Case No. S188161

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.

OPENING BRIEF ON THE MERITS 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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INTRODUCTION

It is well-settled law in California that a party seeking judicial review of a public agency determination made pursuant to the California Environmental Quality Act ("CEQA") must first exhaust its administrative remedies. A failure to exhaust prevents the parties from asserting a CEQA violation for the first time in a judicial action. All parties herein, including the appellants Fred and D'Arcy Tomlinson (hereafter "Appellants"), agreed in argument before the trial court and the Court of Appeal that the exhaustion of administrative remedies requirement is a prerequisite for

judicial review. Nevertheless, the First District Court of Appeal in *Tomlinson, et al. v. County of Alameda, et al.* (2010) 188 Cal.App.4th 1406 has carved out an exception to this rule, contrary to both case law and statutes, including Public Resources Code § 21177. To achieve this result, the *Tomlinson* court chose to ignore this fundamental rule and the long line of cases enforcing the exhaustion doctrine, misapplies the plain language in the CEQA statute, and unfairly extends the holding in another published decision, *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165.

Real Parties in Interest and Respondents, Y.T. Wong and SMI Construction, Inc. (hereafter collectively referred to as "Real Party"), contend that the *Tomlinson* opinion is contrary to well-established public policy that public agencies be given an opportunity to respond to issues before resorting to judicial review, misinterprets the plain language of the CEQA statute, and incorrectly extends the holding in *Azusa, supra.*

For the reasons set forth below, Real Party respectfully requests that the Supreme Court reverse the Court of Appeal's decision below, and affirm the trial court's decision to deny Appellants' petition for writ of mandate.

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ISSUE PRESENTED

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.

FACTUAL AND PROCEDURAL HISTORY

A. SUMMARY OF FACTS

Like most subdivision project applications submitted to a public agency for approval, Real Party's application for an 11-unit single-family subdivision underwent rigorous review and was the subject of multiple public hearings prior to its approval by the County of Alameda Board of Supervisors.

The Proposed Project

On or about August 18, 2006, Real Party submitted an application to the Planning Department at the County of Alameda (hereafter "County") 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, and is bounded by Bayview Avenue on the west, and single-

[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.

family homes on the north, south and east property lines. (AR 1:35.) The Project site is subject to the General Plan for Central-Metropolitan-Eden-Washington Planning Units (hereafter "General Plan"). (AR 3:578-680.) The Project site is also subject to the Fairview Area Specific Plan (hereafter "Specific Plan"). (AR 3:682-707.) The zoning of the Project area was re-classified to an R-1 (Residential Single-Family) District in 1968. (AR 1:34.)

Real Party sought the merging of 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 soil engineers, arborists, biologists, and archeological and historical consultants to address all requirements from the Planning Department. (AR 1:185-186.)

The Project is surrounded by residential neighborhoods. As indicated by the aerial photos assembled by the Planning Department, the 1.89 acre area sits amidst numerous developments in both unincorporated Alameda County and the City of Hayward. (AR 3:515) In assessing the 1.89 acre parcel, the biologist noted the developed and residential character of the infill lots, attaching an aerial view and stating the "project

area is intensively developed with suburban single-family and multi-family residences and commercial areas on the south side of Interstate 580. Adjacent lands consist of residential neighborhoods." (AR 6:1255, 1267) The City of Hayward agreed that the project was consistent with its General Plan designation of Medium Density Residential, specifically stating "the property provides a splendid location for infill development." (AR 1:53; 1:226)

Planning Commission Approval

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 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 environment 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 the traffic and parking concerns, before recommending approval of this Project. (AR 1:38-46.)

