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October 13, 2014

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

Re: Request by the League of California Cities and California Park and Recreation Society pursuant to California Rule of Court, Rule 8.1125 for Depublication of the Opinion in *City of Pasadena v. Superior Court*, Court of Appeal for the Second Appellate District, Div. 3, Case No. B254800; (Petition for review pending – California Supreme Court Case No. S221455.)

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

We are writing on behalf of the League of California Cities ("League") and the California Park & Recreation Society ("CPRS"), to seek depublication of the Court of Appeal's Opinion ("Opinion") in the above-entitled case, in accordance with California Rules of Court ("Rules") Rule 8.1125, in the event that the Court does not grant review of the issues we have framed in our separate amicus letter in support of review.

A. INTERESTS OF LEAGUE AND CPRS

The League is an association of 473 California cities dedicated to protecting and restoring local control in order to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. **Protecting the fiscal health of cities is a fundamental purpose of the League**. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide—or nationwide—significance. The Committee has identified this case as being of such significance in light of its dramatic expansion of cities' liabilities for injuries caused by trees damaged by windstorms and the resultant threat to cities' fiscal health.

CPRS was founded in 1946 to provide park, recreation, leisure and community service professionals and interested citizens with the knowledge and resources to enhance their leadership role in creating community through people, parks and programs. CPRS is a nonprofit, professional and public interest organization with more than 3,200 members statewide. CPRS membership is well-distributed, with 86 percent of the 535 park and recreation agencies in California boasting at least one CPRS individual member. Through its strong member-based Legislative Committee, CPRS legislative and legal efforts include monitoring bills, and testifying on local, state and federal issues important to the profession and the municipalities that CPRS members serve. The Committee has identified this issue as one that may have far reaching effects to adversely affect parks and recreation throughout California for the reasons articulated by the League.

B. SUMMARY OF OPINION AND ITS ADVERSE EFFECTS

The Court of Appeal denied the City of Pasadena's petition for writ of mandate to reverse the Los Angeles County Superior Court's denial of summary adjudication of causes of action for nuisance and inverse condemnation. As the Opinion ("Op.") notes, over 5,000 trees were damaged during a windstorm that struck the City of Pasadena on November 30, 2011 (Op. p. 2) One such City of Pasadena street tree damaged private property in the City and the insurer of that property paid off the property owners and then filed suit against the City. (*Ibid.*)

The Opinion first holds — purporting to rely on decisions of this Court — that the storm-damaged City tree constituted a public improvement triggering liability under California Constitution Article 1, section 19, for the taking or damaging of private property for public use without just compensation. (Op. pp. 5-10.) The Opinion next holds that the damaged street tree exposed the City to liability for nuisance based upon negligence (Op. pp. 11-13) notwithstanding the fact that the plaintiff had already dismissed a cause of action for damages based upon a dangerous condition of public property. (Op. p. 3.)

The Opinion thus constitutes an unprecedented, expansion of public entities' liability for damages hitherto limited by the California Government Claims Act (Gov't Code §§810-996) in general, and Government Code section 835 in particular, imposing liability under limited conditions for injuries caused by dangerous conditions of public property. The Opinion also conflicts with other reported decisions, including those of

this Court. It will likely stimulate new inverse condemnation and nuisance cases for damages against public entities. The herculean and exemplary efforts of many generations of California residents and their local and State officials to protect the State's stunning natural beauty by creating, preserving and expanding the vast and diverse array of public parks, forests, beaches and recreational areas, would be severely threatened in the face of such additional daunting liability. Scarce public resources already make it difficult to preserve these local and State treasures. We address each of the legal problems with the Opinion in greater detail below.

C. THE OPINION CONFLICTS WITH DECISIONS OF THIS COURT ON THE SCOPE OF ARTICLE 1, SECTION 19 OF THE CALIFORNIA CONSTITUTION.

