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December 14, 2022

Hon. Tani Cantil-Sakauye, Chief Justice,
Associate Justices of the Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

VIA ELECTRONIC FILING

Re: Request for Depublication, *G.I. Industries v. City of Thousand Oaks*,
(Oct. 26, 2022, B317201) ___ Cal.App.5th ___ [2022 Cal. App. LEXIS 971]
CA Supreme Court Case S277439

Honorable Justices:

Pursuant to California Rules of Court, Rule 8.1125, the County of Sonoma respectfully requests that the Court order the depublication of the opinion by the Second District Court of Appeal in *G.I. Industries v. City of Thousand Oaks*, filed October 26, 2022, and substantially amended on November 22, 2022 (the "Opinion"; slip opinion attached). This letter sets forth the County's interest in depublication and the reasons the Opinion should be depublished.

The Opinion introduces procedural uncertainty where the Legislature has sought procedural certainty. The Opinion is wrongly decided, and greatly confuses existing precedents. Because there are ambiguities in the Opinion's logic and intent, it is unclear how the case will function as precedent, but the multiple possible readings of the Opinion all justify depublication.

I. Sonoma County's interest

Sonoma County is subject to the requirements of the Brown Act, and subject to the provisions of the California Environmental Quality Act (CEQA). Sonoma County has a strong interest in government transparency, and in avoiding the unintended consequences that arise from well-intentioned but poorly reasoned decisions that thwart the Legislature's intent. Sonoma County has no relationship with the parties in the litigation, and contracts with none of them for waste services.

II. Background

Broadly, the Opinion holds for the first time that the inapplicability of CEQA needs to be included in a local agency's individual Brown Act agenda items. (Opinion at 10 ["[T]he City violated the Brown Act by adopting the exemption without having listed it as an item on its agenda for at least 72 hours."])

Document received by the CA Supreme Court.

The Brown Act requires that the “legislative body” of a “local agency” post an agenda 72 hours in advance containing a “brief general description of each item of business to be transacted or discussed” at upcoming meetings. (Gov’t Code § 54954.2.) CEQA in turn requires agencies to “certify” an Environmental Impact Report where a project has the potential to have significant environmental impacts, and then to make certain findings prior to project approvals. (Pub. Res. Code § 21081; 14 Cal. Code Regs. § 15090.) Alternatively, an agency may “consider” and “adopt” a negative declaration, which demonstrates that an Environmental Impact Report is not required. (14 Cal. Code Regs. § 15074, subd. (b) and (c).)

San Joaquin Raptor Rescue Center v. County of Merced (2013) 216 Cal.App.4th 1167 held that the “adoption” of a Negative Declaration must be listed on the agency agenda, and the court reasoned that the same logic applies to other “CEQA documents.” (216 Cal.App.4th at 1178.)

The Opinion purports to extend *San Joaquin Raptor Rescue Center*, but actually departs from that decision because it ignores CEQA’s procedures. Sonoma County concurs with the reasons stated in the Request for Depublication filed by the California State Association of Counties and Solano County on November 18, 2022, and without reiterating that depublication request, points out that the following additional reasons also support depublication.

III. The Opinion is directly contrary to the Legislature’s express intent in Public Resources Code section 21083.1 that courts should not create new CEQA procedures.

The Opinion holds that the “adoption” of an exemption is similar to the adoption of a Negative Declaration document and should therefore be subject to the same rule. The Opinion reasons briefly as follows:

The City argues that its adoption of the CEQA exemption was a component of the agenda item awarding the franchise agreement to Athens. But *San Joaquin Raptor* rejected that argument.

(Opinion at 9, emphasis supplied.)

However, exemptions are not “adopted” under CEQA. They apply to an agency action, or they do not. The applicability of the exemption does not depend on valid agency findings. If the agency is silent on exemptions but an exemption applies, the project remains exempt. (*Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal. App. 4th 173, 179 [agency does not waive right to assert exemption if it erroneously prepares an Environmental Impact Report and only later realizes that the approval was exempt]; *Santa Barbara County Flower & Nursery Growers Assn. v. County of Santa Barbara* (2004) 121 Cal.App.4th 864, 873.)