On or about June 22, 2007, Real Party caused to be posted and/or mailed out, at its own expense, a Notice of Public Hearing to the neighbors of the Project notifying them of the public hearing and the findings of the Planning Department. The aforementioned posted and/or mailed notices for the public hearing scheduled for July 2, 2007, included the following language:

> "This project has been determined Exempt from the California Environmental Quality Act and State and County CEQA Guidelines according to Article 19, Section 15332 In-fill Development Projects, as the proposed development would occur in an established urban area, will not significantly impact traffic, noise, air or water quality, and can be served by required utilities and public services.
>
> If you challenge the decision of the Commission in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the Planning Commission at or prior to the public hearing." (AR 6:1297.)

After describing the findings and determinations of the Planning Department, and the concerns expressed by the neighbors about the loss of view, 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.)

Before the July 2, 2007 Preliminary Review Hearing, the Planning Commissioners made a "field trip" to personally view the Project site.

(AR 1:69-74.) Further, at all public comments portion of the Planning Commission Preliminary Review Hearing held on July 2, 2007, Appellants repeatedly indicated that their main concern was the loss of view from their property. (AR 1:72, 78, 102.) Neither Appellants nor anyone else mentioned that the Project may not comply with the definition of "in-fill exemption" under CEQA § 15332. The Commission then continued the hearing for revision and consideration on December 17, 2007. (R1:69-74.)

In preparation for the Commission's December 17, 2007 review of the revised Project proposal, the Planning Department submitted a Staff Report (AR 1:47-68) with supporting documents addressing the assessment of potential environmental impacts of the Project. The Planning staff provided a comprehensive explanation of its residential density calculations supporting its conclusion that the Project met the residential density requirements under the General Plan and the lot size requirements under the Specific Plan. (AR 1:57, 58, 61, 62; 3:683.) The Planning staff also prepared an "Ordinance Requirement Comparison" Chart indicating that the Project meets all minimum requirements under the General Plan, Specific Plan, and the local ordinances. (AR 1:58.)

A memorandum from the Traffic Division of the Public Works Agency – Traffic was also submitted addressing the parking and traffic concerns. (AR 1:52-53.) The letter concluded that traffic generated by this Project would not have any substantial impact on traffic in the area nor would impact adversely in terms of access from Bayview Avenue. (AR 1:53, 62.) The Traffic Division also clarified that the Project proposal, as revised, had adequately addressed all concerns by the Public Works Agency. (*Ibid.*)

Prior to the December 17, 2007, Real Party again posted and mailed out a second Notice of Public Hearing containing nearly identical language to the notice posted for the prior hearing. Neighbors were again notified that they may be limited to raising in court only those issues that someone raises at the public hearing orally or in writing. (AR 6:1366.)

During the December 17, 2007 hearing, and after informing the Commission that the Project qualified as infill for CEQA purposes, the Planning staff presented a detailed response to the comments received by Appellants and their neighbors, thereafter concluding that lot sizes of the Project were consistent with the surrounding neighborhood. (AR 1:121.) Appellants again complained that the Project would impact views, drainage, and create traffic and parking issues. (AR 1:135.) As before, neither Appellants nor anyone else challenged the County's determination that the Project met the "in-fill exemption" under CEQA § 15332.

Appellants 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 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 Commission unanimously approved the Project. (AR 1:186-187.) In its approval, the Commission concluded that:

> "1. The proposed map is consistent with applicable general and specific plans in that the area is planned and zoned for the proposed use;
>
> 2. The design and improvement of the proposed subdivision is consistent with the applicable general and specific plans in that it is a residential development that meets the density of the Zoning Code;
>
> . . .
>
> 5. The design of the subdivision and the proposed improvements will not cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat in that the development constitutes infill in an already developed area;... . " (AR 1:1-2.)

Board of Supervisors Appeal

On or about January 9, 2008, Appellants 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.)

County staff met with Appellants and other neighbors on February 19, 2008 to address their concerns. (R 2:430-442.) In attendance were staff members from the Public Works agency, Planning Department and Supervisor Nate Miley's office. (AR 6:1382-1383, 1392-1393, AR 2:423-427.) This meeting included a discussion of whether the Specific Plan further limited density of the Project. (AR 2:433.)

