



CITY OF MILPITAS

455 EAST CALAVERAS BOULEVARD, MILPITAS, CALIFORNIA 95035-5479
GENERAL INFORMATION: 408-586-3000, www.ci.milpitas.ca.gov

10/04/2011
Agenda Item No. 1



ATTACHMENTS AND/OR ADDITIONAL MATERIALS RELATED TO AGENDA ITEM AFTER AGENDA PACKET DISTRIBUTION





September 29, 2011

City of Milpitas
City Council
455 E. Calaveras Blvd
Milpitas, CA 95035

Re: Capital Telecom Proposed Cell Tower, 777 S. Main St, Milpitas, CA - Appeal

Mayor Esteves and Members of the City Council,

On August 24, 2011 Capital Telecom's application was heard in front of the Milpitas Planning Commission for a proposed 80 foot stealth tree (Mono-Elm) cell tower located at the above referenced address on the City of Milpitas Fire Department property. The proposed facility is specifically designed to accommodate AT&T Wireless and three other wireless carriers, the goal being to consolidate cellular facilities at one location. Our cell tower application was subsequently approved at a height of 60 feet. Unfortunately, the Planning Commission's approval of a 60 foot cell tower will not satisfy the needs of the wireless provider and this project at this site would have to be abandoned. We respectfully request that the original proposal for an 80 foot stealth tree (Mono-Elm) cell tower be granted.

During the Planning Commission hearing on August 24, 2011, the planner assigned to this project, Cindy Hom, informed the board and the general public attending the hearing that the property in question was located in the Mixed Use (MXD) zone and had a 45 foot height restriction. In reality, the site is located in the Institutional (I) zone and has no height restriction. Members of the public and the board were concerned with the height of the structure and this misinformation may have affected the outcome of the approval. There was also a concern that a tower of this height may be too close to residential areas and too tall for the City of Milpitas. Currently, there is a 100 foot monopole cell tower located at 200 W. Calaveras Boulevard. This tower is not stealth, or designed to resemble something other than a cell tower, and is located

1500 Mt. Kemble Ave, Site 203, Morristown, NJ 07960 973-425-0606 (Office) 973-425-1616 (Fax)

adjacent to a large multi-family development along Junipero Drive. In comparison, our tower was purposefully designed as a stealth tree to reduce visual impacts and not negatively impact the adjacent residential area.

The proposed cell tower is designed to reach 80 feet above grade level, but the centerline of the proposed 6 foot antennas will only be mounted at the 72 foot level. In order to properly conceal the antennas within the branches of the Mono-Elm tree the tower must be designed so that the faux branches reach the 80 foot level. This allows for the tree to naturally taper around the proposed antenna array and properly conceal them from view. In addition to the branches, "antenna socks" garnished with faux Elm leaves are placed over the antennas to better conceal the antennas within the branches.

During the testimony at the August 24, 2011 Planning Commission Hearing, members of the community that attended the meeting were primarily concerned with the health effects due to the RF (Radio Frequency) exposure from the proposed antennas. Per the City's requirements an RF Exposure study was submitted as part of our application. The report prepared by Hammett & Edison, Inc. on August 22, 2011 indicates that the exposure level at any nearby building is 2.6% of the public exposure limit permitted by the FCC. This percentage is based on a worst case scenario for the power levels of the proposed antennas. It is important to point out that the proposed antennas are pointed at 20 (north east), 140 (south east), and 260 (west) degrees. None of these antennas will point directly at the residential building to the north west of the fire department property. As the council is aware and as noted in the staff report to the Planning Commission, the Federal Telecommunications Act of 1996 states that "no state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] commission's regulations concerning such emissions." As concluded by the RF Exposure study provided to the City, "the proposed operation will comply with the FCC Guidelines limiting public exposure to RF energy."

The City entered into a land lease agreement with Capital Telecom on August 3, 2011 for a portion of the property on which the City's fire department is located. The terms of the lease indicated that Capital Telecom would build an 80 foot cell tower within a 2,812.50 square foot compound for the compensation of \$1000/month to the City. Rent will increase annually by 3.5% for the duration of the lease. The City will receive \$500/month for each additional carrier located on the tower for a total of \$2500/month should the tower be fully occupied. Should Capital Telecom fail to sublease to a second carrier within the first or second year of the lease, base rent will increase \$250/year after the first year and \$500/year after the second year. At the approved height of 60 feet, the first carrier will locate their antennas at 52 feet above grade. A second tenant would locate their antennas at 42 feet above grade. At 42 feet a second tenant is not expected. After years one and two, Capital Telecom would be forced to pay an increased base rent to the City for a spot on the tower that is not leasable. This fact makes building the

tower at 60 feet economically infeasible and Capital Telecom would be compelled to terminate the lease on that basis, with the unfortunate result of the City losing that potential rent revenue.

While we are respectful of the Planning Commission's decision, we feel that the proposed tower at 80 feet will better serve the City and the surrounding community for the following reasons. At the increased height the tower can accommodate multiple carriers (AT&T, Verizon, Sprint, Metro PCS, etc). Most jurisdictions prefer towers, such as the one proposed here, that can accommodate multiple carriers as opposed to only one to reduce visual impact. The increased height of the tower at 80 feet will eliminate the need for multiple towers in this area. Second, the primary purpose of AT&T's antennas is to handle capacity issues in the area. Capacity issues prevent customers from making phone calls or downloading data due to high volume at particular tower locations. If there is too much voice, or data, traffic on a tower phone calls will not connect and data transmission rates will be severely impeded. During the recent earthquake in Virginia it was well documented by the FCC that blocked calls were a major issue due to the lack of capacity, and increased volume, on the wireless networks. Even without natural disasters wireless networks are increasingly utilized for E911 phone calls. For all these reasons we respectfully request that the proposed 80 foot stealth tree (Mono-Elm) cell tower be approved by the City Council.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Scott Von Rein', with a long horizontal flourish extending to the left.

Scott Von Rein
Senior Director of Site Development
svonrein@capitaltelecomsites.com

From: Mary Lavelle
Sent: Tuesday, October 04, 2011 9:05 AM
To: Rachelle Currie
Subject: FW: 60 feet tall wireless telecommunication...

Importance: High

From: A. H. Lu [mailto:arhuey2@yahoo.com]
Sent: Monday, October 03, 2011 11:10 PM
To: Mary Lavelle
Subject: Fw: 60 feet tall wireless telecommunication...

--- On **Mon, 10/3/11**, **A. H. Lu <arhuey2@yahoo.com>** wrote:

From: A. H. Lu <arhuey2@yahoo.com>
Subject: 60 feet tall wireless telecommunication...
To: mlavelle@ci.milpitas.ca.gov
Date: Monday, October 3, 2011, 5:14 PM

Hi Mary,

I am writing to you to oppose having a 60 feet telecommunication facility almost at the backyard of my condo. I reside at 700 S. Abel, Milpitas. The facility will be at 777 S. Main St. I am sure this is not only damaging to the sight but also very damaging to the health of the nearby residents with such close encounter to the wireless communicating waves.

I do not know why Milpitas city is even considering the possibility of having such facility to be built in the city. I think it can worsen the image of Milpitas and depreciate the living quality and housing value for Milpitas resident.

Thank you for taking my opinions into consideration.

