OFFICE OF
COUNTY COUNSEL
675 TEXAS STREET, SUITE 6600
FAIRFIELD, CALIFORNIA 94533-6342
(707)784-6140
FAX (707)784-6862

BERNADETTE S. CURRY
COUNTY COUNSEL

CARRIE BLACKLOCK
ASSISTANT COUNTY COUNSEL

LEE AXELRAD
JULIE A. BARGA
RYAN K. FITZGERALD
KIMBERLEY G. GLOVER
JAMES W. LAUGHLIN
LORI A. MAZZELLA
MICHAEL E. MCDONALD
ANA C. OLDWIN
ADRIENNE L. PATTERSON
CLARISA P. SUDARMA
DANA VAUGHN
KELLY A. WELSH
KIMBERLY ALEXANDER YARBOR
DEPUTIES COUNTY COUNSEL

CYNTHIA GORDON FOREMAN
CLAIMS AND CIVIL LITIGATION MANAGER

November 18, 2022

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

Re: Request for Depublication, *G.I. Industries v. City of Thousand Oaks,* (Oct. 26, 2022, B317201) ___ Cal.App.5th ___ [2022 WL 14750209]

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

Pursuant to California Rules of Court, Rule 8.1125, and on behalf of the County of Solano and the California State Association of Counties (CSAC), we respectfully request this court to order that the opinion by the Second District Court of Appeal in *G.I. Industries v. City of Thousand Oaks,* filed October 26, 2022 (the "Opinion"; slip opinion attached) be depublished. This letter sets forth the County's interest in depublication and the reasons the Opinion should be depublished.

The Opinion misapplies the agenda requirements of the Brown Act (Gov. Code, § 54950, et seq.) in a way that is inconsistent with the three-tier environmental review process established in the California Environmental Quality Act ("CEQA"; Pub. Res. Code, § 21000, et seq.) and applied by this court in *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372 ("*Muzzy Ranch*").

The Opinion addresses the question of whether the city council of the City of Thousand Oaks violated the Brown Act when it awarded a solid waste management franchise agreement to a new franchisee. The County of Solano and CSAC do not have any interest in the old or new franchise agreement, nor in any of the parties to that dispute.

However, as a "local agency" with multiple "legislative bodies" that are subject to both the Brown Act and CEQA, the County has a substantial interest in fully complying with the obligations imposed on it jointly by those two enactments.[1] From the County's perspective as a local agency, the Opinion's interpretation of the interaction between the Brown Act and CEQA places an unreasonable burden on local agencies in preparing meeting agendas for their legislative bodies, and it severely constrains the ability of those legislative bodies to exercise their inherent authority to oversee the work done by their staff. In addition, because the Solano County Counsel represented the Airport Land Use Commission in the *Muzzy Ranch* litigation, we have a particular interest in seeing that this court's *Muzzy Ranch* opinion is not distorted or misapplied in subsequent published opinions.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The central purpose of both CEQA and the Brown Act is to foster better-informed governmental decision making. Neither act should be interpreted in a manner that elevates form over function, or that needlessly creates opportunities for "gotcha" litigation.

The *G.I. Industries* Case

The appeal is from a judgment entered after the trial court sustained a demurrer without leave to amend. The Court of Appeal reversed, concluding that G.I.'s petition for writ of mandate stated a cause of action based on section 56960.1 of the Brown Act. To state such a cause of action, a complainant must allege: (1) that a legislative body of a local agency violated one or more enumerated Brown Act statutes; (2) that there was "action taken" by the local legislative body in connection with the violation; and (3) that before commencing the action, plaintiff made a timely demand of the legislative body to cure or correct the violation and the legislative body did not do so. (*Olson v. Hornbrook Community Services Dist.* (2019) 33 Cal.App.5th 502, 517.)

