Case No. S188161

**IN THE SUPREME COURT OF CALIFORNIA**

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FRED AND D'ARCY TOMLINSON, individuals
Plaintiffs 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 Respondents



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# ANSWER BRIEF ON THE MERITS BY PLAINTIFFS AND APPELLANTS FRED AND D'ARCY TOMLINSON

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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

The fundamental question presented by this case is whether the exhaustion requirement should apply with full force when a public agency, despite providing citizens an opportunity to be heard at a public hearing, misleads the public about applicable legal requirements. Plaintiffs and Appellants FRED and D'ARCY TOMLINSON ("the Tomlinsons") submit that under the circumstances of this case, any duty to exhaust regarding the specific issue about which they were misled should be waived. Otherwise Respondent COUNTY OF ALAMEDA ("County") or other public agencies would be encouraged to follow a practice of being less than fully honest in their dealings with the public with the hope that no lay person will be able to ferret out key omissions before it is too late to raise the hidden issues. Such a clearly unjust result cannot be allowed.

The Tomlinsons respectfully urge this Court to uphold the ruling of the First Appellate District in their favor. In doing so, the Tomlinsons suggest that the appellate court's grounds for finding the exhaustion requirement does not apply to projects found exempt from the California Environmental Quality Act ("CEQA") (Pub. Resources Code, §§ 21000 et seq.) could be clarified or altered, based on the unique facts and circumstances of this case. The fundamental informational purpose of

CEQA is not well served by an interpretation that shifts the burden of full disclosure in the first instance to the public, rather than the agency, where it properly belongs.

The Tomlinsons agree with Real Parties in Interest and Respondents Y.T. WONG and SMI CONSTRUCTION, INC. ("Real Parties") regarding at least one fundamental point – that the exhaustion requirement is intended to foster a robust, honest dialogue between interested members of the public and their representative decision makers and government with the aim of potentially resolving disputes before resort to litigation is necessary. (*Bohn v. Watson* (1954) 130 Cal.App.2d 24, 37.) For issues subject to legitimate dispute based on competing or conflicting evidence or differing opinions, the exhaustion doctrine is sound public policy in that it avoids premature or unnecessary judicial involvement in disputes that should be resolved in the first instance, after robust political debate, by responsible agency officials. But the dialogue promoted by the exhaustion doctrine cannot effectively and fairly serve its intended purpose when, as here, an agency staff, in presenting issues for discussion by the public and decision by elected officials, misleads both the public and those decision-makers in every public communication regarding key legal issues. Here, this deception relates to County staff's repeated and seemingly intentional failure to fairly describe the terms of a "categorical exemption" from the requirements of the CEQA. Specifically, County staff repeatedly failed to disclose the one key criterion that indisputably prevents the County from using the exemption at issue: the fact that the exemption only applies in cities, and not in unincorporated areas such as the one where the "project" in dispute is located.

Despite the fact that Real Parties are aware that the County of Alameda never once disclosed in any of its public documents the fact that the exemption it claimed for Real Parties' residential project, the "infill" exemption (Cal. Code Regs., tit. 14, div. 6, ch. 3 ["CEQA Guidelines"] §§ 15000, 15332), is limited to projects located "within city limits," Real Parties fail to acknowledge this highly important fact in their Opening Brief on the Merits ("OB") until just a passing reference at the end of their brief. Real Parties emphasize the Tomlinsons' purported duty to bring this fact to light, yet fail to grapple honestly with the fact that County staff hid this crucial point from everyone interested in the project, including, apparently, the Real Parties.

The language of the exhaustion doctrine codified in the CEQA statute at Public Resources Code section 21177, subdivision (a), is also of interest here. That provision requires that for the exhaustion requirement to be triggered, there must have been a formal comment period provided by CEQA or a notice of determination issued by the agency following a public hearing. Since neither of those circumstances were present in the County's administrative proceedings for the project at issue here, Real Parties assert this Court should ignore the plain language of the statute and interpret the provision to cover a broader range of proceedings. Real Parties' proffered interpretation would conflict with the black-letter requirements faithfully applied by both the First Appellate District in this case and the court of appeal in *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165 and lead to portions of the statute being treated as mere surplusage.

This case is somewhat unique among the long line of CEQA cases addressing the exhaustion issue in that this case centers on an undisputed

fact of which reasonable minds would assume an agency would not have to be informed. As noted by the Tomlinsons in their briefs in the courts below and the Court of Appeal in its decision published on October 6, 2010 (*Tomlinson, et al. v. County of Alameda, et al.* (2010) 188 Cal.App.4th 1406) ("Opinion"), the undisputed fact of the project's location outside city limits "does not implicate the County's particular expertise and does not require an evidentiary determination." (Opinion, p. 13.) In other words, the appellate court quite reasonably found that a county should not have to be informed that it is not a city. Nor need the County be made aware that the site of the proposed project is in an unincorporated area, as counties have no land use authority within cities, but only in unincorporated areas. (See Cal. Const., art. XI, §7; *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 886 ["counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law"].) This situation is therefore distinguishable from others in which members of the public may be fairly charged with a duty to bring to light previously *unknown* relevant facts bearing on the agency's determinations under CEQA. Such facts might be based on observation and relate, for example, to the use of the project site by special status wildlife, or problematic traffic conditions in a neighborhood that a proposed project may exacerbate. Under circumstances involving factual issues of this kind, requiring adherence to the public policy goal of the exhaustion doctrine serves its intended purpose, by providing the agency's decision-makers with *new, previously unknown* information or an alternative interpretation of a relevant law.

