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S188161

Case No. _____

IN THE
SUPREME COURT OF CALIFORNIA

FRED AND D'ARCY TOMLINSON, individuals,
Petitioners and Appellants,

v.

COUNTY OF ALAMEDA, BY AND THROUGH THE BOARD OF SUPERVISORS; and DOES 1 THROUGH 20,
Defendant and Respondent,

Y.T. WONG, SMI CONSTRUCTION, INC., AND DOES 21 THROUGH 30, inclusive,
Real Parties In Interest and Respondent.

PETITION FOR REVIEW BY REAL PARTIES IN INTEREST AND RESPONDENTS, Y.T. WONG AND SMI CONSTRUCTION, INC.

After a Decision by the Court of Appeal
First Appellate District, Division Five, Case No. A125471

On appeal from the Superior Court of the State of California for the County of Alameda, The Honorable Frank Roesch
Alameda County Superior Court No. RG08396845

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To the Honorable Chief Justice Ronald M. George and the Honorable Associate Justices of the California Supreme Court:

The real parties in interest and respondents, Y.T. Wong and SMI Construction, Inc. (hereafter collectively referred to as "Real Party") respectfully petition for review of the published opinion by the Court of Appeal, First District, Division Five, in *Tomlinson, et al. v. County of Alameda, et al.* (October 6, 2010, A125471) (hereafter "Opinion"), a copy of which is attached hereto as Exhibit A, and present the following issue for consideration by this Court.

ISSUE PRESENTED FOR REVIEW

Whether the requirement in CEQA that a petitioner exhaust administrative remedies (Pub. Res. Code section 21177) applies when the public agency holds duly noticed public hearings on a project and concludes that the project qualifies for a CEQA exemption.

INTRODUCTION

Appellants herein, Fred and D'Arcy Tomlinson ("Tomlinsons") brought this petition challenging the County of Alameda's ("County") approval of an 11-home subdivision in the urban Fairview area of Alameda County. Tomlinsons argued to the trial court that the County did not comply with the California Environmental Quality Act ("CEQA") and misapplied an exemption therein. The County and Real Party argued that Tomlinsons were precluded from raising an issue of noncompliance with CEQA because they failed to raise the issue in any of the numerous publically noticed hearings, thus failing to exhaust their administrative remedies. The trial court agreed and denied the petition. Tomlinsons appealed.

The First Appellate District, Division Five, reversed, concluding Tomlinsons were not required to show that they had exhausted their administrative remedies before seeking judicial review. This conclusion

was particularly unexpected by the parties in light of the fact that Tomlinsons conceded in their appellate briefs that they were required to exhaust their administrative remedies and argued that they did do so.

The matter was further complicated when another division of the First Appellate District issued an opinion holding that showing exhaustion of administrative remedies was required as a prerequisite to challenging a public agency's determination of a categorical exemption under CEQA. This opinion directly conflicts with the opinion for which review is sought herein.

The conflict in these opinions creates significant uncertainty about important law affecting every public agency in the State of California that is required to comply with CEQA and the public in general.

REASONS REVIEW SHOULD BE GRANTED

The California Supreme Court may order review of a Court of Appeal decision "[w]hen necessary to secure uniformity of decision or to settle an important question of law." California Rules of Court, Rule 8/500(b)(1). Review is warranted here for both reasons.

The First District Appellate Court's opinion is in direct conflict with *Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830 ("*Hines*"), issued by a different panel of the First District. The *Hines* court was presented with the same issue as *Tomlinson*, but reached the opposite

conclusion, holding that petitioners were barred by the exhaustion doctrine from raising the CEQA noncompliance claims for the first time on judicial review of a determination that the challenged project was exempt from CEQA. Just as in *Tomlinson*, petitioners in *Hines* had ample opportunities to raise their CEQA claims at public hearings but failed to do so.

Review by the Supreme Court is necessary to ensure a unified approach to exhaustion of categorical exemption cases not only in the First District Court of Appeal but also throughout the State.

The Court of Appeal's opinion is also contrary to the longstanding public policy expressed in a long line of cases discussing the purpose behind the exhaustion of administrative remedies requirement – to allow a public agency the opportunity to review and address any issues arising under that agency's specific area of expertise, and render litigation unnecessary.

The issue of whether a party is required to satisfy the exhaustion of administrative remedies requirement when appealing a public agency's CEQA exemption determination is of critical importance to every city and county in the state, as well as the public in general, because further clarification is necessary regarding the jurisdictional requirement that a petitioner must first exhaust before judicial review may be sought on a CEQA exemption determination. Review should be granted because the Appellate Court's decision here has carved out a major exception to the

exhaustion requirement not codified in Public Resources Code §21177 by holding, in essence, that the requirement does not apply in matters where the public agency ultimately determines the project is exempt from CEQA, irrespective of whether or not petitioners had opportunities to present the noncompliance issue at public hearings or at public comment period.

Real Party also contends that the Appellate Court misinterpreted the Fourth District Appellate Court's decision in *Azusa Land Reclamation Company, Inc. v. Main San Gabriel Basin Watermaster, et al.* (1997) 52 Cal.App.4th 1165 ("*Azusa*"), extending the *Azusa* holding well beyond the facts in that case. Real Party contends that *Azusa* should be more narrowly construed.

This issue is ripe for final resolution by the Supreme Court in that only the highest court can resolve the conflict between the inconsistent opinions in *Hines* and this case. Further, a grant of review would provide the Supreme Court an opportunity to clarify the applicability of the holding in *Azusa* in CEQA exemption determination cases where public hearings are held or opportunity existed for petitioners to present their objections.

In order for this important issue to be resolved, Real Party respectfully requests that the Supreme Court grant review.

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FACTUAL AND PROCEDURAL HISTORY

A. SUMMARY OF FACTS

On or about August 18, 2006, Real Party submitted an application to the Planning Department at the County of Alameda for the construction of a single-family subdivision ("the Project") in the area known as Fairview. (AR 2:290.)[1] The Project site is located in a single-family residential area of unincorporated Alameda County.

Real Party sought to merge two parcels into one parcel totaling 1.89 gross acres (AR 1:34) and to subdivide the merged parcel into 11 buildable lots, each to be developed with a single-family home. (AR 1:47.) Real Party worked for approximately two years to comply with all requests of the various municipal and county agencies. (AR 1:185.) Real Party also retained qualified professional consultants, including architects, civil and soils engineers, arborists, biologists, and archeological and historical consultants to address all requirements from the Planning Department. (AR 1:185-186.)

On or about July 2, 2007, the County Planning Department prepared a Preliminary Plan Review report and determined that the Project was exempt from CEQA under the "infill exemption" (CEQA Guidelines, Title 14, Code of Regulations § 15332) because "the proposed

[1] AR 2:290 refers to page 290 of Volume 2 of the Administrative Record lodged with the court. The preceding zeros on the page numbers have been eliminated from all AR citations.

development would occur in an established urban area, would not significantly impact traffic, noise, air or water quality, and could be served by required utilities and public services." (AR 1:34-46.) Despite finding that the Project qualified as an in-fill development under Section 15332, the Planning staff evaluated the Project in terms of its environmental impact per CEQA. (AR 1:34-40, 62.) The Preliminary Plan Review clearly indicated that the Planning staff carefully considered the residential density of the Project, as well as traffic and parking concerns, before recommending approval of the Project. (AR 1:38-46.)

After describing the findings and determinations of the Planning Department, the concerns expressed by the neighbors about the loss of view, potential traffic and parking problems, and the loss of trees on the property, the Planning Department recommended that the Planning Commission approve the Project. (AR 1:54-63.)

At the noticed public hearing of the Planning Commission held on July 2, 2007, Tomlinsons repeatedly indicated that their main concern was the loss of view from their property. (AR 1:72, 78, 102.) No mention was ever made, by either Tomlinsons or anyone else, that the Project may not comply with the definition of "in-fill exemption" under CEQA § 15332. The Planning Commission then continued the hearing for revision and consideration to December 17, 2007. (R1:69-74.)

During the December 17, 2007 hearing, and after informing the

Planning Commission that the Project qualified as infill for CEQA purposes, the Planning staff presented a detailed response to the comments received by Tomlinsons and their neighbors, thereafter concluding that lot sizes of the Project were consistent with the surrounding neighborhood. (AR 1:121.) Tomlinsons again complained that the Project would impact views, drainage, and create traffic and parking issues. (AR 1:135.) As before, neither Tomlinsons nor anyone else challenged the County's determination that the Project met the "in-fill exemption" under CEQA § 15332. Tomlinsons made general references to environmental review, but only in the context of the Specific Plan. (AR 1:134.)

On or about December 17, 2007, after completing the public hearing, the Planning Commission determined that the Project was "Categorically Exempt pursuant to Section 15332 (In fill Development)" of CEQA and that it complied with the applicable zoning ordinance requirements. (AR 1:1.) The Planning Commission unanimously approved the Project. (AR 1:186-187.)

On or about January 9, 2008, Tomlinsons appealed the Planning Commission's decision to the County of Alameda Board of Supervisors. Tomlinsons sent a letter to the Planning Department expressing the two areas of concern for appeal – i.e., traffic and residential density. (AR 2:384-387.) Additional letters expressing concerns regarding the traffic and

residential density were sent to the Board on or about February 7, 2008 by neighbors of the Project. (AR 2:405-418.)

The Board of Supervisors heard Tomlinsons' appeal on April 8, 2008. Tomlinsons only presented unsubstantiated opinions, concerns and/or suspicions relating to their concerns about traffic and density. At no time during the hearing on appeal did Tomlinsons or anyone else challenge the County's application of the infill exemption.

At the end of the hearing, the Board of Supervisors denied Tomlinsons' appeal and approved the project consistent with the findings of the Planning Commission. (AR 1:16-18.)

B. PROCEDURAL HISTORY

Tomlinsons appealed the Board of Supervisors' approval of the project by filing their Petition for Writ of Mandate in the trial court below.

After the hearing on Tomlinsons' Petition for Writ of Mandate, the trial court issued an order denying Tomlinsons' petition and, in summary, determined that: there was no basis to reverse County's determination that the proposed density for the Project complies with the applicable general and specific plans (see Appellants' Appendix, Vol. 2, page 401-407 [AA 2:401-407]); Tomlinsons failed to exhaust their administrative remedies by failing to object that the Project was not to be built "within city limits" under CEQA Guidelines § 15332(b), and therefore were precluded from raising this issue for the first time on appeal (AA 2:409-412); Tomlinsons

failed to present substantial evidence to raise a fair argument that the Project will have a significant effect on the environment due to unusual circumstances (CEQA Guidelines § 15300.2) (AA 2:412-421); and, finally, the conditions included in the County's approval of the Project do not function as a mechanism to bring the Project within an exemption and, therefore, the rule against "mitigating into an exemption" did not apply (AA 2:421-425).

