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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

TURN DOWN THE LIGHTS,

Petitioner,

v.

CITY OF MONTEREY,

Respondent.

_____/

Case No. M116731

Petitioner's Supplemental Reply Brief in support of Petition for Writ of Mandamus

Hon. Lydia M. Villarreal

Supplemental Reply

Petitioner Turn Down the Lights clarifies its responses to the questions posed, attempting not to repeat arguments made in its prior briefs and at the merits hearing. Respectfully, the categorical exemption relied on by the City of Monterey fails, as does the City's claimed defense of a failure to exhaust remedies.

QUESTION 1

The City notes and Petitioner concurs that no notice is required when an agency adopts a categorical exemption. Case law implementing CEQA confirms that exhaustion of remedies to challenge an exemption is excused if the public either did not have notice of the categorical exemption or notice that includes a reasonable description of the Project. Here we have both circumstances. (*Defend Our Waterfront v. California State Lands Commission* (2015) 240 Cal.App.4th 570, 582-586; *International Longshoremen's and Warehousemen's Union v. Board of Supervisors* (1981) 116 Cal.App.3d 265; *McQueen v. Board of Directors of the Mid-Peninsula Regional Open Space District* (1988) 202 Cal.App.3d 1136.)

Under the statute, the facts, and the case law, the City's November 2011 agenda *did not violate CEQA's notice requirements* either in its incomplete description of the LED streetlights project or by its failure to disclose its intention to adopt a categorical exemption. (AR:44.) However, the agenda notice was *insufficient to trigger a duty to the public, including Petitioner and its members, to exhaust remedies*. Those simple points refute the City's lengthy supplemental brief and so Petitioner will not respond in kind to what is mostly irrelevant argument and citation to inapplicable case law.

The City asserts that the November 2011 agenda was "a straightforward description" that was sufficient to constitute notice. (City's Supplemental Brief (Supp.Opp) at 2.) Petitioner has explained why that argument is unsupported. (Supplemental Brief (Supp.) at 5 and *passim*.) The only adequate notice of the categorical exemption was via the Notice of Exemption filed in February 2012, almost three months after the approval. (AR:1.)

The Court will recall that prior to November 2011, the City referenced the Project in similarly vague terms, as "authorizing the application for a low-interest loan from the California Energy Commission to implement energy efficient measures" in December 2009 and March 2010 and as an "appropriation of funds to implement energy efficient measures" in April 2011. (AR: 296, 274, 244.) Even if the public could have ferreted out that the Project entailed the replacement of streetlights in 2009 and 2010, the City had planned to replace the high-pressure sodium bulbs with induction lighting not LED lighting. (AR:307.) The change to LED did not occur until after the State Historic Preservation Officer signed off on the Project. (AR:277-280, 309-310, 317-323.)

The City's claim that "the only issue here is whether there was a public hearing or any other opportunity for a member of the public to raise objections …" is inaccurate. (Supp.Opp. at pg. 2.) The issue is whether the City gave notice of the proposed CEQA exemption and reasonably described the Project such that the public should have known there was an opportunity to object at a public hearing. Petitioner has explained that the agenda notice did neither. Under these circumstances there is no need to exhaust administrative remedies. (Supp., *passim*.)

The City again claims the Court may ignore the ruling in *Defend Our Waterfront*, *supra*, 240 Cal.App.4th 570, arguing that there was no requirement for the City to notice the exemption. (Opp. at 24; Supp. Opp. at 4.) Alternatively, the City attempts to distinguish the case by pronouncing it "unclear whether the court meant also to suggest" that CEQA exemption determinations need to be part of a meeting agenda. (Supp.Opp. at 4.) Again, while there is no requirement to give notice of reliance on a categorical exemption, failure to do so excuses the requirement to exhaust remedies. Consistently, *Defend Our Waterfront* maintained that failure to include adequate notice of a CEQA action excuses the requirement to exhaust administrative remedies. (*Defend Our Waterfront, supra,* 240 Cal. App.4th at 583-584.)

The City concedes that the agenda notice was not sufficient to explain the City's proposed actions and that it was necessary to review the agenda report to understand: "All anyone had to do to discover the City's exemption determination was to look at the

agenda report which was available online as part of the agenda packet and was also available with the agenda in hard copies at various locations in the City." (Supp. Opp. at 5-6.) But as *Defend Our Waterfront* makes clear, the public is not expected to do so, because "someone would have to take the additional steps of accessing and reviewing the report in order to learn that a CEQA issue would be decided at the . . . meeting." (Id. at 584.) Going further, the Court held that even if a member of the petitioner group happened to somehow receive actual notice, "subdivision (e) does not provide that actual notice satisfies CEQA's notice requirement." (*Id.* at 584.)