Here, however, where the staff of an agency misleads the public and its own decision-makers by failing to disclose the relevance of an indisputable and obvious fact that the agency should be charged with knowing, any duty to exhaust administrative remedies prior to litigating that issue should be waived. The fact an agency's procedural requirements provide for a public hearing and an appeal process is of no significance if that process is founded on gross and seemingly intentional deception by agency staff. Basic principles of fairness strongly suggest that members of the public, unrepresented by counsel, should not be tasked with discovering and challenging the distorted perceptions created by the deception in time to bring them to the attention of officials. Nor should trusting citizens unaided by counsel have to undertake sophisticated legal research in the spirit of second-guessing what the agency claimed was a fair presentation of applicable law. Ironically, the County's improper reliance on what it should have known was an inapplicable categorical exemption eliminated the formal CEQA public review period that would have given the Tomlinsons additional time to root out the wrongdoing. In the words of the ancient maxim of jurisprudence, "[n]o one can take advantage of his own wrong." (Civ. Code, § 3517.)

## STATEMENT OF FACTS

The Court of Appeal distilled the general facts of the case into a concise and cogent summary, which the Tomlinsons hereby incorporate by reference. (Opinion, pp. 2-7.) In their Opening Brief, Real Parties present only some of the salient facts about the environmental review process and the extent of the Tomlinsons' participation in the administrative process

leading up to the approval of the challenged project. To fill in the missing blanks, the following additional facts are provided.

Real Parties first submitted a project application on August 18, 2006, and later submitted a revised version on April 12, 2007. (AR 2:290.) The project's neighbors sent numerous emails and letters to the County during this time, documenting concerns regarding adequate involvement of the public in the review process. (AR 2:311-314; 320-323.) Neighbors' concerns also included such issues as inadequate parking, traffic, and tree removal. (*Ibid.*) The Tomlinsons first inquired about the details of the project in June of 2007. (AR 2:320.) Among other things, they raised concerns regarding inadequate parking, obstructed views, cumulative impacts associated with recent similar developments, public utilities, and building heights. (AR 2:320-323.)

On July 2, 2007 the Alameda County Planning Commission began its formal preliminary review of the project. County staff reported that issues such as drainage, parking, storm water quality protection measures, and inadequate information about project easements were of concern from the project's inception. (AR 2:290-293.)

The Staff Report for the July 2, 2007 hearing indicated that the Planning Department determined the project was exempt from CEQA under the "infill exemption" (CEQA Guidelines, § 15332) because "the

proposed development would occur in an *established urban area*,[1] would not significantly impact traffic, noise, air or water quality, and could be served by required utilities and public services." (AR 1:35.)[2]

After a discussion of various issues regarding tree removal, lot size, and fire department concerns, among other things, the Planning Department concluded, "[r]esolving [parking, setbacks, sidewalk paving and viewshed] issues may require the loss of a parcel. If a parcel were to be removed, staff would like the applicant to re-evaluate the tree plan to determine whether one of the significant trees could be preserved on the site." (AR 1:42.)

At the initial Planning Commission hearing to consider the proposed project, at least one Planning Commissioner saw significant problems with the project:

> Commissioner Carbone felt that this is a dense narrow project not meeting the parking requirements which will impact the neighborhood as Bayview Avenue will suffer. Thus, the project was not a benefit to the area.

(AR 1:73 [minutes].) The matter was then continued. (*Ibid.*)

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[1]/ The phrase "established urban area" does not appear in the text of CEQA Guidelines section 15332. Section 15332, subdivision (b), requires that "[t]he proposed development occurs *within city limits* on a project site of no more than five acres substantially surrounded by urban uses." (Italics added.)

[2]/ Notably, this description, like every other discussion of the claimed exemption in the County's record, fails to ever mention the additional mandatory requirement that the project be located "within city limits." (CEQA Guidelines, § 15332, subd. (b).) The County and Real Parties have never disputed this assertion in the courts below, indeed, because no such disclosure can be found in the record.

The Tomlinsons and their neighbors sent letters to the County on November 30, and December 4, 2007, citing concerns about affordable housing, lot size, compatibility with surrounding properties, drainage, traffic, transit, and infrastructure, as well as planning consistency. (AR 2:331-339.) They provided a petition listing the names of all of the neighbors who opposed the project, citing potential traffic congestion as their main concern (AR 2:332-335, 343-348), although they also questioned how the project could be exempt from environmental review, given their understanding that the Fairview Area Specific Plan required such review for infill projects (AR 2:351).

The Planning Commission considered the project again on December 17, 2007. (AR 1:1.) D'Arcy Tomlinson conveyed to the Planning Commission her view that an environmental assessment of this area was "critical," in light of the multiple environmental concerns raised by the Fairview community. (AR 1:78.)

Planning staff again asserted the project was exempt from CEQA at this hearing. (AR 1:62-63.) As would be repeated throughout the administrative process, they justified this conclusion based on their conclusion that the project would occur in an "established urban area" (AR 1:62), even though the Fairview Area Plan specifically depicts the Fairview area as "rural." (AR 3:683.) The staff report stated the following to justify the exemption conclusion:

> Some environmental factors, such as impacts on agricultural or mineral resources, would not be impacted because of the location of the project. Other impacts, such as air quality, noise and water quality associated with the construction of the project, would be similar to any other construction project and would be addressed by standard conditions. The project

> *would be located in an established urban area*[3] and is consistent with the applicable General Plan designation for the area, so impacts on public services, utilities, hazards, recreation, population, land use and traffic would not be significant. In terms of traffic, comments from the Traffic Division indicated that no significant traffic impacts are anticipated as result of this project. Aesthetic impacts are generally considered from public views; since this property is not visible from a public view point, such as Don Castro Recreation Area, and the visual character of the single-family homes would be consistent with the development of the surrounding area, aesthetic impacts would not be considered significant. Biological resources (including tree analysis), cultural resources, geological and soils issues have been analyzed by experts. While some conditions were recommended to ensure that possible impacts are avoided, the reports indicated that there were no significant impacts expected to occur as result of the project.