On or about March 18, 2008, the Planning Department's Senior Planner, Rodrigo Orduna, again provided a detailed explanation to Supervisor Nate Miley's staff, Seth Kaplan, confirming how the density and lot sizes were calculated. (AR 2:448-450.) The Planning Department submitted a Staff Report to the Board for the April 8, 2008 hearing describing the Commission's approval of the Project, and responding to the Petitioners' appeal and their letter of March 17, 2008. (AR 2:443.)

On or before March 28, 2008, Real Party caused to be posted and/or mailed out a Notice of Public Hearing notifying the Project's neighbors about the public hearing scheduled for April 8, 2008 before the County Board of Supervisors "to consider the appeal of Fred and D'Arcy Tomlinson, on behalf of the residents of Baview/Kelly Hill." (AR 6:1398.) The aforementioned Notice of Public Hearing again contained

language specifying that the project had been determined exempt under Section 15332 in-fill categorical exemption and that challenges to the court may be limited to those issues raised at the hearing. (AR 6:1398.)

The Board heard Appellants' appeal on April 8, 2008. At the hearing, Chris Bazar, Director of the Community Development Agency, which oversees the Planning Department, informed the Board that the Planning staff spent a significant amount of time verifying that the Project's residential density complied with the General Plan and Specific Plan. (AR 1:17:10-19.)

Senior Planner, Rodrigo Orduna, testified that the Planning staff carefully considered the Project under both the General Plan's and the Specific Plan's requirements and that, "to calculate density in a general plan you look at the density in the entire neighborhood including all the streets, etcetera, that serve a residential neighborhood." (AR 1:193:20-25, 194:1-16.)

In addition to extensive discussion to ensure that the Board was correctly applying the General and Specific Plans, John Bates, Senior Traffic Engineer with the County's Public Works Agency, testified at the Board hearing that the traffic impacts for the Project would be "minimal" and explained the factual and statistical basis upon which the agency reached that conclusion. (AR 2:204-205, see also AR 1:56, 2:441.) Real Party also recounted that Mr. Bates participated at one of the roundtable

discussions with the local residents and that Mr. Bates presented additional information regarding the analytical approach, considerations, and protocols including statistical methods used by the traffic department to assess traffic conditions. (AR 1:187-188.)

Appellants introduced no expert opinion or evidence at the April 8, 2008 hearing, or at any other time, in support of their claims on appeal. Neither did they or anyone else challenge the County's application of the infill exemption. Appellants only presented unsubstantiated opinions, concerns and/or suspicions relating to their concerns about traffic and density.

At the end of the hearing, the Board denied Appellants' appeal and approved the Project consistent with the findings of the Planning Commission. (AR 1:16-18.) The Board's findings were based on substantial deliberation and consideration of the traffic and density concerns before them.

B. PROCEDURAL HISTORY

Superior Court Action

Appellants 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 Appellants' Petition for Writ of Mandate, the trial court issued an order denying Appellants' petition and, in summary, determined that: (1) 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]); (2) Appellants 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); (3) Appellants 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 (4) 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).

Appellants appealed the trial court's order.

Tomlinsons' Appeal to the First District Court of Appeal

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 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 Appellants' 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's 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 Appellants 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. EXHAUSTION OF ADMINISTRATIVE REMEDIES IS A FUNDAMENTAL PREREQUISITE TO JUDICIAL REVIEW OF A PUBLIC AGENCY DETERMINATION.

