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January 17, 2023

VIA ELECTRONIC FILING
(TRUEFILING)

Chief Justice Tani G. Cantil-Sakauye
Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The League of California Cities ("Cal Cities") submits this letter as amicus curiae in support of the petitions for review of *G.I. Industries v. City of Thousand Oaks, et. al*. (2022) 84 Cal.App.5th 814 ("*G.I. Industries*" or the "Opinion"). The Opinion creates ambiguity for cities and other local agencies regarding compliance with the Ralph M. Brown Act ("Brown Act") and the California Environmental Quality Act ("CEQA"). The Opinion's uncertainty risks increasing cities' administrative costs in preparing meeting agendas and holding public meetings without meaningfully increasing information access to the public or public participation in decision-making. Review is necessary to remove the ambiguity and provide clear guidance on what local agencies must do to comply with the law.

Cal Cities is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Facts

The City Council of the City of Thousand Oaks (the "City") posted an agenda to consider approval of a solid waste hauler contract with Arakelian Enterprises, Inc., d.b.a. Athens Services ("Athens") at a public meeting. The City had an existing solid waste hauler contract with G.I. Industries, d.b.a. Waste Management ("WM"), but the City was unable to reach an agreement with WM to continue those services and the City sought bids from other providers. WM objected that

the City had not considered whether the City's approval of a contract with Athens could have adverse environmental impacts. WM raised this objection after the agenda had been posted but before the City Council meeting. At the meeting, the City Council approved the Athens contract and determined that the approval was exempt from CEQA.

WM filed suit. WM claimed that the City violated the agenda requirements of the Brown Act. The trial court sustained a demurrer to WM's complaint. The Court of Appeal reversed. The Court held that the City violated the Brown Act by adopting a CEQA exemption without having listed it as a separate agenda item for at least 72 hours before the Council meeting. (Slip op. at p. 10.) In so doing, the Court held for the first time that the inapplicability of CEQA needs to be included in a local agency's individual Brown Act agenda items.

Background CEQA Law

To demonstrate the ambiguity and unreasonable burdens the Opinion creates for cities and other local agencies, a word about CEQA is in order. CEQA applies to "projects." CEQA defines projects as any activity "which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment," and which is either directly undertaken, financially supported, or issued permits or other entitlements by a public agency. (Pub. Res. Code § 21065.)

Whether a project is subject to CEQA and, if so, how is determined by a "three-tier" review process. (*Muzzy Ranch Co. v. Solano County Airport Land Use Com*. (2007) 41 Cal.4th 372, 380 ("*Muzzy Ranch*").)

1. Tier one. The first step is to determine whether the project falls within CEQA.

2. Tier two. The second step is to determine if the project is exempt from CEQA. If the project is exempt, no further environmental review is necessary. If the project is *not* exempt, the project proceeds to a third tier of review. (Slip op. at p. 8, citing *Muzzy Ranch*, 41 Cal.4th at 380-381.)

3. Tier three. The third step is preparation and approval of a Negative Declaration, a Mitigated Negative Declaration, or an Environmental Impact Report. Adoption and certification of one of these documents is a formal action.

***G.I. Industries* Opinion**

In *G.I. Industries*, the Court held that the determination that a project is exempt from CEQA – or tier two – falls within the purview of the Brown Act and must be properly agendized. (Slip op. at p. 8). The Opinion reasons that a finding that a project is exempt from CEQA is not a minor

matter. Such a finding forecloses any analysis of the project's environmental impact. (Slip op. at p. 11)

The Opinion conflates tiers two and three. In tier two – a decision made often in conjunction with tier one - the agency merely makes a determination with respect to which type of document/report is required for tier three. Tier three documents require a formal action taken by the legislative body. These formal actions are already required to be agendized. (See *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167, 1176-1178.) There is an opportunity for members of the public to make their voices heard. They can review and provide "analysis of the project's environmental impact." (Slip op. p. 11.)