Apparently, dissatisfied with the trial court's decision, and continuing on their "not in my back yard" mission to prevent the project from going forward at any cost, Tomlinsons appealed the trial court's order.

On March 3, 2010, after review of the briefs submitted by the parties and the administrative record, and prior to the oral arguments on appeal, the First Appellate District requested additional briefing from the parties on the following issues:

> "(1) If this court determines that the project's alleged noncompliance with the exemption's "within city limits" criterion was not presented at the administrative level, does section 21177 preclude appellants' assertion of this ground of noncompliance in this action?
>
> (2) May this court consider whether section 21177 required assertion of the project's alleged noncompliance with the "within city limits" requirement at the administrative level, in light of appellant's failure to raise this issue in their briefing on appeal and their concessions in the trial court that they "do not claim that the potential exception [set out in *Azusa*] applies . . . [and] readily acknowledge that since the County held a hearing, [they] had a duty to exhaust."

On April 15, 2010, the parties presented their oral arguments before the First Appellate District.

On June 18, 2010, the Court of Appeal filed its original opinion reversing the trial court's order denying Tomlinsons' petition for writ of mandate, and remanding the matter to the trial court with instructions to issue a writ of mandate directing the County to set aside its decision approving the proposed subdivision and to comply with the requirements of CEQA when reconsidering approval of the proposed subdivision.

On July 14, 2010, after filing its petition for rehearing, respondent County sent a letter to the Court of Appeal advising it of a recent change in the publication status of *Hines v. California Coastal Commission* (A125254, June 17, 2010), which was not originally certified for publication prior to the Court of Appeal original decision in this matter.

On July 19, 2010, the Court of Appeal denied respondent County's petition for rehearing but, instead, issued an order granting rehearing on its own motion and requested additional briefing on the following issue: "How does *Hines v. California Coastal Commission* (A125254, June 17, 2010) impact the court's holding, in light of *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, that '[Public Resources Code] section 21177 does not bar Tomlinsons from challenging the County's exemption determination on the ground that the proposed subdivision is not 'within city limits.' (See *Azusa*, at p. 1209

[holding section 21177 does not apply in actions challenging an agency's exemption determination]."

After review of the parties' additional briefing, the Court of Appeal reiterated its prior decision by filing its October 6, 2010 opinion holding, in part, that the exhaustion of administrative remedies requirement does not apply in the action herein and, therefore, Section 21177 does not bar Tomlinsons from raising their CEQA noncompliance issue on the ground that the project cannot comply with the "within city limits" requirement of the in-fill categorical exemption.

LEGAL DISCUSSION

A. THE COURT OF APPEAL'S OPINION IS IN DIRECT CONFLICT WITH THE *HINES* OPINION, CREATES AN EXCEPTION CONTRARY TO THE PLAIN LANGUAGE IN PUBLIC RESOURCES CODE § 21177, AND MISAPPLIES THE HOLDING IN *AZUSA*.

1. The Court of Appeal's Opinion Directly Conflicts With Its Own Decision In *Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830.

The Court of Appeal's decision directly conflicts with another decision certified for publication by Division Two of the same court in *Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830 (review denied October 13, 2010). In *Hines, supra,* the First Appellate District held "that appellants "failed to exhaust their administrative remedies ... by failing to raise any issue regarding the purported violation

of CEQA before the county at any stage, despite ample notice that county staff considered the project exempt and several opportunities ... to raise any objection or argument with respect to the categorical exemption. (§21177, subd. (a).)" *Hines v. California Coastal Commission, supra,* 186 Cal.App.4th at 852-853.

After considering the holding of *Azusa Land Reclamation Company v. Main San Gabriel Basin Watermaster, supra,* the Second Division of the First Appellate District Court held in *Hines* as follows: "'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.'" *Id.*, at p. 853.

The *Hines* court concluded that section 21177's exhaustion requirement applies when there are public hearings that include environmental review, ample notice of such hearings is given notifying the agency's reliance on the exemption, and the public does not raise an objection to the exemption despite an opportunity to do so. *Hines, supra,* at pp. 852-855. Similar to the case before this Court, the *Hines* court determined that "there was ample notice before the multiple public hearings held with regard to the project that it was considered under the 'Class 3'

categorical exemption provision of Regulation § 15303, subdivision (a) (new single-family residence). *Id.*, at p. 854.

The Court of Appeal's decision here should be consistent with the decision in *Hines, supra,* given the similar facts and circumstances. In *Hines, supra,* the County issued several notices to appellants and other neighbors of their determination that the project was categorically exempt from CEQA. *Id.*, at p. 836-839. Appellants spoke at public hearings. Despite making claims of other nonconformities, appellants made no claim about the determination that the project was exempt under CEQA. Following another public hearing, the Board of Supervisors approved the project after determining, among other things, that the project was categorically exempt from CEQA. The appellants in *Hines, supra,* again appealed the County's decision to the California Coastal Commission. Following yet another hearing at which appellants spoke, the Coastal Commission followed the recommendation of its staff, and unanimously determined that the appeal did not give rise to a "substantial issue." *Id.* Appellants filed a petition for writ of mandate. Trial court denied the petition. *Id.*

Even though the Court of Appeal's opinion here acknowledged that the *Hines* case involved facts and "circumstances similar to those presented here," the court nevertheless concluded, without explanation, that "[t]he court's holding in *Hines* does not alter its conclusion under *Azusa* that

section 21177's exhaustion requirement has no preclusive effect in this case." (Opinion, at p. 1422.)

Supreme Court review is necessary to resolve the direct conflict between the appellate decision in *Hines* and the Court of Appeal opinion herein.

2. The Judicially Created Exception To the Exhaustion of Administrative Remedies Statute Violates the Plain Language of Section 21177.

Despite the plain language in the statute, and agreement by all parties that the exhaustion of administrative remedies under Section 21177 applies in this action, the First District Court of Appeal reached a contrary conclusion by holding that Section 21177 does not apply to bar Tomlinsons' objection to the County's determination that the project is exempt from CEQA. (Opinion, p. 1417-1424.[2]) In support of its decision, the Court of Appeal ignored all prior decisions relating to the exhaustion of administrative remedies requirement. Instead, the Court of Appeal wholly relied on the Fourth District Court of Appeal decision in *Azusa Land Reclamation Company v. Main San Gabriel Basin Watermaster, supra*, and unfairly extended *Azusa* on the assumption that a project that complies with CEQA through a categorical exemption never has public hearings.

Public Resources Code § 21177(a) expressly provides as follows:

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[2] Cited page numbers in Opinion refer to the page numbers in the California Official Report (Exhibit A).

> "(a) *No action or proceeding may be brought pursuant to Section 21167* unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division *or prior to the close of the public hearing on the project before the issuance of the notice of determination.*" (Public Resources Code § 21177(a); emphasis added.)

Based on the plain language of Section 21177(a), the exhaustion of administrative remedies doctrine is a prerequisite to any action claiming noncompliance with CEQA if there is a public hearing (or public hearings, in this case) or other opportunity for public comment prior to the public agency's decision regarding project approval. Public Resources Code § 21177(a).

In enacting Section 21177, the Legislature sought to expressly preclude an action based on noncompliance with CEQA if the petitioner had an opportunity to present that issue to the public agency during the public comment period or at a public hearing, but failed to do so, even if that action was filed within the statute of limitations period under Public Resources Code § 21167 (subsection (d) requires an action or proceeding to be commenced within 35 days from the filing of a notice of exemption by the public agency, or 180 days from the public agency's decision to carry out or approve the project). (Public Resources Code § 21177(a).)

Section 21177 does not provide an exception to the exhaustion requirement except in instances where "there was no public hearing or other

opportunity for members of the public to raise these objections orally or in writing prior to the approval of the project, or if the public agency failed to give the notice required by law." (Public Resources Code § 21177(e).)

In concluding that Section 21177 does not apply in the matter at hand, the First District Court of Appeal's opinion here states as follows:

> "In *Azusa, supra,* 52 Cal.App.4th at page 1209, the court held that the doctrine of exhaustion of administrative remedies does not apply in actions challenging an agency's exemption determination. The court noted that under the statute's own terms, the exhaustion requirement established by section 21177 applies only 'where (1) CEQA provides a public comment period, or (2) there is a public hearing before a notice of determination is issued.' (*Azusa*, at p. 1210.) CEQA does not provide for a public comment period before an agency makes an exemption finding, and there is no 'public hearing ... before the issuance of the notice of determination' because this document is never filed if the agency declares an exemption. (*Ibid.*) Accordingly, '[t]he *only* prerequisite to an action challenging an exemption determination is that it be brought within 180 days of the date of the final decision of the agency. (Guidelines, § 15062, subd. (d).)' (Citations omitted.)"
>
> (Opinion, p. 1418-1419; citations omitted.)

As indicated above, the appellate court herein and the *Azusa* court both assume incorrectly that a project exempt from CEQA never involves public hearings. As clearly indicated by the facts in *Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830, and the facts of the instance case, the aforementioned assumption is incorrect.

The Court of Appeal muddles its interpretation of Section 21177(a) and *Azusa* by overlooking the fact that a "notice of exemption" is simply

one form of a statutory notice of determination. In footnote 11 of the Court of Appeal's opinion, the court understood that [u]nder CEQA, the term 'notice of determination' in Section 21177(a) refers to a document an agency must file '[w]henever [it] approves or determines to carry out a project that is subject to this subdivision [CEQA]....' (Public Resources Code §§ 21108, subd. (a), 21152, subd. (a).)" But the court misses the fact that 21108(b) and 21152(b) refer to the very same notices of *determination* that an exemption applies. Each is a notice of determination. The *Tomlinson* court picks up the phrase "notice of exemption" from the Guidelines (CEQA Guideline § 15062), and tries to draw a distinction between a notice of exemption and a notice of determination, but the statute supports no such distinction. Real Party believes that the court's confusion with the meaning of the aforementioned terms has led to its erroneous interpretation of Section 21177 and *Azusa*.

3. Supreme Court Review Is Necessary To Determine Whether the Holding In *Azusa* Applies To CEQA Exemption Determination Cases Where There Was Opportunity To Raise the CEQA Noncompliance Issue During Public Comment Period Or At Public Hearings.

Real Party further contends the Court of Appeal's opinion misapplies the holding in *Azusa, supra.* The holding in *Azusa, supra,* must be understood in light of that court's finding that there was no public comment period or public hearing for purposes of Section 21177 because

the exemption determination was made simultaneously with the project's approval. *Azusa, supra,* 52 Cal.App.4th 1165, 1210.