Petitioner further discussed *Defend Our Waterfront*, the defining case here, as well as related cases in its Supplemental Brief and respectfully refers the Court to that discussion rather than repeating the same here. (Supp. at 2-4.)

Regarding whether the "public appearance" hearing in November 2011 provided an opportunity to be heard, as the City asserts, Petitioner explained the difference in the way the City adequately noticed the "public appearance item" in an agenda for the adoption of the ordinance to ban plastic bags as opposed to how the Project was inadequately noticed. (Supp. at 5-7.) To summarize, the agenda notice concerning the adoption of the plastic bag ordinance detailed precisely what was proposed; the scope of how the ordinance would be applied; and the Council's intention to take CEQA action that would entail adoption of a negative declaration. (*Ibid.*) Here, the City's agenda did none of these things. That did not trigger an exhaustion duty.

In its supplemental opening brief, Petitioner argued that the eight-word agenda item – "Award Street and Tunnel Lighting Replacement Project Contract" (AR 44) – did not even provide the notice required under the Brown Act and Planning and Zoning Law. (Supp. at 5-6.) Petitioner cited to the Government Code sections of Planning and Zoning law, and accidentally omitted providing Government Code citations to the Brown Act, with which Respondents are very familiar and thus no prejudice occurred. Petitioner apologizes to the Court for the omission.

Pursuant to the Brown Act, at least 72 hours prior to a regular meeting, an agenda must be posted which contains a brief general description of each item to be

transacted or discussed at the meeting. (Gov. Code, § 54954.2(a).) The purpose of the brief general description is to inform interested members of the public about the subject matter under consideration so that they can determine whether to monitor or participate in the meeting. (*San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167, 1177-1178; California Attorney General "The Brown Act – Open Meetings for Local Legislative Bodies," 2003, p. 16.)

Generally, the legislative body may use a short description of less than 20 words to provide essential information about the item to members of the public. (54954.2(a).) Critically, the description must be sufficient to provide interested persons with an understanding of the subject matter which will be considered. (*Carlson v. Paradise Unified School Dist*. (1971) 18 Cal.App.3d 196, 200.) *Carlson* has been cited by the California Attorney General with regard to the Brown Act compliance. (E.g., California Attorney General "The Brown Act – Open Meetings for Local Legislative Bodies," 2003, pp. 17, 21; 78 Ops. Cal. Atty. Gen. 327, 329.) In *Carlson*, the issue was former section 966 of the Education Code, and the school board's agenda contained as one item the language "Continuation school site change." As the Court of Appeal held:

> This was entirely inadequate notice to a citizenry which may have been concerned over a school *closure*.
>
> On this point alone, we think the trial court was correct because the agenda item, though not deceitful, was entirely misleading and inadequate to show the whole scope of the board's intended plans. It would have taken relatively little effort to add to the agenda that this 'school site change' also included the discontinuance of elementary education at Canyon View and the transfer of those students to Ponderosa School.

(*Carlson v. Paradise Unified School Dist*., *supra*, 18 Cal.App.3d 196, 200, original emphasis.)

The Brown Act seeks to "facilitate" and "motivate members of the public to participate in the process and have their voices heard." (*San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167, 1177.) The Brown Act's

purposes include ensuring that the public is adequately notified of what will be addressed at a meeting in order to facilitate public participation. (Gov. Code § 54950; *San Joaquin Raptor, supra*, 216 Cal.App.4th at 1178.) Those purposes would be impaired if a public agency could refuse to disclose in its meeting agenda that it will be considering approving new LED lights. Such an approach would allow potentially controversial issues to be quietly proposed and decided without having meaningful public input. That is one of the evils the Brown Act was designed to prevent. (216 Cal.App.4th at 1178; Gov. Code § 54950].) CEQA contains short, mandatory statute of limitations and rigorous exhaustion requirements (see, e.g., Pub. Resources Code, §§ 21167, 21177), which makes the City's approach even more detrimental in this particular context. (See *San Joaquin Raptor supra*, 216 Cal.App.4th at 1178, fn. 16.)

Here, the City of Monterey used an eight-word agenda item description that did not adequately inform the public to what was being considered so that, once alerted, they could participate. The eight words "Award Street and Tunnel Lighting Replacement Project Contract" were not adequate to provide essential information about the LED streetlight item to members of the public. (See Gov. Code, 54954.2(a).) It would have taken little effort to add information about the new LED streetlights to be installed city-wide, including the historic district (see Supp. at p. 5, lines 25-27, suggesting sample 19-word item description that would have been adequate and informational).