Subdivisions (a)(1) and (a)(3) of section 54954.2 of the Brown Act provide, in relevant part, as follows:

---

[1] See Gov. Code, §§ 54951 and 54952 for the Brown Act's definitions of "local agency" and "legislative body."

> At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words.... [¶] No action or discussion shall be undertaken on any item not appearing on the posted agenda....

G.I. provided solid waste management within the City of Thousand Oaks pursuant to a franchise agreement. The City was considering entering into a new exclusive franchise agreement with Arakelian Enterprises. The City posted an agenda for a city council meeting, stating as an "item of business" that the council would consider awarding a new franchise agreement to Arakelian. The agenda noted that staff was recommending approval but provided no further details about staff's recommendation.

Prior to the council meeting but after the City had posted the agenda, G.I. submitted written comments alleging that the City had not considered whether approval of the Arakelian franchise agreement could have adverse environmental impacts. In a supplemental staff report, provided immediately prior to the council's meeting, staff recommended that the council's approval decision would be exempt from CEQA under the Class 1 and Class 8 categorial exemptions as well as the "commonsense" exemption (CEQA Guidelines, §§ 15301, 15308, & 15061(b)(3), respectively).[2] Staff had prepared a draft resolution for the council, but the draft did not include this CEQA exemption finding. The Opinion describes the council's action(s) at the meeting as follows:

> A council member moved to approve the [Arakelian] franchise agreement. The mayor suggested the council member include in the motion a finding that the project is exempt from CEQA. The council member agreed. The City council adopted the motion as amended to include the CEQA exemptions. The minutes of the meeting reflect separate actions by the council in approving the agreement and in finding it exempt from CEQA.

After unsuccessfully asking the City to cure and correct, G.I. filed a petition for writ of mandate alleging that the City had violated section 54954.2 of the Brown Act due to the council's discussion of the CEQA exemption during the meeting and the council's "action" to include a CEQA exemption finding in its resolution approving the franchise agreement. Based on these facts, the Court of Appeal held as follows:

---

[2] The State CEQA Guidelines are at 14 Cal. Code Regs, § 15000 et seq. This court has repeatedly instructed that trial and appellate courts should "accord the CEQA Guidelines great weight except where they are clearly unauthorized or erroneous." (*Muzzy Ranch, supra*, 41 Cal.4th at p. 380, fn. 2; see also *California Building Industry Assoc. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 381.)

> The CEQA exemption involved a separate action or determination by the City and concerned discrete significant issues of CEQA compliance.... It follows that the City violated the Brown Act by adopting the exemption without having listed it as an item on its agenda for at least 72 hours.

(Slip opinion, pp. 9-10.)

A CEQA Exemption Finding is not Equivalent to The Adoption of a Mitigated Negative Declaration

The Opinion relies heavily on *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167 and equates an agency's finding that a project is exempt from CEQA with an agency's decision to adopt a Negative Declaration or a Mitigated Negative Declaration. Although the Opinion makes several references to this court's opinion in *Muzzy Ranch*, the Opinion fails to consider how the three-tier CEQA environmental review process described in *Muzzy Ranch* should be applied consistent with the Brown Act.

In *San Joaquin Raptor*, a county planning commission listed its consideration of a subdivision application as an item of business on its meeting agenda, but the agenda did not identify that the commission would also be considering the adoption of a Mitigated Negative Declaration (MND) for the subdivision project. *San Joaquin Raptor* holds that when an agency's legislative body adopts an MND, that action is a distinct "item of business" for purposes of the Brown Act and must be placed on the meeting agenda separate from the body's decision on the project proposal. (*Id.* at p 1178.) By analogy, this holding also applies to a legislative body's adoption of a Negative Declaration (ND) and certification of an Environmental Impact Report (EIR). This holding of *San Joaquin Raptor* is fully consistent with the three-tier CEQA process described in *Muzzy Ranch,* but that three-tier process and the holding in *San Joaquin Raptor* have been misapplied in the *G.I. Industries* Opinion.