The *Azusa* decision, which reiterated the legislative prerequisite that "the exhaustion requirement applies where: (1) CEQA provides a public comment period, or (2) there is a public hearing before a notice of determination is issued," was predicated on the court's finding that there was no public comment period or public hearing prior to the agency's determination, thus triggering the exhaustion of administrative remedies exception under Section 21177(e). *Azusa, supra,* 52 Cal.App.4th at p. 1210.

The *Azusa* court determined that, where an agency approves a project and simultaneously decides that the project is exempt from CEQA, "there is no 'public hearing . . . before the issuance of the notice of determination." *Azusa, supra,* 52 Cal.App.4th 1165, 1210. The *Azusa* court held that respondent therein was estopped from arguing that the water agencies failed to exhaust the administrative requirements "because the Regional Board declared that the project was exempt from CEQA, there was *no* 'public comment period provided by [CEQA]' and there was *no* 'public hearing ... before the issuance of the notice of determination.'" *Id.* The *Azusa* court also noted that the language in Section 21177 requiring that the alleged grounds for noncompliance must have been presented "during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice

of determination" was not added until 1993, years after the Regional Board's 1986 finding that the landfill was subject to the "ongoing project" exemption under CEQA. *Id.*

The *Azusa* court further determined that "[w]hether a party has exhausted its administrative remedies 'in a given case will depend upon the procedures applicable to the public agency in question.'" *Id.*, at p. 1211; citing *City of Sacramento v. State Water Resources Control Bd.* (1992) 2 Cal.App.4th 960, 969.

Despite reaching the conclusion early in its opinion that the exception to the exhaustion requirement applied, the *Azusa* court nevertheless made the factual determination that "[e]ven if respondents had to challenge the exemption filing administratively, they clearly did so here" by seeking the respondent's review of the Regional Board's finding that the categorical exemption applied. *Id.*, at p. 1211.

The facts in the case here are clearly distinguishable from the facts in *Azusa, supra.* This action does not involve a public agency's approval of a project simultaneous with the agency's determination that the project is categorically exempt from CEQA. In fact, it has been well established in the administrative record that, prior to the Planning Commission's approval of the project, the County's Planning Department held at least two separate hearings permitting the public to comment specifically on the Preliminary Plan Review reports prepared by the Planning Department dated July 2,

2007 and December 17, 2007, which included a determination that the project was exempt from CEQA under Title 14 of Code of Regulations, Section 15332 "In-fill Development." Subsequent to the public comment hearings, a formal public hearing was held on April 8, 2008 on Appellants' appeal to the County Board of Supervisors.

The *Azusa* court's holding that "[t]he *only* prerequisite to an action challenging an exemption determination is that it be brought within 180 days of the date of final decision of the agency" must be construed strictly based on the distinct set of facts in that case and on that court's finding that the exception to Section 21177 applied. To give the *Azusa* decision a broader interpretation would defeat the plain language of Section 21177(e) and well-established purpose for the exhaustion of administrative remedies doctrine, i.e., to give the public agency an opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review. *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198.

The *Azusa* decision cannot be interpreted to hold that an assertion of noncompliance can be raised for the first time upon filing a petition in superior court so long as the action is brought within the statute of limitations period of Section 21167. That interpretation would defeat the intent of the exhaustion doctrine and would render the language in Section 21177 meaningless. Further, such a reading would carve out a substantial

exception to the doctrine by allowing objecting parties dissatisfied with the public agencies' exemption determination to simply raise the CEQA noncompliance grounds for the first time upon filing of a petition.

Based on the above, Supreme Court review is necessary to determine whether the *Azusa* holding applies to public agency exemption determinations where there was opportunity to raise the CEQA noncompliance issue during public comment period or at public hearings, and, if so, whether the Court of Appeal applied the *Azusa* decision correctly.

B. THE COURT'S EXHAUSTION ANALYSIS IS CONTRARY TO WELL ESTABLISHED PUBLIC POLICY THAT PUBLIC AGENCIES BE GIVEN AN OPPORTUNITY TO RESPOND TO ISSUES BEFORE RESORTING TO JUDICIAL REVIEW.

1. Exhaustion Doctrine Is a Prerequisite to Allow Public Agency Opportunity to Review Issue, Act On It and Perhaps Render Litigation Unnecessary.

The fundamental policy behind the exhaustion doctrine is to afford public agencies and other affected parties an opportunity to receive and respond to articulated factual issues and legal theories, to allow the public agency an opportunity to act before its actions are subjected to judicial review, and to render litigation unnecessary. *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198; *Mani Bros Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1394.

"'The essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review.' (*Citations omitted.*) By presenting the issue to the administrative body, the agency 'will have had an opportunity to act and render the litigation unnecessary.' (*Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal. App. 3d 886, 894.)" *Azusa, supra,* at p. 1215.

The *Azusa* court acknowledged that "[i]n enacting *Public Resources Code section 21177*, the Legislature said that 'It is the intent of the Legislature in adding *Section 21177* . . . to codify the exhaustion of administrative remedies doctrine. It is not the intent to limit or modify any exception to the doctrine of administrative remedies contained in case law.' (Stats. 1984, ch. 1514, § 14.5, p. 5345.)

Real Party contends that, had Tomlinsons presented the CEQA noncompliance claim at the one of public hearings, the County would have had an opportunity to consider whether the categorical exemption was correctly applied. The Court of Appeal's decision allows, in essence, for parties seeking to derail an approved project to simply wait while public hearings are completed, then raise an exemption issue for the first time in a judicial proceeding. This is directly contrary to the fundamental intent and policy of the exhaustion doctrine.

2. The Court Of Appeal's Decision Based On the Merits Of the Infill Exemption Argument (i.e., How The County Could Have Responded To Tomlinsons' Argument Had It Been Made) Swallows the "Prerequisite" Exhaustion Of Administrative Remedies Requirement.

In its opinion, the First District Court of Appeal erroneously reverses the "prerequisite" analysis of determining whether the exhaustion requirement was met and, instead, looks at the merits of the case before deciding that the exhaustion requirement does not apply here. The opinion states as follows:

> "The doctrine of exhaustion of administrative remedies 'prevents courts from interfering with the subject matter of another tribunal' by giving the agency an opportunity to respond to factual issues and legal theories within its area of expertise before its actions are reviewed by a court. (Citation omitted.) The exhaustion requirement also 'facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.' [Citation.] It can serve as a preliminary administrative sifting process [citation], unearthing the relevant evidence and providing a record which the court may review. [Citation.]' (Citations omitted.) The point the Tomlinsons purportedly failed to raise here – that the project would not occur 'within city limits' – does not implicate the County's particular expertise and does not require an evidentiary determination. Indeed, the fact on which it turns is undisputed, and the County conceded at oral argument that it had not been deprived of an opportunity to offer evidence of this fact. With these policy implications in mind, we follow the lead in *Azusa* in holding that section 21177 does not bar the Tomlinsons from challenging the County's exemption determination on the ground that the proposed subdivision is not 'within city limits.'"

(Opinion, at p. 1419-1420.)

The Court of Appeal's opinion constitutes a profound departure from well-established California exhaustion of administrative remedies law which places the burden on the petitioners to first establish that they exhausted administrative remedies. *Porterville Citizens for Responsible Hillside Development v. City of Porterville, et al.* (2007) 157 Cal.App.4th 885, 909-910.

C. THE COURT'S OPINION ERRS IN FACT AND LAW BY CONCLUDING THAT THE COUNTY'S HEARINGS WERE NOT SUFFICIENT TO INVOKE THE EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIREMENT.

The Court of Appeal's opinion concludes in a footnote that the public hearings held before the County of Alameda Planning Commission and County Board of Supervisors were not sufficient to invoke the exhaustion requirement of Section 21177. (Opinion, at p. 1419, fn. 8.) This conclusion is erroneous both in law and fact.

Here, the administrative process clearly met the public hearing requirements under Section 21177, *Azusa* and *Hines*. The facts in *Azusa* are distinguishable from the facts in this case because that court found that there was neither a public comment period nor public hearing prior to the agency's determination, so the obligation to exhaust administrative remedies was never triggered. The *Azusa* court determined that "there is no 'public hearing . . . before the issuance of the notice of determination"

where an agency approves a project and simultaneously decides that the project is exempt from CEQA. *Azusa, supra,* 52 Cal.App.4th 1165, 1210.

In contrast, the *Hines* court held that the exhaustion requirement of section 21177 was invoked since the county issued several notices to appellants and other neighbors of its determination that the project was categorically exempt from CEQA and the appellants spoke at public hearings. *Hines, supra,* at p. 854-855. Following another public hearing, the Board of Supervisors approved the project after determining, among other things, that the project was categorically exempt under CEQA. The appellants in *Hines* again appealed the County's decision to the California Coastal Commission. Yet, despite multiple opportunities, appellants failed to raise the CEQA noncompliance issue prior to seeking judicial review.

Here, the overwhelming evidence in the record demonstrates that the hearings held in this matter far exceeded the standards of Section 21177 and *Azusa*, and were sufficient to trigger the exhaustion requirement under Section 21177 (a). The County planning department staff report dated July 2, 2007 specifically stated that the project was categorically exempt from the requirements of CEQA under California Code of Regulations section 15332 because it qualified s an in-fill development project. (AR 1:35.) County staff repeated this information at the Planning Commission hearing held on December 17, 2007. (AR 1:121.) The Planning Department and Planning Commission invited the public on at least two separate occasions

to comment on its initial determination that the Project was categorically exempt as an "in-fill development." Tomlinsons availed themselves of, and actively participated in, the public comment and public hearing proceedings by expressing concerns regarding the Project's impact on traffic and parking, and even its impact on wildlife habitat, but failed to raise any objection regarding the "within city limits" requirement of the exemption. (AR 1:133.) The County and its agency engaged in an open dialogue with members of the public by accepting and responding to e-mails from Tomlinsons and their neighbors. Tomlinsons raised every possible argument in an attempt to take the Project out of the "in-fill development" exemption, but failed to raise any issue regarding the "within city limits" requirement.

On April 4, 2008, prior to the Board of Supervisors' hearing the appeal, Tomlinsons sent an e-mail to County staff wherein they directly quote the language from California Code of Regulations section 15332, but did not raise any concern with the County's use of the infill exemption based on the Project location within city limits. On April 8, 2008, at the Board of Supervisors' hearing on the matter, Tomlinsons again made comments on the record but never once raised the Project's exemption status based on city limits. (AR 1:178.)

In sum, the facts described above and in *Hines* distinguish this case from *Azusa*. As *Hines* demonstrates, the distinction between an opportunity

to address use of a categorical exemption on a regularly scheduled agenda item with no public hearing and no advance notice of the proposed categorical exemption use (the facts in *Azusa*) and an opportunity to address the use of a categorical exemption at a properly noticed public hearing where the decision-making body has specifically noticed its proposed use of the categorical exemption (the facts in the present case and *Hines*) is critical. Thus, the Court of Appeal's approach to distinguishing *Azusa* does not conform to the law as articulated in *Hines*.