California case law has long held that the exhaustion of administrative remedies requirement is a "fundamental rule of procedure" and attempts to carve an exception to that rule must be carefully scrutinized. "That failure to exhaust administrative remedies is a bar to

relief in a California court has long been held the general rule." *Sierra Club, et al. v. San Joaquin Local Agency Formation Commission* (1999) 21 Cal. 4th 489. This Court has stated that "the general rule that exhaustion of administrative remedies 'is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding upon all court .... Exhaustion of the administrative remedy is a jurisdiction prerequisite to resort to the courts.'" *Sierra Club, et al. v. San Joaquin Local Agency Formation Commission, supra,* at p. 495-496; citing *Abelleira v. District Court of Appeal* (1941) 17 Cal. 2d 280.

"In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. ... The California cases have consistently applied this settled rule. [Citations omitted.]" *Abelleira v. District Court of Appeal, supra,* at p. 292-293.

"'There are several reasons for the exhaustion of remedies doctrine. 'The basic purpose for the exhaustion doctrine is to lighten the burden to overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief.' [Citation omitted.] Even where the administrative remedy may not resolve all issues or resolve the precise relief requested by a party, the exhaustion doctrine is still viewed with favor 'because it facilitates the development of a complete

record that draws on administrative expertise and promotes judicial efficiency.' [Citation omitted.] It can serve as a preliminary administrative sifting process (citation omitted), unearthing the relevant evidence and providing a record which the court may review. [Citations omitted.]" *Sierra Club, et al. v. San Joaquin Local Agency Formation Commission, supra,* at p. 501.

In holding that a court's refusal to apply the exhaustion of administrative remedies or attempts to carve out an exception to the exhaustion rule will be carefully reviewed by the higher courts, the Supreme Court stated in *Abelleira, supra,* that "[w]e are here asked to sanction its violation, either on the ground that a valid exception to the rule is applicable, or that despite the uniformity with which the rule has been applied, it may be disregarded by lower tribunals without fear of prevention by the higher courts. This last point cannot be too strongly emphasized, for the rule will disappear unless this court is prepared to enforce it. To review such action of a lower court only on appeal or petition for hearing would permit interference with the administrative proceeding pending the appeal or hearing, with the effect of completely destroying the effectiveness of the administrative body." *Abelleira, supra,* at p. 293.

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B. THE *TOMLINSON* COURT'S ANALYSIS CONFLICTS WITH THE JURISDICTIONAL ANALYSIS IN *STOCKTON CITIZENS FOR SENSIBLE PLANNING V. CITY OF STOCKTON* (2010) 48 Cal.4th 481 AND STATUTORY LAW.

In *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, decided shortly before the Court of Appeal oral argument in this case, this Court held that "[c]ourts have often noted the Legislature's clear determination that 'the public interest is not served unless CEQA challenges are promptly filed and diligently prosecuted.' [Citations omitted.] 'Patently, there is legislative concern that CEQA challenges, with their obvious potential for financial prejudice and disruption, must not be permitted to drag on to the potential serious injury of the real party in interest.' [Citation omitted.] 'The Legislature has obviously structured the legal process for a CEQA challenge to be speedy, so as to prevent it from degenerating into a guerrilla war of attrition by which project opponents wear out project proponents.' [Citation omitted.]" *Stockton Citizens, supra,* at p. 500.

In *Stockton Citizens, supra,* the petitioners challenged a project approval after Stockton issued a notice of exemption. The petitioners did not file their suit within the 35-day statute of limitation provided for in Public Resources Code § 21167. Rejecting the *Stockton Citizens* petitioners' assertion that the Notice of Exemption did not trigger the statute of limitations because the underlying project approval was defective,

this Court held that "consistent with the principle that statute of limitations apply equally to well- and ill-founded suits, the Legislature meant to specify that all CEQA challenges to an agency's exemption determination, even those with merit, must be brought within 35 days after the agency files a complaint NOE." *Id.,* at p. 504; emphasis added.

Although the *Tomlinson* matter does not involve statute of limitations, this Court's reasoning in *Stockton Citizens* applies equally here. Both the statute of limitations and the exhaustion of administrative remedies are jurisdictional requirements. *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442. If a petitioner cannot meet the requirements of either rule, the matter does not proceed on the merits.