Unlike exemptions, the CEQA Guidelines require that Negative Declarations be “adopted.” (14 Cal. Code Regs. § 15074.) Similarly, Environmental Impact Reports must be separately “certified,” with separate findings. (14 Cal. Code Regs. § 15090.) In these cases, there are distinct “CEQA documents” that an agency must approve as a separate action. There is no equivalent distinct and separate process for exemptions, and there is no equivalent “CEQA document” that would justify the Opinion’s reliance on *San Joaquin Raptor Rescue Center*. Under CEQA, an agency must make a “determination” whether an exemption applies, and the

CEQA Guidelines expressly provide that this “determination” is among the actions (*unlike* the power to “adopt” or “certify” a CEQA document) that can be delegated to an agency’s staff. (Compare 14 Cal. Code Regs. § 15025, subd. (a)(1) [exemption determination can be delegated] with § 15025, subd. (b) [adoption of Environmental Impact Report and Negative Declaration cannot be delegated]; see also 14 Cal Code Regs. §§ 15002(k), 15061(a).) The Court of Appeal’s reasoning ignores the separate processes that the Natural Resources Agency has crafted for exempt and non-exempt projects.

The only “CEQA document” associated with an exemption is a Notice of Exemption. To provide certainty for agencies and stakeholders, CEQA provides for *post-approval* Notices of Exemption that serve only to shorten the statute of limitations after approval. (Pub. Res. Code § 21152(b); 14 Cal. Code Regs. § 15062.) These notices are typically, but not always, optional, and they are not “approval” documents. (14 Cal. Code Regs. §§ 15061(a), 15062(d).¹) If a post-approval Notice of Exemption is somehow defective, but the project falls under an exemption, the project is exempt. The defective notice has no impact on the approval.

The Opinion’s rewrite of the CEQA Guidelines to require notice for the “adoption” of an exemption determination is contrary to the Legislature’s express intent in Public Resources Code section 21083.1:

It is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret this division or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines.

Because the Legislature and Natural Resources agency do not require a written document for exemptions to apply, the Opinion’s holding is contrary to section 21083.1. The Opinion extends *San Joaquin Raptor Rescue Center* to exemption determinations (and possibly, as discussed below, to determinations that are not even before the legislative body), but provides no analysis of why, under CEQA, an optional sub-finding in an approval is a separate “item of business” *if* it is present.

The Opinion does not substantively discuss CEQA precedent, but briefly attempted to distinguish *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356, on the grounds that it was not a Brown Act case. (Opinion at 10.) *San Lorenzo Valley* explains:

When a negative declaration or an EIR is required, it must be in writing. “CEQA impliedly requires (and the guidelines expressly require) that the agency render a written determination whether a project requires an EIR before it gives final approval to that project.” (*No Oil, Inc. v. City of Los Angeles, supra*, 13 Cal. 3d at p. 75 [post hoc negative declaration]; see Guidelines, § 15362 [defining “environmental documents”].) By contrast, there is no

¹ Compare, by way of example, Public Resources Code section 21080.20(c), which makes the post-approval Notice of Exemption mandatory for certain bicycle transportation projects.