(AR 1:62, italics added.) The Planning Commission then approved the project. (AR 1:1-2.)

The Tomlinsons appealed the Planning Commission decision and sent a letter to the County on January 9, 2008, further explaining their concerns regarding traffic and residential density. (AR 2:384-387.) Contrary to the Real Parties' characterization of their communications as devoid of any mention of the exemption (OB, pp. 7-8, 12), the Tomlinsons also continued to express skepticism of the County staff's determination

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[3]/ It seems nearly inconceivable that County staff, reading the words "within city limits" as used in subdivision (b) of CEQA Guidelines section 15332, did not make a conscious choice to ignore those plain words by substituting instead a broader term – "established urban area" – that might be stretched to apply to an area that is plainly *outside* city limits. The County may not like the language of section 15332 insofar as it gives cities a break that counties do not get; but the County, in order to avoid the strictures of CEQA, should not have presented section 15332 dishonestly in its dealings with the public.

that the project was exempt from environmental review, asserting, for example, that cumulative impacts intended to be addressed under the Fairview Area Specific Plan were evading consideration under the County's approach. (AR 2:351 [expressing confusion about how cumulative impacts of multiple similar projects are to be assessed as per the intent of the Fairview Specific Plan if each is considered exempt from CEQA]; 2:385 ["If one or all of these projects are exempt from an environmental impact review, it appears the original intent of the Fairview Specific Plan as we understand it, is being circumvented."].)

At the April 8, 2008 Alameda County Board of Supervisors hearing on their appeal, the Tomlinsons again questioned the determination that the project could be exempt from environmental review due to their understanding that the Fairview Area Specific Plan required consideration of cumulative effects for projects within its boundaries. (AR 6:1413 [Tomlinsons' presentation to Board].) They also reiterated their concerns about unstudied traffic impacts (AR 6:1414-1415) and project consistency with the surrounding neighborhood (AR 6:1416-1417).

At the end of the hearing, the Board denied the appeal and approved the project, contingent on reducing the heights of four of the proposed homes. (AR 1:18.) The County did not post a notice of exemption with the County Clerk documenting the Board's adoption of the CEQA exemption.[4]

**ARGUMENT**

The "hardship" that Real Parties complain they have incurred in defending against the Tomlinsons' challenge to their project (OB, p. 22)

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[4]/ The filing of a notice of exemption is only optional, not required under CEQA, but does affect the statute of limitations, which is 180 days after project approval if no notice is posted. (Pub. Resources Code, § 21167, subd. (d).)

would have been entirely avoidable had the County exercised due diligence and full disclosure of the actual requirements of the claimed exemption, which on its face only applies "within city limits." (See CEQA Guidelines, § 15332, subd. (b).) This nearly three-year proceeding easily could have been avoided if the County had honestly disclosed the fact that there was one more relevant (and mandatory) criterion – the project had to be located *within city limits* – that had to be met to make a finding that the infill exemption applied. The administrative record shows that the Tomlinsons responded to all of the criteria that were actually disclosed in the staff's misleading summaries of the infill exemption's requirements in their comments to County staff, the Planning Commission, and the Board of Supervisors. The Tomlinsons asserted, for example, claims pertaining to planning consistency, effects on wildlife, traffic and utilities (AR 2:331-339), which are among the criteria of the infill exemption disclosed by County staff, along with several other issues (AR 2:320-323 [noting concerns about inadequate parking, obstructed views, cumulative impacts associated with recent developments, public utilities and building heights]).

To the extent the County somehow believed that the phrase "established urban area" was a proper substitute for the "within city limits" requirement of the exemption, the Tomlinsons, in effect, challenged that assertion too, noting that the controlling specific plan depicted the "*rural* residential character of the area." (AR 1:181 [italics added]; 6:1407.)[5] The Tomlinsons' careful attention to addressing all of the exemption criteria that actually were disclosed by the County strongly supports a presumption

[5]/ A County supervisor also questioned the staff's characterization of the area as "urban," recognizing an intent in the Specific Plan "to keep the community semi-rural as much as possible . . . ." (AR 1:208.)

that *had* the County disclosed this criterion in its public documentation, the Tomlinsons also would have noted the County did not meet the "within city limits" requirement to apply the exemption. Everyone who participated in the administrative proceedings obviously knew that the project site was not within any "city limits." If the County had quoted the actual language used in CEQA Guidelines section 15332, everyone hearing or reading those words would have known immediately that the exemption did not apply. The fact that the Tomlinsons did not note the obvious fact that the project site was not within a city, while they did exhaustively explain their several reasons for disagreement with the applicability of all of the other disclosed criteria, strongly indicates they were misled by County staff into believing there were no other relevant criteria to consider.

Equally troubling is the fact that the County's own decision-makers, the elected Board of Supervisors, were similarly misled. Had that criterion been disclosed in any of the planning staff's reports or testimony to the Board, one or more of the Supervisors also would have been able to recognize that their agency was not a city but a county, and to publicly question the applicability of the exemption to a project in the unincorporated area. The "dog that didn't bark" supports an inference that the Board was equally misled. (See *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1380 ["[t]his lack of comment, like Sherlock Holmes's 'dog in the night-time' which tellingly failed to bark (2 Doyle, *Silver Blaze,* in The Annotated Sherlock Holmes [Baring-Gould ed. 1967], pp. 277, 280), was in itself evidence."].)