In addition, the Court of Appeal's blanket release of project opponents from CEQA exhaustion not only creates conflict in the CEQA case law, it also conflicts with well-established exhaustion doctrine across a broad spectrum of land use law. For example, Planning and Zoning Law section 65009(b)(1) requires exhaustion "prior to or at the public hearing" before pursuant any claim to challenge most land use approvals. Local agencies typically hold public hearings on projects not because of CEQA, but because of local requirements or because statutes, like those found throughout the Planning and Zoning Law, require them.

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C. THE HOLDING OF THE COURT OF APPEAL IS CONTRARY TO WELL-ESTABLISHED PUBLIC POLICY THAT PUBLIC AGENCIES BE GIVEN AN OPPORTUNITY TO RESPOND TO ISSUES BEFORE RESORTING TO JUDICIAL REVIEW.

In reaching its conclusion that Appellants did not need to articulate their CEQA exemption noncompliance argument to the County staff or Board of Supervisors, the *Tomlinson* court brushes aside several critical policy considerations supporting Public Resources Code § 21177's exhaustion requirement. In essence, the *Tomlinson* court disregarded the fundamental policy behind the exhaustion doctrine – 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.

"When a ground of noncompliance with CEQA was not raised during the comment period or during the public hearing on project approval, the right to raise the issue in a subsequent legal action is waived. The petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level. (Citation.) '[T]he objections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them.'" *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 909-910 (emphasis added); citing *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1136.

To advance the exhaustion doctrine's purpose "[t]he 'exact issue' must have been presented to the administrative agency... ." *Mani Brothers Real Estate Group v. City of Los Angeles, supra*, 153 Cal.App.4th at p. 1394 (emphasis added); citing *Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894.

While "'less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding, ... 'generalized environmental comments at public hearings,' 'relatively ... bland and general references to environmental matters' [Citation], or 'isolated and unelaborated comments' [Citation] will not suffice. The same is true for '[g]eneral objections to project approval.' [Citations.]" *Porterville Citizens for Responsible Hillside Development v. City of*

Porterville, supra, 157 Cal.App.4th at p. 910.

Had Appellants presented the CEQA noncompliance issue at the public hearings, the County would have had an opportunity to consider whether the categorical exemption was correctly applied. The *Tomlinson* decision allows project opponents to sit quietly while public hearings are held and the administrative proceedings are completed, and 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, which is to allow public agencies to address the issue, thereby minimizing the necessity for judicial review.

The exception to the exhaustion doctrine created in *Tomlinson* also results in undue prejudice to developers or applicants who have expended significant time and financial resources. *Tomlinson* would have an adverse impact on developments in its jurisdiction because its decision may result in undue hardship and greater costs to developers – in both time and money. Real Party procured all necessary reports to address the concerns that Appellants did raise at public hearings. It took almost two years for Real Party to get approval of the County's Board, not including the additional two years since Appellants filed their writ petition. The exhaustion requirement was codified exactly for the purpose of mitigating the type of prejudice that Real Party here has had to suffer.

As stated above, Real Party performed all steps required to comply with the public agencies' notice and public hearing requirements. Real Party mailed the public hearing notices issued by the public agencies at its own expense for the separate hearings. Real Party did not request an exemption and did not seek any variance. Real Party actively participated in the very same public hearings attended by Appellants. Like the public agencies herein, Real Party was given no notice that there was an issue concerning the application of the categorical exemption by County to the Project.