requirement that the agency put its exemption decision in writing. According to the Guidelines, “the agency *may* file a notice of exemption.” (Guidelines, § 15062, subd. (a), italics added.) But it is not required to do so: “A notice of exemption has no significance other than to trigger the running of the limitations period.” (*Apartment Assn. of Greater Los Angeles v. City of Los Angeles, supra*, 90 Cal. App. 4th at p. 1171.) For that reason, “it is irrelevant” whether an exemption notice contains “all that it should under the CEQA guidelines.” (*Id.* at p. 1171, fn. 23.) There are other procedural differences between first-tier review and later CEQA evaluations, including the opportunity for public comment. “CEQA provides for public comment on a negative declaration and an EIR. (§ 21092.) By contrast, CEQA does not provide for a public comment period before an agency decides a project is exempt.” (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster, supra*, 52 Cal. App. 4th at p. 1210.) “Similarly, where an agency approves a project and simultaneously decides that the project is exempt from CEQA, there is no ‘public hearing ... before the issuance of the notice of determination.’ (*Ibid.*; see *City of Pasadena v. State of California, supra*, 14 Cal. App. 4th at p. 821 [agency “not required to hold a hearing prior to filing the notice of exemption”].) Underlying these differences in procedural rules is a more fundamental concept: CEQA does not apply to exemption decisions

(139 Cal.App.4th at 1385-1386.) The Opinion does not substantively discuss the precedents that explain at length how exemptions and “CEQA documents” are not procedurally similar. The Opinion’s logic that CEQA precedent does not control ignores the mechanics of the Opinion’s own conclusions. The Opinion rewrote CEQA’s exemption procedures, injected that rewrite into the Brown Act context, and then concluded that the Brown Act was violated in a manner that did not require the examination of CEQA precedent. Decades of precedent has confirmed that exemptions do not require written findings or documentation. (*San Lorenzo Valley*, 139 Cal.App.4th at 1385; *CalBeach Advocates v City of Solana Beach* (2002) 103 Cal.App.4th 529, 539-540 (where emergency project was exempt, court would review applicability of emergency exemption, but not exemption findings, because agency findings were not required); *Association for Protection of Env’tl Values v City of Ukiah* (1991) 2 Cal.App.4th 720, 729 (no findings required for exemption determination because no hearing was required by local ordinances for exemption determinations); *Dehne v County of Santa Clara* (1981) 115 Cal.App.3d 827, 835 (no findings were required for exemption, because county was not required by law to hear appeal of exemption); see 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2019) §§ 5.114, 5.115.) The Opinion’s reasoning is inconsistent with Public Resources Code section 21083.1 at every step. A double bank shot argument that the Opinion is a Brown Act case and not a CEQA case fails because the Brown Act actions to be noticed *are* CEQA processes. Moreover, the Court of Appeal’s reasoning explicitly turned on its assessment of CEQA’s procedures and not on the Brown Act’s statutory language. The Opinion explains:

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. [citation omitted] A finding of an

exemption is as least as important to environmental protection as an MND. (Opinion at 11.)

Notably, in making this assessment of CEQA’s procedures, the Court of Appeal simultaneously ignored non-CEQA precedents construing the Brown Act to not require separate agendization of sub-findings of a single item of business. (*Martis Camp Community Assn. v. County of Placer* (2020) 53 Cal.App.5th 569, 590, fn. 14 [rejecting, outside of the CEQA context, the argument that a sub-component of a project approval is “a distinct item of business that needed to be separately agendized”]; *Olson v. Hornbrook Community Services Dist.* (2019) 33 Cal. App. 5th 502, 527 [relying on *San Joaquin Raptor Rescue Center* in holding that a single item does not require multiple agenda entries]; cf. *Hernandez v. Town of Apple Valley*, 7 Cal.App.5th 194, 208 [Brown Act violated where the agenda did not mention a *separate agreement* that was proposed for adoption].) The Court of Appeal’s refusal to consider CEQA’s provisions combined with its emphasis on the “importance” of CEQA exemption determinations casts doubt on decades of well-reasoned precedent.