The First and Second Tiers of the Three-Tier CEQA Process

Every activity of a public agency, and every decision made by the agency's legislative body, is potentially a "project" subject to CEQA. In the first tier of the three-tier CEQA process, the lead agency determines whether a proposed activity is a "project" as that term is defined in CEQA. (*Muzzy Ranch, supra,* 41 Cal.4th at p. 380.) CEQA defines "project" as "an activity which may cause either a direct physical change 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.)

There are three reasons why an activity may not come within this statutory definition of "project." First, the activity may not be one that will be directly undertaken, financially supported, or issued permits or entitlements by the agency. Second, the activity may not have the potential to cause environmental change. (See, e.g., *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171.) Third, the activity may be part of a larger project that has already undergone CEQA review, in which case the relevant inquiry is not whether the activity is itself a separate "project" but whether additional review is required. (See, e.g., Pub. Res. Code, § 21166 [events triggering additional review]; see also CEQA Guidelines, § 15378 ["project" means the whole of an action; it does not mean each separate governmental approval].)

If the proposed activity is a "project" subject to CEQA, then the second tier of the process requires the lead agency to determine whether the project is exempt from CEQA review based on either a statutory exemption, a categorical exemption, or because of what is often called the commonsense exemption, "which applies '[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment'". (*Muzzy Ranch, supra,* 41 Cal.4th at p. 380, citing CEQA Guidelines, § 15061, subd. (b)(3).)

A leading CEQA treatise describes the purpose of the commonsense exemption as follows:

> The commonsense exemption was adopted to guard against the possibility that an "obviously exempt" type of project not listed in the categorical exemptions "might be required needlessly to comply with the requirements of CEQA." *Myers v Board of Supervisors* (1976) 58 CA3d 413, 425. This exemption is based on the idea that CEQA applies jurisdictionally only to activities that have the potential for causing environmental effects. See *No Oil, Inc. v City of Los Angeles* (1974) 13 C3d 68. See also *Kaufman & Broad-South Bay, Inc. v Morgan Hill Unified Sch. Dist.* (1992) 9 CA4th 464. The exemption acts as something of a "catchall" provision, since a project the "qualifies for neither a statutory nor a categorical exemption may nonetheless be found exempt" if it fits within the terms of this exemption. *Muzzy Ranch*, 41 C4th at 380.

(Practice Under the California Environmental Quality Act (2nd ed Cal CEB), § 5.110.)

In theory, and according to the sections 15050 and 15061of the CEQA Guidelines, these first two CEQA determinations are distinct from each other and are to be made sequentially; in practice, however, that is often not the case, because the determinations of "subject to" and "exempt from" have substantial overlap and the two terms are sometimes functionally interchangeable. (See, e.g., *Mountain Lion Foundation v. Fish and Game Comm.* (1997) 16 Cal.4th 105, 124 ["A project falling within … a categorical exemption is not subject to CEQA."].)

The only significant difference between these first two determinations is in the standard of judicial review. Whether a particular activity "constitutes a 'project' within the purview of CEQA ... is an issue of law." (*Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 794-795.) In contrast, "whether a particular activity qualifies for the commonsense exemption presents an issue of fact." (*Muzzy Ranch, supra*, 41 Cal.4th at p. 386.)

The Third Tier of the CEQA Process

If the second-tier determination is that the project is *not* exempt from CEQA review, then the third tier requires the preparation and approval of an appropriate document—either a Negative Declaration (ND), a Mitigated Negative Declaration (MND), or an Environmental Impact Report (EIR)—that evaluates the project's potential environmental impacts. The lead agency's ND, MND, or EIR may be prepared, in whole or in part, by the agency itself, the agency's consultant, or the project applicant. (Pub. Res. Code, § 21982.1, subd. (a) & (b).) Regardless of who prepares the CEQA document, adoption of an ND or MND, or certification of an EIR, is the action by which the agency formally adopts the document as its own and takes legal responsibility for the content of the document.

