike Verespej, *San Fran's Bag Plans Skirt State*, PLASTICS NEWS, Jan. 29, 2007, at 1, *available at* 2007 WLNR 1948840 (noting "the difficulty in distinguishing between compostable plastic bags and conventional plastic bags.").

making it apply only to the fifty-four largest grocery stores<sup>151</sup> in San Francisco at six months after enactment and to large pharmacies one year after enactment.<sup>152</sup> This incremental plan will affect a large majority of checkout bags in San Francisco in the initial phase and ensure that the largest generators (those arguably most capable of absorbing the increased cost) are the initial participants.<sup>153</sup> If the major grocery store and pharmacy ban goes smoothly, the Ordinance could be amended to gradually include more types of retail stores,<sup>154</sup> and the city could decrease the gross annual sales requirement so that more stores become subject to the Ordinance.<sup>155</sup>

### 1. *The Media Onslaught and Cities that Followed*

On March 27, 2007, shortly before the passage of the Plastic Bag Reduction Ordinance by the San Francisco Board of Supervisors, Supervisor Mirkarimi held a press conference on the steps of City Hall. At the conference, Supervisor Mirkarimi gave away canvas bags that read “SF Environment: Our Home. Our City. Our Planet.”<sup>156</sup> In his office before the conference, Supervisor Mirkarimi demonstrated the strength of compostable plastic bags by holding a biodegradable bag, full of 55 pounds of rocks, for reporters.<sup>157</sup> The Ordinance, and images of this press conference, drew national media attention.

“Hopefully, other cities will follow suit,” Supervisor Mirkarimi said at the press conference.<sup>158</sup> And other cities did follow, as *The Economist* magazine described:

Los Angeles, Santa Monica, Oakland and, naturally, Berkeley are exploring similar moves. There is some talk of restrictions or a tax in New York. The plastic-bag lobby fought hard to stop a ban in San Francisco precisely because it feared that defeat there would start a

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<sup>151</sup> See Office of Supervisor Ross Mirkarimi, Issues Summary, Compostable Grocery Bag Legislation, City and County of San Francisco, 2007 at 2 (on file with author).

<sup>152</sup> S.F. ENV'T CODE §§ 1702(I), 1706 (2007).

<sup>153</sup> See Office of Supervisor Ross Mirkarimi, Issues Summary: Compostable Grocery Bag Legislation 2 (City and County of San Francisco 2007) (on file with author).

<sup>154</sup> See Office of Supervisor Ross Mirkarimi, Issues Summary: Compostable Grocery Bag Legislation 2 (City and County of San Francisco 2007) (on file with author).

<sup>155</sup> Joe Truini, *San Francisco Close to Bag Tax*, WASTE NEWS, Jan. 31, 2005, at 1.

<sup>156</sup> See John M. Glionna, *Paper or Plastic? San Francisco Decides*, L.A. TIMES, Mar. 28., 2007, at 1, available at 2007 WLNR 5824156.

<sup>157</sup> John M. Glionna, *Paper or Plastic? San Francisco Decides*, L.A. TIMES, Mar. 28., 2007, at 1, available at 2007 WLNR 5824156.

<sup>158</sup> Press Wire Services, *Plastic Gets Sacked in San Fran; Where Next?*, THE GRAND RAPIDS PRESS, Mar. 28, 2007, at A1.

nationwide trend.<sup>159</sup>

That was just the beginning.

## 2. *The Legislative Experiment Continues in Other Cities*

Other cities have not fared as well as San Francisco in avoiding litigation. In Oakland, the City Council adopted a very similar ordinance.<sup>160</sup> However, the Coalition to Support Plastic Bag Recycling (a conveniently named plastics industry group) filed a Verified Petition for Writ of Mandate<sup>161</sup> under the California Environmental Quality Act ("CEQA") requiring that the ordinance be set aside and that the city conduct an environmental review under CEQA.<sup>162</sup> The petition alleges that Oakland's ordinance conflicts with A.B. 2449<sup>163</sup> because compostable bags could contaminate the plastic-bag recycling process, and it argues that the ordinance requires an Environmental Impact Report ("EIR") because production of alternatives to traditional plastic bags could increase pollution.<sup>164</sup> At the time of this writing, the petition is pending and succeeded in postponing the implementation of Oakland's ordinance.<sup>165</sup>

One town that was quick to follow the San Francisco ban, Fairfax, California, folded in the face of a similar suit against that city's ordinance.<sup>166</sup> The suit was threatened by the Coalition to Support Plastic

<sup>159</sup> *The War on Shopping Bags: Plastics of Evil*, ECONOMIST 85, Mar. 31, 2007.

