SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

Turn Down the Lights,

Plaintiff/Petitioner,

vs.

City of Monterey,

Defendant/Respondent

Case No.: M116731

INTENDED DECISION

This matter came on for court trial on May 11, 2016. All sides were represented through their respective attorneys. The matter was argued and taken under submission. On August 1, 2016, the court requested supplemental briefing. Supplemental briefing was completed on October 12, 2016.

This intended decision resolves factual and legal disputes, and shall suffice as a statement of decision as to all matters contained herein. (Cal. Rules of Court, rule 3.1590(c)(1).)

Background

Petitioner Turn Down the Lights challenges the City of Monterey's approval of a project to replace the City's street and tunnel light fixtures with energy-efficient LED and induction light fixtures. The Project's goal was to increase energy efficiency and reduce energy costs. The Project was funded by a low-interest loan from the California Energy Commission (CEC). (AR 38-39.)

On November 1, 2011, the City adopted a resolution approving a contract bid to install the replacement lighting. (AR 2, 7.) The topic was included in the regularly-noticed agenda for the City Council meeting as Item 7. (AR 44.) Prior to adopting the resolution, City staff gave a presentation detailing the scope of the Project and comparing the existing high-pressure sodium (HPS) light bulbs with the proposed LED bulbs. (AR 18-40.) No one requested to speak regarding the Project during the meeting and no written comments were submitted. On January 17, 2012, the City began replacing the existing HPS fixtures with new LED fixtures. (AR 676.)

Shortly thereafter, City residents complained that the new lights were too bright, caused glare and light trespass, and negatively affected views of the night sky. (AR 681-683, 685, 696, 706-708.) The City responded to these complaints by adding light shields, dimming lights, and modifying the angle at which lights were pointed. (AR 716-717, 860-863.)

On February 21, 2012, the City filed a Notice of Exemption. (AR 1.) The Notice of Exemption described the Project as the "replacement of existing street and tunnel lights with LED street light fixtures and induction fixtures in the tunnel." (*Id.*) According to the Notice of Exemption, the Project qualified for a Class 2 categorical exemption under California Environmental Quality Act (CEQA) Guidelines section 15302, on the ground that the Project replaced existing light fixtures and did not include new lights. (*Id.*)

The present petition followed shortly thereafter. The petition contends that the Project does not qualify for a Class 2 categorical exemption and that consequently, the City was required to perform environmental review prior to project approval.

Administrative Record

The administrative record was admitted into evidence. The City's request to strike portions of the administrative record is denied.

Request for Judicial Notice

Petitioner requests judicial notice of two "Legal Notice" sections of the Monterey County Herald newspaper dated October 22, 2011 and November 26, 2011. The City caused these items to be published to be heard at a specific City Council meetings. The court takes judicial notice of the existence of these documents as official acts of government entities – but not of the truth of their contents – under Evidence Code, section 452, subdivision (c). (*Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134.)

The City requests judicial notice of an agenda report prepared by the City for proposed City Council Agenda Modifications, dated September 12, 2001, with the proposed Agenda Structure attached; meeting minutes for the City of Monterey's September 18, 2001 City

Council meeting; and five Notices of Exemption filed by various jurisdictions statewide concerning LED light replacement projects. The court takes judicial notice of the existence of these documents as official acts of government entities – but not of the truth of their contents – under Evidence Code, section 452, subdivision (c). (*Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134.)

Discussion

(I.) Standard of Review

Two CEQA statutes address the standards of review as to agency action. Public Resources Code section 21168 provides the standard for decisions "made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency." Section 21168.5 provides the standard for all other actions "to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with [CEQA]." Because the City was not required to hold a hearing to invoke the exemption, section 21168.5 applies. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1110.) Under that section, this court must determine "whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Resources Code, § 21168.5.)

(II.) Exhaustion

The City contends that Petitioner failed to exhaust its administrative remedies because it did not appear at the November 1, 2011 City Council meeting. Petitioner concedes it failed to appear, but argues its absence was waived by the City's failure to provide adequate notice of both the project description and the City's exemption determination.

The agenda item for the November 1, 2011 City Council meeting described the project as "Award Street and Tunnel Lighting Replacement Project Contract." (AR 44.) The City insists that this "straightforward description" was sufficient notice the City was considering a project to replace street and tunnel lights. Petitioner argues the agenda's description was inadequate to provide notice that 1) the City

intended to install new LED lights; and 2) that the City would be invoking a categorical exemption. The City replies that the public could obtain more information, including the proposed invocation of a CEQA exemption, by reviewing the agenda report. The agenda report was attached to physical copies of the agenda and available by hyperlink embedded in the electronic version of the agenda. (AR 38-40.)