When an agency approves a CEQA document, it is declaring: (1) that the document reflects the agency's independent judgment and analysis; (2) that the document complies with CEQA and adequately evaluates the environmental impacts of the project; and (3) that the agency's decision-maker has reviewed and considered the information in the document prior to approving the project. (CEQA Guidelines, §§ 15074, subd. (b) [ND or MND], & 15090, subd. (a) [EIR].)

A CEQA Exemption Finding in the Second Tier is not Equivalent to A Decision to approve a CEQA Document in the Third Tier

The Opinion conflates the second and third tiers of the CEQA process and holds that an agency's CEQA exemption determination is a separate "item of business" for purposes of the Brown Act. The Opinion supports this holding as follows:

> 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. (See *Muzzy Ranch Co. v. Solano County Airport Land Use Com.*, *supra*, 41 Cal.4th at p. 380.) A finding of an exemption is [at] least as important to environmental protection as an MND.

(Slip opinion, p. 11.)

When an agency makes a CEQA exemption determination, it is making a finding about the project. In contrast, when an agency adopts a ND or MND, or certifies an EIR, it is making a decision about the document. As described above, when an agency

approves the CEQA document, it is making a decision that the document adequately informs other agencies and the public generally of the potential environmental impacts of a project. (See CEQA Guidelines, § 15003, subd. (c).). The agency's decision about the informational adequacy of the CEQA document is necessarily independent from its factual findings or subjective judgments regarding the proposed project.

Further, when an agency approves a CEQA document, that decision regarding the adequacy of the document as an information document is generally binding on responsible agencies, i.e., agencies other than the lead agency who have responsibility for carrying out or approving the project. (See Pub. Res. Code, §§ 21069 [definition of responsible agency] & 21080.1 [conclusive presumption of adequacy].) In contrast, when a lead agency has made a CEQA exemption finding for the project, a responsible agency is not bound by that finding and may instead assume the role of lead agency and prepare its own CEQA document prior to taking its action on the project. (CEQA Guidelines, § 15052, subd. (a)(1).)

The Opinion relies on an Unsupported Presumption of Legislative Intent

The Opinion's statement equating a CEQA exemption finding with a decision to adopt an MND suffers from another, larger defect: Without citation to any authority, the Opinion assumes that the question of whether a legislative body's particular finding is a separate "item of business" for purposes of the Brown Act, and therefore must be listed as such on the body's meeting agenda, depends on whether the finding relates to important public policies expressed in CEQA or in other laws.

When a local legislative body acts in a quasi-judicial capacity, its decision must always be supported by findings and those findings must be supported by substantial evidence in the agency's administrative record. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515 ("*Topanga*").) *Topanga* holds that "implicit in section 1094.5 [of the Code of Civil Procedure] is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Ibid.*) While the *Topanga* requirement for findings applies only to quasi-judicial decisions, this court has recognized that findings made in support of a quasi-legislative decision can be very useful to both the public and a reviewing court for a number of reasons. (*California Hotel and Motel Assn. v. Industrial Welfare Comm.* (1979) 25 Cal.3d 200, 210-211.)

In addition to their function as an analytic bridge between the evidence and the decision, the Legislature has also required local agencies to make specific types of findings in connection with various types of decisions. The purpose of these statutorily mandated findings is to ensure that the agency is acting within its lawful scope of authority. For example, most every decision by a city or county to approve a land use or development project must be supported by a finding that the project is consistent with the agency's general plan. (See, e.g., Gov. Code, §§ 66473.5 [subdivisions], 65867.5

[development agreements], 65860 [zoning ordinances], 51056 & 51084 [open space easements]; see also Gov. Code, §§ 65401 & 65402.) If a project of this type is inconsistent with the general plan, it usually must be disapproved.