I left a message in your answering machine. You can e-mail me back or call me at 209-543-6015

Mrs. Hwang (Ar-Huey Lu)

Rachelle Currie

From: Mary Lavelle
Sent: Tuesday, October 04, 2011 3:01 PM
To: Rachelle Currie
Subject: FW: comments regarding appeals for Council meeting Oct. 4, 2011
Attachments: telecommunications_facility_alternative_site.pdf
for Item No. 1

From: Estuardo Licona [mailto:jelicona@yahoo.com]
Sent: Tuesday, October 04, 2011 2:51 PM
To: Mary Lavelle
Subject: comments regarding appeals for Council meeting Oct. 4, 2011

Dear Council Members,

Regretfully I will be unable to attend today's meeting. However, I wish to express my concerns regarding the desire to install an 60 ft telecommunications facility so close to residential housing. Observing aerial maps of the area around the proposed installation point I notice that on the other side of the railroad tracks there is a vast parking lot that could serve the purpose of providing wireless coverage without having an antenna that is unsightly (even with camouflage) and may or may not cause health hazards to residents. The current proposed location is at most 150 ft from my home and the same distance from a park. I suggest that the council propose that the alternative location (parking lot) be used by the company proposing the installation. This alternative location is much further from all surrounding homes than the current location (thereby decreasing the possible health hazard and home valuation issues) and should provide adequate coverage for all the proposed carriers. Installation at this location would provide the needed coverage without affecting the residential neighborhoods in the surrounding areas. I have attached a map marking the parking lot in question for the council's reference. In it I marked with an x the current proposed site and I have outlined the parking lot that I believe is a much better alternative for this facility. I sincerely hope that the council members take into consideration the concerns of the affected residents, as I believe that most of them would also be concerned if a similar facility were proposed within 200 feet of their own homes.

Sincerely

Jorge Licona
Resident at 700 South Abel St Milpitas, Ca

10/4/2011

from Appellant

10/3/2011

PRESENTATION TO THE CITY OF MILPITAS

OPPOSITION TO THE CONSTRUCTION OF
CELL TOWER AT FIRE STATION # 1
LOCATED AT 777 S. MAIN ST.
(UP 11-0026)

October 3, 2011

1

Overview of Complaint

We are representing a group of homeowners of Luna Community including (600 S. Abel St., 700 S. Abel St., 800 S. Abel St.) and are formally registering an opposition of building the cell tower at fire station #1 located at 777 S. Main St. based on the following concerns:

Cell tower proximity to local establishments
Health hazards posed to surrounding citizens
Overall decrease of surrounding property value

10/3/2011

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Cell Tower Location

The following represents a list of affected housing, public facilities, commercial businesses impacted by the building of the cell tower (all facilities within 1000 ft):

Pre-school facility: Hands-on Learning Center

Private housing: Luna Community- housing for more than 1000 residents consisting of adults, senior citizens, children

Religious gathering facility: Indian Temple - activities are held there during weekends and weekdays

City Public Park: heavily used by Milpitas citizens, especially children and senior citizens

Public Service Station: Fire Station #1 and Training Facility - many brave firemen work and train here

Commercial shops: Taco Bell franchise

Cell Tower Location



Luna community (S. Abel St):

Bldg # 600: 300 ft.

Bldg # 700: less than 100 ft.

Bldg # 800: 250 ft.

Fire station #1: 250 ft.

Fire training Tower: less 50 ft.

City Park: 20 to 100 ft.

Preschool & Playground: 75 to 120 ft.

Indian Temple: On S. Main St. (opp to Fire station)

Health Hazards

Cell Tower: generates radiofrequency electromagnetic radiation (RF)

Thermal Level

Non-thermal level

10/3/2011

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Health Hazards – Thermal Levels

The Communication Industry (ANSI/IEEE or CNIRP) claims there are no health effects based on the “Safety Standard”

However, their explicitly stated claims of “safe levels of exposure” are based on “thermal levels” only

Industry studies **do not address “non-thermal levels” exposure – the impact on the health of those living or working in the area**

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Health Hazards- Thermal Levels (cont.)

“The FCCs current exposure guidelines...are thermally based, and *do not* apply to chronic, non-thermal exposure situations.... Therefore, the generalization that the guidelines protect human beings from harm by any or all mechanisms is not justified.”

Norbert Hankin, Radiation Protection Division,
EPA Palm Beach, Florida, Los Angeles,
California

10/3/2011

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Health Hazards-Non Thermal levels

Cell Towers emit low intensity RF radiation, like micro wave (mw)

Many internationally acknowledged experts find strong evidence that RF radiation from Cell Towers damages human health depending on duration

With short duration exposure, symptoms include:

Headache, sleep disorders, poor memory, mental excitation, confusion, anxiety, depression, loss of appetite, and listlessness

With Long duration exposure: notes reports of **cancer, reduced fertility, memory loss and adverse changes in behavior and development of children**

Degree of health damage is most harmful to children and seniors due to weakened immune systems

10/3/2011

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Cell Tower Risks: International Association of Fire Fighters (IAFF)

- ▶ International Association of Fire Fighters (IAFF) oppose the use of fire stations as base stations for towers and/or antennas for the conduction of cell phone transmissions until a study with the highest scientific merit and integrity on health effects of exposure to low-intensity RF/MW radiation is conducted and it is proven that such sitings are not hazardous to the health of our members
- ▶ The World Health Organization (WHO) notes reports of "cancer, reduced fertility, memory loss, and adverse changes in the behavior and development of children"
- ▶ The International Association on Research on Cancer of the World Health Organization assigned this designation "possible human carcinogens." to ELF/EMF in Volume 80 of its IARC Monographs on the Evaluation of Carcinogenic Risks to Humans

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Cell Tower Risks: IAFF (Cont.)

- ▶ National Institute of Environmental Health Sciences panel also designated power frequency electromagnetic fields (ELF/EMF) as "possible human carcinogens."
- ▶ Internationally acknowledged experts in the field of RF/MW radiation research have shown that RF/MW transmissions:
 - * Increased cell growth of brain cancer cells
 - * Increased single- and double-strand breaks in DNA, our genetic material
 - * Resulted in 2 to 4 times as many cancers in Polish soldiers exposed to RF
 - * More childhood leukemia in children exposed to RF
 - * Changes in sleep patterns and REM sleep
 - * Headaches caused by RF/MW radiation exposure
 - * Neurologic changes

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Cell Tower Safe Distance Scientific Studies

German Study – 1000 patients analyzed

The proportion of *newly developed cancer cases was 3x higher* among those who had lived during the past ten years at a distance of up to 400m (about 1300 feet) from the cellular transmitter site, compared to those living further away.

They also revealed that the patients *fell ill on average 8 years earlier*.

"The Influence of Being Physically Near to a Cell Phone Transmission Mast on the Incidence of Cancer" (German study), 2004.

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Cell Tower Safe Distance Scientific Studies-cont.

Israel Study – 1844 patients analyzed

Out of the 622 exposed patients who lived within 350 meters of a cell phone tower, 8 cases of different kinds of cancer were diagnosed in a period of just one year (July 1997 to June 1998): breast cancer, ovarian cancer, lung cancer, Hodgkin's disease, osteoid osteoma and kidney cancer. – 13 cases per 1000 people!

This compares with 2 per 1,222 patients who lived further away in the matched controls of the nearby clinic.

– 2 cases per 1000 people

The *relative risk of cancer was 4.15x higher for those living near the cell-phone transmitter* compared with the entire population of Israel.

"Increased Incidence of Cancer Near a Cell-Phone Transmitter Station" (Israel study), 2004.

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Cell Tower safe distance



Opposition of Fire Fighters on Cell Towers Located on Fire Department Facilities

IAFF – International Association of Fire Fighters

The International Association of Fire Fighters' official position on locating cell towers commercial wireless infrastructure on fire department facilities, as adopted by its membership in August 2004, is that the IAFF opposes the use of fire stations as base stations for towers and/or antennas for the conduction of cell phone transmissions until a study with the highest scientific merit and integrity on health effects of exposure to low-intensity RF/MW radiation is conducted and it is proven that such sitings are not hazardous to the health of our members

10/3/2011

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Health Safety Facts

FCC has not issued standard safety guidelines for workers working on cell towers.