<sup>160</sup> Oakland Ordinance 12818, §§ 2-7, 2007, codified as OAKLAND MUN. CODE § 8.11.010-060, *available at* [http://municipalcodes.lexisnexis.com/codes/oakland/\\_DATA/TITLE08/Chapter\\_8\\_11\\_NON\\_COMP\\_OSTABLE\\_P.html](http://municipalcodes.lexisnexis.com/codes/oakland/_DATA/TITLE08/Chapter_8_11_NON_COMP_OSTABLE_P.html)

<sup>161</sup> Verified Petition for Writ of Mandate Under the Cal. Env'tl. Quality Act ("CEQA"), Coalition to Support Plastic Bag Recycling v. City of Oakland, No. RG07339097 (Super. Ct. Alameda County Aug. 3, 2007).

<sup>162</sup> Petitioner's Opening Brief in Support of Petition for Writ of Mandate Under the California Environmental Quality Act at 2, Coalition to Support Plastic Bag Recycling v. City of Oakland, No. RG07339097 (Super. Ct. Alameda County Nov. 21, 2007).

<sup>163</sup> A.B. 2449, 2005-2006 Gen. Assem., Reg. Sess. (Cal. 2006).

<sup>164</sup> Verified Petition for Writ of Mandate Under the Cal. Env'tl. Quality Act ("CEQA"), Coalition to Support Plastic Bag Recycling v. City of Oakland, No. RG07339097 (Super. Ct. Alameda County Aug. 3, 2007).

<sup>165</sup> See Oakland Ordinance 12818, §§ 2-7, 2007, codified as OAKLAND MUN. CODE § 8.11.010-060, *available at* [http://municipalcodes.lexisnexis.com/codes/oakland/\\_DATA/TITLE08/Chapter\\_8\\_11\\_NON\\_COMP\\_OSTABLE\\_P.html](http://municipalcodes.lexisnexis.com/codes/oakland/_DATA/TITLE08/Chapter_8_11_NON_COMP_OSTABLE_P.html); see also Christopher Heredia, *Lawsuit delays Oakland's plastic bag ban*, S.F. CHRON., Jan. 29, 2008, *available at* <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/01/29/BAIDUNPN4.DTL>.

<sup>166</sup> Rob Rogers, *Fairfax Folds On Plastic Bag Ban*, MARIN INDEP. J., Oct. 30, 2007, *available at* [http://www.marinij.com/ci\\_7318889?source=most\\_viewed](http://www.marinij.com/ci_7318889?source=most_viewed).

Bag Recycling, the same plaintiff in Oakland, and was also premised upon using CEQA to require the city to complete an EIR (at an estimated cost of \$100,000).<sup>167</sup> Councilmember Lew Tremaine, who sponsored the Fairfax ban, called the suit an abuse of the CEQA process and has opted to make the town's ban voluntary.<sup>168</sup>

Philadelphia was also considering an ordinance similar to San Francisco's, and the plastics industry expressed a sudden desire to work with Philadelphia on developing an in-store plastic-bag recycling program.<sup>169</sup> Philadelphia City Councilmember Frank DiCicco, sponsor of the bag-ban bill, said that he may consider the industry's proposal if he cannot gain enough support for his outright ban.<sup>170</sup>

Legislation under consideration by the New York City Council, similar to A.B. 2449 and what the grocers' Agreement in San Francisco was intended to accomplish, would require stores within the city occupying at least 5,000 square feet to establish an in-store plastic-bag recycling program.<sup>171</sup> The proposal would also include a provision requiring data collection and is thought by members of the Council to potentially have a more lasting impact than an outright ban.<sup>172</sup> The legislation would not penalize consumers but would require expenditure by the grocery industry.<sup>173</sup> Supermarket owners found the legislation

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<sup>167</sup> Press Release, PLASTICS NEWS, *An Update on Proposed Plastic Bans*, Nov. 1, 2007, available at [http://www.flexpack.org/INDUST/PRESS\\_RELEASES/2007/112007/Update\\_on\\_proposed\\_plastic\\_bag\\_bans.pdf](http://www.flexpack.org/INDUST/PRESS_RELEASES/2007/112007/Update_on_proposed_plastic_bag_bans.pdf).