For that matter, Real Parties were either similarly misled, or else were aware of the omitted criterion, and therefore complicit with staff in hiding it from the public and the County's decision-makers and allowing

staff to claim an exemption that is clearly inapplicable, on its face, to the project. One can take them at their word that they did not request an exemption and were unaware of any issues concerning the application of the exemption (OB, p. 23), but still be troubled by their legal position. After all, they continue to argue that, nonetheless, they should be allowed to proceed with the project as if it were truly exempt. They rely on the Catch-22 that the County's deception was effective and was not discovered until the Tomlinsons retained legal counsel after the administrative process was already complete. Such an unconscionable result cannot be allowed in light of CEQA's seminal purposes of promoting informed, accountable decision-making and encouraging public participation. (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 [*Goleta II*] [the CEQA process "protects not only the environment but also informed self-government"]; *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 392 [*Laurel Heights I*] [CEQA procedures should be "scrupulously followed," so that "the public will know the basis on which its responsible officials either approve or reject environmentally significant action" and will be able to "respond accordingly to action with which it disagrees"].) Fundamental principles of fairness demand the same result; otherwise, the County will have profited from the clear deception of its staff.

**1. Standard of Review**

The standard of review in an action challenging an agency's determination under CEQA is governed by Public Resources Code section 21168 in administrative mandamus proceedings (such as this one), and section 21168.5 in traditional mandamus actions. (*Laurel Heights I, supra,* 47 Cal.3d at p. 392, fn. 5.) Under section 21168, a court shall determine

"whether the act or decision is supported by substantial evidence in the light of the whole record." Under section 21168.5, the court's "inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." "[T]he standard of review is essentially the same under either section, i.e., whether substantial evidence supports the agency's determination." (*Laurel Heights I, supra,* 47 Cal.3d at p. 392, fn. 5.) For the purposes of CEQA, "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (Pub. Resources Code, § 21080, subd. (e)(1).)

"Generally speaking, an agency's failure to comply with the procedural requirements of CEQA is prejudicial when the violation thwarts the act's goals by precluding informed decisionmaking and public participation." (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1375.) Where, as here, an agency has failed to proceed in the manner prescribed by CEQA because it has omitted essential environmental review, this informational void is presumed to be a "prejudicial abuse of discretion" under CEQA. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236-1237.) "The foremost principle under CEQA is that the Legislature intended the act 'to be interpreted so as to accord the fullest possible protection to the environment within the reasonable scope of the statutory language.'" (*Goleta II, supra,* 52 Cal.3d at pp. 563-564, quoting *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 274, 259; CEQA Guidelines, § 15003, subd. (f).) Therefore, this court "can and must . . . scrupulously enforce all legislatively mandated

CEQA requirements." (*Goleta II, supra*, 52 Cal.3d at p. 564.) "When the informational requirements of CEQA are not complied with, an agency has failed to proceed in the manner required by law and has therefore abused its discretion." (*Save Our Peninsula Com. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117-118.)

California courts have noted that a somewhat extensive preliminary environmental review is often necessary to determine whether an exemption applies:

> An agency will often have to conduct a fairly extensive preliminary review to develop substantial evidence that there will be no significant effect on traffic, noise, air quality or water quality for a project that appears to fall under the urban in-fill exemption. Although, there may be some theoretical objection to the performance of such a study at the preliminary review stage, the need to perform a thorough analysis "simply to determine whether an activity is subject to CEQA in the first instance" "is not absurd when we consider the principles that a[n] ...exemption...should be *strictly construed* [citation], and that such strict construction allows CEQA to be interpreted" "in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."

(*Banker's Hill v. City of San Diego* (2006) 139 Cal.App.4th 249, 269, fn. 19, italics added, quoting *East Peninsula Ed. Council v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, 171.) While an agency need not necessarily prepare a formal study in every instance to establish the propriety of an exemption, "the administrative record must disclose substantial evidence of *every element* of the contended exemption." (*CalBeach Advocates v. City of Solana Beach* (2002) 103 Cal.App.4th 529, 536, italics added, quoting *Western Mun. Water Dist. v. Superior Court* (1986) 187 Cal.App.3d 1104, 1113.) The County's record

fails to justify the claimed exemption in light of the project's location in an unincorporated area.

**2. The process followed by the County does not meet the requirements at Public Resources Code section 21177, subdivision (a) to trigger the exhaustion obligation.**

A. Section 21177, subdivision (a), does not apply to this case, because the County provided no formal public comment period, and it did not publish a notice of determination following its approval of the project at a public hearing.

Contrary to Real Parties' arguments, Public Resources Code section 21177 does not preclude the Tomlinsons' assertion of the specific claim that the County failed to properly apply the "infill" exemption because it cannot meet the "within city limits" criterion.

In *Azusa Land Reclamation Co. v. Main San Gabriel Watermaster, supra,* 52 Cal.App.4th 1165, 1210, the court explained that it was "unable to discern a requirement in the section [21177(a)] that a person contest an exemption determination before challenging it in court." The *Azusa* court closely examined the language of section 21177, subdivision (a), and found that its requirements applied *only* where the agency is required to provide a public comment period or to conduct a public hearing prior to issuing a notice of determination. (*Ibid.*) Because CEQA does not require an agency to provide a public comment period on a proposed determination of exemption, and because an agency only files a notice of determination after certifying an environmental impact report (or adopting a negative declaration), the court concluded that section 21177, subdivision (a), had no application to circumstances where the agency makes an exemption determination. (*Ibid.*)

The *Azusa* court further determined that, to the extent there was any exhaustion requirement under the circumstances of that case, the

challengers satisfied their procedural obligations by pursuing the administrative appeal remedies available to them before filing their petition for writ of mandate in superior court. (*Id.* at pp. 1211-1212.) Similarly, here, the Tomlinsons fulfilled their obligation to pursue the administrative remedy available to them under the County's procedures, by timely appealing the County Planning Commission's decision to approve the project to the Board of Supervisors, prior to filing their petition for writ of mandate in Alameda County Superior Court. (AR 2:384-387.)