FDA has explicitly rejected claims that cellular phones are "safe"

EPA has rejected the current (ANSI/IEEE) safety standards because they are based on "thermal levels" effects alone

The World Health Organization claims that radiation from cell phones can possibly cause cancer. The agency now lists mobile phone use in the same "carcinogenic hazard" category as lead, engine exhaust and chloroform

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Places where Cell Tower construction was rejected

In June 2000, City of Los Angeles Board of Education adopted a ban on building future cell tower adjacent to school property until appropriate regulatory standards are adopted
 Palo Alto voted down Cell Tower in April 2011
 Daly City voted down Cell Tower in August 2011

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Many Organization's Concerns on RF exposure and Health

FDA has explicitly rejected claims that cellular phones are "safe"

EPA has rejected the current (ANSI/IEEE) safety standards because they are based on thermal effects alone

Many scientists and physicians question the safety of exposure to RF. The CSIRO study notes that there are no clear cutoff levels at which low intensity exposure has no effect, and that the results of ongoing studies will take years to analyze

CSIRO : Commonwealth Scientific Industrial Research Organization

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Conclusion on Health Hazards

Low intensity RF does impact human health. The results of research studies will take years to establish

Without being proved that RF exposure is safe, shall we allow ourselves and children be at risk?

Fire Fighters be at risk?

We should ban the Cell Tower construction at the proposed site or relocate to a safer site

Why can't underground fiber cables be used to transmit RF in lieu of cell tower? It will be safer

10/3/2011

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Property Devaluation

A number of organizations and studies have documented the detrimental effects of cell towers on property values - 2 to 20%

Some examples:

Windsor Hills/View Park, CA - Confirmed by real estate companies, home associations, resident organization that real estate values would decrease with a cell phone antenna in their neighborhood.

Santa Cruz, CA - a preschool closed up because of a cell tower installed on its grounds

Merrick, NY - Declined home values where wireless facilities were installed.

Many more examples can be found in research online.

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Property Devaluation – cont.

People don't want to live next to a cell tower not just because of health concerns, but also due to aesthetics and public safety reasons, i.e., cell towers become eyesores, obstructing or tarnishing cherished views, and also can attract crime, are potential noise nuisances, and fire and fall hazards.

These points underscore why wireless facilities are commercial facilities that don't belong in residential areas, parks and schools and they should be placed in alternative, less obtrusive locations.

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Negative Fiscal Impact on City

This negative effect contributes to urban blight, and a deterioration of neighborhoods and school districts when residents want to move out or pull their children out because they don't want to live or have their children attend schools next to a cell tower...

... Resulting in reduced home values, which computes to much less assessed property tax the city

This reduced tax income certainly exceeds the revenue that City of Milpitas receives from the cell phone tower

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Negative Aesthetic Aspect

The tallest trees in the neighborhood are about 20 ft.

The 5-story condo complexes are about 56 ft.

This 80 ft. antenna farm is an eyesore to the surrounding areas

Yes, it is more than a cell phone tower. With antenna from 4 vendors, it is more an antenna farm

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Negative Aesthetic Aspect - cont.

The company that builds this monstrous antenna farm knows it is ugly since they are attempting to camouflage it as a tree!

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Concluding Remarks

- ▶ We unequivocally oppose the construction of the planned cell tower due to the following:
 - Inappropriate location
 - Health hazards to surrounding citizens
 - Devaluation of property
 - Negative fiscal impact to the City
 - Lack of aesthetic sense

- ▶ We respectfully request that the City of Milpitas choose an alternative site

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8

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Unleaded Gas Pipeline



4

Preston Pipelines
Gate Code
904#

SIRNOTT LN
Gate Code
11140

40

8v

7

Tract 9699

CITY AND COUNTY OF SAN FRANCISCO
Main St. Turnout

New Cell Tower
Location

8

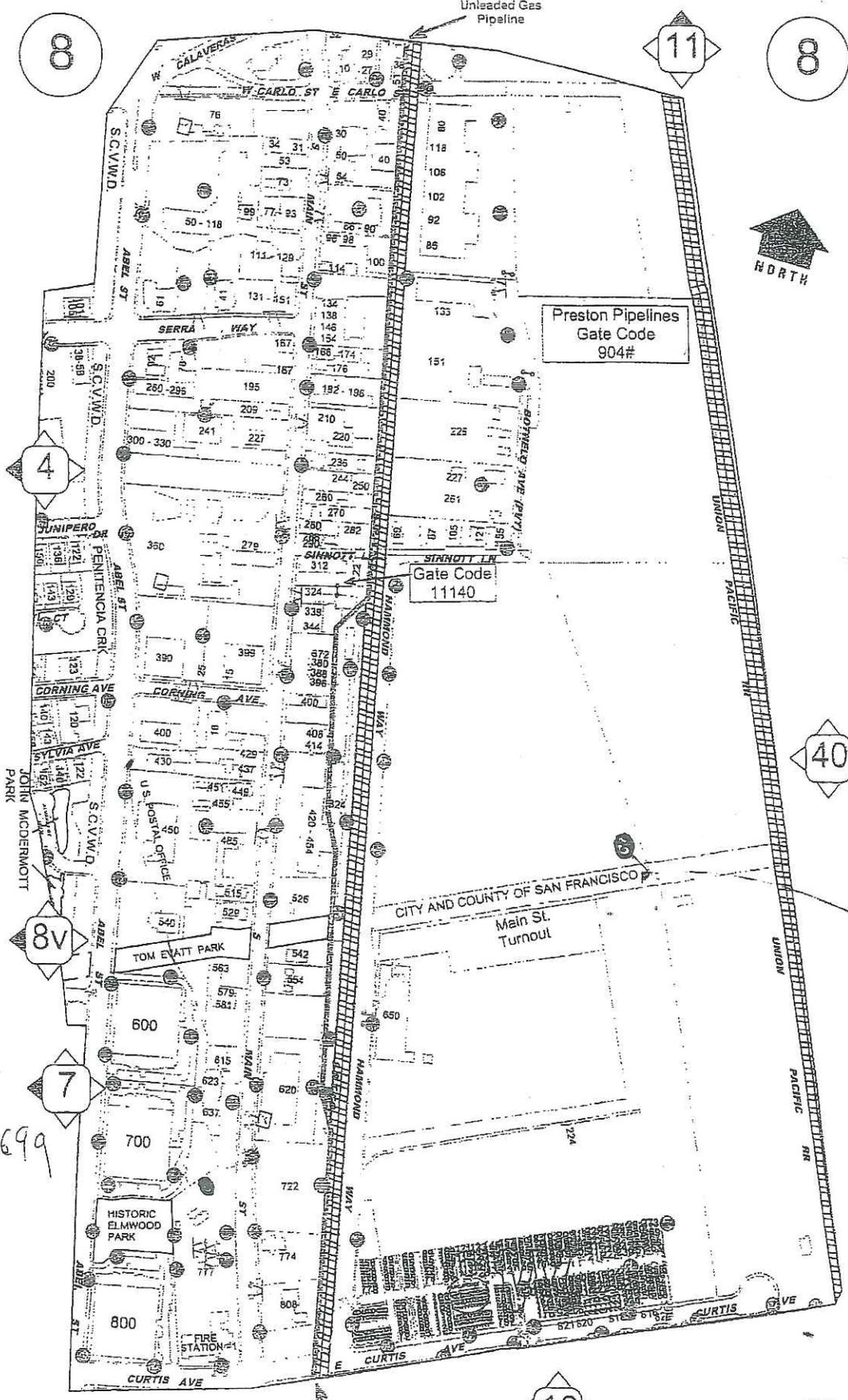
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Unleaded Gas Pipeline

10

8

Last Updated 06-14-11





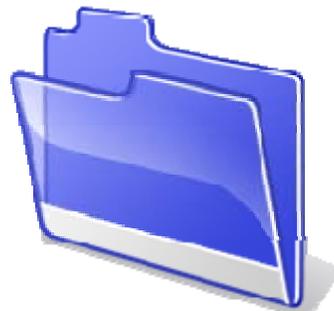
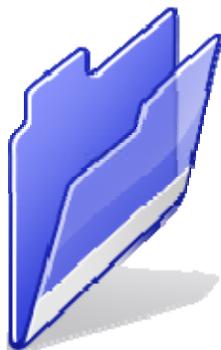
CITY OF MILPITAS