"'Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action.' . . . That requirement is satisfied if 'the alleged grounds for noncompliance with [CEQA] were presented . . . by any person during the public comment period provided by [CEQA] *or* prior to the close of the public hearing on the project before the issuance of the notice of determination.'" (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 792, quoting Pub. Resources Code, § 21177, subd. (a), italics added.)

Nevertheless, the exhaustion requirement does not apply when the administrative procedure either did not provide for a public hearing or some other opportunity for members of the public to raise objections before project approval or did not provide the "notice required by law." (*Id.* at subd. (e).) The exhaustion issue frequently arises in the exemption context because an agency may properly rely on a CEQA exemption without providing either public notice or a hearing. (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1385-1386.) However, the exhaustion requirement is only triggered when an agency provides "notice of the ground for its exemption determination and that determination is preceded by public hearings at which members of the public had the opportunity to raise any concerns or objections to the proposed project." (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 291.) Further, the notice provided must be both substantively accurate and procedurally proper; a misleading notice does not trigger the exhaustion requirement. (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1150-1151; *Defend Our Waterfront v. California State Lands Commission* (2015) 240 Cal.App.4th 570, 580.) Both *McQueen* and *Defend Our Waterfront* are apposite.

In *McQueen*, an agency's notice for a proposed categorical exemption stated it intended to purchase surplus federal property but failed to disclose that hazardous substances were stored on the

property. The court "consider[ed] petitioner's situation tantamount to a lack of notice due to the incomplete and misleading project description employed by the district." (*Id.* at p. 1150.) The court reasoned that "[t]o apply the exhaustion requirement under these circumstances would stand CEQA on its head and encourage a public agency to leave environmental concerns out of its announced plans. It would require the public to ferret out the true nature of the public agency's project and its possible environmental consequences." (*Id.* at p. 1151.) The court therefore concluded the exhaustion requirement did not apply. (*Ibid.*)

In *Defend Our Waterfront*, *supra*, 240 Cal.App.4th 570, an agency's meeting agenda informed the public the agency intended to approve an agreement but neglected to mention the agency was considering invoking a CEQA exemption. (*Id.* at p. 575.) The court held this omission rendered the agenda insufficient to trigger the duty to exhaust administrative remedies. (*Id.* at pp. 583-584.) The agency further contended that notice was adequate because a staff report, accessible via a hyperlink posted on the meeting agenda, mentioned the CEQA exemption. (*Id.* at p. 584.) The court rejected this argument as well, 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." (*Ibid.*)[1]

As in *McQueen*, the City of Monterey's agenda omitted key information concerning project characteristics with potential environmental impacts. (See Guidelines Appendix G, § I, subd. (d) [a project that may "create a new source of substantial light or glare which would adversely affect day or nighttime views" may have a significant environmental impact].) The agenda item, "Award Street and Tunnel Lighting Replacement Project Contract," suggests the project will replace existing lighting, but does not disclose that LED lights will replace HPS lights. (AR 44.) Moreover, the description fails to indicate the City's intent to invoke a categorical exemption to CEQA. Members of the public are not required to "ferret out the true nature of the public agency's project and its possible environmental

[1] The court also rejected this argument because the agency did not timely add the hyperlink to the meeting agenda in violation of Government Code, section 11125, subd. (a). However, this reasoning was essentially in the alternative. (*Defend Our Waterfront*, *supra*, 240 Cal.App.4th at p. 584 ["Second, and in any event, the hyperlink to the staff report was not added to the meeting agenda until August 7 . . ."].)

consequences." (*McQueen*, *supra*, 202 Cal.App.3d at p. 1151.) The mere fact that this information was available in an agenda report does not excuse these deficiencies. Members of the public are not required to look beyond the agenda to determine whether a CEQA issue will be decided in a public meeting. (*Defend Our Waterfront*, *supra*, 240 Cal.App.4th at p. 584.)

The City asserts that *Defend Our Waterfront* does not apply because that court based its ruling, in part, on a statute applicable only to state agencies. The City contends CEQA contains no such notice requirement. In fact, because an agency may claim an exemption without notice of any kind (*Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1110), the City argues that the notice provided was more than adequate to trigger the duty to exhaust. Neither claim is accurate.