The *Azusa* decision sets a very low bar for exhaustion of administrative remedies where the agency makes a determination of exemption from CEQA for a project. The case holds that CEQA does not require project opponents to contest an exemption determination in *substantive* detail before the agency acts. But, prior to litigating, challengers may have to follow any other *procedural* administrative remedies afforded them by the agency's own procedures to give the agency's decisionmakers "an opportunity to act and render the litigation unnecessary." (*Id.* at p. 1212.) The Tomlinsons complied with this duty.

Notably, the *Azusa* decision did not touch the question of how specifically project opponents must explain their substantive concerns in any administrative appeal process prior to challenging the project approval in court. As explained above, the Tomlinsons satisfied (and exceeded) any minimum duty they may have had to apprise the Board of Supervisors generally of their numerous concerns about County staff's determination of exemption for the project, handicapped as they were by the staff's misleading and incomplete explanations of the applicability of the infill exemption to the project. Their appeal and subsequent presentation to the Board developed specific factual and legal theories supporting their claim that the project was not truly exempt from CEQA's requirements for

comprehensive environmental review, as well as their concerns about land use planning inconsistencies. (AR 2:384-386; 443-447; 6:1402-1419.)

In holding that the Tomlinsons were not required to have raised the issue of the County's failure to meet the "within city limits" criterion of the claimed infill exemption during the County's administrative appeal process prior to litigating this issue, the Court of Appeal faithfully adhered to the settled law set forth *Azusa*, as well as the plain language of the applicable statutory authority. This Court should reject Real Parties' attempt to expand the scope of the exhaustion requirement to circumstances that are not covered by the express terms of Public Resources Code section 21177, subdivision (a), particularly here in light of the misleading way in which the County staff communicated the exemption's requirements to the public. Section 21177, subdivision (a), provides:

> An action or proceeding shall not be brought pursuant to Section 21167 unless the 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*.

(Italics added.)

The *Azusa* court carefully reviewed this language and strictly applied it in reaching the conclusion that CEQA's exhaustion requirement does not apply to exemption determinations because CEQA does not provide for any public comment period prior to making a final determination that a project qualifies for an exemption; nor is a notice of determination required to be issued after approving a project in reliance upon an exemption. (52 Cal.App.4th at p. 1210.) As in *Azusa*, neither of those circumstances was present in the County's processing of the proposed project in this case. The

application of the infill exemption requires no formal comment period under CEQA (and the County did not provide one); nor did the County file any notice of determination (or exemption) following its approval of the project.

B. Both the CEQA statute and its implementing Guidelines treat notices of determination and notices of exemption as different types of documents with important implications for agency responsibilities and the duties of the public.

Real Parties argue that the Court of Appeal in this case, as well as in *Azusa*, read Section 21177, subdivision (a), incorrectly, asserting that both decisions erroneously assume that an exempt project never receives public hearings. (OB, p. 28.) It is Real Parties' reading of the law, however, that is incorrect. Neither court made a mistake of law; rather, both strictly applied the language of the statute, as they should. The statute refers to a "public hearing on the project before the issuance of the notice of determination." (Pub. Resources Code, § 21177, subd. (a).) The *Azusa* court correctly noted, and the Court of Appeal in this case agreed, that by referring to a notice of determination, as well as to projects for which CEQA requires a public comment period, the statute does not appear to cover exemption decisions, because those types of determinations require neither a public comment period nor the issuance of a "notice of determination." (*Azusa, supra,* 52 Cal.App.4th at p. 1209; Opinion, pp. 16-17.)

Real Parties further argue the Court of Appeal in this case mistakenly distinguished "notices of determination" from "notices of exemption." Real Parties assert these two types of documents are one and the same and should be treated under Public Resources Code section 21177,

subdivision (a), as non-distinct, so as to extend the exhaustion requirement to exemption determinations. (OB, p. 29.) Real Parties' assertion that the statute supports no distinction between the two types of notice is incorrect. In fact, the very same sections of CEQA (Public Resources Code sections 21108 and 21152) that Real Parties claim require treating the two types of notice identically, actually provide a key distinction between the two types of notices. For projects subject to CEQA (i.e., where an initial study and negative declaration or environmental impact report has been prepared for the project), the filing of a notice of determination is mandatory. (Pub. Resources Code, §§ 21108, subd. (a); 21152, subd. (a) [state or local agencies "shall file notice of the approval or determination" with either the Office of Planning and Research or county clerk].) For projects determined not to be subject to CEQA (i.e., exempt), however, the filing of a notice of exemption memorializing the approval is *optional*. (Pub. Resources Code, §§ 21108, subd. (b); 21152, subd. (b) [state or local agencies "may file notice of the approval or determination" with either the Office of Planning and Research or county clerk].) As previously noted, in this case, the County never filed any notice of exemption or "determination" following the Board's approval of the project, underscoring the disparate requirements for exempt projects under the law as compared to projects that are "subject to CEQA."