Again, the faulty logic in the Opinion turns on CEQA: “[a] finding of an exemption is as least as important to environmental protection as an MND.” (Opinion at 11.) In the context of CEQA exemptions, other courts have recognized that they have authority to enforce CEQA’s procedural requirements, but not to write new ones based on independent judicial assessments on how procedures could be improved. (E.g., *Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 477.) While the Court of Appeal expressed concern regarding the relative “importance” of exemption determinations, the Legislature and Natural Resources Agency have adopted very different procedures for exempt and non-exempt projects. The most notice and process is reserved for projects with potentially significant impacts and not for projects where CEQA does not apply. The Legislature and Natural Resources Agency have sought a balance, melding rigorous environmental review requirements with limits. In Public Resources Code section 21083.1, the Legislature emphasized the importance of those limits. Because the Opinion’s holding is contrary to the Legislature’s express intent, and because there is no basis in CEQA for the Opinion’s Brown Act holding, the Opinion should be depublished.

IV. The Opinion should be depublished because some language in the decision, even if arguably dicta, directly contradicts black letter law, leading to fundamental uncertainty about the scope and meaning of the decision.

The main holding of the Opinion appears to be that *if* the local agency’s legislative body makes an exemption finding, *then* that determination must be separately included on the agenda. This holding lacks support in Brown Act and CEQA precedent, and also leads to the obvious policy objection that the Opinion is discouraging transparency and public understanding, since if a project opponent makes a frivolous “late hit” argument that an action is not exempt, then any explicit explanation of why an exemption applies could trigger a continuance. In short, the Opinion is incorrect on the law, and has terrible unintended consequences.

However, the Opinion goes further than the facts presented, and appears to assert that the legislative body must provide notice of actions that potentially are not even being taken. The relevant and highly ambiguous language in the Opinion is as follows:

The City can delegate its duty to its staff to determine whether a CEQA exemption applies. (Guidelines, §§ 15025(a)(1), 15356.)

But the delegation only goes so far. The legislative body of the local agency retains the inherent power to overrule its staff's determination. Thus, the local agency makes the ultimate decision whether a CEQA exemption applies. [¶] The City cannot avoid the Brown Act simply by delegating its duty to its staff. 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. (Opinion at 12-13, emphasis supplied.)

If this language is read very literally, the legislative body has an obligation to agendaize staff determinations it is *not proposing to revisit*. The Opinion does not provide a basis for this reasoning. There actually appear to be at least two distinct possible readings of the implicit logic, both of which justify depublication. First, contrary to all existing authority, and contrary to Public Resources Code section 21083.1, the court's reasoning may in fact have been that exemption determinations and findings by the legislative body are required. Guideline 15025 does not require that the legislative body revisit *every* staff determination that an exemption applies, and to the extent the Opinion suggests otherwise, this suggestion is wrong and contrary to CEQA's procedures. The Opinion unfortunately fails to discuss the applicable CEQA rules. Agencies are required to have procedures to implement CEQA (Pub. Res. Code § 21082; 14 Cal. Code Regs. § 15022), and these procedures must provide for appeals of staff exemption determinations to the elected body if there is one. (Pub. Res. Code § 21151(c).) The language in the Opinion concerning "inherent authority" is thus not wrong, but it is procedurally misleading because it ignores agency procedures. (See *Association for Protection of Envi'l Values*, 2 Cal.App.4th at 729-732 [emphasizing the importance of local procedures in concluding that exemption findings were not required under the circumstances].) The Opinion's ambiguous statement that a delegation to agency staff under Guideline 15025 "only goes so far" alters the plain meaning of Guideline 15025 if the intent is to say that legislative body determinations are required in every case. The Natural Resources Agency has explicitly carved out such determinations from the rules that prohibit other types of CEQA adoption actions from being delegated. (14 Cal. Code Regs. § 15025.) Where authority is delegated by the local agency, agency staff have authority to make exemption determinations, and those determinations can be appealed or revisited, but this is not required for every item.