Every statute that requires a local agency to make a specific type of finding in connection with a decision is, in effect, a statement by the Legislature that such a finding relates to an important public policy concern. "The law neither does nor requires idle acts." (Civ. Code, § 3532.) As for the relative importance of the various public policy reasons for these statutorily required findings, that relative importance is for the Legislature to establish. In holding that a CEQA exemption finding is a separate "item of business" due to the importance of environmental protection, the Opinion raises the following issues:

- An agency's determination whether an activity is a project "subject to" CEQA is arguably just as important for environmental protection as its determination whether an exemption applies. If these two determinations are both "items of business" for purposes of the Brown Act—and there is nothing in the Brown Act to support a conclusion that the Legislature intended for the Act's agenda requirements to apply only to second-tier "exempt from" determinations but not to first-tier "subject to" ones—then the meeting agenda for every legislative body would need to list at least the agency's first-tier determination and possibly its second-tier determination in connection with every matter on the agenda
- When an agency approves a project for which an EIR has been certified, CEQA requires the agency to make written findings for each environmental impact identified as potentially significant in the EIR. (CEQA Guidelines, § 15091.) For many EIR projects, this may require the agency to make several dozen impact-specific findings. Is each of these required findings a separate "item of business" for purposes of the Brown Act? Because these written findings are statutorily mandated by CEQA, the Legislature has indicated that each of these findings is important for environmental protection.
- The general plan has been described as the "constitution for all future developments" within the city or county. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Ca.3d 553, 571.) Given the constitution-like status of the general plan, should the Brown Act's "item of business" agenda requirement apply only to the agency's CEQA exemption finding but not to its general plan consistency finding? More importantly, which branch of government should decide this question, the Legislature or the judiciary?
- The holding potentially encompasses a legislative body's discussions regarding the balancing of competing priorities. By June 30 of each year, each county's board of supervisors is required to conduct a public hearing and adopt a recommended budget. (Gov. Code, § 29064.) By October 2, the board is required

to conduct another public hearing and adopt a final budget. (Gov. Code, § 29088.) At each of these hearings, the board is required to consider and make decisions allocating county revenues between various funds and budget units, which typically number in the dozens. (See Gov. Code, §§ 29063, 29082, 29088, & 29089.) Is the board's discussion and decision regarding how much revenue to allocate to each fund or budget unit a separate "item of business" for purposes of the Brown Act, such that the allocation for each fund or budget unit must be separately listed and described in the board's hearing agenda, or is the board's consideration and decision on the overall budget a single "item of business"?

CEQA defines "project" as "the whole of an action" rather than each separate governmental approval. (CEQA Guidelines, § 15378, subd. (a) & (c); *Citizens Assn. for Sensible Development v. County of Inyo* (1985) 172 Cal.App.3d 151, 165.) The Opinion turns this concept on its head and holds that, for purposes of the Brown Act, the term "item of business" is not the "whole of an action" but is instead each separate finding or sub-decision that a legislative body makes in support of its ultimate decision. This result does not harmonize the Brown Act with CEQA.

The Legislature could amend the Brown Act to redefine the term "item of business" to encompass not only a legislative body's decision to approve, conditionally approve, or deny a proposed governmental activity, but to also include various types of findings and sub-decisions made in support of those decisions. To date, the Legislature has not done so. Through the Opinion, the Court of Appeal has stepped into this legislative breach and interpreted section 54954.2 as implicitly requiring a CEQA exemption finding to be listed on the agenda as a separate "item of business" for purposes of the Brown Act. This holding cannot be characterized as anything other than legislating from the bench, without allowing for input from interested stakeholders and without considering the ramifications of this expansive interpretation of section 54954.2.