455 EAST CALAVERAS BOULEVARD, MILPITAS, CALIFORNIA 95035-5479
GENERAL INFORMATION: 408-586-3000, www.ci.milpitas.ca.gov

10/04/2011
Agenda Item No. 5



ATTACHMENTS AND/OR ADDITIONAL MATERIALS RELATED TO AGENDA ITEM AFTER AGENDA PACKET DISTRIBUTION



Rachelle Currie

From: Mary Lavelle
Sent: Tuesday, October 04, 2011 9:05 AM
To: Rachelle Currie
Subject: FW: Single-use Carryout Bags - XV 5 - October 4, 2011 Agenda

Importance: High

-----Original Message-----

From: Tim James [mailto:tjames@CAGrocers.com]
Sent: Tuesday, October 04, 2011 8:31 AM
To: Jose Esteves; Pete McHugh; Debbie Giordano; Armando Gomez; Althea Polanski
Cc: Kathleen Phalen; Tom Williams; Mary Lavelle
Subject: Single-use Carryout Bags - XV 5 - October 4, 2011 Agenda

Dear Councilmembers,

On behalf of the California Grocers Association, I am encouraging the City of Milpitas to follow the City of San Jose carryout bag ordinance model when regulating bags. A unified regional approach to carryout bag regulations provides retailers regulatory consistency and eliminates jurisdictional disadvantages. A consistent countywide ordinance approach also creates greater predictability for consumers and provides the greatest amount of environmental gain.

CGA is a non-profit, statewide trade association representing the food industry since 1898. CGA represents approximately 500 retail members operating over 6,000 food stores in California and Nevada, and approximately 300 grocery supplier companies. Retail membership includes chain and independent supermarkets, convenience stores and mass merchandisers. CGA members operate a number of grocery stores located in Milpitas and in Santa Clara County.

Please contact me for additional information or with any questions. Thank you for your consideration. Tim

Timothy James
Manager, Local Government Relations
1415 L Street, Suite 450
Sacramento, CA 95814
Phone: 916-448-3545
Cell: 916-832-6149

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From: Mary Lavelle
Sent: Monday, October 03, 2011 2:11 PM
To: Rachelle Currie
Subject: FW: Agenda Item: Plastic Bag Issue

Attachments: ACC Letter to Milpitas.pdf
[Rachelle, here's another letter related to Item No. 5 on tomorrow night's agenda, for the purple folder.](#)

[Mary](#)

From: Kenny, Ryan [mailto:Ryan_Kenny@americanchemistry.com]
Sent: Monday, October 03, 2011 12:40 PM
To: Jose Esteves; Pete McHugh; Debbie Giordano; Armando Gomez; Althea Polanski
Cc: Mary Lavelle
Subject: Agenda Item: Plastic Bag Issue

Dear Honorable Members of the Milpitas City Council,

Please find attached a letter from the American Chemistry Council offering comments on the plastic bag agenda item scheduled for Tuesday evening's meeting. We would appreciate your consideration of our views.

Sincerely,

Ryan Kenny
Manager, State Affairs
American Chemistry Council

1121 L Street, Suite 609
Sacramento, CA 95814
Phone (916) 448-2581
Fax (916) 442-2449
Cell (916) 606-5772
www.americanchemistry.com

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October 3, 2011

The Honorable Jose Esteves
Mayor, City of Milpitas
455 East Calaveras Boulevard
Milpitas, California 95035

Re: Agenda Item XV.5: Carryout Bag Issue

Dear Mayor Esteves:

I write on behalf of the American Chemistry Council (ACC). It is our understanding that the City of Milpitas City Council is considering whether to direct city staff to pursue development of an ordinance to ban retail plastic bags. By way of background, the ACC is a national trade association of manufacturing companies, including the major domestic producers of retail plastic bags.

As you know, the City Council directed staff to contract with Cascadia Consulting Group to complete a study on the issue so that a decision could be based upon the findings. We have two serious concerns: (1) opinion research is invalid as the basis for any of the technical findings that need to be made under the California Environmental Quality Act (CEQA). CEQA requires the lead agency to review or develop factual evidence whether the project may have an effect on the environment; opinion data cannot be used for this purpose.¹ Second, if the City intends to rely on an opinion survey to inform it regarding the importance of a proposed action, it should rely on opinion data that has been developed on accurate and reliable information. Here, we believe the research methodology is so fundamentally flawed that it fails to accurately reflect opinion, and there is no rational basis for a legislative body to be able to rely upon it for decision making.

The Surveys of Milpitas Residents Cannot be Relied Upon for any Purpose.

The October 4 staff report states the City Council agenda packet contains a copy of the study including a "summary [of] a statistically-reliable phone survey of 293 Milpitas residents..." **Because of fundamental errors in research methods, the survey is not statistically reliable and thus the results cannot be extrapolated to the full population.** Please consider these key errors:

- The Cascadia study concluded², "...approximately 75% of respondents agreed with the statement that these products (plastic bags and polystyrene food service) can harm wildlife," "73% of respondents agreed...that these products litter the environment," and "54%...believed that single-use bags should be banned." These results are invalid partially because of a design flaw in the questionnaire, where the question suggests the answer: questions 2, 3, and 4 first criticize plastic bags and polystyrene food service products then the respondents were immediately asked in question #5 if these products should be banned. The results are also invalid because the questions are double-barreled: they ask about two different products but allow only one possible answer. The results cannot yield legitimate opinion data on plastic bags.
- Also, survey question #2³, "Do you think single use bags and polystyrene foam food take-out containers litter our creeks, bay, and the oceans?" is loaded by letting the respondent know the interviewer is linking these products to litter. The question is also double-barreled by asking the respondent about both products and not one.
- The fundamental calculations of the resident public opinion survey are incorrect: the city's population of 67,895 (as reported in 2009) with 293 respondents has a margin of error of plus/minus 5.71%⁴, not 5.00% as Cascadia stated. This is not an insignificant mistake and is symptomatic of the other methodology errors.

¹ See definition of substantial evidence, Section 15384 (b) of CEQA Guidelines: "substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (Emphasis added).

² "Single-Use Carryout Bag Study," page 22.

³ Appendix 8.1

⁴ Margin of Error Calculator: <http://americanresearchgroup.com/moe.html>



- The report states⁵, “Cascadia gathered Milpitas resident phone numbers from Allied Waste records.” This implies that a representative, random sample of Milpitas residents was NOT obtained since the universe of respondents is only from Allied Waste records. How many people who would be negatively impacted from a bag tax and have an opinion were missed?
- The report states⁶ that a sample size of 293 residents represents approximately 4% of the population. It does not. While 293 respondents is sufficient for a 5.71% margin of error, Cascadia actually sampled approximately **0.4%** of the population.
- The survey data results are further invalidated because nowhere in the survey are respondents’ views tested against alternative policies such as recycling and public education.

Surveys of Store Managers

According to Appendix 7.4, only 24 store managers were interviewed covering an estimated 3% of potentially impacted stores. The margin of error and confidence level were not calculated. Please consider these methodology errors further invalidating the survey results:

- A random sample of stores was not completed, violating a fundamental tenet of statistical research methods and thus invalidating the conclusions reached. Cascadia “compiled a list of potential businesses” yet instead of deriving a research sample using random methods they allowed staff to help specifically identify those questioned. Cascadia only went to one location of each chain (other locations serve other members of the population, why were they not surveyed?), mostly to businesses on major roads (ignoring other businesses), and haphazardly chose other businesses at-will while in the field.