Article 1, section 19 reads in pertinent part as follows: "Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation." The Opinion relied on language in two opinions of this Court to reach its conclusions that a storm damaged tree could be a public improvement triggering inverse condemnation liability under Article 1, section 19.

1. The Opinion Misreads And Conflicts With *Customer Co v. City of Sacramento* (1995) 10 Cal.4th 368

The Opinion relies on the following language in *Customer Co v. City of Sacramento* (1995) 10 Cal.4th 368, ("*Customer Co.*") for a description of the scope of Article 1, section 19: "[R]ead as a whole, the 'just compensation' clause is concerned, most directly, with the state's exercise of its traditional eminent domain power . . . .[¶] The California Constitution of 1879 added the phrase 'or damaged' to the just compensation provision . . . to clarify that application of the just compensation provision is not limited to physical invasions of property taken for 'public use' in eminent domain, but also encompasses special and direct damage to adjacent property resulting from the *construction* of public improvements." (Op. p. 6, quoting *Customer Co.*, 10 Cal.4th at 376-380, [emphasis added].)

The Opinion entirely fails to appreciate the key italicized word in this quote from *Customer Co.*, namely, that the liability must result from the "construction" of the improvement. Nor does it discuss this Court's painstaking elucidation, in that opinion, of the historic interpretation of the "or damaged" language of Article 1, section 19. In *Customer Co.*, this Court went to some lengths to emphasize that inverse condemnation liability may only result from damage caused by a public improvement as designed and constructed, not by its maintenance.

- "'The destruction or damaging of property is sufficiently connected with 'public use' as required by the Constitution, if the injury is a result of dangers *inherent in the construction of the public improvement* as distinguished from dangers *arising from the negligent operation of the improvement*.'" (*Customer Co., supra,* 10 Cal. 4th at 381-82 quoting *House v. L. A. County Flood Control Dist.* (1944) 25 Cal.2d 384, 396 (conc. opn. of Traynor, J.) [Italics added by *Customer Co.* court].)

- "Damage resulting from negligence in the routine operation having no relation to the function of the project as conceived is not within the scope of the rule applied in the present case." (*Customer Co., supra*, 10 Cal. 4th at 382 [italics in original].)

- "The holding . . . that negligent conduct of public employees or a public entity does not fall within the aegis of section 19 - has been followed repeatedly and uniformly . . . ." (*Customer Co., supra,* 10 Cal. 4th at 381.)

The Opinion by contrast focused solely on whether the planting of the tree was a deliberate action of the state in furtherance of a public purpose. (Op. p. 7.) It then purported to rely, erroneously, on another decision of this Court in *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507 (Op. pp. 7-8.)

2. The Opinion Misreads And Conflicts With *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507

The Opinion purports to derive from this Court's decision in *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507 ("*Regency Outdoor Advertising*") the conclusion that this Court "assumed that the subject trees were part of a public improvement, but held that the defendant was not liable for inverse condemnation

as no damages had been shown." This conclusion in the Opinion misunderstands the issues before the Court in *Regency Outdoor Advertising*.

In *Regency Outdoor Advertising* this Court explained the nature of the plaintiff's claim that street trees which had grown to obstruct the plaintiff's billboards constituted a taking of their property without just compensation. "In an inverse condemnation action, before the question turns to the amount of compensation due, "'the property owner must first clear the hurdle of establishing that the public entity has, in fact, taken [or damaged] his or her property'" [citation] and "[a]s part of this threshold showing, the plaintiff must demonstrate that the government has 'taken or damaged' a cognizable property right." (*Regency Outdoor Advertising*, 39 Cal.4th 516.)

The Court held it had not. "All in all, we conclude that the Court of Appeal was correct and that Regency has not advanced a property right warranting compensation here. Where, as in this case, an impairment of a billboard's visibility is the sole harm alleged from a municipal landscaping project occurring on city-owned property, eminent domain and inverse condemnation principles do not require the payment of compensation." (*Regency Outdoor Advertising*, 39 Cal.4th 523.) In short, whether a "public improvement" had caused physical damage to private property was not an issue decided by this Court in *Regency Outdoor Advertising*.