D. THE COURT OF APPEAL'S DECISION IGNORES THE PUBLIC POLICY OF PROMOTING A COMPLETE RECORD.

In its opinion, the *Tomlinson* court 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. 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 [Public Resources Code] 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.[2])

In deciding that the Section 21177 exhaustion requirement did not apply to Appellants' failure to raise the County's use of the infill categorical exemption, the Court reasoned that because the County could not change the fact that the project site was not "within city limits," exhaustion should not apply. (Opinion, at pp. 1419-1420.) This distinction strips from the exhaustion doctrine the requirement that a decision-making body have an opportunity to "act to render the litigation unnecessary." During oral argument before the Court of Appeal, the County conceded that the Board could not have moved the project into a city if the Appellants had raised their objections about the County's use of the infill exemption, but the County emphasized that the Board could have decided that the County's use of the infill exemption was inappropriate and directed staff to reevaluate its determination. Ignoring the statutory and case law providing that the County must have precisely this chance, the *Tomlinson* opinion

[2] Cited page numbers in Opinion refer to the page numbers in the California Official Report.

offers no rationale for disregarding this well-established exhaustion of administrative remedies requirement in CEQA. The Court of Appeal's opinion is a profound departure from well-established California law that 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.

The *Tomlinson* court's opinion also brushes aside pertinent case law holding that a key purpose of the exhaustion requirement is to develop a complete record. As noted in the opinion, one purpose of the Section 21177 exhaustion requirement is to develop a complete record, thus serving "as a preliminary administrative sifting process [citation], unearthing the relevant evidence and providing a record which the court may review." (Opinion, at p. 1419; quoting *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 501.) The *Tomlinson* court disregards this body of case law, concluding that it does not apply when the argument that [Appellants] failed to make "does not require an evidentiary determination." (Opinion, at 13.) However, because the issue never came up before the decision-making body, the record is incomplete as to what the County would have done if the CEQA exemption noncompliance issue had been raised during the administrative process.

E. THE COURT OF APPEAL'S DECISION IS CONTRARY TO THE PLAIN LANGUAGE OF THE GOVERNING STATUTE.

Despite the plain language in the governing statute and agreement by all parties that the exhaustion of administrative remedies under Section 21177 applies in this action, the Court of Appeal reached a contrary conclusion and held that Section 21177 does not apply to bar Appellants' objection to the County's determination that the project is exempt from CEQA. (Opinion, p. 1417-1424.) 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's decision in *Azusa Land Reclamation Company v. Main San Gabriel Basin Watermaster, supra*, and unreasonably extended *Azusa* based on the erroneous assumption that a project that is categorically exempt never has a public hearing on the project.

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

> "(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, in this case multiple public hearings, 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 expressly sought to preclude any 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 on the project, but failed to do so. This is the rule 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).)

The only exception to Section 21177 created by Legislature applies 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).)

Reading subsections (a) and (e) of Section 21177 together compels the conclusion that Legislature intended to carve out an exception to the exhaustion of administrative remedies requirement only 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 approval of the project. In other words, Public Resource Code § 21177(e) requires only that there be an "opportunity" for public comment.

In concluding that Section 21177 does not apply in the matter at hand, the Court of Appeal's opinion in *Tomlinson* 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, both the *Tomlinson* and the *Azusa* courts incorrectly assume that a project exempt from CEQA is not the subject of a public hearing. As clearly indicated by the facts in *Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830, and the facts here, this assumption is simply incorrect.

Further, the *Tomlinson* court's interpretation of what constitutes a public hearing causes the court to misapply CEQA's limited exception to the duty to exhaust. Specifically, CEQA provides that no exhaustion of administrative remedies is required if 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. Public Resources Code § 21177(e) (emphasis added.) Because the *Tomlinson* court read "public hearing" as only a public hearing before a notice of determination by which an agency approves a CEQA document, such as an EIR or negative declaration, and misunderstood that a notice of determination that a project is exempt is still a notice of determination, it incorrectly concluded that Alameda County's duly noticed public hearings were not public hearings for purposes of the CEQA exhaustion requirement.

Tomlinson muddles its interpretation of Section 21177(a) and *Azusa* by overlooking the fact that a "notice of exemption" is simply one form of what the statute refers to a 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).)" However, 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 for purposes of the statute.

