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.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO APPELLANTS' MOTION TO DISMISS REVIEW

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

This is an appeal from a court of appeal's decision regarding the California Environmental Quality Act ("CEQA"). Respondent County of Alameda ("County"), for unexplained reasons, chose not to seek review in the Supreme Court leaving the burden on the Real Parties in Interest, Y.T. Wong and SMI Construction, Inc. (collectively referred to as "Real Party"). The request for review was supported by several important statewide organizations, including the California State Association of Counties ("CSAC"), League of California Cities and California Building Industry

Association (CBIA). The appellants, Fred and D'Arcy Tomlinson ("Appellants"), opposed the request for review on several grounds. Despite the fact that Appellants were fully aware at the time they filed their opposition that the County was not joining the request for review, they failed to raise the argument that review would be moot. Furthermore, despite the County's failure to participate in the request for review, this Court granted review. The conclusion is inescapable: the County's participation in the request for review is irrelevant to the issues on appeal.

Appellants now seek a dismissal of this Court's review of this action by claiming that the issue before the Court is moot because a controversy no longer exists, the issue is not relevant to Real Party, and the public interest exception to the mootness doctrine does not apply herein.

Real Party respectfully requests that this Court deny Appellants' motion to dismiss review because Real Party right to an appeal cannot be waived by the County, the controversy at issue directly affects Real Party and is not moot; and the continuing public-interest exception to the mootness doctrine applies to preclude a dismissal.

LEGAL DISCUSSION

A. COURT OF APPEAL'S DECISION IS STAYED PENDING THIS COURT'S DECISION ON ITS GRANT OF REVIEW.

Appellants argue that, because the County decided not to pursue litigation further, it has voluntarily agreed to comply with the Court of

Appeal's order and waived its defense that the exhaustion of administrative remedies bars Appellants' claims. Therefore, Appellants argue the controversy at issue no longer exists and this action must be dismissed as moot.

However, under Code of Civil Procedure § 916, an order directing issuance of a writ of mandate is automatically stayed pending appeal. Code of Civil Procedure § 916; *Johnston v. Jones* (1925) 239 P. 862. Therefore, contrary to the representations made by Appellants, the County does not have to take any steps to comply with CEQA consistent with the *Tomlinson* court's order pending this Court's decision in this review. As stated above, for reasons unknown to the Real Party, the County has decided not to actively participate in this review. Nevertheless, the County's lack of participation does not render moot the controversy at issue – i.e., whether the exhaustion of administrative remedies requirement applies to bar Appellants' claim regarding the applicability of the CEQA in-fill categorical exemption – and does not resolve the fact that the Real Party would be unduly prejudiced if the Court of Appeal's decision is affirmed.

B. THE COUNTY CANNOT WAIVE THE REAL PARTY'S RIGHT TO AN APPEAL.

Even if the County waived its right to an appeal by failing to participate in this review, the County's decision does not constitute a waiver of the Real Party's right to pursue its appeal.

In *Save Our Residential Environment v. City of West Hollywood et al.* (1992) 9 Cal.App.4th 1745 (*SORE*), another case cited by Appellants, a nonprofit association of property owners and residents petitioned for a writ of mandate to halt construction of a senior citizen housing development. The association claimed that the City's approval of the project was inconsistent with the zoning ordinance and general plan, and that the environmental impact report (EIR) was inadequate. The superior court in that case granted the petition, and multiple notices of appeal were filed. During the pendency of the consolidated appeals, the City prepared a supplemental EIR and filed a return stating that it had complied with the writ's directive. The SORE organization argued that the issue on appeal was moot and that the City waived its right to appeal by complying with the writ. The court of appeal in *SORE* held that "even if the City has waived its right to appeal the issuance of the writ by complying with its directives, the City is powerless to waive [Real Party in Interest and Appellant] Rossmoor's right to appeal. (*Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1085.)" *SORE, supra,* at p. 1751. Pursuant to that determination, the *SORE* court proceeded to review the merits of the action.[1]

[1] Here, the County has neither expressly indicated it would comply with the Court of Appeal's decision nor taken any administrative action in compliance pending this Court's review.

C. THE CASE LAW CITED BY APPELLANTS DOES NOT SUPPORT A DISMISSAL OF THE APPEAL FILED BY REAL PARTY, A PARTY DIRECTLY AFFECTED BY THE COURT OF APPEAL'S DECISION.