The public would have come to the meeting if they had known about the item, as shown by the public participation and dialogue before the Historic Preservation Commission on the City's proposed new landscape lighting for the small city park known as Friendly Plaza (AR 587-634). The City knew that lighting in Monterey, and especially in the historic district of Monterey, was a controversial matter of significant public interest, and the City avoided the disclosure required.

QUESTION 2

The City claims that it does not matter what label is given to agenda items, whether "public hearing." "public appearance" or "consent item," as long as there is an opportunity provided for public comment. (Supp. Opp. at. 7-8.) While Petitioner asserts that the label did make a difference, without adequate notice of what was proposed for adoption the public was not required to appear and provide testimony.

QUESTION 3

The City claims Petitioner misunderstood the staff discussion with Councilmember Selfridge. (Supp.Opp at 13, n. 1.) But the discussion speaks for itself; the City's interpretation is unsupported. Petitioner explained in its opening brief that

> When the project was approved by the City Council, Councilmembers were told that the new LED lights would not be installed in the Historic District and that there was separate funding for lights for the Historic District. (AR:20; *ante*, p. 8.) The claim that the new LED lights would not be installed in the Historic District turned out to be untrue. Lights have been installed in the Historic District and their adverse impacts are significant. (*E.g.*, AR: 701, 862-863, 888.)

(Petitioner's opening brief filed Nov. 23, 2015, at 23:6-13.)

The exchange between Mr. Helms and Councilmember Selfridge confirms that the LED lights should not have been installed in the Historic District, pursuant to City staff representation of the project to the Council.

> MR. HELMS: ... I thought it would be important for Council to see what your new streetlights might look like. The picture to the left is the cobra head. That's what we now have in the city, and it has the old high-pressure sodium style. The one to the right, of course, is what your new LED streetlights should look like, should you pass this resolution.
> So in summary, we have had two phases. The first phase was completed when we replaced all of your recreation trail lights with the energy-efficient

> induction. And now, before you tonight, is we're asking Council to approve the award, and we will replace all 1,676 streetlights with your energy-efficient LEDs, all of the tunnel lights with energy-efficient induction lights, and we will be completed with that project, if Council approves it, in March of 2012...

(AR:19.)

> MAYOR DELLA SALA: Very good. And a very good presentation, Mr. Helms. Questions of staff? Councilmember Selfridge?
> COUNCILMEMBER SELFRIDGE: In our historic district, will the lights look like that? Or will they be somehow in a correct format?
> MR. HELMS: They won't look -- they won't look like that. There is a separate grant for decorative lights, and they'll look exactly the way they look now.

(AR:20.)

The City's claim that if the City of Monterey is deemed *per se* unusual due to its historic nature, no categorical exemption could be adopted for any reason, is not true. If a project's impacts did not concern or affect the status of the City's historic resources, unlike here, and the project fit within the scope of a categorical exemption, unlike here, then no further review would be necessary. (Supp.Opp. at 14.)

The City generally objects to the quality of the evidence presented, claiming it does not rise to substantial evidence. (Supp.Opp. at 17.) CEQA defines substantial evidence as encompassing facts, reasonable assumptions based on facts, or expert opinion based on facts. (Pub. Resources Code, § 21080(e)(1).) Without walking through the evidence with which the Court is now familiar, the evidence while including subjective opinions based on the experiences of Monterey residents, is fact-based. (Petitioner's opening brief filed Nov. 23, 2015 at 9-13, 19-21, 23-25.) Relevant personal observations of area residents on nontechnical subjects qualify as substantial evidence. (*Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 730;

Ocean View Estates Homeowners Assn., Inc. v. Montecito Water District (2004) 116 Cal.App.4th 396, 402-403; CEQA Guidelines, § 15384.).

Similarly, while the City claims that there is no evidence that the Project "will" have a significant impact (Supp.Opp at 18-19), the Project has been implemented and evidence of the impacts is surely not speculative, it is factual. Monterey residents have provided fact-based opinions not that the LED streetlight project may have or even will have significant impacts, but that the already-installed LED lights in fact *do have* significant impacts. (*Ibid.*)

Conclusion

The City spends a lot of pages in its supplemental brief trying to parse the issues to fit the case law, but the facts cannot be denied. The November 2011 agenda notice did not violate CEQA and, respectfully, it is irrelevant whether it violated the Brown Act. As in *Defend Our Waterfront*, because the notice was insufficient to trigger a requirement to exhaust remedies, the public had no obligation to go online to review the agenda report to learn that a categorical exemption was proposed. The evidence that the new streetlights *have* significant environmental impacts has been catalogued. The Project is not within the scope of the Class 2 exemption, and even if so considered, the unusual circumstances exception applies.

Petitioner respectfully requests that the Court's peremptory writ issue in the public interest to require a CEQA process to consider and mitigate Project impacts.

October 3, 2016

Respectfully submitted,

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