As with the resident questions, many of the survey questions asked of store managers are loaded, leading, biased, and/or double-barreled thus invalidating the data and conclusions. For example:

- Store managers were asked, “Do you think single-use bags make up a large percentage of the litter in the environment?” This question is loaded linking plastic bags to a large percentage of the litter and cues the respondent to what the researcher believes and wants to hear. An objective valid question could have been, “What percentage of litter in the environment do you believe are plastic bags?” and then specific percentage ranges could have been offered. It is worth noting that the City of San Francisco found plastic bag litter on city streets was **only 0.6% AFTER their plastic bag ban**. The Cascadia study conclusions did not reconcile public opinion perception to such empirical data.
- Question #8 asks, “Did you know that the City of Milpitas is considering a ban on single use take-out bags?” and then immediately asks in question #9 if store managers “think the City should ban businesses from providing single use take-out bags to customers?” This leads the respondent, biases the sample, and invalidates the data.
- No alternate policies were included in the survey, leaving the impression the only universe of policy options is a ban/fee or nothing. **Recycling and public education were never discussed.**

Without using a random sample, using flawed survey questions, and not calculating the margin of error the respondent questions are not representative of retailers throughout the city and are merely anecdotal biased comments from one snapshot in time.

In our view, bag litter and packaging waste can be reduced by encouraging consumers to use reusable bags and to not only recycle their plastic bags but other plastic packaging as well. Bag bans and taxes seem to be a simple solution, but they must be carefully evaluated for their unintended environmental impacts and economic impacts on consumers and shoppers, additional burden on City administrative costs, and other negative consequences.

As you and your colleagues discuss this issue, ACC respectfully requests that you consider several policy issues and potential alternative approaches:

⁵ “Residential Survey Methods: Continued,” Appendix 8.2

⁶ “Single-Use Carryout Bag Study,” page 22.



- A common misconception is that plastic bags are not recyclable. California law requires all large grocery stores and pharmacies to provide a recycling bin for plastic bags. Nationally, plastic bag and film recovery has increased by 31 percent since 2005. There is strong nationwide demand for recycled plastic bags for composite decking and other products.
- All such ordinances are subject to the California Environmental Quality Act (CEQA), even small jurisdictions, and must complete at least an initial review, if not a full review culminating in an Environmental Impact Report (EIR), before an ordinance can be enacted.
- If a fee is proposed on alternative products such as paper bags (in an effort to reduce use of those products) the ordinance would likely be subject to procedural/passage requirements of Proposition 26.
- Whether an analysis has been conducted as to the potential consumer cost impact for residents who may now be forced to pay for paper bags, especially those who are struggling to make ends meet?
- Whether such an ordinance would require city expenditures to implement, monitor and audit the program, especially as it relates to a city mandated per bag charge?

Thank you in advance for the opportunity to provide these comments and we would welcome the opportunity to discuss potential recycling opportunities in the city of Milpitas. If you or your colleagues have any questions or comments, please do not hesitate to contact me at 916-448-2581 or via email at ryan_kenny@americanchemistry.com

Sincerely,



Ryan Kenny
Manager, State Affairs
American Chemistry Council

cc: Members, Milpitas City Council; City Clerk



From: Sue Vang [mailto:suevang@cawrecycles.org]
Sent: Monday, October 03, 2011 12:02 PM
To: Jose Esteves
Cc: Pete McHugh; Debbie Giordano; Armando Gomez; Althea Polanski; Mary Lavelle
Subject: single-use bag ordinance-SUPPORT

Dear Honorable Mayor Esteves,

On behalf of Californians Against Waste and its hundreds of members in Santa Clara County, I respectfully submit a letter in support of a single-use bag ordinance. Please direct staff to prepare a single-use bag ordinance at the next council meeting.

Thank you for your environmental leadership on this issue.

Sincerely,

Sue Vang
Policy Associate | Californians Against Waste
921 11th Street, Suite 420 | Sacramento, CA 95814
(p) 916-443-5422 | (f) 916-443-3912
www.cawrecycles.org

Get updates and support us on [Facebook](#), [Twitter](#), or [Causes!](#)

10/4/2011



Californians Against Waste

Conserving Resources. Preventing Pollution. Protecting the Environment.

October 3, 2011

Jose Esteves, Mayor
City of Milpitas
455 East Calaveras Boulevard
Milpitas, California 95035

Re: Reduction of Single-Use Carryout Bags – Support

Dear Honorable Mayor Esteves,

On behalf of Californians Against Waste and its hundreds of members in Santa Clara County, I respectfully urge you to support and move forward with a proposed single-use bag ordinance for the City of Milpitas. Plastic bags are a costly, environmentally damaging, and easily preventable source of litter and pollution. Fourteen local jurisdictions have already passed similar ordinances to deal with this issue, including Santa Clara County and the City of San Jose.

In these tough economic times, a single-use bag ordinance would help lower cleanup and compliance costs. Californians use an estimated 12 billion plastic bags per year. According to CalRecycle, only three percent of these bags are actually recycled. The rest end up in landfills and as litter. Prior to passing its ordinance, the City of San Jose spent nearly \$9 million each year to manage street litter and implement litter control programs for creek protection in compliance with stormwater permit requirements. Studies found that up to 23% of the litter collected in San Jose area creeks was composed of plastic bags.

In addition to the economic benefits of a plastic bag ban, there are countless environmental benefits. These include reduced use of natural resources for bag production, reduced wildlife fatalities from strangulation and suffocation, and improved water and soil quality. For all intents and purposes, plastic never biodegrades but slowly photo degrades. As it photo degrades, plastic film breaks into smaller and smaller pieces which attract surrounding toxins. When mistaken as a food source, these plastic particles form a progressively greater health risk of food chain contamination.

Plastic marine pollution is a global problem with local solutions. Banning the free distribution of bags is widely considered an appropriate and practical legislative action that can protect our environment and save financial resources.

CAW thanks you for your environmental leadership on this issue and urges you to continue that leadership example by moving forward with single-use bag ordinance.

Sincerely,

Mark Murray
Executive Director

cc: City Council Members

From: Mary Lavelle
Sent: Monday, October 03, 2011 4:17 PM
To: Rachelle Currie
Subject: FW: Milpitas Bag Legislation

Attachments: Schmeer Complaint.pdf
[To City Council:](#)

From: Phil Rozenski [mailto:Phil.Rozenski@hilexpoly.com]
Sent: Monday, October 03, 2011 4:02 PM
To: Mary Lavelle
Subject: Milpitas Bag Legislation

Ms. Lavelle,

As an employee of [Hilex Poly](#), an industry leading manufacturer and recycler of plastic bag and film products, I have been following with interest the recent bag conversation in California. With a vote on this issue approaching, I wanted to share some information about the real impacts of bag legislation and an alternative – recycling – that achieves the goal of reducing litter while protecting the 10,000+ Americans employed by the plastic bag manufacturing and recycling industry, many of whom are Californians.

Experience shows bag legislation cripples green job growth while producing no benefits for the environment or consumers. Put simply, a yes vote on banning plastic bags in Pasadena will:

- Decrease jobs in California
- Increase dependence on foreign oil
- Increase global greenhouse gas emissions
- Decrease recycling of plastic bags, sacks and wraps
- Not decrease the amount of plastic entering the waste stream

I also wanted to let you know that earlier today, several California residents and Hilex Poly [filed a lawsuit](#) against the County of Los Angeles in response to the County's decision to ban the use of plastic carry out bags and impose an unconstitutional tax on paper carry out bags provided by retail stores. Los Angeles County's bag "charge" on consumers violates Proposition 26, which clearly requires local taxes be approved by a two-thirds vote. The ten-cent tax imposed on bags was never approved by voters much less by a two-thirds vote. Proposition 26 was implemented to counter situations exactly like this one where taxes are labeled by the local government as 'fees' in order to circumvent the electoral process. I have attached the Complaint to this email for your reference.