Based on the foregoing, the Court of Appeal's opinion expressed *in dictum* that the public hearings afforded Tomlinsons were not sufficient to invoke the exhaustion of administrative remedies requirement, is erroneous.

CONCLUSION

For the foregoing reasons, review should be granted in order that the Supreme Court can determine whether the Court of Appeal decision should be reversed.

Dated: 11/12/10

Respectfully submitted,

ABDALAH LAW OFFICES
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By: _____

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Attorneys for Respondent,
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CONSTRUCTION, INC.

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.504(d)(1))

I, MIRIAM H. WEN-LEBRON, hereby certify that the word count in PETITION FOR REVIEW OF REAL PARTIES IN INTEREST Y.T. WONG AND SMI CONSTRUCTION, INC. is 6,245 words.

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

Executed this 12 day of November, 2010 in Cupertino, California.

MIRIAM H. WEN-LEBRON

EXHIBIT A

1 of 3 DOCUMENTS

FRED TOMLINSON et al., Plaintiffs and Appellants, v. COUNTY OF ALAMEDA et al., Defendants and Respondents; Y.T. WONG et al., Real Parties in Interest and Respondents.

A125471

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

188 Cal. App. 4th 1406; 2010 Cal. App. LEXIS 1725

October 6, 2010, Filed

PRIOR HISTORY: [**1]

Superior Court of Alameda County, No. RG08396845, Frank Roesch, Judge.

Tomlinson v. County of Alameda, 185 Cal. App. 4th 1029, 111 Cal. Rptr. 3d 140, 2010 Cal. App. LEXIS 908 (Cal. App. 1st Dist., 2010)

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court denied a petition for a writ of administrative mandate filed by residents challenging a county's decision to approve a proposed subdivision development. The proposed subdivision site was located in an unincorporated area of the county. The planning commission found it categorically exempt under *Pub. Resources Code, § 21080, subd. (a)*, from the California Environmental Quality Act (CEQA) (*Pub. Resources Code, § 21000 et seq.*) as in-fill development pursuant to *Cal. Code Regs., tit. 14, § 15332*, because it was in an established urban area. The residents expressed concern about traffic issues while acknowledging the county's conclusion that the proposed subdivision was exempt as in fill. (Superior Court of Alameda County, No. RG08396845, Frank Roesch, Judge.)

The Court of Appeal reversed and remanded to the trial court with instructions to issue a writ of mandate directing the county to set aside its decision approving the proposed subdivision and to comply with the requirements of CEQA when reconsidering approval of the proposed subdivision. The court held that the residents' failure to challenge the exemption determination did not preclude them from raising the issue on appeal because the exhaustion requirement of *Pub. Resources Code, § 21177*, does not apply to an action challenging an exemption determination. Although it appeared that the residents had conceded a duty to exhaust, such a concession did not have to be accepted on a pure question of law. The proposed subdivision was not exempt as in-fill development under *§ 15332* because it was not within city limits, a phrase that the court construed as requiring that a project occur within the boundaries of a municipality. (Opinion by Jones, P. J., with Simons and Needham, JJ., concurring.) [*1407]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Pollution and Conservation Laws § 1.8--California Environmental Quality Act--Projects--Exemptions--Effect of Categorical Exemption.--It is state policy in California that the long-term protection of the environment shall be the guiding criterion in public decisions. The overriding purpose of the California Environmental Quality Act (CEQA) (*Pub. Resources Code, § 21000 et seq.*) is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage. To implement this policy, CEQA and its guidelines (*Cal. Code Regs., tit. 14, § 15000 et seq.*) establish a three-tiered process determining the level of environmental review required. The first step of this process requires public agencies to conduct a preliminary review to determine whether CEQA applies to a proposed activity. If the activity constitutes a project as defined by statute, CEQA applies unless the activity falls within one of the exemptions established by the Legislature or the CEQA guidelines (*Pub. Resources Code, § 21080, subd. (a)*). Where a project is categorically exempt, it is not subject to CEQA requirements and may be implemented without any CEQA compliance whatsoever. Accordingly, if the agency determines that an exemption applies, no further environmental review is necessary.

(2) Pollution and Conservation Laws § 2.9--California Environmental Quality Act--Proceedings--Judicial Review--Exhaustion of Administrative Remedies.--Although the exhaustion requirement has been described as jurisdictional, a failure to exhaust does not deprive a court of fundamental subject matter jurisdiction. Properly understood, exhaustion under *Pub. Resources Code, § 21177*, is a statutory prerequisite for asserting a ground of California Environmental Quality Act (*Pub. Resources Code, § 21000 et seq.*) noncompliance. It is designed to give an agency the opportunity to receive and respond to articulated factual issues and legal theories before its actions are subject to judicial review. To that end, the exact issue asserted in the trial court must have been presented to the administrative agency. The petitioner bears the burden of showing that the issues raised in the judicial proceeding were first raised at the administrative level.

(3) Pollution and Conservation Laws § 2.9--California Environmental Quality Act--Proceedings--Judicial Review--Exhaustion of Administrative Remedies.--The doctrine of exhaustion of administrative remedies does not apply in actions challenging an agency's exemption determination. Under the statute's own terms, the exhaustion requirement established by *Pub. Resources Code, § 21177*, applies only where [*1408] (1) the California Environmental Quality Act (CEQA) (*Pub. Resources Code, § 21000 et seq.*) provides a public comment period, or (2) there is a public hearing before a notice of determination is issued. CEQA does not provide for a public comment period before an agency makes an exemption finding, and there is no public hearing before the issuance of the notice of determination because this document is never filed if the agency declares an exemption. Accordingly, the only prerequisite to an action challenging an exemption determination is that it be brought within 180 days of the date of the final decision of the agency (*Cal. Code Regs., tit. 14, § 15062, subd. (d)*).

(4) Statutes § 20--Construction--Judicial Function--Interpreting Laws as Written.--The role of a judicial body is to interpret the laws as they are written. It is for the Legislature to weigh the relevant policy considerations.

(5) Pollution and Conservation Laws § 1.8--California Environmental Quality Act--Projects--Exemptions--In-fill Development--Within City Limits.--The plain meaning of the phrase "within city limits," as it is used in *Cal. Code Regs., tit. 14, § 15332*, requires that a project occur within the boundaries of a municipality.

(6) Statutes § 30--Construction--Language--Plain Meaning Rule--When Language Clear.--If the statutory language is clear, a statute's plain meaning generally controls.

(7) Statutes § 38--Construction--Giving Effect to Statute--Construing Every Word--In Context of Statutory Framework.--A court must consider the words of a statute in the context of the statutory framework, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.

(8) Statutes § 49--Construction--Reference to Other Laws--In Pari Materia (Same Subject Matter)--Use of Different Words.--The use of different words in a regulation suggests that different meanings were intended. Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.

(9) Pollution and Conservation Laws § 1.8--California Environmental Quality Act--Projects--Exemptions--Policy Considerations.--Unlike the statutory exemptions in *Pub. Resources Code, § 21080, subd. (b)*, which reflect policy decisions of the Legislature, the categorical exemptions identified in *Cal. Code Regs., tit. 14, § 15000 et seq.*, [*1409] represent a determination by the Secretary for Resources that particular classes of projects generally do not have a significant effect on the environment (*Cal. Code Regs., tit. 14, § 15300*). Thus, a policy does not overcome the requirements of the California Environmental Quality Act (*Pub. Resources Code, § 21000 et seq.*) and does not expand an exemption to projects that clearly lie outside the legal criteria.

(10) Pollution and Conservation Laws § 1.8--California Environmental Quality Act--Projects--Exemptions--In-fill Development--Within City Limits.--A county used the wrong legal standard in applying the in-fill development exemption set forth in *Cal. Code Regs., tit. 14, § 15332*, and substantial evidence did not show that the proposed subdivision, which was outside the city limits, satisfied the exemption's criteria.

[*Manaster & Selmi, Cal. Environmental Law & Land Use Practice (2010) ch. 21, § 21.06*; *Cal. Forms of Pleading and Practice (2010) ch. 418, Pollution and Environmental Matters, § 418.33.*]

COUNSEL: Remy, Thomas, Moose & Manley and Sabrina V. Teller for Plaintiffs and Appellants.

Jewell J. Hargleroad for Fairview Community Club as Amicus Curiae on behalf of Plaintiffs and Appellants.

Richard E. Winnie, County Counsel, Brian E. Washington, Assistant County Counsel, and Manuel F. Martinez, Associate County Counsel, for Defendants and Respondents.

Richard K. Abdalah and Miriam H. Wen-Lebron for Real Parties in Interest and Respondents.

JUDGES: Opinion by Jones, P. J., with Simons and Needham, JJ., concurring.

OPINION BY: Jones

OPINION

JONES, P. J.--Appellants Fred and D'Arcy Tomlinson (the Tomlinsons) filed a petition for a writ of administrative mandate (*Code Civ. Proc., § 1094.5*), challenging the decision of respondent County of Alameda (County) to approve a subdivision development proposed by real parties in interest, Y.T. Wong and SMI Construction, Inc. (Developer). The trial court denied the petition. The Tomlinsons appeal from the trial court's order, [*1410] contending the County abused its discretion in deeming the proposed subdivision exempt from the California Environmental Quality Act (*Pub. Resources Code, § 21000 et seq.*) (CEQA), under the categorical [**2] exemption for in-fill development (*Cal. Code Regs., tit. 14, § 15332*). [1] As we agree that this exemption does not apply, we reverse the trial court's order and remand the matter with instructions to issue a writ of mandate directing the County to set aside its decision.

> 1 All further statutory citations are to the Public Resources Code unless otherwise specified. We refer to the CEQA regulations (*Cal. Code Regs., tit. 14, § 15000 et seq.*), as "the Guidelines." (*San Lorenzo Valley Community Advocates For Responsible Education v. San Lorenzo Valley Unified School Dist. (2006) 139 Cal.App.4th 1356, 1372 [44 Cal. Rptr. 3d 128]* (*San Lorenzo*).)

FACTUAL AND PROCEDURAL BACKGROUND

The Proposed Subdivision

In December 2006, Developer filed an application with the Alameda County Planning Department (Planning Department) to merge two parcels on Bayview Avenue into one 1.89-acre parcel, subdivide it into 12 lots, and develop each with a single-family home (the proposed subdivision). The proposed subdivision site is located in the Fairview area of unincorporated Alameda County, a residential area primarily consisting of single-family homes. The property is classified for zoning purposes as R-1 residential single family. Three [**3] older structures are situated on the site, but the rear of the property is undeveloped. There are 34 trees on or adjacent to the site. As part of the proposed subdivision, all of the structures would be demolished, and most of the trees would be removed.