Appellants cite various cases in support of its claim that, by failing to file a brief with this Court, the County has in essence waived its exhaustion of administrative remedies requirement defense and conceded the correctness of the Court of Appeal's decision.

However, a closer review of the cases cited by Appellants does not support such a conclusion. In fact, one appellate decision cited by Appellants specifically holds that a failure by one party to continue to pursue its appeal does not result in abandonment by the other appealing parties of their claims on appeal. In *Freitas v. Atwater* (1961) 196 Cal.App.2d 289, 296-297, the Court of Appeal affirmed the injunctive relief issued by the trial court against the city and the cannery after determining that the injunction was proper. The *Freitas* court, however, dismissed the appeal filed by the food company, another party also affected by the injunction, because the food company failed to submit any brief after filing a notice of appeal. The *Freitas* court of appeal assumed that the appeal had been abandoned as to the food company only. *Freitas v. Atwater, supra,* 196 Cal.App.2d at 296-297.

In *Doran v. White* (1961) 196 Cal.App.2d 676, the Third District Court of Appeal dismissed an appeal filed by the sole appellant in that

action, and determined that appellant had abandoned his appeal because he failed to file a brief in support of his appeal despite the court's grant of six successive extensions of time. That is not the situation here.

In sum, the aforementioned cases cited by Appellants involve circumstances where, after a notice of appeal was filed, the appellate court determined that an appealing party abandoned its appeal due to that party's failure to submit a brief or present argument in support of the appeal. None of the decisions cited by Appellants provide that when one party elects not appeal, that renders the appeal moot as to other parties that still have an interest in the appeal.

D. THE CONTROVERSY BEFORE THIS COURT IS NOT MOOT BECAUSE THE COURT OF APPEAL'S DECISION REGARDING THE APPLICABILITY OF THE EXHAUSTION DOCTRINE DIRECTLY AFFECTS THE REAL PARTY, AND REAL PARTY HAS THE RIGHT TO SEEK REVIEW OF THE COURT OF APPEAL'S DECISION.

Appellants ask this Court to dismiss review on the ground that the matter is moot and because "no effective relief can be granted" since the County has decided not to join the Real Party in seeking review. Appellants make the erroneous assumption that the only party adversely affected by the Court of Appeal's decision is the County. As this Court is well aware, that assumption is incorrect.

In support of its mootness claim, Appellants cite *Vernon v. State of California* (2004) 116 Cal.App.4th 114; *Neary v. Regents of University of*

California (1992) 3 Cal.4th 273, 281-282 and *City of Carmel-by-the-Sea v. Board of Supervisors* (1982) 137 Cal.App.3d 964. However, the cases cited by Appellants actually support Real Party's contention that a controversy still exists and, therefore, this matter is not moot.

In *Vernon v. State of California, supra,* the respondent sought a dismissal of appellant's appeal on the ground that the action was rendered moot when the State's Department of Industrial Relations granted the employer city an "experimental variance" exempting operation of the challenged CAL-OSHA regulations for at least six months. The *Vernon* court held as follows:

> "We do not consider the present appeal moot due to the issuance of an experimental variance that has provisionally granted the City an exemption from the regulatory prohibition against employees with facial hair wearing SCBA respirators. Appellant may still obtain effectual relief from this court with a favorable ruling in this action. If we declare the CAL-OSHA regulations invalid as discriminatory, appellant will not need to rely upon additional, speculative variances that may or may not be granted to the City in the future. Furthermore, even if an action is moot, pursuant to established exceptions an appellate court may nevertheless exercise discretion to address the merits of an appeal if there may be a recurrence of the controversy between the parties or the case presents an issue of broad public interest that is likely to recur. [Citations omitted.] The record before us does not indicate that the variance is other than temporary. Thus the constitutional issues of public interest presented by the case may recur between these parties or

> others, and we decline to find that appellant has raised only moot points. [Citations omitted.]"
>
> *Vernon v. State of California, supra,* at p. 121.

Here, as in *Vernon*, the exception to the exhaustion doctrine created by the *Tomlinson* court results in undue prejudice to developers and/or applicants who have expended significant time and financial resources to follow the administrative process required by the public agency and to participate in all public hearings held on their projects.