"CEQA does not require formal hearings at any stage of the environmental review process." (Guidelines, § 15202, subd. (a).) However, if an agency chooses to provide a public hearing regarding project approval, "the agency should include environmental review as one of the subjects for the hearing." (Guidelines, § 15202, subd. (b).) Similarly, while no notice is required to *claim* an exemption (*San Lorenzo Valley*, *supra*, 139 Cal.App.4th at pp. 1385-1386), the *duty to exhaust* is triggered only if the agency provides adequate notice. (*Tomlinson*, *supra*, 54 Cal.4th at p. 291.)

Finally, the City argues the only applicable notice statute is in the Brown Act. The Brown Act requires agencies to, at least 72 hours before a public meeting, post an agenda containing a "brief general description of each item of business" which "generally need not exceed 20 words." (Gov. Code, § 54954.2, subd. (a)(1).) This requirement limits the action an agency can take because the statute further states, "[n]o action or discussion shall be undertaken on any item not appearing on the posted agenda . . . ." (Gov. Code, § 54954.2, subd. (a)(2).) Accordingly, an agency must separately identify a proposed action when it constitutes a "distinct item of business, and not a mere component of project approval . . . ." (*San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167, 1177, citing Gov. Code, § 54954.2, subd. (a)(1)-(2).)

In *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167, 1170, a County Planning Commission posted an agenda that included a potential approval of a subdivision. The

agenda did not mention the Commission would also be considering whether to adopt a mitigated negative declaration (MND) as to the subdivision. (*Ibid.*) The court held the Commission violated the Brown Act because the adoption of an MND "was plainly a distinct item of business, and not a mere component of project approval, since it (1) involved a separate action or determination by the Commission and (2) concerned discrete, significant issues of CEQA compliance and the project's environmental impact." (*Id.* at p. 1177, fns omitted.)

To invoke a categorical exemption, the City must determine whether the project fits into one or more of the 33 classes of categorical exemptions, and hence, whether CEQA applies. (Pub. Resources Code, § 21080, subd. (b)(9); Guidelines, §§ 15061, 15300 et seq.) Further, that determination must be supported by substantial evidence. (*Creed-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 510.) As with an MND, then, a categorical exemption determination involves a separate determination by the agency and concerns issues of CEQA compliance. It is therefore a "distinct item of business" that must be identified on an agenda.[2] Here, the City failed to separately identify its categorical exemption determination on the agenda. Consequently, it violated the Brown Act. (Gov. Code, § 54954.2, subd. (a)(1)-(2).)

In sum, the exhaustion requirement does not apply because the City did not provide the "notice required by law." (Pub. Resources Code, § 21177, subd. (e).)

(II.) Categorical Exemptions

Petitioner argues that the City improperly invoked a categorical exemption.

Categorical exemptions apply only to projects that "do not have a significant effect on the environment." (Pub. Resources Code, § 21084, subd. (a).) These "categorical exemptions" "should be construed in the light of that authorization . . . . This principle of interpretation is embodied in the Guidelines, which state that CEQA should be interpreted to 'afford the fullest possible protection to the

[2] Contrary to the City's argument, *San Joaquin Raptor* did not "expressly state[] [in footnote 17] that exemption determinations do *not* need to be included on an agenda." Rather, the footnote simply explains that, as to an exemption, an agenda's reference to project approval alone is *especially* insufficient because in that instance, no CEQA document would exist of which the public might otherwise have notice. (*San Joaquin Raptor*, *supra*, 216 Cal.App.4th at p. 1179, fn. 17.)

environment within the reasonable scope of the statutory language. [Citation.]' (Guidelines, § 15003, subd. (f); [citations])." (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1192-1193.) Accordingly, categorical exemptions are strictly construed. (*Save Our Schools v. Barstow Unified School District Board of Education* (2015) 240 Cal.App.4th 128, 140; *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125 [categorical exemptions may not be expanded "beyond the reasonable scope of their statutory language"].)

When an exemption determination "turns only on an interpretation of the language of the Guidelines or the scope of a particular CEQA exemption, this presents 'a question of law, subject to de novo review by this court.' [Citation.]" (*Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 693.) By contrast, when an agency makes factual determinations as to whether the project fits within the scope of the exemption, the court reviews the record to determine whether substantial evidence supports the agency's decision. (*Id.* at p. 694.) In that instance, "all conflicts in the evidence are resolved in [the agency's] favor and all legitimate and reasonable inferences are indulged in to uphold findings, if possible." (*Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2009) 170 Cal.App.4th 956, 968.)