Nonetheless, the Court of Appeal reasoned, erroneously, that *Regency Outdoor Advertising* required its conclusion. "As demonstrated in *Regency Outdoor Advertising*, if the instrumentality that allegedly caused the plaintiff's damages (such as a tree) is part of the construction of a public improvement (such as a highway beautification plan), the public improvement element of an inverse condemnation claim is satisfied." (Op. p. 8.) Accordingly, the Opinion should be depublished as conflicting with this Court's decisions, should this Court decide not to grant review of the issues proposed by amici.

D. THE OPINION IMPLIES THAT NUISANCE ACTIONS MAY EVADE LIMITATIONS ON MUNICIPAL LIABILITY UNDER THE GOVERNMENT CLAIMS ACT

1. The Court of Appeal's Analysis of the Nuisance Claim

The Court described the evidence on the nuisance claim as follows: "The City's separate statement also set forth the following facts in support of summary adjudication of the nuisance cause of action: (1) on November 30, 2011, hurricane-force winds struck the City; (2) more than 5,500 City trees were damaged by the windstorm and over 2,000 "uprooted or destroyed"; (3) the subject tree fell onto the O'Halloran residence that day; (4) the tree was owned by the City; and (5) the City had pruned the tree in 2005 and 2010. Mercury only disputed the City's statement regarding the speed of the winds during the windstorm." (Op. p. 3.)

The Court of Appeal begins its legal analysis of the nuisance thus: "A nuisance is '[a]nything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." (Civil Code, § 3479.)'" (Op. p. 10.) The Court does not, however, discuss how this standard would be applicable to the undisputed fact that the tree in question was struck down in a windstorm that took down 5,500 trees.

The Court's discussion next turns to the standard for imposing liability. "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance even in the absence of negligence.'" (Op. p. 10.) "However, "'where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved.'" (Op. p. 11 [citations omitted].)

The Court of Appeal described the nature of the claim in this case. "Here, the complaint alleged a cause of action for nuisance based on the City's alleged failure to 'prevent and/or stop the collapse' of the subject tree." (Op. p. 11.) The Court elaborates further in footnote 3. "In Mercury's discovery responses, it claims that the City should have 'performed appropriate maintenance' on the tree prior to the windstorm." In sum, neither these allegations nor any supporting evidence established that the tree was a nuisance under Civil Code section 3279 or that the City had failed to conduct appropriate

maintenance on the tree. The Court acknowledged but gave no significance to the fact that "Mercury also alleged a cause of action for 'dangerous condition o[f] public property' but later dismissed this claim." (Op. p. 3, fn. 1.)

2. The Opinion Conflicts With Other Cited Cases

Government Code section 835 is the sole statutory basis for a liability claim against a public entity based on the condition of public property. (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434.) Under section 835, a public entity may be liable if it creates an injury-producing dangerous condition on its property or if it fails to remedy a dangerous condition despite having notice and sufficient time to protect against it. (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939.)

CACI 1100 sets forth the elements of a cause of action for a dangerous condition of public property. To establish [the claim that plaintiff was harmed by a dangerous condition of public property], [plaintiff] must prove all of the following:

1. That [defendant] owned the property;

2. That the property was in a dangerous condition at the time of the incident;

3. That the dangerous condition created a reasonably foreseeable risk of the kind of incident that occurred;

4. That the negligent or wrongful conduct of [defendant]'s employee acting within the scope of his or her employment created the dangerous condition;

   Or

   The [defendant] had notice of the dangerous condition a long enough time to have protected against it;

5. That [plaintiff] was harmed; and

6. That the dangerous condition was a substantial factor in causing [plaintiff]'s harm.

Section 830 defines a "[d]angerous condition" as "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." Dangerous condition of public property cannot be alleged generally, but must specify the manner in which the property is dangerous. (*Mixon v. Pacific Gas & Elec.* (2012) 207 Cal.App.4th 124, 131.) Plaintiffs must identify specific physical characteristics of the roadway, crosswalk or intersection that make the crosswalk unsafe when used with due care and cannot rely on generalized allegations. (*Brenner v. City of El Cajon* (2003) 113 Cal. App. 4th 434, 439-440.)