In April 2007, Developer revised its application to address concerns raised by various agencies.

Preliminary Plan Review

On May 14, 2007, the Planning Department issued a referral notifying various agencies and local residents of Developer's revised application and inviting comments. Although the Planning Department had originally contemplated conducting an initial study (*Guidelines, § 15063*), the referral indicated that the proposed subdivision was exempt from CEQA "based on the site's existing conditions (developed as a low-density residential site with gently sloping land and minimal habitat value), and conformance to the existing zoning for the site ... ."

On July 2, 2007, the Alameda County Planning Commission (Planning Commission) held a preliminary plan review for the proposed subdivision at [*1411] its regularly scheduled meeting. The staff report concluded that the proposed subdivision was categorically exempt from CEQA as in-fill development [**4] (*Guidelines, § 15332*) because "the proposed development would occur in an established urban area, would not significantly impact traffic, noise, air or water quality, and could be served by required utilities and public services." The staff report noted that the plans did not meet zoning requirements for guest parking, and one lot violated the setback requirements of a zoning ordinance. Planning Department staff believed a reduction in the number of lots might be required to resolve these issues.

When the Planning Commission opened the floor to public testimony, residents voiced concerns about the loss of views, compatibility with existing homes, additional traffic, parking, and preservation of the mature trees. The chairman continued the matter, noting "this is the direction we've given[,] and we look forward to you [(Developer)] coming back to us with your formal application."

In an August 2007 e-mail to the County, the Tomlinsons noted that two new developments were underway within half a mile of the proposed subdivision and that there were several other developments within a one-mile radius. They asked for data on recent and planned growth in the area and comprehensive plans addressing [**5] the impact on the infrastructure, including traffic, transportation, utilities, and police and fire protection.

On November 19, 2007, the County sent out another referral regarding the proposed subdivision, noting that it had been modified to address comments from various agencies and the public. The referral gave notice that the Planning Commission would consider the proposed subdivision again on December 17, 2007.

On November 30, 2007, the Tomlinsons sent County staff a letter signed by more than 70 local residents, expressing concerns about additional traffic congestion and related safety issues, increased taxes and utility costs, reduced property values, and drainage problems. Noting that other single-family homes less than a quarter-mile away had been on the market for a year, the letter expressed concern that the houses in the proposed subdivision could become rentals with multifamily occupancy if they did not sell, significantly increasing parking overflow and traffic in the area. Residents requested an environmental review to evaluate whether the proposed subdivision was consistent with the goals of the general plan.

A few days later, the Tomlinsons pointed out the issues to [**6] be considered in reviewing new in-fill projects under the specific plan, including residential density, traffic, parking, public services and utilities, building height, natural [*1412] features such as mature vegetation and creeks, and retention of existing areas of contiguous open space. The Tomlinsons were "particularly interested in the

findings of (what we've read as required in the ... Specific Plan) an environmental review."

Approval by the Planning Commission

The Planning Commission considered the proposed subdivision at its regularly scheduled meeting on December 17, 2007. Developer had modified the plans to reduce the density of the site to 11 lots. Ten of the lots ranged from 5,000 to 5,186 square feet, and one lot had an area of 7,170 square feet. Each lot would be developed with a two-story, 2,900-square-foot home.

Planning Department staff indicated that the proposed subdivision "complied with the relevant General Plan, Fairview Area Specific Plan and zoning requirements," "would occur in an established urban area, has no value as wildlife habitat, would not result in significant effects relating to traffic, noise, air quality or water quality, and can be adequately served by [**7] all required utilities and public services ... ." Accordingly, the staff recommended that the Planning Commission find the proposed subdivision "Categorically Exempt from the requirements of [CEQA] per *Section 15332*, Infill Development Projects, and that further environmental analysis is not necessary."

At the Planning Commission's meeting, the Tomlinsons acknowledged the County's conclusion that the proposed subdivision was exempt as in-fill, but said: "[W]e really do feel that it's critical that an environmental assessment is done because ... [75] homeowners ... sign[ed] that petition, and their primary concern was existing traffic issues ... ." They explained that several other new developments within a half-mile of the proposed subdivision would generate more than 100 cars in additional traffic, and that traffic management was critical under the specific plan.

By resolution, the Planning Commission approved the proposed subdivision and found it exempt from CEQA, concluding the proposed subdivision was in the public interest and imposing 60 conditions "necessary for the public health and safety and a necessary prerequisite to the orderly development of the surrounding area."

The [**8] *Appeal to the Board of Supervisors*

On behalf of local residents, the Tomlinsons appealed from the Planning Commission's decision to the Alameda County Board of Supervisors (Board). (See Alameda County Gen. Ord. No. 16.08.100.) The Tomlinsons wrote a [*1413] letter to the Board reiterating the concerns raised before the Planning Commission and expressing confusion that the proposed subdivision was exempt from CEQA, contending the specific plan required such review for all in-fill projects. They noted again that there were other developments within a half-mile radius of the proposed subdivision and expressed concern that the intent of the specific plan would be circumvented if the County applied the exemption to all of them. In such case, the Tomlinsons contended, analysis of each individual project and their cumulative effects would not be addressed.

The Planning Department submitted a summary of the Planning Commission's decision and the Tomlinsons' appeal to the Board, noting the residents' desire for a traffic study of the proposed subdivision's individual and cumulative impacts.

Four days prior to the hearing before the Board, the Tomlinsons sent an e-mail to County planners entitled, "Assistance [**9] Requested" and stating: "It is our understanding for the Environmental Impact categorical exemption, an Environmental Checklist (Appendix G of CEQA guidelines) is typically filed. Since the Fairview Plan required environmental impact reviews[,] we wanted to check that this procedural process did occur ... ." The Tomlinsons asked for a copy of this checklist. Their e-mail also set out (1) *subdivision (c) of section 15332* of the Guidelines, which requires that the proposed development have "no value, as habitat for endangered, rare or threatened species," and (2) a provision in the specific plan that "[t]he County shall require that roadways and developments be designed to minimize impacts to wildlife corridors and regional trails." The Tomlinsons said deer and other wildlife used this open space daily as a corridor to Don Castro Regional Park.

On April 8, 2008, the day of the Board hearing, a County planner responded to the Tomlinsons in an e-mail noting: "There is no indication leading the lead agency to suspect that the project site has any value for endangered, rare or threatened species." The remainder of the e-mail, taken directly from the

December 17, 2007 staff report, simply [**10] restated the basis for the exemption.

At the Board hearing, the Tomlinsons said the proposed subdivision violated the specific plan's density requirements, which they claimed allowed fewer than eight homes on the site. They said they had "learned that infill projects are categorically exempt from environmental reviews," but again contended the specific plan required environmental review of in-fill projects and raised concerns about the cumulative impact of this proposed subdivision and several other developments nearby. [*1414]

The Board denied the Tomlinsons' appeal and approved the proposed subdivision. The Board did not expressly find that the proposed subdivision was exempt from CEQA but indicated in its resolution that the Planning Department had "review[ed] this petition in accordance with the provisions of [CEQA], and determined that it was Categorically Exempt pursuant to *Section 15332* (Infill Development)." The Board proposed two additional conditions relating to viewsheds and sidewalk construction, but otherwise concurred with the findings and conditions of the Planning Commission.

The Trial Court Proceedings

On July 7, 2008, the Tomlinsons filed in Alameda County Superior Court a [**11] verified petition for a writ of mandate setting aside the County's decision. They alleged the County had violated state planning and zoning laws (*Gov. Code, § 65000 et seq.*) and had not complied with CEQA. In September 2008, they amended their petition to supplement their allegations. On January 15, 2009, the trial court held a hearing on the petition, and took the matter under submission. Three months later, the trial court denied the petition. The Tomlinsons filed a timely notice of appeal from the trial court's order. [2] On appeal, the Tomlinsons have abandoned their contentions under the state Planning and Zoning Law (*Gov. Code, § 65000 et seq.*) and focus exclusively on the County's failure to comply with CEQA.

2 An order denying a petition for a writ of mandate is appealable as a final judgment in a special proceeding. (*Haight v. City of San Diego (1991) 228 Cal.App.3d 413, 416, fn. 3 [278 Cal. Rptr. 334]*; *Dunn v. Municipal Court (1963) 220 Cal.App.2d 858, 863, fn. 1 [34 Cal. Rptr. 251].*)

DISCUSSION

A. *The Standard of Review*

"In considering a petition for a writ of mandate in a CEQA case, '[o]ur task on appeal is "the same as the trial court's." [Citation.] Thus, we conduct our review independent of the trial court's findings ...' [**12] ... [and] examine the [County's] decision, not the trial court's." (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego (2006) 139 Cal.App.4th 249, 257 [42 Cal. Rptr. 3d 537]*, citation omitted.) Under *section 21168.5*, we review the County's exemption determination for a prejudicial abuse of discretion. (*San Lorenzo, supra, 139 Cal.App.4th at pp. 1381-1382* [applying *§ 21168.5* to agency's exemption determination]; *East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist. (1989) 210 Cal.App.3d 155, 165 [258 Cal. Rptr. 147]* (*East Peninsula*) [same].) [3] "Abuse [*1415] 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." (*§ 21168.5.*) " 'Judicial review of these two types of error differs significantly: [w]hile we determine de novo whether the agency has employed the correct procedures, "scrupulously enforc[ing] all legislatively mandated CEQA requirements" [citation], we accord greater deference to the agency's substantive factual conclusions.' [Citation.]" (*Save Tara v. City of West Hollywood (2008) 45 Cal.4th 116, 131 [84 Cal. Rptr. 3d 614, 194 P.3d 344].*)

3 Both Developer and the Tomlinsons incorrectly contend that *section 21168* [**13] provides the standard of review here, but that section applies in actions to set aside a public agency's decision "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 ... ." The County was not required to hold a hearing in connection with its exemption determination or the Tomlinsons' appeal. (See *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster (1997) 52 Cal.App.4th 1165, 1210*

[61 Cal. Rptr. 2d 447] (*Azusa*); Alameda County Gen. Ord. No. 16.08.100, subd. D [affording the Board discretion to reject an appeal of subdivision approval without a public hearing].) In any event, "[t]he distinction between [*sections 21168* and *21168.5*] 'is rarely significant. In either case, the issue ... is whether the agency abused its discretion.' " (*County of Amador v. El Dorado County Water Agency (1999) 76 Cal.App.4th 931, 945 [91 Cal. Rptr. 2d 66]* (*County of Amador*).)