If you have any questions or would like to discuss the facts about plastic bags and the impacts of plastic bag legislation, please let me know; I am available to discuss this further with you at any time.

1 NIELSEN MERKSAMER PARRINELLO
GROSS & LEONI, LLP
2 JAMES R. PARRINELLO (SBN 063415)
ERIC J. MIETHKE (SBN 133224)
3 SEAN P. WELCH (SBN 227101)
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Email: jparrinello@nmgovlaw.com
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8 Email: koneto@nmgovlaw.com

9 *Attorneys for Petitioners/Plaintiffs*
Lee Schmeer, Salim Bana, Jeff
10 Wheeler, Chris Kucma, Hilex Poly Co. LLC

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF LOS ANGELES

14 LEE SCHMEER, SALIM BANA, JEFF }
15 WHEELER, CHRIS KUCMA, and }
16 HILEX POLY CO. LLC, }

17 *Petitioners/Plaintiffs,*

18 vs.

19 COUNTY OF LOS ANGELES,
20 CALIFORNIA; GAIL FARBER in her
official capacity as Los Angeles Co.
21 Director of Public Works; KURT
FLOREN in his official capacity as Los
22 Angeles Co. Director of the Dept. of
23 Agricultural Commissioner/Weights
and Measures; DR. JONATHAN
24 FIELDING in his official capacity as
Los Angeles Co. Director of Public
25 Health; and DOES 1-10,

26 *Respondents/Defendants.*
27
28

Case No.:

**VERIFIED COMPLAINT FOR
WRIT OF MANDATE,
INJUNCTIVE RELIEF, AND
DECLARATORY RELIEF**

1 **INTRODUCTION**

2 1. Los Angeles County has by ordinance banned the use of plastic carry
3 out bags and imposed a mandatory “charge” on consumers who use paper carry out
4 bags provided by retail stores for the purpose of carrying away purchased items.
5 This so-called “carryout bag charge”—actually an illegal and unconstitutional
6 special tax—is being imposed by the County at a time when consumers can least
7 afford to bear another government-imposed cost burden. As explained in more
8 detail below, the so-called “charge” violates the California Constitution because it is
9 in fact a local special tax that that has not been approved by a vote of qualified
10 electors in the County of Los Angeles.

11 2. The ordinance imposing the so-called “charge”—actually a special tax
12 under California law—should be declared invalid, and the County of Los Angeles
13 should be prohibited from enforcing the ordinance and forcing retail stores to
14 collect the special tax.

15 3. This Court is a proper venue for this action under Code of Civil
16 Procedure § 394.

17 **PARTIES**

18 4. Petitioners/Plaintiffs (“Petitioners”) Lee Schmeer, Salim Bana, Jeff
19 Wheeler and Chris Kucma are individuals and California taxpayers; each has been
20 required to pay and has paid the carryout bag “charge”—actually a special tax—
21 imposed, administered and enforced by Respondents/Defendants (“Respondents”).
22 Petitioner Hilex Poly Co. LLC is a manufacturer of plastic bags which are banned by
23 the Ordinance at issue.

24 5. Respondent County of Los Angeles (“COUNTY”) adopted Ordinance
25 2010-0059, adding Chapter 12.85 to Title 12 of the Los Angeles County Code (“L.A.
26 Co. Code”), to impose a \$0.10 so-called “charge” on every paper carryout bag
27 provided by retail stores to consumers within the COUNTY. A true and correct copy
28 of that ordinance is attached hereto as Exhibit A. Until enactment of said ordinance,

1 retail stores were not required to charge for such paper bags and routinely provided
2 them without charge.

3 6. Respondent GAIL FARBER is the Director of Public Works for the
4 COUNTY and has primary responsibility under Ordinance No. 2010-0059 for
5 enforcing the paper carryout bag special tax. (L.A. Co. Code § 12.85.080(A).)

6 7. Respondent KURT FLOREN is the Director of the Department of
7 Agriculture Commissioner/Weights and Measures for the COUNTY and is
8 responsible under Ordinance No. 2010-0059 for assisting in the enforcement of the
9 paper carryout bag special tax. (L.A. Co. Code § 12.85.080(A).)

10 8. Respondent DR. JONATHAN FIELDING is the Director of Public
11 Health for the COUNTY and is responsible under Ordinance No. 2010-0059 for
12 assisting in the enforcement of the paper carryout bag special tax. (L.A. Co. Code §
13 12.85.080(A).)

14 9. Petitioners are unaware of the true names and capacities of
15 Respondents DOES 1 through 10, and names such respondents/defendants by
16 fictitious names. Petitioners are informed, and believe, and based upon such
17 information and belief allege, that each of the fictitiously named Respondents is in
18 some manner responsible for the actions described in this Complaint. When the
19 true identities and capacities of these Respondents have been determined,
20 Petitioners will seek leave to amend this Complaint to insert such identities herein.

21 **The Ordinance**

22 10. On November 23, 2010, the COUNTY adopted Ordinance No. 2010-
23 0059 ("Ordinance"). The Ordinance added Chapter 12.85 to Title 12 of the L.A. Co.
24 Code relating to plastic and paper carryout bags and promoting the County policy in
25 support of reusable nonpaper carryout bags.

26 11. As a part of the scheme, the Ordinance bans stores from providing
27 plastic carryout bags to customers. (L.A. Co. Code § 12.85.020(A).)

28 ///

1 tax may be imposed, extended, or increased. Proposition 218 became operative on
2 November 6, 1996.

3 18. Proposition 218 defined “local government” as “any county, city, city
4 and county, including a charter city or county, any special district, or any other local
5 or regional governmental entity.” (Cal. Const., art. XIII C, § 1(c).) Furthermore,
6 Proposition 218 defined “general tax” as “any tax imposed for general governmental
7 purposes;” and “special tax” as “any tax imposed for specific purposes...” (Cal.
8 Const., art. XIII C, § 1(a) & (d).)

9 19. Proposition 218 states that no local government may impose, extend or
10 increase any general tax until the tax is submitted to the electorate and approved by
11 a majority vote. (Cal. Const., art. XIII C, § 2(b).) Proposition 218 states that no
12 local government may impose, extend, or increase any special tax until the tax is
13 submitted to the electorate and approved by a two-thirds vote. (Cal. Const., art.
14 XIII C, § 2(d).)

15 20. On November 2, 2010, the electors of the State of California approved
16 Proposition 26. Proposition 26 amended Article XIII C of the California
17 Constitution to define “tax” for local purposes as “any levy, *charge, or exaction of*
18 *any kind imposed by a local government*” subject to seven specified exemptions not
19 applicable here. (Emphasis added.)

20 21. Proposition 26 also changed the burden of proof in lawsuits
21 challenging any levy, charge or exaction at the local level. It requires the local
22 government imposing a levy, charge, or exaction to prove by a preponderance of the
23 evidence that the levy, charge, or other exaction is not a tax. (Cal. Const., art. XIII
24 C, § 1.)

25 **No Local Tax Can Be Imposed Unless Approved by the Voters**

26 22. It should come as no surprise that the paper carryout bag special tax
27 can only be imposed upon approval of the electors. Through a series of ballot
28 measures dating back more than thirty years, California voters have repeatedly

1 expressed their unambiguous intent that local taxes should not be imposed without
2 prior voter consent.

3 23. *First*, in 1978, voters adopted Proposition 13, which added Article XIII
4 A to the California Constitution. Section 4 of Article XIII A prohibits counties from
5 imposing special taxes without first obtaining a two-thirds vote of electors.

6 24. *Second*, eight years after Proposition 13's passage, Proposition 62 was
7 adopted to add a new article to the Government Code (§§ 5370-53730) originally
8 requiring that all new taxes imposed by counties be approved by local electors.