Real Parties further discount the weight that the CEQA Guidelines are to be afforded in interpreting and applying CEQA. Real Parties criticize the Court of Appeal's reliance on Guidelines Section 15062 in distinguishing between the two types of notice (OB, p. 30); but, in doing so, they disregard the fact that the statute itself also distinguishes the two by providing different statutes of limitations for each type of "determination."

(Compare Pub. Resources Code, § 21167, subdivisions (b) and (c) [30 days] to subdivision (d) [35 days or 180 days, depending on whether the optional notice is filed].)

The Court of Appeal's Opinion expressly cautioned against the expansive reading of the term "notice of determination" in Public Resources Code section 21177, subdivision (a), that Real Parties urge this Court to follow:

> 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)] . . . ." ([Pub. Resources Code,] § 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 35-day statute of limitations]; see also § 21167, subds. (b) & (c).) There is no indication the County filed a notice of exemption in this case.

(Opinion, pp. 16-17, fn. 11, italics added.) The Court of Appeal's Opinion demonstrates that it considered *all* of the applicable and relevant sections of both the statute and the Guidelines in reaching its conclusion to follow

reasoning similar to that applied in the *Azusa* decision. Real Parties would have the Court follow their preference of picking and choosing which statutes and guidelines to follow in interpreting and applying Section 21177, subdivision (a), in order to serve their own policy goal, instead of considering the plain language of all relevant authority. In construing a statute, however, "a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387; Code Civ. Proc., § 1858.) If the meaning is without ambiguity, doubt, or uncertainty, then the plain language controls. (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239.) Real Parties' preferred interpretation would ignore those portions of Section 21177 that indicate there must be a comment period *required by CEQA* or a *notice of determination* issued after the public hearing in order to trigger the exhaustion requirement. Real Parties' interpretation, therefore, conflicts with accepted principles of statutory interpretation.

As noted by the Court of Appeal, the CEQA Guidelines also make a clear distinction between notices of determination and notices of exemption. (Compare CEQA Guidelines, §§ 15062 and 15094.) According to this Court's precedent, "[a]t a minimum . . . courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." (*Laurel Heights I, supra,* 47 Cal.3d at p. 391, fn. 2.) Here, the fact that the CEQA Guidelines further elaborate upon the important distinctions between the mandatory notice of determination for projects subject to CEQA and the optional notice of exemption for projects

determined not to be subject to CEQA (as well as the different consequences that flow from the filing of such notices), is highly relevant in determining the meaning of Section 21177, subdivision (a). A statute should be construed so as to harmonize, if possible, with other laws relating to the same subject. (*Isobe v. Unemployment Ins. Appeals Bd.* (1974) 12 Cal.3d 584, 590-591.)

Here, as has been noted, the County provided no formal comment period, presumably because none is authorized or required by CEQA for an exemption. Nor did the County, following its approval of the project, ever file any notice memorializing its conclusion that the project was exempt from CEQA. Therefore, the Court of Appeal reached the correct result in concluding that the Tomlinsons were not subject to the exhaustion requirement of Public Resources Code section 21177, subdivision (a). The circumstances set forth therein simply were not present here.

Subsequent decisions dealing with other instances in which neither a negative declaration nor an environmental impact report was prepared follow the reasoning of *Azusa*, supporting a conclusion that the fundamental factor to consider in determining whether substantive exhaustion is required is the existence or extent of any public review period and a public hearing prior to the issuance of a notice of determination. (*Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 702 [where addendum prepared and no public review process provided prior to approval hearing, exhaustion requirement does not apply]; *Concerned McCloud Citizens v. McCloud Community Services Dist.* (2007) 147 Cal.App.4th 181, 189 [Section 21177 inapplicable where there was no public comment or review period and no public hearing prior to an issuance of a notice of determination for the approval of an

agreement].) These decisions, unlike Real Parties' preferred interpretation, give meaning and effect to every word of Section 21177, subdivision (a), as the courts are required to do.

Thus, it appears clear that where there is no formal public review period or public hearing preceding the filing of a notice of determination, an opposing party need only exhaust any available procedural administrative remedies provided by the agency. The Tomlinsons did just that in this case, to the best extent of their abilities, given the misleading information they were provided by the County and the fact that they had no assistance of legal counsel at the time. To hold that petitioners must provide the same kind of substantive detail in pursuing any procedural remedies to challenge an exemption determination that they would have to follow in challenging a negative declaration or environmental impact report, where a much more robust public review process must be provided, would contravene the obligations of CEQA Guidelines section 15020. That section places on each public agency the burden of its own compliance with CEQA and the Guidelines and warns against a practice of knowingly publishing deficient documents while hoping that public comments will correct any defects.

### 3. The *Hines* decision fails to carefully consider the language of Public Resources Code section 21177, subdivision (a), in ruling that the exhaustion requirement applies to an exemption determination.