3. The Opinion is Inconsistent With *Mikkelsen v. State of California* (1976) 59 Cal.App.3d 621, Another Decision of The Second Appellate District, Division 3.

Apparently, the City did not argue and the Court of Appeal did not consider whether its nuisance determination was consistent with a prior decision of division 3 of the Second District Court of Appeal, *Mikkelsen v. State of California* (1976) 59 Cal.App.3d 621 ("Mikkelsen"), finding that the design immunity of Government Code section 830.6 precluded a claim for wrongful death arising out of a freeway overpass bridge connector that had collapsed in the Sylmar areas as a result of an earthquake, notwithstanding the plaintiff's attempts to frame the claim as a nuisance under Civil Code section 3279.

"Here, as in *O'Hagan*, the pertinent code section outside the Tort Claims Act is general in nature in that Civil Code section 3479 covers all nuisances whether arising from intentional, negligent, reckless or ultrahazardous acts. As aptly stated in *O'Hagan*, 38 Cal.App.3d at p. 729, 113 Cal.Rptr. at p. 506: 'In other words, this means that the Tort Claims Act is a special statute regulating the tort liabilities and immunities of public entities and employees, while Code of Civil Procedure section 1095 (in the instant case, Civil Code section 3479) is a general statute providing for damages in mandamus proceedings which embrace a great variety of legal actions (citations). This, of course, calls into play the well-established legal principle that where inconsistencies appear in statutes, a special statute dealing expressly with a particular subject controls and takes priority over the general statute.'"

(*Mikkelsen*, 59 Cal.App.3d 629.)

The *Mikkelsen* court found the immunity applicable to preclude the nuisance cause of action: "To permit the effectiveness of the design immunity embodied in Government Code section 830.6 to depend upon whether a cause of action is pleaded on the theory of nuisance or on that of negligence would be to thwart the legislative purpose. To borrow the apt words of *O'Hagan*, 38 Cal.App.3d at p. 730, 113 Cal.Rptr. at page 507: 'Considering the strongly worded legislative intent, cited above, most certainly the Legislature cannot be deemed to have intended to impose liability and abrogate immunities . . . by maneuvering with the rules of pleadings and procedure.' Consequently, we hold that the trial court did not err in declining to allow appellants to proceed on the basis of the concept of nuisance." (*Mikkelsen*, 59 Cal.App.3d 630.)

For all the foregoing reasons, we respectfully urge that the Opinion be depublished in its entirety if this Court denies review of the issues that we have framed in our amicus letter in support of review.

BURKE, WILLIAMS & SORENSEN, LLP

Manuela Albuquerque

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MA:mg
cc: Service List Attached

PROOF OF SERVICE

I, Monet Garrett, declare that I am a citizen of the United States and employed in Alameda County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1901 Harrison Street, Suite 900, Oakland, California 94612-3501. On October 13, 2014, I served a copy of the:

Request by the League of California Cities and California Park and Recreation Society pursuant to California Rule of Court, Rule 8.1125 for Depublication of the Opinion in City of Pasadena v. Superior Court, Court of Appeal for the Second Appellate District, Div. 3, Case No. B254800; (Petition for review pending – California Supreme Court Case No. S221455.)

by **MAIL** on the following party(ies) in said action, in accordance with Code of Civil Procedure § 1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Burke, Williams & Sorensen, LLP, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Oakland, California.

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

Executed on October 13, 2014, at Oakland, California.

MONET GARRETT