The Opinion's Holding Severely Constrains the Ability of A Legislative Body to exercise its Inherent Oversight Authority

Because the first-tier and second-tier determinations must be made at the outset of the CEQA process, they are typically delegated to staff and made well in advance of when the proposed activity will be considered and acted on by the agency's decision-maker. (See CEQA Guidelines, § 15025.) Of course, it is the agency rather than its staff that is legally responsible for proper CEQA compliance. Unless provided otherwise by other law, staff's determination is non-binding on the agency's decision-maker. As correctly stated in the Opinion, "The legislative body of the local agency retains the inherent power to overrule its staff's determination." (Slip opinion, p. 12.)

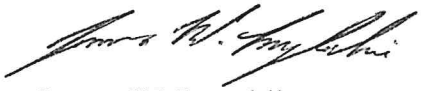
The Opinion does far more, however, than merely acknowledge the legislative body's inherent oversight authority, which the body may exercise either *sua sponte* or in response to public comments. In holding that a legislative body may not lawfully exercise of its inherent oversight authority unless that "action" of overruling or overtly ratifying its staff's recommendations has been listed as a separate "item of business" on the legislative body's meeting agenda, the Opinion imposes a significant condition precedent on a legislative body's ability to exercise its inherent authority. Under this holding, a legislative body is required to silently accept and rubber-stamp its staff's recommendations *unless* the body's "action" to overrule or ratify one of more of its staff's recommendations is listed and described as a separate "item of business" on the legislative body's meeting agenda.

In the *G.I. Industries* case, both the City's staff and its city council may have been unaware of G.I.'s CEQA concerns until G.I. submitted its written comments, which occurred *after* the City had posted the city council meeting agenda. Under the facts and holding in the Opinion, the City's only lawful option would have been to continue the franchise agreement matter to a subsequent meeting. Neither CEQA nor the Brown Act should be interpreted in manner that limits the ability of a local agency's legislative body to exercise its inherent authority to receive and consider comments from the public and, in appropriate cases and when supported by the evidence, overrule its staff's recommendations.

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,

Bernadette S. Curry,
County Counsel



James W. Laughlin,
Deputy County Counsel

cc: (see Proof of Service, attached)

PROOF OF SERVICE

In re G.I. Industries v. City of Thousand Oaks
Appellate case no.: B317201

On **November 18, 2022,** I served a true and correct copy of the **Request for Depublication, *G.I. Industries v. City of Thousand Oaks*** on the following persons or entities by placing a copy in a sealed envelope and depositing the envelope directly in the United States mail with postage prepaid or at my place of business for same day collection and mailing with the United States mail, following our ordinary business practices with which I am readily familiar:

☒ Clerk of the Court
California Court of Appeal
2nd Appellate District, Div. 6
200 East Santa Clara Street
Ventura, CA 93001
Mail

☒ Andrea Kristen Leisy
Remy Moose & Manley LLP
555 Capitol Mall #800
Sacramento, CA 95814
[Attorney for G.I. Industries]
Mail

☒ Joel Frederick Franklin
225 Crossroads Blvd., Ste. 407
Carmel, CA 93923
[Attorney for G.I. Industries]
Mail

☒ Holly O. Whatley
Colantuono, Highsmith & Whatley, PC
790 East Colorado Blvd., Ste. 850
Pasadena, CA 91101
[Attorney for City of Thousand Oaks]
Mail

☒ David S. Womack
Thousand Oaks City Attorney's Office
2100 Thousand Oaks Blvd.
Thousand Oaks, CA 91362
[Attorney for City of Thousand Oaks]
Mail

☒ Benjamin G. Shatz
Manatt, Phelps & Phillips, LLP
2049 Century Park East, Ste. 1700
Los Angeles, CA 90067-3119
[Attorney for Arakelian Enterprise, Inc.]
Mail

At the time of service and I was at least 18 years of age and not a party to this cause. I am employed in the County of Solano, State of California. My business address is the Office of the Solano County Counsel, Government Center, 675 Texas Street, 6th Floor, Suite 6600, Fairfield, California 94533.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 18, 2022 at Fairfield, California.

By: _____
Youtso Tenzin
Declarant