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. The *Tomlinson* court's confusion with the meaning of the aforementioned terms has led to its erroneous interpretation of Section 21177 and *Azusa*.

The terms "Notice of Exemption" and "Notice of Determination" are only mentioned in the CEQA Guidelines. The CEQA statute does not use the term Notice of Exemption. Instead the statute uses the very same wording – "notice of the determination" for notice of an exemption decision as is used for the notice of a decision to approve a project that is not exempt from CEQA. The distincton between a "notice of determination" and a "notice of exemption" appears only in the Guidelines – as a shorthand way to refer to two types of notices of determination that trigger the shortened statutes of limitation. These terms, added by the Office of Planning and Research to the Guidelines, should not be used to interpret the meaning of the phrase "notice of the determination" in the statute.

Further, courts should rely on the CEQA statute itself to interpret Section 21177. *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 670 [When

interpreting a statute, courts 'begin with the statutory language, viewed in light of the entire legislative scheme ofwhich it is a part, as the language chosen is usually the surest guide to legislative intent.] In enacting Section 21177, the Legislature expressly stated in Stats 1984, ch 1514 as follows:

> "SEC. 14.5. It is the intent of the Legislature in adding Section 21177 to the Public Resources Code in Section 14 of this act 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.)

F. THE APPELLATE COURT UNREASONABLY EXTENDED THE HOLDING IN *AZUSA LAND RECLAMATION CO. V. MAIN SAN GABRIEL BASIN WATERMASTER* (1997) 52 Cal.App.4th 1165, A CASE THAT DID NOT INVOLVE A PUBLIC HEARING.

The *Tomlinson* court misapplies and incorrectly relies on *Azusa, supra,* to support its holding. The holding in *Azusa, supra,* is distinguishable from this appeal because, in *Azusa*, there was no public comment period or public hearing for purposes of Section 21177. 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.

In *Azusa*, the public agency never held a public hearing before determining a project was exempt from CEQA. 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 materially distinguishable from *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, the administrative record shows 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." After the planning department's public hearings, a formal public hearing was held on April 8, 2008 on Appellants' appeal to the County Board of Supervisors.

It should be noted that even Appellants conceded that the holding in *Azusa* does not apply in this case. In their letter brief dated March 17, 2010 to the Court of Appeal, Appellants state as follows:

> "Furthermore, unlike in *Azusa* where the agency apparently made the exemption determination only at the last minute when it approved the project, the County here did provide at least general notice that it intended to find the project exempt from CEQA as an infill project and its Planning Commission held a public hearing prior to approving the project; therefore, Appellants had an opportunity to contend that determination based on the limited information they were provided, and they did so. Appellants respectfully disagree with the court's suggestion that Appellants failed to raise the issue of whether section 21177 required them to exhaust at all in this appeal. As explained above, Appellants have acknowledged that they had an obligation to pursue their *procedural* administrative remedies before litigating and for this reason, they have not argued that *Azusa* provides a blanket exception to any kind of duty to exhaust."
>
> (Page 3 of Appellants' Letter Brief to Court of Appeal dated March 17, 2010.)

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

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.

Further, 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 also 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 in the trial court.

G. THE HOLDING OF THE COURT OF APPEAL CONFLICTS WITH *HINES V. CALIFORNIA COASTAL COMMISSION* (2010) 186 Cal.App.4th 830 (REVIEW DENIED OCTOBER 13, 2010), A DECISION ISSUED BY THE SAME DISTRICT.

The *Tomlinson* court's decision directly conflicts with another decision certified for publication by Division Two of the same Appellate District, entitled *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 *Tomlinson* 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 in *Hines* spoke at the public hearings. Despite making claims of other nonconformities, appellants did not question whether the project was exempt under CEQA. Following another public hearing, the Sonoma County Board of Supervisors approved the project after determining, among other things, that the project was categorically exempt from CEQA. The appellants in *Hines, supra,* 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 *Tomlinson* opinion 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.) In essence, under *Tomlinson*, any party seeking to object to a project can simply remain silent through multiple public hearings, then raise the CEQA exemption determination issue for the first time in a judicial proceeding, even though that party did not raise any CEQA exemption concerns during the public hearings.