<sup>168</sup> Press Release, PLASTICS NEWS, *An Update on Proposed Plastic Bans*, Nov. 1, 2007, available at [http://www.flexpack.org/INDUST/PRESS\\_RELEASES/2007/112007/Update\\_on\\_proposed\\_plastic\\_bag\\_bans.pdf](http://www.flexpack.org/INDUST/PRESS_RELEASES/2007/112007/Update_on_proposed_plastic_bag_bans.pdf) ("It would have cost a lot of dollars to defend it, with questionable results. It is an abuse of the CEQA process. I hope Oakland slays this dragon in court,' or it will be a tactic the industry continues to use [said Tremaine].").

<sup>169</sup> Mark McDonald, *Bill to Ban Plastic Bags Could Aid Recycling*, PHILADELPHIA DAILY NEWS, Oct. 25, 2007, available at [http://www.philly.com/dailynews/local/20071025\\_Bill\\_to\\_ban\\_plastic\\_bags\\_could\\_aid\\_recycling.html](http://www.philly.com/dailynews/local/20071025_Bill_to_ban_plastic_bags_could_aid_recycling.html).

<sup>170</sup> Mark McDonald, *Bill to Ban Plastic Bags Could Aid Recycling*, PHILADELPHIA DAILY NEWS, Oct. 25, 2007, available at [http://www.philly.com/dailynews/local/20071025\\_Bill\\_to\\_ban\\_plastic\\_bags\\_could\\_aid\\_recycling.html](http://www.philly.com/dailynews/local/20071025_Bill_to_ban_plastic_bags_could_aid_recycling.html).

<sup>171</sup> The Associated Press, *Plastic Bag Law Blowing In the Wind?*, NEWSDAY (USA) at A15, available at 2007 WLNR 21337333; Frankie Edozien, *Pols Want Stores to Bag Plastic*, N.Y. POST, Oct. 29, 2007 at 9, available at 2007 WLNR 21299134.

<sup>172</sup> Frankie Edozien, *Pols Want Stores to Bag Plastic*, N.Y. POST, Oct. 29, 2007 at 9, available at 2007 WLNR 21299134.

<sup>173</sup> Associated Press, *Plastic Bag Law Blowing In the Wind?*, NEWSDAY (USA) at A15, available at 2007 WLNR 21337333 ("We give out a million bags a week," [a supermarket owner] said, "and it would be a nightmare if you tried to take a million bags back.").

misguided, placing the responsibility on supermarkets for collection of the material that they distribute, and suggested that the city take responsibility for the daunting task of plastic-bag disposal.<sup>174</sup>

In England, plastic bags are following a parallel route to extinction. In March 2007, the small Devon town of Modbury became the first European city to ban plastic bags in its retail establishments, with more than fifty other European cities quickly following suit.<sup>175</sup> Modbury's road to a ban began when a local camerawoman, Rebecca Hosking, made a DVD documenting her trip to Hawaii to film a dying flock of albatrosses that mistakenly feed on floating plastic bags.<sup>176</sup> Hosking held a screening of her documentary for local retailers, after which they voted unanimously to ban plastic bags in favor of cotton bags and cheaper biodegradable bags made of cornstarch.<sup>177</sup> "[Y]ou don't have to wait for the Government to do it for you," she said.<sup>178</sup> "In fact, I think we all know that if you do wait for the Government the chances are little will be done."<sup>179</sup> The ban may soon spread to London, where a similar proposal is set to take effect in 2009.<sup>180</sup>

#### IV. BEYOND SAN FRANCISCO'S PLASTIC-BAG ORDINANCE

##### A. WHICH OPTION SHOULD OTHER CITIES PURSUE? THE MERITS OF FEES V. BANS

Charging a fee for plastic bags taken at the checkout was the first

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<sup>174</sup> Associated Press, *Plastic Bag Law Blowing In the Wind?*, NEWSDAY (USA) at A15, available at 2007 WLNR 21337333 ("We give out a million bags a week," [a supermarket owner] said, "and it would be a nightmare if you tried to take a million bags back.").

<sup>175</sup> *I Don't Need a Bag, Thanks*, S. WALES EVENING POST, Oct. 27, 2007, at 15.

<sup>176</sup> Rebecca Hosking, *Bag Lady: How a Farmer's Daughter From Modbury Tried to Save Some Dying Albatrosses - and Ended Up Starting a Worldwide Crusade That Will Change the Way We All Go Shopping*, MAIL ON SUNDAY (UK), Nov. 18, 2007, available at 2007 WLNR 22853146. ("[T]here is so much colourful plastic floating in the water that they mistakenly pick this up instead. They fly back and feed their chicks with it. It fills up the chicks' stomachs so they die from either dehydration or starvation.").