9 25. *Third*, California voters adopted the aforementioned Proposition 218 in
10 1996 to stop repeated efforts by local governments to evade Proposition 13's limits
11 on taxation without voter approval. Proposition 218 further states that its
12 provisions "shall be liberally construed to effectuate its purposes of limiting local
13 government revenue and enhancing taxpayer consent."

14 26. *Finally*, less than a year ago in November 2010, voters adopted the
15 aforementioned Proposition 26 to stop repeated attempts by local governments to
16 circumvent Proposition 218's voter approval requirements by labeling taxes as
17 "fees." Proposition 26's findings and declarations of purpose note that the
18 escalation in taxation

19 does not account for the recent phenomenon whereby the Legislature and
20 local governments have disguised new taxes as "fees" in order to extract even
21 more revenue from California taxpayers without having to abide by these
22 [Propositions 13 and 218's] constitutional voting requirements. Fees couched
23 as "regulatory" but which exceed the reasonable costs of actual regulation or
24 are simply imposed to raise revenue for a new program and are not part of
25 any licensing or permitting program are actually taxes and should be subject
26 to the same limitations applicable to the imposition of taxes.

27 27. Proposition 26 further found and declared that "In order to ensure the
28 effectiveness of these constitutional limitations," the measure "defines a 'tax' for
state and local purposes so that neither the Legislature nor local governments can
circumvent these restrictions on increasing taxes by simply defining new or
expanded taxes as 'fees'."

1 exemptions to the definition of a local “tax” in California Constitution, Article XIII
2 C, § 1(e), and is therefore a “tax” under the Constitution.

3 30. The \$0.10 paper carryout bag “charge” is precisely what Proposition 26
4 sought to prohibit—taxes characterized as “fees” or “charges” in order to do an end-
5 run around the California Constitution’s voter approval requirements.

6 **The “Charge” is a Special Tax and Must Be**
7 **Approved by a Two-Thirds Vote of the Electors**

8 31. The \$0.10 paper carryout bag “charge” is not covered by any of the
9 exemptions from the definition of “tax” under the California Constitution. Instead,
10 the “charge” is a tax imposed on retail store customers to support the COUNTY’S
11 program of promoting and encouraging the use of reusable nonpaper carryout bags.

12 32. Since the “charge” is a tax imposed to support the COUNTY’s program
13 of promoting and encouraging the use of reusable nonpaper carryout bags, it is a tax
14 imposed for a specific purpose.

15 33. Since the “charge” is a tax imposed for a specified purpose, it is a
16 special tax under the California Constitution and can only be legally imposed upon
17 approval by two-thirds of the electors in the COUNTY.

18 34. Under the California Constitution, the COUNTY bears the burden of
19 proving by a preponderance of the evidence that the “charge” is not a special tax
20 subject to two-thirds voter approval.

21 **FIRST CAUSE OF ACTION**
22 **(Writ of Mandate and Injunctive Relief)**

23 35. The allegations of paragraphs 1 through 34 above are incorporated by
24 reference as though fully set forth herein.

25 36. For the reasons set forth herein, the so-called “charge” on paper
26 carryout bags imposed by the Ordinance constitutes a special tax under California
27 Constitution, Article XIII C.

28 ///

1 unconstitutional because it did not receive approval by a two-thirds vote of qualified
2 electors.

3 45. It is necessary and appropriate for this Court to declare that the so-
4 called "charge" on paper carryout bags imposed by the Ordinance is a special tax
5 subject to the requirement of approval by a two-thirds vote of qualified electors; and
6 that the Ordinance and the special tax that it imposes are therefore invalid, illegal,
7 and unconstitutional.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Petitioners pray that this Court enter judgment in favor of
10 Petitioners and against Respondents as set forth below:

11 1. A Declaration that the Ordinance including without limit the special tax
12 on paper carryout bags, is invalid, illegal, and unconstitutional in its entirety.

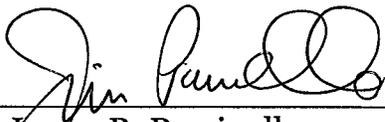
13 2. Writ of Mandate, Injunctive relief and/or other appropriate relief
14 against implementation and enforcement of the Ordinance by Respondents and
15 their agents and all persons acting under their direction, including without limit
16 from enforcing the Ordinance in its entirety including the special tax on paper
17 carryout bags.

18 3. For costs of suit and attorneys fees.

19 4. For such other and further relief as the Court shall deem appropriate.
20

21 Dated: October 3, 2011

NIELSEN MERKSAMER PARRINELLO
GROSS & LEONI, LLP

22
23 By: 
24 James R. Parrinello
25 *Attorneys for Petitioners*
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VERIFICATION

I, James R. Parrinello, declare as follows:

I am an attorney at law duly admitted and licensed to practice before all courts of this State and I have my professional office at 2350 Kerner Blvd., Suite 250, San Rafael, CA 94901.

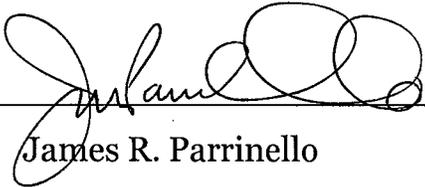
I am the attorney of record for Petitioners/Plaintiffs in this action. Petitioners are absent from the county in which I have my office and for that reason I am making this verification on their behalf.

I have read the foregoing Verified Complaint for Writ of Mandate, Injunctive Relief, and Declaratory Relief and know the content thereof.

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

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

Executed on October 3, 2011, at San Rafael, California.


James R. Parrinello

Chapter 12.85 CARRYOUT BAGS

12.85.010 Definitions.

The following definitions apply to this Chapter:

- A. "Customer" means any person purchasing goods from a store.
- B. "Operator" means the person in control of, or having the responsibility for, the operation of a store, which may include, but is not limited to, the owner of the store.
- C. "Person" means any natural person, firm, corporation, partnership, or other organization or group however organized.
- D. "Plastic carryout bag" means any bag made predominantly of plastic derived from either petroleum or a biologically-based source, such as corn or other plant sources, which is provided to a customer at the point of sale. "Plastic carryout bag" includes compostable and biodegradable bags but does not include reusable bags, produce bags, or product bags.
- E. "Postconsumer recycled material" means a material that would otherwise be destined for solid waste disposal, having completed its intended end use and product life cycle. "Postconsumer recycled material" does not include materials and by-products generated from, and commonly reused within, an original manufacturing and fabrication process.
- F. "Produce bag" or "product bag" means any bag without handles used exclusively to carry produce, meats, or other food items to the point of sale inside a store or to prevent such food items from coming into direct contact with other purchased items.
- G. "Recyclable" means material that can be sorted, cleansed, and reconstituted using available recycling collection programs for the purpose of using the altered form in the manufacture of a new product. "Recycling" does not include burning, incinerating, converting, or otherwise thermally destroying solid waste.
- H. "Recyclable paper carryout bag" means a paper bag that meets all of the following requirements: (1) contains no old growth fiber, (2) is one hundred percent (100%) recyclable overall and contains a

minimum of forty percent (40%) post-consumer recycled material; (3) is capable of composting, consistent with the timeline and specifications of the American Society of Testing and Materials (ASTM) Standard D6400; (4) is accepted for recycling in curbside programs in the County; (5) has printed on the bag the name of the manufacturer, the location (country) where the bag was manufactured, and the percentage of postconsumer recycled material used; and (6) displays the word "Recyclable" in a highly visible manner on the outside of the bag.

I. "Reusable bag" means a bag with handles that is specifically designed and manufactured for multiple reuse and meets all of the following requirements: (1) has a minimum lifetime of 125 uses, which for purposes of this subsection, means the capability of carrying a minimum of 22 pounds 125 times over a distance of at least 175 feet; (2) has a minimum volume of 15 liters; (3) is machine washable or is made from a material that can be cleaned or disinfected; (4) does not contain lead, cadmium, or any other heavy metal in toxic amounts; (5) has printed on the bag, or on a tag that is permanently affixed to the bag, the name of the manufacturer, the location (country) where the bag was manufactured, a statement that the bag does not contain lead, cadmium, or any other heavy metal in toxic amounts, and the percentage of postconsumer recycled material used, if any; and (6) if made of plastic, is a minimum of at least 2.25 mils thick.