H. THE *TOMLINSON* 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 *Tomlinson* opinion concludes in *dictum* 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 as 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." Appellants 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 Appellants and their neighbors. Appellants 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, Appellants 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, Appellants 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* explains, the distinction between an opportunity to address application of a categorical exemption during 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*.

Appellants will argue that, because the County mislead them by improperly using the urban "infill" categorical exemption, and by not fully and properly citing the language in the exemption, they should be excused from their failure to raise the noncompliance issue at the administrative level during the public comments periods or at the public hearing on the project before the County Board of Supervisors. However, as explained by this Court in the *Stockton Citizens* decision, a public agency is not required to provide a full recitation of the language in the exemption or "explain all the arguable environmental implications, or all the grounds upon which such a challenge to the exemption determination might be based." *Stockton Citizens, supra,* at p. 514.

Here, even if a Notice of Exemption had been filed at the time County determined the Project to be exempt from CEQA, the County would not have been required to provide any information other than "a 'brief' description of the approved project, state its location, and set forth

reasons for the agency's finding of exemption. (CEQA Guidelines, § 15062, subd. (a).) Once the agency files a notice satisfying these basic requirements, thus alerting the public to the agency's decision and its basis, it is the public's obligation thereafter to determine whether a challenge to the project approval is appropriate. The CEQA Guidelines do not demand that the NOE itself disclose and explain all the arguable environmental implications, or all the grounds upon which such a challenge to the exemption determination might be based." *Stockton Citizens, supra,* at p. 514.

Real Party argues that multiple Notices of Public Hearing were issued to Appellants and their neighbors with the necessary information regarding the County's decision that the project was determined exempt under CEQA in-fill categorical exemption. Even if the County's determination was erroneous, it would have been left to Appellants and/or other project opponents to raise the CEQA exemption noncompliance to the attention of the County Board of Supervisors.

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 AND REQUESTED DISPOSITION

Based on the foregoing, Real Party respectfully requests that the Supreme Court reverse the Court of Appeal's decision in *Tomlinson*, and

affirm the trial court's decision to deny Appellants' petition for writ of mandate.

Dated: 2/17/11

Respectfully submitted,

ABDALAH LAW OFFICES
A Professional Law Corporation

By: _____
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Attorneys for Respondent,
Real Parties in Interest,
Y.T. WONG and SMI
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 OPENING BRIEF ON THE MERITS BY REAL PARTIES IN INTEREST Y.T. WONG AND SMI CONSTRUCTION, INC. is 9,467 words.

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

Executed this 17 day of February, 2011 in Cupertino, California.

MIRIAM H. WEN-LEBRON

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 February 18, 2011, I served a copy of the attached as indicated:

OPENING BRIEF ON THE MERITS BY REAL PARTIES IN INTEREST Y.T. WONG AND SMI CONSTRUCTION, INC.

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

Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4712	(Original and 13 copies) Hand Delivery
Court of Appeal of the State of California First Appellate District, Division Five 350 McAllister Street San Francisco, CA 94102-4712	(1 copy) 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
Jewell J. Hargleroad, Esq. LAW OFFICES OF JEWELL J. HARGLEROAD 1090 B Street, No. 104 Hayward, CA 94541	(1 Copy)	by U.S. Mail
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Beth Collins-Burgard, Esq. BROWNSTEIN, HYATT, FARBER, SCHRECK 2029 Century Park East, Ste. 2100 Los Angeles, CA 90067	(1 Copy)	by U.S. Mail
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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 February 18, 2011, at Cupertino, California.

_____

DIANE REES