B. *CEQA: General Principles*

(1) "It is state policy in California that 'the long-term protection of the environment ... shall be the guiding criterion in public decisions.' [Citations.]" (*Davidon Homes v. City of San Jose (1997) 54 Cal.App.4th 106, 112 [62 Cal. Rptr. 2d 612]* [**14] (*Davidon Homes*).) " '[T]he overriding purpose of CEQA is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage.' " (*San Lorenzo, supra, 139 Cal.App.4th at p. 1372*, quoting *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors (2001) 87 Cal.App.4th 99, 117 [104 Cal. Rptr. 2d 326].*) To implement this policy, CEQA and the Guidelines establish a three-tiered process determining the level of environmental review required. (*San Lorenzo, supra, 139 Cal.App.4th at pp. 1372-1373*; *Davidon Homes, supra, 54 Cal.App.4th at p. 112.*) At issue here is the first step of this process, which requires public agencies to conduct a preliminary review to determine whether CEQA applies to a proposed activity. (*San Lorenzo, supra, 139 Cal.App.4th at pp. 1372-1373*; *Davidon Homes, supra, 54 Cal.App.4th at p. 112*; see *Guidelines, §§ 15060, 15061.*) If the activity constitutes a "project" as defined by statute, CEQA applies unless the activity falls within one of the exemptions established by the Legislature or the CEQA Guidelines. (*§ 21080, subd. (a)*; *San Lorenzo, supra, 139 Cal.App.4th at p. 1373*; *Davidon Homes, supra, 54 Cal.App.4th at p. 112*; [**15] see *§ 21065* [defining "project"].) " 'Where a project is categorically exempt, it is not subject to CEQA requirements and "may be implemented without any CEQA compliance whatsoever." ' " (*San Lorenzo, supra, 139 Cal.App.4th at* [*1416] *p. 1386.*) Accordingly, if the agency determines that an exemption applies, no further environmental review is necessary. (*Id. at p. 1373*; *Davidon Homes, supra, 54 Cal.App.4th at p. 113.*) [4]

4 If the proposed subdivision is not exempt, the agency must proceed to "[t]he second tier of the process" and conduct an initial study to determine whether there is " 'substantial evidence that the project may have a significant effect on the environment.' " (*San Lorenzo, supra, 139 Cal.App.4th at p. 1373*; see *Guidelines, §§ 15063, 15070*; *Davidon Homes, supra, 54 Cal.App.4th at p. 113.*) If so, the agency must prepare a full environmental impact report. (*San Lorenzo, at p. 1373*; *Davidon Homes, at p. 113.*)

C. *The County's Exemption Determination Constitutes an Abuse of Discretion.*

The Tomlinsons contend that the requirements of CEQA apply because the proposed subdivision does not meet the criteria for the in-fill development exemption. (See *Guidelines, § 15332.*) We review the County's [**16] finding for substantial evidence. (*Davidon Homes, supra, 54 Cal.App.4th at p. 115.*) To establish the propriety of an exemption, " 'the administrati[ve] record must disclose substantial evidence of every element of the contended exemption ... .' [Citation.]" (*CalBeach Advocates v. City of Solana Beach (2002) 103 Cal.App.4th 529, 536 [127 Cal. Rptr. 2d 1]* (*CalBeach*).)

1. *The In-fill Development Exemption (Guidelines, § 15332).*

A project is categorically exempt as "in-fill development" if:

"(a) [it] is consistent with the applicable general plan designation and all applicable general plan policies[,] as well as with applicable zoning designation and regulations[;]

"(b) [t]he proposed development occurs *within city limits* on a project site of no more than five acres substantially surrounded by urban uses[;]

"(c) [t]he project site has no value, as [a] habitat for endangered, rare or threatened species[;]

"(d) [a]pproval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality[; and]

"(e) [t]he site can be adequately served by all required utilities and public services." (*Guidelines, § 15332*, italics added.)

The Tomlinsons' primary contention is that the proposed subdivision [**17] will not occur "within city limits" under *subdivision (b) of Guidelines section* [*1417] *15332* because the site is located in unincorporated Alameda County. [5] The County seeks a broader construction of the phrase "within city limits" but argues, along with Developer, that the Tomlinsons are precluded from asserting the "within city limits" requirement in the first instance because they did not object on this ground at the administrative level and, therefore, failed to exhaust their administrative remedies as to this argument (*§ 21177*). As we explain in part C.3. of this opinion, we conclude the Tomlinsons are correct in their assertion that substantial evidence does not show the proposed subdivision satisfies the "within city limits" requirement of the in-fill development exemption. Before we reach the merits of this argument, however, we must first dispose of respondents' contention that *section 21177* precludes the Tomlinsons from asserting it. [6]

5 The Tomlinsons also contend the proposed subdivision "would not entirely comply with the local zoning ordinance," and would not be served by existing utilities. (See *Guidelines, § 15332, subds. (a), (e).*) They have not set forth all the material evidence on [**18] these issues, pointing only to evidence that supports their position, and have waived any error in this regard. (See *Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 881 [92 Cal. Rptr. 162, 479 P.2d 362]*; *Nwosu v. Uba (2004) 122 Cal.App.4th 1229, 1246 [19 Cal. Rptr. 3d 416].*) Moreover, although they cite facts relating to utilities and zoning, they fail to provide a reasoned argument establishing this claim of error. (See *Benach v. County of Los Angeles (2007) 149 Cal.App.4th 836, 852 [57 Cal. Rptr. 3d 363].*)

6 The trial court agreed with respondents' contentions in this regard. We review this determination independently. (*Sierra Club v. City of Orange (2008) 163 Cal.App.4th 523, 536 [78 Cal. Rptr. 3d 1]* (*City of Orange*); *Citizens for Open Government v. City of Lodi (2006) 144 Cal.App.4th 865, 873 [50 Cal. Rptr. 3d 636]* (*Lodi*).)

2. *Section 21177 Does Not Bar the "Within City Limits" Argument.*

(2) *Section 21177* codifies the doctrine of exhaustion of administrative remedies in CEQA proceedings. (*Lodi, supra, 144 Cal.App.4th at p. 875.*) *Former section 21177, subdivision (a)* provided: "No action or proceeding may be brought [to attack, review, set aside, void, or annul certain acts or decisions of a public agency on the grounds of noncompliance with CEQA] unless the alleged grounds for noncompliance with this division [**19] were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination." (See Stats. 2010, ch. 496, § 11, effective Sept. 29, 2010 [no substantive change].) Although the exhaustion requirement has been described as "jurisdictional" (*Bakersfield Citizens For Local Control v. City of Bakersfield (2004) 124 Cal.App.4th 1184, 1199 [22 Cal. Rptr. 3d 203]*), a failure to exhaust does not deprive a court of fundamental subject matter jurisdiction (*Azusa, supra, 52 Cal.App.4th at pp. 1215-1216*). Properly understood, exhaustion under *section 21177* is a statutory prerequisite for asserting a ground of CEQA noncompliance. (*Porterville Citizens For Responsible Hillside Development v. City of Porterville (2007) 157 Cal.App.4th 885, 910 [69 Cal. Rptr. 3d 105]* [*1418] (*Porterville*).) It is designed to give an agency "the opportunity to receive and respond to articulated factual issues and legal theories before its actions are subject to judicial review." (*Ibid.*, citing *Coalition for Student Action v. City of Fullerton (1984) 153 Cal.App.3d 1194, 1198 [200 Cal. Rptr. 855].*) To that end, the exact issue asserted in the trial court must have been presented to the administrative agency. [**20] (*Resource Defense Fund v. Local Agency Formation Com. (1987) 191 Cal.App.3d 886, 894 [236 Cal. Rptr. 794].*) The petitioner bears the burden of showing that the issues raised in the judicial pro-

ceeding were first raised at the administrative level. (*Porterville, at p. 909.*)

The Tomlinsons contend they exhausted their administrative remedies before the County, maintaining they are subject to a less stringent standard for exhaustion because (1) this was an administrative proceeding, and they were unrepresented by counsel, and (2) the County misled them by failing to expressly advise them of the legal requirement that the proposed subdivision be "within city limits." They and other local residents raised a number of concerns in the administrative proceedings and requested environmental review multiple times. They questioned the applicability of the exemption but did so, not because the proposed subdivision was outside city limits, but on the ground that the specific plan required environmental review. We need not decide whether to hold the Tomlinsons to a lesser standard or whether these objections were sufficient to satisfy the exhaustion requirement, as we conclude *section 21177* does not apply here. [7]

> 7 " ' "[G]eneral [**21] objections to project approval," ' " " 'generalized environmental comments ... ,' 'relatively ... bland and general references to environmental matters' [citation], or 'isolated and unelaborated comment[s]' [citation] will not suffice." (*City of Orange, supra, 163 Cal.App.4th at p. 536.*) Nonetheless, "less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding ... because '"[in] administrative proceedings, [parties] generally are not represented by counsel. To hold such parties to knowledge of the technical rules of evidence and to the penalty of waiver for failure to make a timely and specific objection would be unfair to them." [Citation.] It is no hardship, however, to require a layman to make known what facts are contested.' [Citation.]" (*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal.App.3d 151, 163 [217 Cal. Rptr. 893]*; see *East Peninsula, supra, 210 Cal.App.3d at pp. 176-177.*)

(3) In *Azusa, supra, 52 Cal.App.4th at page 1209*, the court held that the doctrine of exhaustion of administrative remedies does not apply in actions challenging an agency's exemption determination. The court noted that under the [**22] statute's own terms, the exhaustion requirement established by *section 21177* applies only "where (1) CEQA provides a public comment period, or (2) there is a public hearing before a notice of determination is issued." (*Azusa, at p. 1210.*) CEQA does not provide for a public comment period before an agency makes an exemption finding, and there is no " 'public hearing ... before the issuance of the notice of determination' " because this document is never filed if the agency declares an exemption. (*Azusa, at* [*1419] *p. 1210.*) Accordingly, "[t]he *only* prerequisite to an action challenging an exemption determination is that it be brought within 180 days of the date of the final decision of the agency. (*Guidelines, § 15062, subd. (d).*)" (*Azusa, at pp. 1210-1211*, citing *Castaic Lake Water Agency v. City of Santa Clarita (1995) 41 Cal.App.4th 1257, 1266 [49 Cal. Rptr. 2d 79]*, and *City of Pasadena v. State of California (1993) 14 Cal.App.4th 810, 821 [17 Cal. Rptr. 2d 766]*, disapproved on other grounds in *Western States Petroleum Assn. v. Superior Court (1995) 9 Cal.4th 559, 569-570 & fn. 2 [38 Cal. Rptr. 2d 139, 888 P.2d 1268]*; see *Santa Teresa Citizen Action Group v. City of San Jose (2003) 114 Cal.App.4th 689, 702 [7 Cal. Rptr. 3d 868]* (*Santa Teresa*) [*§ 21177, subd. (e)* "codifies the rule that unless there is a clearly [**23] defined administrative procedure for resolving complaints, the exhaustion doctrine is inapplicable"].) [8]

> 8 The hearing in this case was not sufficient to invoke the requirements of *section 21177.* In *Azusa*, although the agency had taken comments from staff and interested members of the public at its regularly scheduled public meeting, the court rejected the appellant's contention that this qualified as a " 'public hearing ... before the issuance of the notice of determination.' " (*Azusa, supra, 52 Cal.App.4th at pp. 1188, 1210*; see also *Concerned McCloud Citizens v. McCloud Community Services Dist. (2007) 147 Cal.App.4th 181, 189-190 [54 Cal. Rptr. 3d 1]* [holding that CEQA did not require a public comment period in connection with agency's determination that approval of a tentative agreement did not constitute "approval" of a proposed subdivision triggering

CEQA requirements, and informational meeting did not qualify as a "public hearing before the issuance of the notice of determination"].)