J. "Store" means any of the following retail establishments located within the unincorporated area of the County:

A full-line, self-service retail store with gross annual sales of two million dollars (\$2,000,000), or more, that sells a line of dry grocery, canned goods, or nonfood items and some perishable items;

A store of at least 10,000 square feet of retail space that generates sales or use tax pursuant to the Bradley-Burns Uniform Local Sales and Use Tax Law (Part 1.5 (commencing with Section 7200) of Division 2 of the Revenue and Taxation Code) and that has a pharmacy licensed pursuant to Chapter 9 (commencing with Section 4000) of Division 2 of the Business and Professions Code; or

A drug store, pharmacy, supermarket, grocery store, convenience food store, foodmart, or other entity engaged in the retail sale of a limited line of goods that includes milk, bread, soda, and snack foods, including those stores with a Type 20 or 21 license issued by the Department of Alcoholic Beverage Control. (Ord. 2010-0059 § 1, 2010.)

12.85.020 Plastic carryout bags prohibited.

- A. No store shall provide to any customer a plastic carryout bag.
- B. This prohibition applies to bags provided for the purpose of carrying away goods from the point of sale and does not apply to produce bags or product bags. (Ord. 2010-0059 § 1, 2010.)

12.85.030 Permitted bags.

All stores shall provide or make available to a customer only recyclable paper carryout bags or reusable bags for the purpose of carrying away goods or other materials from the point of sale, subject to the terms of this Chapter. Nothing in this Chapter prohibits customers from using bags of any type that they bring to the store themselves or from carrying away goods that are not placed in a bag, in lieu of using bags provided by the store. (Ord. 2010-0059 § 1, 2010.)

12.85.040 Regulation of recyclable paper carryout bags.

- A. Any store that provides a recyclable paper carryout bag to a customer must charge the customer 10 cents (\$0.10) for each bag provided, except as otherwise provided in this Chapter.
- B. No store shall rebate or otherwise reimburse a customer any portion of the 10-cent (\$0.10) charge required in Subsection A, except as otherwise provided in this Chapter.
- C. All stores must indicate on the customer receipt the number of recyclable paper carryout bags provided and the total amount charged for the bags.
- D. All monies collected by a store under this Chapter will be retained by the store and may be used only for any of the following purposes: (1) costs associated with complying with the requirements of this Chapter, (2) actual costs of providing recyclable paper carryout bags, or (3) costs associated with a store's educational materials or education campaign encouraging the use of reusable bags, if any.
- E. All stores must report to the Director of Public Works, on a quarterly basis, the total number of recyclable paper carryout bags provided, the total amount of monies collected for providing recyclable paper carryout bags, and a summary of any efforts a store has undertaken to promote the use of reusable bags by customers in the prior quarter. Such reporting must be done on a form prescribed by the Director of Public Works, and must be signed by a responsible agent or officer of the store confirming that the information provided on the form is accurate and complete. For the periods from January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31, all

quarterly reporting must be submitted no later than 30 days after the end of each quarter.

F. If the reporting required in Subsection E is not timely submitted by a store, such store shall be subject to the fines set forth in Section 12.85.080. (Ord. 2010-0059 § 1, 2010.)

12.85.050 Use of reusable bags.

A. All stores must provide reusable bags to customers, either for sale or at no charge.

B. Each store is strongly encouraged to educate its staff to promote reusable bags and to post signs encouraging customers to use reusable bags. (Ord. 2010-0059 § 1, 2010.)

12.85.060 Exempt customers.

All stores must provide at the point of sale, free of charge, either reusable bags or recyclable paper carryout bags or both, at the store's option, to any customer participating either in the California Special Supplemental Food Program for Women, Infants, and Children pursuant to Article 2 (commencing with Section 123275) of Chapter 1 of Part 2 of Division 106 of the Health and Safety Code or in the Supplemental Food Program pursuant to Chapter 10 (commencing with Section 15500) of Part 3 of Division 9 of the Welfare and Institutions Code. (Ord. 2010-0059 § 1, 2010.)

12.85.070 Operative date.

This Chapter shall become operative on July 1, 2011, for stores defined in Subsections J(1) and J(2) of Section 12.85.010. For stores defined in Subsection J(3) of Section 12.85.010, this Chapter shall become operative on January 1, 2012. (Ord. 2010-0059 § 1, 2010.)

12.85.080 Enforcement and violation--penalty.

A. The Director of Public Works has primary responsibility for enforcement of this Chapter. The Director of Public Works is authorized to promulgate regulations and to take any and all other actions reasonable and necessary to enforce this Chapter, including, but not limited to, investigating violations, issuing fines, and entering the premises of any store during business hours. The Director of the Department of Agricultural Commissioner/Weights and Measures and the Director of Public Health may assist with this enforcement responsibility by entering the premises of a store as part of their regular inspection functions and reporting any alleged violations to the Director of Public Works.

B. If the Director of Public Works determines that a violation of this Chapter has occurred, he/she will issue a written warning notice to the operator of a store that a violation has occurred and the potential

penalties that will apply for future violations.

C. Any store that violates or fails to comply with any of the requirements of this Chapter after a written warning notice has been issued for that violation shall be guilty of an infraction.

D. If a store has subsequent violations of this Chapter that are similar in kind to the violation addressed in a written warning notice, the following penalties will be imposed and shall be payable by the operator of the store:

A fine not exceeding one hundred dollars (\$100.00) for the first violation after the written warning notice is given;

A fine not exceeding two hundred dollars (\$200.00) for the second violation after the written warning notice is given; or

A fine not exceeding five hundred dollars (\$500.00) for the third and any subsequent violations after the written warning notice is given.

E. A fine shall be imposed for each day a violation occurs or is allowed to continue.

F. All fines collected pursuant to this Chapter shall be deposited in the Solid Waste Management Fund of the Department of Public Works to assist the department with its costs of implementing and enforcing the requirements of this Chapter.

G. Any store operator who receives a written warning notice or fine may request an administrative review of the accuracy of the determination or the propriety of any fine issued, by filing a written notice of appeal with the Director of Public Works no later than 30 days after receipt of a written warning notice or fine, as applicable. The notice of appeal must include all facts supporting the appeal and any statements and evidence, including copies of all written documentation and a list of any witnesses, that the appellant wishes to be considered in connection with the appeal. The appeal will be heard by a hearing officer designated by the Director of Public Works. The hearing officer will conduct a hearing concerning the appeal within 45 days from the date that the notice of appeal is filed, or on a later date if agreed upon by the appellant and the County, and will give the appellant 10 days prior written notice of the date of the hearing. The hearing officer may sustain, rescind, or modify the written warning notice or fine, as applicable, by written decision. The hearing officer will have the power to waive any portion of the fine in a manner consistent with the decision. The decision of the hearing officer is final and effective on the date

of service of the written decision, is not subject to further administrative review, and constitutes the final administrative decision. (Ord. 2010-0059 § 1, 2010.)

12.85.090 Severability.

If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held to be invalid by a decision of any court of competent jurisdiction, that decision will not affect the validity of the remaining portions of the ordinance. The Board of Supervisors hereby declares that it would have passed this ordinance and each and every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of this ordinance would be subsequently declared invalid. (Ord. 2010-0059 § 1, 2010.)

12.85.100 No conflict with federal or state law.

Nothing in this ordinance is intended to create any requirement, power or duty that is in conflict with any federal or state law. (Ord. 2010-0059 § 1, 2010.)

Thank you,

v/r

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Director of Marketing and Sustainability

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Learn the facts about plastic bags at www.bagtheban.com

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