Real Parties argue that the recent *Hines* decision, from a different division of the same appellate district, reaching the conclusion that exhaustion is required for challengers of an exemption determination, was correctly decided, given the extent of the public participation opportunities afforded to the petitioners in that case. (OB, pp. 36-38, citing *Hines v.*

*California Coastal Comm.* (2010) 186 Cal.App.4th 830, 836-839.) As the Court of Appeal in this case rightly noted, however, the *Hines* court did not apply a very rigorous reading of Public Resources Code section 21177, subdivision (a). (Opinion, pp. 15-16.) Instead, the *Hines* court applied a subjective, "good enough" standard to the requirements of section 21177, subdivision (a), apparently guided by the belief that as long as there was some kind of publicly noticed hearing before an exempted project approval, the exhaustion requirement should be triggered. (*Hines, supra,* 186 Cal.App.4th at pp. 853-855.) Unfortunately, this reasoning ignores the express language of the statute requiring there to have been a "public comment period provided by [CEQA]" or a public hearing "before a notice of determination is issued." (Pub. Resources Code, § 21177, subd. (a).) The *Hines* opinion acknowledges the language of Section 21177, subdivision (a), and the relevant *Azusa* holding in passing, but does not demonstrate the same rigorous fealty to the *entirety* of the statutory provision that the *Azusa* court and the Court of Appeal in this case did in reaching their conclusions. Indeed, it is not apparent from the *Hines* decision whether the agency in that case even issued a notice of exemption following the approval of the project, just as the County did not do here. The *Hines* decision gives no indication the court ever considered the relevance of that step or the under Section 21177, subdivision (a), for there to have been a formal public comment period and their implications for the exhaustion requirement.

Perhaps more importantly, the facts in *Hines* are distinguishable in significant ways from the facts of this case. In *Hines,* the court appears to have been troubled primarily by the fact that the petitioners in that case never asserted *any* issues relating to the agency's compliance with CEQA, but raised that entirely new claim for the first time only in litigation. Those

facts stand in stark contrast to those evident in the record in this case, which demonstrate that the Tomlinsons grappled at length and in substantive detail with various issues pertaining to whether the County could rightfully claim the infill exemption for the proposed project. As discussed below, it is telling that the one issue the Tomlinsons did not raise is the very one that the County staff mischaracterized or hid throughout the entire administrative process, which (not coincidentally) was the one criterion that indisputably disqualified the project from using the claimed exemption.

If, as a *policy* matter, there appears to be a gap in the exhaustion statute through which exemption determinations fall due to the optional nature of notices of exemption and the use of the specific term "notice of determination" in Section 21177, that is a correction properly left to the Legislature, not the courts.[6] A court has "no general power to rewrite a statute so as to make it conform to some underlying 'policy.' As a rule there can be no intent in a statute not expressed in its words; the intention of the Legislature must be determined from the language of the statute." (*In re San Diego Commerce* (1995) 40 Cal.App.4th 1229, 1235.) Here, the Legislature's invocation of either a *mandatory* public comment period or a public hearing *followed by the issuance of a notice of determination* must not be ignored to instead serve a broader policy encouraging exhaustion.

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[6]/ Similarly, if agencies believe the infill exemption should be extended to cover "urbanized" unincorporated areas, as the County apparently did here, they should direct their views to the California Natural Resources Agency, which is in charge of updating the CEQA Guidelines. (Pub. Resources Code, § 21083, subd. (c).)

## 4. CEQA provides for a low threshold for achieving adequate exhaustion where no formal public comment period was provided or full and accurate information is not disclosed.

### A. The courts do not require petitioners, unrepresented by counsel, to explain black-letter requirements to exhaust their administrative remedies.

Contrary to Real Parties' preferred interpretation, the exhaustion requirement is not so strict that citizens, unrepresented by counsel, must explain black-letter law to an agency that is deliberately ignoring that law. At the trial court, the County and Real Parties argued, and the trial judge agreed, that the Tomlinsons did not adequately exhaust their administrative remedies in the substantive sense, because they did not alert the County to their specific claim that the project did not lie "within city limits". This position applies far too strict a standard to citizens unrepresented by legal counsel at the time of the administrative proceedings, particularly proceedings involving such a shallow and misleading environmental review such as occurred here.

As the Court of Appeal noted in its Opinion, "[a]lthough the exhaustion requirement has been described as 'jurisdictional' [citation], a failure to exhaust does not deprive a court of fundamental subject matter jurisdiction. [citation]" (Opinion, p. 11.) Rather, "[t]he cases that describe the requirement as 'jurisdictional' simply stand for the unremarkable proposition that the court does not have the discretion to apply the doctrine in cases where it applies." (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster, supra,* 52 Cal.App.4th 1165, 1216.) An agency may waive the defense by conceding that a party has exhausted its available administrative remedies. (*Ibid.,* citing *Green v. City of Oceanside*

(1987) 194 Cal.App.3d 212, 223-224.) Here, it is undisputed that the Tomlinsons followed the County's available procedural remedies by timely appealing to the Board of Supervisors the decision of the Planning Commission with which they disagreed, and by communicating the several grounds on which they disputed the County's claim that the project was exempt from CEQA.

The case cited by Real Parties for the point that the exhaustion requirement is to be rigidly applied, like the statute of limitations, *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, is inapplicable to this case. (OB, p. 19.) That case held a suit was barred for failure of the petitioners therein to file it within the 35-day statute of limitations provided in Public Resources Code section 21167, and the statute could not be waived just because petitioners argued the underlying project approval was defective. (*Id.* at p. 504.) Unlike the black-and-white statute of limitations deadline in that case, the precise contours of the exhaustion requirement codified in Public Resources Code section 21177 are not so clear. The degree of specificity required to satisfy the exhaustion requirement depends on a number of factors, including whether the project opponents were represented by counsel during the administrative proceedings, but most importantly, should be commensurate with the quality and amount of information the public is provided by the agency in the first instance.

The implications of imposing an onus on the citizenry to inform the County specifically how to comply with unambiguous, mandatory legal requirements are profoundly disturbing, especially as the County staff, for their part, largely skirted the public's questions about the law and worse yet, failed in the limited responses they did provide ever to disclose all of

the criteria relevant to the exemption. The omitted criterion, after all, was the one that plainly showed that the exemption simply did not apply. Taken to its logical end in light of these facts, Real Parties' interpretation of the exhaustion doctrine would put CEQA and other laws aimed at encouraging public participation on their heads. This position also ignores the well-established principle that an agency "has the burden to demonstrate substantial evidence that the [project] fell within the exempt category of projects." (*Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 475, citing *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115.) The County did not do that here; indeed, because it cannot transform itself into a city and thereby comply with the "within city limits" criterion for any project subject to its land use jurisdiction, which extends only to unincorporated areas.