<sup>177</sup> Rebecca Hosking, *Bag Lady: How a Farmer's Daughter From Modbury Tried to Save Some Dying Albatrosses - and Ended Up Starting a Worldwide Crusade That Will Change the Way We All Go Shopping*, MAIL ON SUNDAY (UK), Nov. 18, 2007, available at 2007 WLNR 22853146.

<sup>178</sup> Rebecca Hosking, *Bag Lady: How a Farmer's Daughter From Modbury Tried to Save Some Dying Albatrosses - and Ended Up Starting a Worldwide Crusade That Will Change the Way We All Go Shopping*, MAIL ON SUNDAY (UK), Nov. 18, 2007, available at 2007 WLNR 22853146.

<sup>179</sup> Rebecca Hosking, *Bag Lady: How a Farmer's Daughter From Modbury Tried to Save Some Dying Albatrosses - and Ended Up Starting a Worldwide Crusade That Will Change the Way We All Go Shopping*, MAIL ON SUNDAY (UK), Nov. 18, 2007, available at 2007 WLNR 22853146.

<sup>180</sup> *I Don't Need a Bag, Thanks*, S. WALES EVENING POST, Oct. 27, 2007, at 15.

successful attempt at significantly reducing plastic-bag consumption.<sup>181</sup> Fees arguably have a more direct effect on changing personal habits because of the immediate association between taking a single-use bag and having a fee imposed (particularly if the fee is substantial). Automatically taking a single-use bag with each small purchase might cease to become second nature if each bag came with a price tag. Additionally, fees generate revenue for local governments that could be used to support recycling programs and environmental education.<sup>182</sup> However, fees are more vulnerable to attack by public-relations firms working for the plastics industry (as well as sincere individual concern) due to a fee's potential disproportionate effect on low-income residents.<sup>183</sup> Most importantly, in California at least, local imposition of fees for single-use plastic bags is preempted by A.B. 2449.<sup>184</sup> Perhaps if public support of plastic-bag regulation continues to gain momentum and other states experiment with bag fees, an amendment to A.B. 2449 could allow for the fee option to once again be available to California's local legislators.

Banning plastic bags—while allowing for compostable plastic bags—avoids the disproportionate-impact argument involved with a fee, but a ban may do little to reduce overall consumption absent a successful public awareness campaign. Without properly educating the public as to the importance of curbing the needless waste associated with single-use bags, a ban on traditional plastic bags might do little to curb consumption and serve only to alter the type of plastic polymer flowing to landfills. The impact of imposing such a ban on a large city is speculative at this point, though, because San Francisco is the first large city to enact such an ordinance.

Ideally, these public awareness campaigns will succeed.

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<sup>181</sup> See, e.g., Katharine Mieszkowski, *Plastic Bags Are Killing Us*, SALON, Aug. 10, 2007, [http://www.salon.com/news/feature/2007/08/10/plastic\\_bags/print.html](http://www.salon.com/news/feature/2007/08/10/plastic_bags/print.html) ("In Ireland, a now 22-cent tax on plastic bags has slashed their use by more than 90 percent since 2002.").

<sup>182</sup> See, e.g., *Charging for Plastic Bags: China, Not San Francisco, Has the Right Idea*, L.A. TIMES, Jan. 11, 2008 ("Charging for plastic bags properly taxes those who use the bags, has proved to be highly effective and creates a new revenue stream."); see Katharine Mieszkowski, *Plastic Bags Are Killing Us*, SALON, Aug. 10, 2007, [http://www.salon.com/news/feature/2007/08/10/plastic\\_bags/print.html](http://www.salon.com/news/feature/2007/08/10/plastic_bags/print.html) (discussing the 2002 bag tax in the Republic of Ireland).

<sup>183</sup> See Suzanne Herel, *San Francisco Grocery Store Bag Fee Lacks Public Support*, *Supervisors Ponder Lower Charge, Other Ways to Reduce Use*, S.F. CHRON., May 13, 2005, at B1 (discussing SF Supervisor Mirkarimi's decision to forgo pushing a 17-cent-per-bag fee in part due to strong industry lobbying that pushed the disproportionate impact on low-income communities argument).

<sup>184</sup> A.B. 2449, § 2, 2005-2006 Gen. Assem., Reg. Sess. (Cal. 2006) (enacting CAL. PUB. RES. CODE § 42254(b) (Westlaw 2008)).