It is unfortunate that the Court of Appeal may have reached the conclusion that the legislative body must affirmatively revisit staff determinations without substantively considering controlling precedent, but this possibility is less radical than another alternative, which is that the Court of Appeal has possibly required notice of findings that the legislative body could make even if it is not proposing to make them because they are unnecessary. The underlined language of the paragraph above appears to support this latter reading. This would be an impractical and drastic expansion of the Brown Act's "*brief general description* of each item of business" language. The rule cannot be that everything that potentially might come up in a legislative body's deliberations, even background legal frameworks that the legislative body does not intend to revisit, must be agendaized. If this is the Opinion's logic, this is no different than saying that all contracts require an agenda notice that the item may not go forward if the legislative body finds the contract results in an unconstitutional gift of public funds. Or perhaps all ordinances should require agenda notices that they comply with the equal protection clause of the Fourteenth Amendment? These other legal frameworks are also "important," but the result of such a rule would be public confusion and notice soup, not transparency. The Brown Act has never been

interpreted as requiring separate notice of all potential sub-issues that hypothetically could arise with an “item of business.” There is no reasonable limiting principle for this rule, assuming that this is what the Court of Appeal intended.

The logic of the Opinion is missing, and the stakes are not small. It is enough that the Opinion is fundamentally ambiguous – in a legal context where stakeholders are entitled to more certainty – to justify an order of depublication from this Court.

V. The reasoning of the Opinion will lead to broad uncertainty, because some of the dicta in the Opinion contradicts controlling Supreme Court authority regarding the identification of “projects” under CEQA.

The Opinion reasons that additional exemption notices will not be burdensome, stating: “Most of the City’s activities would not qualify as a project because they have no potential environmental effect. (See Guidelines, § 15378(a).)” (Opinion at 12.) No explanation is provided for this factual generalization. The Opinion appears to incorrectly suggest that more is required for a “project” than: “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment ...” (Public Resources Code § 21065.) The Opinion amusingly implies a level of ethereality in government work that is surely not the stuff of judicial notice. The reasoning also ignores this Court’s recent holdings regarding the proper means for determining that an action is not a “project.” As this Court has explained, determining that a *particular* agency action will have no environmental effects 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. This determination is made without considering whether, under the specific circumstances in which the proposed activity will be carried out, these potential effects will actually occur....

The somewhat abstract nature of the project decision is appropriate to its preliminary role in CEQA's three-tiered decision tree. Determination of an activity's status as a project occurs at the inception of agency action, presumably before any formal inquiry has been made into the actual environmental impact of the activity. The question posed at that point in the CEQA analysis is not whether the activity will affect the environment, or what those effects might be, but whether the activity's potential for causing environmental change is sufficient to justify the further inquiry into its actual effects that will follow from the application of CEQA. If the proposed activity is the sort that is capable of causing direct or reasonably foreseeable indirect effects on the environment, some type of environmental review is justified, and the activity must be deemed a project. CEQA analysis is then undertaken to evaluate the likelihood and nature of the project's environmental impacts, in order to determine the extent of environmental review required.

1198.) Contrary to the Opinion’s suggestion that burdens are minimal, the Opinion’s requirements will be both very broad and not always clear. The Opinion effectively weaponizes minor distinctions between actions that will have no impacts and actions that will have no impacts but that belong to a broader category that might have impacts. As this Court acknowledged, this presents an “abstract” question. The combination of *Union of Medical Marijuana Patients* with this Opinion yields the possibility of extensive highly technical litigation of an opportunistic nature that will yield no environmental benefits whatsoever. This is not the type of procedural certainty that the Legislature and Natural Resources Agency have sought to ensure in their extremely detailed rules of notice and procedure.

VI. Conclusion

Sonoma County emphatically concurs with the importance of transparency in CEQA proceedings. But the need for transparency is not a justification for rewriting CEQA’s procedures contrary to the Legislature’s express intent. We respectfully request this court to order depublication of the opinion in *G.I. Industries v. City of Thousand Oaks* (Oct. 26, 2022, B317201).

Respectfully submitted,

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Verne Ball,
Deputy County Counsel

cc: (see Proof of Service, attached)

Document received by the CA Supreme Court.