Relying upon the analysis of *Azusa* to hold that *section 21177* does not apply in this case advances CEQA's strong policies of environmental protection and public disclosure of information regarding the environmental impact [**24] of agency action. (See *San Lorenzo, supra, 139 Cal.App.4th at p. 1372*; *Sierra Club v. County of Sonoma (1992) 6 Cal.App.4th 1307, 1315 [8 Cal. Rptr. 2d 473]*.) Moreover, this holding does not offend the dual policy rationale giving rise to the exhaustion requirement in the first instance. The doctrine of exhaustion of administrative remedies "prevents courts from interfering with the subject matter of another tribunal" by giving the agency an opportunity to respond to factual issues and legal theories within its area of expertise before its actions are reviewed by a court. (*Lodi, supra, 144 Cal.App.4th at p. 874*.) The exhaustion requirement also " ' "facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency." [Citation.] It can serve as a preliminary administrative sifting process [citation], unearthing the relevant evidence and providing a record which the court may review. [Citation.]' " (*Sierra Club v. San Joaquin Local Agency Formation Com. (1999) 21 Cal.4th 489, 501 [87 Cal. Rptr. 2d 702, 981 P.2d 543]*, quoting *Yamaha Motor Corp. v. Superior Court (1986) 185 Cal.App.3d 1232, 1240-1241 [230 Cal. Rptr. 382]*; see *Lodi, at p. 874*.) The point the Tomlinsons purportedly failed to raise here--that the project [**25] would not occur "within city limits"--does not implicate the County's particular [*1420] expertise and does not require an evidentiary determination. Indeed, the fact on which it turns is undisputed, and the County conceded at oral argument that it had not been deprived of an opportunity to offer evidence of this fact. With these policy implications in mind, we follow the lead of the court in *Azusa* in holding that *section 21177* does not bar the Tomlinsons from challenging the County's exemption determination on the ground that the proposed subdivision is not "within city limits."

In so holding, we recognize that the Tomlinsons apparently acknowledge a duty to exhaust with regard to their "within city limits" argument, because "there was some opportunity to communicate concerns to the County's decisionmakers." (See *§ 21177, subd. (e)* [*§ 21177* does not apply to "any alleged grounds for noncompliance with [CEQA] for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project ..."].) Indeed, they expressly conceded in the trial court that they "[did] not claim that the potential exception [**26] [set out in *Azusa*] applies ... [and] readily acknowledge[d] that since the County held a hearing, [they] had a duty to exhaust." "This court, of course, is not bound to accept concessions of parties as establishing the law applicable to a case." (*Desny v. Wilder (1956) 46 Cal.2d 715, 729 [299 P.2d 257]*.) [9] The applicability of *section 21177*'s exhaustion requirement to actions challenging an agency's exemption determination is a matter of statutory interpretation and a pure question of law. (See *East Peninsula, supra, 210 Cal.App.3d at p. 165* ["The interpretation and applicability of a statute is a question of law ... ."].) In such cases, "[i]n the public interest we have discretion to reject [a party's] concession, because our function to correctly interpret the statute is not controlled by [a party's] concession of its meaning." (*R.J. Land & Associates Construction Co. v. Kiewit-Shea (1999) 69 Cal.App.4th 416, 427, fn. 4 [81 Cal. Rptr. 2d 615]*; see *Bell v. Tri-City Hospital Dist. (1987) 196 Cal.App.3d 438, 449 [241 Cal. Rptr. 796]* (*Bell*) ["In our view, the Bells' counsel's erroneous concession cannot and should not prevent this court from applying sound legal principles to the objective facts disclosed by the record."], disapproved on other [**27] grounds in *State of California v. Superior Court (2004) 32 Cal.4th 1234, 1244 [13 Cal. Rptr. 3d 534, 90 P.3d 116]*; see also *Bell, at p. 450* [emphasizing the [*1421] strong public policy in favor of resolving cases on their merits rather than on technical procedural grounds].) As noted above, CEQA promotes the public's interest in protection of the environment and the disclosure of information regarding public action that may affect the environment. (*San Lorenzo, supra, 139 Cal.App.4th at p. 1372*; see *Sierra Club v. County of Sonoma, supra, 6 Cal.App.4th at p. 1315* [noting that the purpose of the environmental impact report is "informing the public and government officials of the environmental consequences of decisions before

they are made"].) The County's reliance on an exemption that, by its plain meaning, does not apply thwarts these purposes and impacts the public as a whole, not just the Tomlinsons. We therefore reject the Tomlinsons' concession in the trial court and hold, in the public interest, that *section 21177* does not preclude the Tomlinsons from challenging the County's exemption determination because the proposed subdivision is not "within city limits."

> 9 As the parties' briefs did not address the applicability [**28] of the exhaustion requirement of *section 21177* in an action challenging an agency's exemption determination, we requested supplemental briefing regarding this issue and the court's authority to decide it, in light of the Tomlinsons' concessions and failure to raise this argument. (See *Gov. Code, § 68081.*) In the supplemental briefing, the Tomlinsons argued that *Azusa* sets a "very low bar" for exhaustion of administrative remedies for exemption determinations, but maintained the position set forth in their opening and reply briefs that because they were not represented by counsel in the administrative proceedings and the County misled them regarding the exemption's criteria, their challenge to the exemption on other grounds and their general objections to the project were sufficient to exhaust their administrative remedies.

We note that after our decision in this case was filed, Division Two of this court certified its opinion in *Hines v. California Coastal Com. (2010) 186 Cal.App.4th 830 [112 Cal. Rptr. 3d 354]* (*Hines*) for publication. [10] In *Hines*, the court held that *section 21177*'s exhaustion requirement applied in circumstances similar to those presented here. In that case, the appellants acknowledged the [**29] project was a single-family residence normally exempt from CEQA (*Guidelines, § 15303, subd. (a)*), but contended exceptions for cumulative impact and particularly sensitive environments precluded reliance on the exemption (*Guidelines, § 15300.2, subds. (b) & (c)*). (*Hines, at pp. 851-853.*) The court concluded the appellants "failed to exhaust their administrative remedies ... by failing to raise any issue regarding the purported violation of CEQA before the county at any stage, despite ample notice that county staff considered the project exempt and several opportunities ... to raise any objection or argument with respect to the categorical exemption. (*§ 21177, subd. (a).*)" (*Hines, at pp. 852-853*, fn. omitted.) The court concluded, by negative implication from *section 21177, subdivision (e)*, that *section 21177*'s exhaustion requirement applies when there are public hearings that include environmental review, ample notice of such hearings is given notifying the public of the agency's reliance on the exemption, and the public does not raise an objection to the exemption despite an opportunity to do so. (*Hines, at pp. 852-855*; see *§ 21177, subd. (e)* ["This section does not apply to any [**30] alleged grounds for noncompliance with this division for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project, or if the public agency failed to give the notice required by law."].) *Hines* cites *Azusa* in support of its holding, with the following parenthetical description: "exhaustion requirement applies only when CEQA provides public comment [*1422] period or there is public agency hearing before notice of agency determination is filed." (*Hines, at p. 854.*)

> 10 We granted rehearing on our own motion to allow further consideration of *Hines* and asked for additional briefing from the parties regarding its impact on our decision.

The court's holding in *Hines* does not alter our conclusion under *Azusa* that *section 21177*'s exhaustion requirement has no preclusive effect in this case. *Hines* does not purport to construe the language of *section 21177, subdivision (a)* and does not consider the *Azusa* analysis holding that *section 21177* applies only: "where (1) CEQA provides a public comment period, or (2) there is a public hearing *before a notice of determination is issued.*" (*Azusa, supra, 52 Cal.App.4th at p. 1210*, [**31] italics added.) [11] To the extent *Hines* is impliedly at odds with the holding in *Azusa*, we respectfully disagree.

> 11 *Section 21177, subdivision (a)*'s reference to "the issuance of the notice of determination" may not be construed to encompass every agency decision. Under CEQA, the term "notice of determination" refers to a document an agency must file "[w]henever

[it] approves or determines to carry out a project that is subject to this division [(CEQA)] ... ." (*§§ 21108, subd. (a), 21152, subd. (a)*.) The Guidelines set out special requirements for this document and confirm that the term "notice of determination" applies when projects are subject to CEQA. (See *Guidelines, § 15094* [contemplating an environmental impact report or initial study showing no significant effect on the environment].) When an agency determines that CEQA does not apply because a project is exempt, it *may* file a "notice of the determination ... ." (*§§ 21108, subd. (b), 21152, subd. (b)*.) The Guidelines refer to this filing as a "notice of exemption" and treat it as a separate document with its own requirements and statute of limitations. (*Guidelines, § 15062*; compare *§ 21167, subd. (d)* [a notice of exemption commences a [**32] 35-day statute of limitations] with *Guidelines, § 15094, subd. (g)* [a notice of determination commences a 30-day statute of limitations]; see also *§ 21167, subds. (b) & (c)*.) There is no indication the County filed a notice of exemption in this case.

(4) We recognize that following *Azusa* in the circumstances presented in *Hines* may require a court to decide factual questions reserved for agency determination, based on an evidentiary record that has not been fully developed. [12] We are persuaded, however, that the *Azusa* court's construction of the statutory language is correct. " 'As a judicial body, ... our role [is] to interpret the laws as they are written.' " (*Copley Press, Inc. v. Superior Court (2006) 39 Cal.4th 1272, 1299 [48 Cal. Rptr. 3d 183, 141 P.3d 288]*, fn. omitted.) It is for the Legislature to weigh the relevant policy considerations in setting forth the procedure for reviewing CEQA determinations, including the necessary predicates for challenging them. (See *39 Cal.4th at p. 1299*.)