Additionally, perhaps the higher cost of production of compostable plastic bags, in addition to grocers' resentment toward imposition of a ban on traditional plastic bags, will cause some retailers to decide against offering compostable plastic bags to customers.<sup>185</sup> Limited availability of compostable plastic bags could bring the real focus of the plastic-bag ban—to encourage people to bring their own reuseable bags to the store—back into focus. As an example of the sharpening focus on reusable bags, there has been a pronounced growth in companies manufacturing reusable bags, including San Francisco-based ChicoBag and My Own Bag.<sup>186</sup>

Alternatively, for stores that choose to provide compostable plastic bags to customers, the difference in price between traditional and compostable plastic bags may induce grocers to train their baggers to use bags efficiently.

#### B. POSSIBLE NEXT STEPS BEYOND A FEE OR BAN: REQUIRING A BAG-CREDIT

Another possible option, outside of the scope of A.B. 2449 preemption, could be a local mandate that grocery stores give customers "bag credits" for bringing their own grocery bags.<sup>187</sup> In fact, a component of A.B. 2449 requires that grocery store operators make reusable bags available to customers within the store.<sup>188</sup> Adding the requirement that the grocery store also provide a credit for each use would provide shoppers with a more tangible reason for bringing their own reusable bag, and it could work to change consumer habits. Additionally, this program would be of little cost to retailers, because retailers could provide a credit for an amount that is little more than they spend providing a single-use bag.<sup>189</sup>

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<sup>185</sup> See Interview with Jack Macy, Commercial Zero Waste Coordinator, S.F. Dep't of the Env't, in S.F., Cal. (Jan. 16, 2007) (stating that one month after the San Francisco ban went into effect, only 3 out of 52 of the grocery stores offered compostable plastic bags); Wyatt Buchanan, *Paper or . . . Canvas? Plastic Bags Are Out*, S.F. CHRON., Nov. 19, 2007, at D1, available at 2007 WLNR 22868623.

<sup>186</sup> Ilana DeBare, *Business is Booming for Makers of Reuseable Grocery Bags*, S.F. CHRON., Dec. 21, 2007, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/12/21/MNP9TPS29.DTL>.

<sup>187</sup> See Office of Supervisor Ross Mirkarimi, Issues Summary: Compostable Grocery Bag Legislation 2 (City and County of San Francisco 2007) (on file with author).

<sup>188</sup> A.B. 2449 § 2, 2005-2006 Gen. Assem., Reg. Sess. (Cal. 2006) (enacting CAL. PUB. RES. CODE § 42251(e) (Westlaw 2008)).

<sup>189</sup> As discussed above, single-use plastic bags average about 2 cents per bag, recycled paper bags average about 7-9 cents per bag, and compostable plastic averages about 9-14 cents per bag. If grocery stores were required to give customers bag credits of 10 cents per bag, that amount would not be much more than the average cost of what the grocery stores spend providing a single-use bag.

Verification of the success of such programs would not be possible though, because A.B. 2449 precludes cities and counties from requiring stores to conduct additional auditing or reporting of plastic-bag use.<sup>190</sup>

San Francisco Supervisor Mirkarimi, when asked if he is planning follow-up plastic-bag legislation, responded that he is considering a “menu of possibilities” for further measures.<sup>191</sup> Supervisor Mirkarimi would not elaborate on such measures, though, because of his experience with the bag-fee proposal.<sup>192</sup>

## CONCLUSION

Through what may accurately be described as a legislative experiment, San Francisco was eventually successful in combating the high-powered national plastics lobby and enacting an ordinance aimed at curbing the consumption of single-use bags. San Francisco’s success demonstrates how locally initiated action can evolve into a much larger movement – on an international scale – without being required to wait for a conducive state or national political climate.

Other local governments can learn from San Francisco’s victories and failures and, hopefully, can be more cognizant of potential pitfalls when negotiating with industry groups. More specifically, as cities like Philadelphia and New York consider industry-initiated plastic-bag recycling programs rather than city-mandated bans or fees, these cities would do well to study San Francisco’s experiences and to exercise caution when the plastics industry proposes they table discussion of a ban.

*JENNIE REILLY ROMER\**

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<sup>190</sup> See A.B. 2449, 2005-2006 Gen. Assem., Reg. Sess. (Cal. 2006).

<sup>191</sup> Wyatt Buchanan, *Paper or . . . Canvas? Plastic Bags Are Out*, SF CHRON., Nov. 19, 2007, at D1, available at 2007 WLNR 22868623.

<sup>192</sup> Wyatt Buchanan, *Paper or . . . Canvas? Plastic Bags Are Out*, SF CHRON., Nov. 19, 2007, at D1, available at 2007 WLNR 22868623.

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