(IV.) Class 2 Categorical Exemption

A project qualifies for a Class 2 categorical exemption when it involves the "replacement . . . of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced, including but not limited to . . . [r]eplacement of a commercial structure with a new structure of substantially the same size, purpose, and capacity" or "existing utility systems and/or facilities involving negligible or no expansion of capacity." (Guidelines, § 15302.)

The City argues the Project fell within the exemption because it consisted of replacing light bulbs in existing structures, e.g., the street posts. Thus, the Notice of Exemption states, "The project replaces light fixtures. The project does not include any new lights." (AR 1.) Petitioner maintains the exemption

does not apply because the LED bulbs do not have the same "capacity" as existing bulbs. Petitioner contends the LED bulbs have increased capacity over the HFS bulbs because they are significantly brighter, emit a harsher quality of light, and result in a greater light spread leading to light trespass. The City responds that Petitioner is attempting to unreasonably expand the definition of "capacity." The City defines capacity as "the potential or suitability for holding, storing, or accommodating" or "the maximum amount or number that can be contained or accommodated." The City therefore suggests that, in the context of a "utility system," capacity denotes the amount of wattage an electrical system could accommodate or, in relation to the project, more light bulbs, or poles. The City also argues that even if Petitioner's definition of "capacity" were proper, Petitioner has not presented substantial evidence that the new bulbs have an increased capacity.[3]

As relevant here, "capacity" typically denotes either 1) the maximum amount that something can contain; or 2) the facility to produce, perform, or deploy. ("Capacity." Merriam-Webster.com. <https://www.merriam-webster.com/dictionary/capacity> [as of Dec. 19, 2016].) The only published decision to address this issue, *Dehne v. County of Santa Clara* (1981) 115 Cal.App.3d 827, adopted the second definition. In *Dehne*, which involved the modernization of a cement plant, the evidence indicated that both the existing and proposed facilities had substantially the same capacity because they could both manufacture 1,600,000 tons of cement per year. (*Id.* at p. 839.)

The *Dehne* holding tracks with the apparent intention of the exemption, as it addresses the production capacity of a specific set of buildings or facilities. In the context of light bulbs, however, "capacity" is ambiguous at best. It is unreasonable to evaluate whether a light bulb contains "more" light Than a replacement bulb. Similarly, here neither party suggests a reasonable metric to determine the amount of light any type of bulb is capable of producing.[4]

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[3] This is not the correct standard. Petitioner does not bear the burden of proof. It is the City's burden to prove substantial evidence supports its invocation of a categorical exemption. (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115; *North Coast Rivers Alliance v. Westlands Water District* (2014) 227 Cal.App.4th 832, 852.)

Nor are the parties' proposed definitions of "capacity" availing. Petitioner's definition, stated in terms of brightness, harshness, and glare, has the advantage of addressing potential impacts, but it is legally unsupported and stretches the meaning of "capacity" too far. (See, e.g., *Save Our Carmel River, supra*, 141 Cal.App.4th at p. 698 [Courts have not extended the application of the Class 2 Exemption "beyond the scope of its reasonable language"]; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 966 ["exemptions are construed narrowly and will not be unreasonably expanded beyond their terms"].) The City's definition, "more light bulbs, or more poles" ignores the potential environmental impacts of the light emitted from the relevant bulbs. This definition is contrary to the intent of the categorical exemptions. (See, e.g., *Save Our Carmel River, supra*, 141 Cal.App.4th at p. 697 [categorical exemptions are strictly construed to "afford the fullest possible environmental protections" to "ensure that in all but the clearest cases of categorical exemptions, a project will be subject to some level of environmental review"]); *Salmon Protection and Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1102 ["Only those projects having no significant effect on the environment are categorically exempt from CEQA review"].)

The fact that neither party can adequately define "capacity" as applied to light bulbs goes to the fundamental problem with the City's invocation of the Class 2 categorical exemption. *Save Our Carmel River, supra*, 141 Cal.App.4th 677 is instructive.