In *Neary v. Regents of University of California* (1992) 3 Cal.4th 273, the parties to the action sought review by the Supreme Court after the appellate court refused to reverse and vacate the trial court's judgment after the parties stipulated to such action as a condition of a proposed settlement pending appeal. The Supreme Court in *Neary* held that the court of appeal erred in denying the parties' joint application for a reversal of the trial court judgment because there is a presumption in favor of appellate courts' granting such requests, in the absence of a showing of extraordinary circumstances, and because the record reflected no extraordinary circumstances that weighed against allowing the reversal. *Neary, supra,* at p. 284.

The *Neary* case is not applicable here because there has been no settlement reached by the parties herein. Any settlement discussion must inevitably involve the participation and consent of the Real Party, the

owner and developer of the project at issue. This matter does not involve a request that this Court render an advisory opinion on an issue that no longer affects a party.

E. APPELLANTS' CLAIM THAT THE ISSUE OF WHETHER APPELLANTS EXHAUSTED THEIR ADMINISTRATIVE REMEDIES CONCERNS ONLY THE OBLIGATIONS BETWEEN APPELLANTS AND RESPONDENT COUNTY, AND IS NOT RELEVANT TO REAL PARTY, IS NOT SUPPORTED BY CASE LAW.

California case law has long established that the purpose of the exhaustion of the administrative remedies requirement is to afford public agencies 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."

Here, the actions taken by the County have a direct effect on the Real Party, the developer. If Appellants had exhausted their administrative remedies by raising the issue that the Project did not meet the "within city limits" requirement of the CEQA in-fill categorical exemption (§ 15332), the County would have had an opportunity to look into that issue and perhaps render litigation unnecessary. However, because Appellants proceeded with litigation, Real Party has been unduly prejudiced by having

to incur substantial attorneys' fees and costs, in addition to the significant loss of value to its property as a result of the delay, to defend its cause in litigation.

The exhaustion of administrative remedies requirement does not simply benefit the public agencies. It benefits all who are or may be affected by the public agencies' decisions. Therefore, Appellants' argument that the issue of exhaustion doctrine only concerns the Appellants and the County is wholly without merit.

F. THE CONTINUING PUBLIC-INTEREST EXCEPTION TO THE MOOTNESS DOCTRINE APPLIES HERE; THEREFORE, THIS CASE CANNOT BE DISMISSED.

Even if this Court determines that the issue of whether the exhaustion of administrative remedies requirement applies to bar Appellants' action is moot as to the County, the issue must still be addressed as it applies to the developer Real Party. Furthermore, this Court has discretion to review this appeal because this case affects the general public interest and the future rights of parties as evidenced by the supporting requests for review from CSAC, League of California Cities and CBIA.

An appeal may be dismissed as moot when the occurrence of events renders it impossible for the appellate court to grant appellant any effective relief. *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541. "Notwithstanding, there are three discretionary

exceptions to the rules regarding mootness: (1) when the case presents an issue of broad public interest that is likely to recur (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1202, fn. 8 [31 Cal. Rptr. 2d 776, 875 P.2d 1279]); (2) when there may be a recurrence of the controversy between the parties (*Grier v. Alameda-Contra Costa Transit Dist.* (1976) 55 Cal.App.3d 325, 330 [127 Cal. Rptr. 525]); and (3) when a material question remains for the court's determination (*Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 205.)" *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479-480.

Here, there is no doubt that allowing the *Tomlinson* court's decision to stand would have a significant jurisdictional effect on all matters involving a public agency's CEQA exemption determination. Following the *Tomlinson* decision, courts throughout the state could begin acting on matters that they do not have jurisdiction to hear. In essence, project opponents would be permitted to withhold raising CEQA exemption determination issues to a public agency and bring up those issues later for the first time in a court proceeding. Changing the jurisdictional requirement would create additional uncertainty, and possible expense and delay, to all projects subject to a public agency approval. As such, the *Tomlinson* decision not only affects the Real Party directly, but also other developers and public agencies in the State of California.

/ / /

CONCLUSION

Based on the foregoing, Real Party respectfully requests that the Supreme Court deny Appellants' motion to dismiss review.

Dated: 3/10/11

Respectfully submitted,

ABDALAH LAW OFFICES
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By: _____

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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 MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO APPELLANTS' MOTION TO DISMISS REVIEW is 2,480 words.

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

Executed this 10 day of March, 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:

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO APPELLANTS' MOTION TO DISMISS REVIEW

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

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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
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 10, 2011, at Cupertino, California.

Diane Rees

DIANE REES