12 Like an exemption determination, CEQA does not provide for a public comment period or require a notice of determination when an agency considers whether an exception precludes reliance on the exemption. (*Guidelines, § 15300.2*.) Applying the *Azusa* analysis [**33] in *Hines*, therefore, would have required the court to decide significant factual issues not considered by the agency (i.e., whether the project would impact wildlife and open the door to successive projects), based on an evidentiary record that addresses these questions only incidentally, if at all. (*Hines, supra, 186 Cal.App.4th at pp. 851-852*; see *Santa Teresa, supra, 114 Cal.App.4th at p. 707* ["extra-record evidence is inadmissible to support the writ petition"]; *Western States Petroleum Assn. v. Superior Court, supra, 9 Cal.4th at pp. 572-573* [deference to agency determination under separation of powers doctrine and in light of agency expertise].)

[*1423]

Having disposed of respondents' exhaustion defense, we turn to the merits of the Tomlinsons' contentions regarding the "within city limits" requirement.

3. *Substantial Evidence Does Not Support the County's Exemption Finding.*

The Tomlinsons contend that substantial evidence does not show the proposed subdivision will occur "within city limits," an essential criterion of the in-fill development exemption (*Guidelines, § 15332*), because the site is located in unincorporated Alameda County. To satisfy this criterion, they argue, a project must [**34] occur "within the clearly demarcated (and commonly accepted) legal boundaries of a municipality." The County contends this interpretation is "inflexible" and the phrase "within city limits" must be construed in a manner that promotes in-fill development within urbanized areas. The scope of an exemption is a question of statutory interpretation that we review independently. (*San Lorenzo, supra, 139 Cal.App.4th at p. 1382*.) We must interpret CEQA and its Guidelines "in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Guidelines, § 15003, subd. (f)*; see *County of Amador, supra, 76 Cal.App.4th at pp. 943-944*.) Exemptions to CEQA are narrowly construed and " '[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language.' " (*San Lorenzo, supra, 139 Cal.App.4th at p. 1382*, quoting *Mountain Lion Foundation v. Fish & Game Com. (1997)*

16 Cal.4th 105, 125 [65 Cal. Rptr. 2d 580, 939 P.2d 1280].)

(5) Applying these principles, we agree with the Tomlinsons' construction of *section 15332, subdivision (b)* of the Guidelines and conclude that the proposed subdivision will not occur "within city limits" within the meaning of [**35] this provision. The plain meaning of the phrase "within city limits," as it is used in *section 15332*, requires that a project occur within the boundaries of a municipality. (See *People v. Dieck (2009) 46 Cal.4th 934, 940 [95 Cal. Rptr. 3d 408, 209 P.3d 623]* **(6)** [if the statutory language is clear, the statute's plain meaning generally controls].) It is undisputed that the proposed subdivision in this case does not.

(7) The County was aware throughout the administrative proceedings that the site is located in the unincorporated area of Alameda County but relied on the exemption nonetheless because the proposed subdivision would occur in an "established urban area." On appeal, the County argues against "reading the 'infill' exemption too rigidly" and asserts: "Just one look at an aerial photograph of this development located a half mile from Interstate 580 unequivocally demonstrates that the project is urban infill." We disagree, concluding that the County reads the exemption too broadly. We must [*1424] consider the words of the statute in the context of the statutory framework, giving " 'significance ... to every word, phrase, sentence[,] and part of an act in pursuance of the legislative purpose.' " (*People v. Black (1982) 32 Cal.3d 1, 5 [184 Cal. Rptr. 454, 648 P.2d 104]*, [**36] quoting *Select Base Materials v. Board of Equal. (1959) 51 Cal.2d 640, 645 [335 P.2d 672].*) Accordingly, we must give independent effect to both the requirement that the project occur "within city limits" and the final criterion in *Guidelines section 15332, subdivision (b)* that the project be "substantially surrounded by urban uses." The County's reading does not do so.

(8) In addition, we observe that the term "urbanized areas" is defined in the Guidelines and is used in setting out the criteria for other categorical exemptions. (See *Guidelines, § 15387* [" 'Urbanized area' means a central city or a group of contiguous cities with a population of 50,000 or more, together with adjacent densely populated areas having a population density of at least 1,000 persons per square mile."]; *id., § 15301* [exemption for existing facilities]; *id., § 15303* [exemption for new construction or conversion of small structures]; *id., § 15315* [exemption for minor land divisions].) Thus, in setting out the criteria for the in-fill development exemption, the Secretary for Resources could easily have specified that a project must occur "within an urbanized area," but used the phrase "within city limits" instead. (See *Guidelines, § 15332, subd. (b).*) This strongly [**37] suggests that the secretary intended a different meaning for the "within city limits" criterion. (*Trancas Property Owners Assn. v. City of Malibu (1998) 61 Cal.App.4th 1058, 1061 [72 Cal. Rptr. 2d 131]* ["the use of different words in the regulation suggests that different meanings were intended ..."]; see *City of Port Hueneme v. City of Oxnard (1959) 52 Cal.2d 385, 395 [341 P.2d 318]*, quoting *People v. Town of Corte Madera (1950) 97 Cal.App.2d 726, 729 [218 P.2d 810]* [" 'Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.' "].)

The County relies on *CalBeach, supra, 103 Cal.App.4th 529*, contending the court should refuse to apply the statutory language strictly because doing so would frustrate the goal of the exemption. *CalBeach* does not support the County's expansive reading of the Guideline. In that case, the Court of Appeal construed the statutory exemption for "[s]pecific actions necessary to prevent or mitigate an emergency" (emergency exemption). (*§ 21080, subd. (b)(4).*) CEQA defines "emergency" as "a sudden, unexpected occurrence, involving a clear and imminent danger, demanding [**38] immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services." (*§ 21060.3*; see *CalBeach, at pp. 536-538.*) When a public agency applied the emergency exemption in approving a special use permit for the construction of a seawall to prevent the collapse of a sandstone bluff due to erosion, a nonprofit group challenged the decision, contending the [*1425] collapse of the bluff was not an "unexpected" occurrence. (*CalBeach, at p. 535.*) The court rejected this contention, holding that an emergency does not have to be unexpected for the emergency exemption to apply. (*Id. at p. 537.*) Contrary to the County's assertion, however, the court did not simply read

the term "unexpected" out of the statute, as the County asks us to do here with the phrase "within city limits"; the court interpreted the provision as a whole and, applying principles of statutory construction, refused to read one portion of the statute in a way that nullified another. (*Ibid.*) In this case, giving effect to the phrase "within city limits" does not nullify any other part of the regulation.

(9) The County asks us to simply disregard the phrase "within city limits" because, in its judgment, [**39] this requirement "defeat[s] the exemption's goal of allowing infill in very urban settings ... ." Unlike the statutory exemptions (*§ 21080, subd. (b)*), which reflect policy decisions of the Legislature, the categorical exemptions identified in the Guidelines represent a determination by the Secretary for Resources that particular classes of projects generally do not have a significant effect on the environment. (*Guidelines, § 15300*; *Sunset Sky Ranch Pilots Assn. v. County of Sacramento (2009) 47 Cal.4th 902, 907 [102 Cal. Rptr. 3d 894, 220 P.3d 905]*.) Thus, contrary to the County's assertion, a policy of encouraging urban in-fill does not overcome the requirements of CEQA and does not expand the exemption to projects that clearly lie outside the legal criteria. To the extent the County contends the statute *should* extend to all urban in-fill, such policy judgments are outside our purview. [13]

13 We question whether the proposed subdivision may be deemed "urban" in any case. The specific plan makes note of the "rural residential character of the area," and a County supervisor recognized an intent "to keep the community semi-rural as much as possible ... ." Photographs show a number of trees with large canopies, an expanse [**40] of open field at the rear of the site, and suburban neighborhoods surrounding it. (See *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency (2000) 82 Cal.App.4th 511, 541 [98 Cal. Rptr. 2d 334]* [explaining the term "urban"], superseded by statute on other grounds, as stated in *Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency (2005) 134 Cal.App.4th 598, 607 [36 Cal. Rptr. 3d 249]*.)

(10) We conclude, accordingly, that the County used the wrong legal standard in applying the exemption and that substantial evidence does not show the proposed subdivision satisfied the exemption's criteria. In short, the project was not exempt from CEQA review. It is well settled that "[a]n agency's use of an erroneous legal standard constitutes a failure to proceed in a manner required by law." (*East Peninsula, supra, 210 Cal.App.3d at p. 165.*) Moreover, when a failure to comply with the law subverts the purposes of CEQA by omitting information from the environmental review [*1426] process, the error is prejudicial. (*210 Cal.App.3d at p. 174.*) As the Tomlinsons have demonstrated a prejudicial abuse of discretion, the trial court's order must be vacated. [14]

14 Having concluded the project does not satisfy the [**41] criteria for the in-fill development exemption (*Guidelines, § 15332*), we do not consider the Tomlinsons' remaining assertions of error.

DISPOSITION

The order denying the petition is reversed, and the matter is remanded to the trial court with instructions to issue a writ of mandate directing the County to set aside its decision approving the proposed subdivision and to comply with the requirements of CEQA when reconsidering approval of the proposed subdivision. The parties shall bear their own costs.

Simons, J., and Needham, J., concurred.

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, a resident of and employed in the County of Santa Clara and not a party to the within action; my business address is 10455 Torre Avenue, Cupertino, California, 95014.

I am readily familiar with this firm's business practice for collection and processing of correspondence for mailing with Federal Express and the United States Postal Service. On November 15, 2010, I served a copy of the attached as indicated:

PETITION FOR REVIEWBY REAL PARTIES IN INTEREST AND RESPONDENTS, Y.T. WONG AND SMI CONSTRUCTION, INC.

by placing a true copy thereof enclosed in a sealed envelope addressed to:

Court of Appeal of the State of California First Appellate District, Division Five 350 McAllister Street San Francisco, CA 94102-4712	(1 copy)	by Hand Delivery
Sabrina V. Teller, Esq. REMY, THOMAS, MOOSE & MANLEY LLP 455 Capitol Mall, Suite 210 Sacramento, CA 95814	(1 Copy)	by U.S. Mail
Richard E. Winnie County Counsel Brian E. Washington Assistant County Counsel COUNTY OF ALAMEDA 1221 Oak Street, Suite 450 Oakland, CA 94612	(1 Copy)	by U.S. Mail

Office of Attorney General (1 Copy) by U.S. Mail
1515 Clay Street
P.O. Box 70550
Oakland, CA 94612-0550

Alameda County Superior Court (1 Copy) by U.S. Mail
1225 Fallon Street
Oakland, CA 94612

with postage thereon fully prepaid for collection and mailing at my place of business following ordinary business practices. Said correspondence will be deposited with the United States Postal Service at Cupertino, California on the above-referenced date in the ordinary course of business; and there is delivery service by United States mail at the place so addressed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 15, 2010, at Cupertino, California.

Diane Rees

DIANE REES