The Opinion is ambiguous

The Opinion attempts to cabin its holding to just tier two decisions: "Most of the City's activities would not qualify as a project because they have no potential environmental effect. (See Guidelines, § 15378(a).)" (Slip Op. at p. 12.) No explanation is provided for this factual generalization. And the Opinion's other reasoning may be read to include tier one decisions—whether something constitutes a "project." As this Honorable Court has recently explained, "no potential environmental effect" is not the standard: "a proposed activity is a CEQA project if, by its general nature, the activity is capable of causing a direct or reasonably foreseeable indirect physical change in the environment." (*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1197.) This broad definition of "project," coupled with the Opinion's open-ended reasoning as to what actions must be agendized under the Brown Act, creates ambiguity. The Opinion risks encouraging lawsuits about local agency actions that have no environmental impacts, but *might* have impacts, and thus should have been agendized.

The Opinion acknowledges that while a local legislative body may delegate its duty to staff to determine whether a CEQA exemption applies, the legislative body retains the power to overrule its staff's determination. (Slip op. at p. 12.) But the Opinion adds: "Where a local agency at a regular meeting approves a project that is subject to a staff's determination of a CEQA exemption, it must give notice of the CEQA exemption on its agenda." (Slip op. at p. 13.) This quoted language is ambiguous. Does it mean that the legislative body must revisit every staff determination that an exemption applies? That reading is not supported by CEQA or the CEQA Guidelines. But if the Opinion requires that, then a local legislative body might have to give public notice of findings the legislative body could make but is not proposing to make because those findings are unnecessary. The Opinion is ambiguous on this point.

The Opinion is also ambiguous in terms of to whom it applies. The Opinion provides that the Brown Act requires a CEQA finding of exemption to be listed on the local agency's agenda for its public meeting. (Slip op. at p. 2.) But a local agency may have several legislative bodies.

In addition to the city council, a city may have various boards and commissions, each devoted to a particular subject, like planning, utilities, parks, etc. A City Youth Commission might plan a summer nature walk for youth. Does the Opinion apply to the Youth Commission? Would it be required to agendize a finding that the nature walk activity is exempt from CEQA? Given the broad language of the Opinion, this is unclear.

The Opinion's uncertainty risks increasing cities' administrative costs without a public benefit

The Opinion downplays the burdens it puts on cities and other local agencies. The Opinion states: "if a local legislative body intends to vote on or discuss a CEQA exemption at a regular meeting, it will require minimal effort to include it as an agenda item." (Slip op. at p. 12.) But adding an agenda item is more than just word processing. Given the ambiguities identified above, substantial staff time may be incurred ferreting out potential CEQA issues and exemptions to add as separate agenda items.

The Opinion will also lead to more staff time incurred at public meetings. The Brown Act already requires time for public comment on every agenda item not on the consent calendar. By requiring that a CEQA exemption be listed separately from the other action to be taken on an item, the Opinion risks doubling the public comment time for every item. An agency might attempt to mitigate the impact, for example, by listing the CEQA exemption as a sub-item. But given the ambiguity of the Opinion, it is not clear this would be sufficient.

The Brown Act contains cure and correct procedures by which a local agency may avoid liability for Brown Act errors after the fact. (Gov. Code § 54960.1.) But use of these procedures requires more staff time and likely attorney time too. The upshot is that the Opinion will require cities and other local agencies to incur substantial costs in terms of staff and attorney time in preparing agendas, conducting public meetings, and addressing post-meeting claims of error. Requiring more notice is often justified by claims that it will improve public access and participation. But given the other robust notice requirements in the Brown Act and established CEQA procedures, the Opinion is unlikely to meaningfully increase public information access or participation. Cities and other local agencies will incur increased costs without a public benefit to justify them.

Conclusion

Cal Cities urges this Court to grant review to clarify what cities and other local agencies must do to comply with the Brown Act and CEQA.

Respectfully submitted,

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of BEST BEST & KRIEGER LLP
Attorneys for The League of California Cities

GWK

cc: See attached Proof of Service

CERTIFICATE OF SERVICE

G.I. Industries v. City of Thousand Oaks, et al.
Ventura County Superior Court Case No. 56-2021-00554581-CU-WM-VTA
Court of Appeal for the State of California, Second Appellate District, Division Six
Case No. B317201
California Supreme Court Case No. S277439

I, Tatiana Palomares, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 300 South Grand Avenue, 25th Floor, Los Angeles, California 90071. My email address is: tatiana.palomares@bbklaw.com. On January 17, 2023, I served the document(s) described as THE LEAGUE OF CALIFORNIA CITIES AMICUS BRIEF on the interested parties in this action addressed as follows:

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

Executed on January 17, 2023, at Los Angeles, California.

/s/ Tatiana Palomares