Save Our Carmel River, supra, 141 Cal.App.4th 677 concerned a water credit for property that previously housed a commercial building complex. The water credit was near its expiration when the applicant devised a plan to retain the credit. (*Id.* at p. 690.) The applicant proposed transferring the credit to the City of Monterey which would hold the credit "in reserve" until plans for a new development on that site were completed. (*Ibid.*) The City approved the transfer and issued a Notice of Exemption finding the project qualified for a Class 2 categorical exemption because it "involved a transfer of a water

[4] The City suggests measuring brightness in lumens. The City provides no authority or evidence for the proposition that brightness is the correct metric to measure the amount of light generated by a bulb. In any event, there is evidence in the record that this is not a meaningful way to compare LED and HPS lights. (AR 49.) There is also evidence that LED light may be subjectively brighter than HPS light. (AR 912.)

credit from a previously existing building to the City's water allocation, which the City stated it would re-transfer back to the same site 'with the understanding that the property owner will construct a similar-sized building to that which previously existed on the site.'" (*Id.* at p. 691.)

The court rejected this rationale, explaining the exemption "does not apply to a water credit transfer, which is neither a structure nor a facility and therefore does not fit the elements of this exemption." (*Id.* at p. 697.) The court found that applying the exemption to a water credit transfer would extend the application of the exemption "beyond the reasonable scope of its plain language. The typical application involves an agency's consideration of plans for reconstruction or replacement of an existing structure." (*Id.* at p. 698.) The court further noted that the record contained no plans for a replacement s tructure, making comparison between an existing structure and replacement structure impossible. (*Ibid.*)

Similarly here, new LED bulbs and light fixtures are neither a structure nor a facility, by any reasonable definition of these terms. (See *Harris v. Lammers* (2000) 84 Cal.App.4th 1072, 1076 [in the absence of a well-established legal meaning, "courts give the words of a statute the meaning they have in everyday speech"].) And, while the City could arguably term the light poles holding the light fixtures "structures," the fixtures themselves are affixed to the structures, and are not themselves structures. (See Civ. Code, § 660.)

The interpretive canon of *ejusdem generis* supports this interpretation. *Ejusdem generis* "seeks to ascertain common characteristics among things of the same kind, class, or nature when they are cataloged in legislative enactments." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159.) "The *ejusdem generis* canon 'presumes that if the Legislature intends a general word to be used in its unrestricted sense, it does not also offer as examples peculiar things or classes of things since those descriptions then would be surplusage.' [Citation.]" (*Bernard v. Foley* (2006) 39 Cal.4th 794, 807.) Thus, "'where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated . . . . The words 'other' or 'any other' following an enumeration of particular classes should be read therefore . . . to include only others of like kind or character. [Citation.]" (*Scally v.*

Pacific Gas & Electric Co. (1972) 23 Cal.App.3d 806, 819; Civ. Code, § 3534 ["Particular expressions qualify those which are general"].)

Here, Guidelines, section 15302 provides a non-exclusive list of examples of structures and facilities that fall within the scope of the exemption. These examples include hospitals, "commercial structure[s]," "existing utility systems and/or facilities," and "electric utility distribution system facilities." (Guidelines, § 15302, subd. (a)-(d).) Light bulbs and light fixtures are dissimilar to all of these examples.[5]

Simply put, applying the exemption here expanded its application "beyond the reasonable scope of its plain language." (*Save Our Carmel River*, *supra*, 141 Cal.App.4th at p. 698; *Dehne*, *supra*, 115 Cal. App.3d at p. 842; *Mountain Lion Foundation*, *supra*, 16 Cal.4th at p. 125.) Consequently, the City's approval violated CEQA.

Disposition

Petitioner's petition for writ of mandate is granted. The court directs Petitioner's attorney to prepare an appropriate judgment and writ consistent with this ruling, present them to opposing counsel for approval as to form, and return them to this court for signature.

LYDIA M. VILLARREAL

Dated: DEC 20 2016

Judge of the Superior Court
Lydia M. Villarreal

[5] The City may object that replacement of the lights amounts to replacement of an existing "utility system[] and/or facilit[y]." (Guidelines, § 15302, subd. (c).) But light bulbs are not a "utility system" or "facility." They do not generate or supply power. (See Pub. Util. Code, § 216 ["Public utility" includes every . . . electrical corporation . . . where the service is performed for, or the commodity is delivered to, the public or any portion thereof"].)

CERTIFICATE OF MAILING
(Code of Civil Procedure Section 1013a)

I do hereby certify that I am employed in the County of Monterey. I am over the age of eighteen years and not a party to the within stated cause. I placed true and correct copies of the **INTENDED DECISION** for collection and mailing this date following our ordinary business practices. I am readily familiar with the Court's practices for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Services in Salinas, California, in a sealed envelope with postage fully prepaid. The names and addresses of each person to whom notice was mailed is as follows:

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Dated: DEC 20 2016

Teresa A. Risi, Clerk of the Superior Court,
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