B. Courts require less specificity in the administrative process because petitioners are usually unrepresented by counsel.

It has been firmly established that petitioners not represented by counsel are subject to a relatively low threshold in order to satisfy the exhaustion requirement. The courts have recognized it is unreasonable to expect citizens to know and articulate precise legal requirements during an administrative process:

> . . . less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding. This is 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.' (Note (1964) Hastings L.J. 369, 371.) It is no hardship, however, to require a layman to make known what facts are contested. (*Kirby v.*

*Alcoholic Bev. etc. Appeals Bd.* (1970) 8 Cal.App.3d 1009, 1020 [87 Cal.Rptr. 908].).

(*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 163; see also *East Peninsula Ed. Council, Inc., supra,* 210 Cal.App.3d at p. 176 [comments were sufficient to alert agency to the fact that its method of analysis was faulty and should be expanded; the fact that the comments did not refer to specific statutory language was not dispositive.].)

More recently, in *Woodward Park Homeowners Assn. v. City of Fresno* (2007) 150 Cal.App.4th 683 (*Woodward Park*), the court reiterated this low bar for exhaustion in a case such as this:

> The petitioner itself need only have raised *some* objection before the agency (§ 21177, subd. (b)); if it has, it may then litigate any issue. . . . Even so, "less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding," since citizens are not expected to bring legal expertise to the administrative proceeding.

(*Id.* at pp. 711- 712, citing *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo, supra,* 172 Cal.App.3d at p. 163.) The *Woodward Park* court found comment letters supplied by the petitioners challenging the baseline used for the environmental analysis also satisfied the exhaustion standard for later-pled claims regarding the "no project" alternative analyzed in the EIR, because the underlying factual content was similar enough between the two claims. (150 Cal.App.4th at pp. 716-717.) Most importantly, the *Woodward Park* court found the petitioners had exhausted their administrative remedies with respect to their challenges on another issue, regarding the statement of overriding considerations adopted by the agency, even though they had not raised this specific issue during the administrative hearings. One of the main reasons for this holding was the

fact that the city had not provided the relevant documentation; *thus, the court concluded that the petitioners had no way of raising the relevant issues*. The court explained further that the petitioners had raised sufficient factual concerns to put the agency on notice of the legal claims, noting that there was no evidence that the statement of overriding considerations had been made publicly available prior to the hearing at which it was adopted, and therefore it was uncertain whether the exhaustion requirement should even apply to such documents:

> Assuming it does, *where the agency's own action severely limited the public's opportunity to review and analyze the document, it would be antithetical to the purposes of CEQA to require the public to articulate precise factual and legal objections to the statement as a precondition to litigating those issues.*

(*Id.* at p. 720, italics added.) The court went on to say that "[a] more general enunciation of issues related to the statement, sufficient to put the agency on notice that the document may not satisfy legal requirements, is adequate to exhaust administrative remedies." (*Ibid.*) In light of these circumstances, the objections regarding the statement of overriding considerations raised at the city council meeting were deemed sufficient to exhaust the petitioners' remedies with respect to later-pled, more specific issues regarding other flaws in the agency's CEQA compliance. (*Ibid.*)

Here, similarly, the Tomlinsons raised numerous issues pertaining to the applicability of the exemption to the proposed project and the County's "within an established urban area" statements, which should have prompted the County to reevaluate and accurately document whether the project truly met all of the criteria of the infill exemption. As in *Woodward Park*, there is no evidence the County ever disclosed the fact that the city limits

criterion was also one of the mandatory requirements for the exemption, giving the Tomlinsons nothing to respond to on that issue. And, to the extent that the County intended the phrase "established urban area" to substitute for the "within city limits" criterion, the record shows the Tomlinsons and one of the Supervisors did refute this characterization, noting the Specific Plan depicts the area as semi-rural. (AR 1:181, 208; 6:1407.)

Similarly, the court in *Mani Bros. Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1395-1396, excused petitioners from setting forth specific objections where the city did not provide any formal comment period or notice that it was preparing an addendum to a previous EIR. In that case, the petitioners were deemed to have satisfied their exhaustion requirements where they "repeatedly voiced their objections to the 2005 Addendum at various relevant meetings," "raised their concerns about the use of an addendum" at those meetings, and "raised their concerns regarding the project's impacts on air quality, public services, traffic, congestion, parking, aesthetics, and shade and shadow." (*Id.* at p. 1395.) The Tomlinsons did the same here, despite there being no formal public comment period on the County's determination that the project was exempt from CEQA. They submitted detailed letters, spoke at public hearings, and engaged County staff in regular dialogue, seeking to better understand the County's basis for finding the project to be exempt from CEQA and questioning the County's conclusion that the project would have no significant impacts. (See, e.g., AR 2:331-348, 349-351, 388-390, 443-447.)

The legal standard employed in *Citizens Association for Sensible Development of Bishop Area, Woodward Park,* and *Mani Brothers*

embraces the idea that the level of substantive detail required by lay commenters during an administrative process is commensurate with the level of environmental review and agency explanation presented to the public. The Tomlinsons here requested documentation of the County's determination that the claimed CEQA exemption applied to the project, but received in response (on the day of the Board hearing) an email from County staff that only reiterated the same spotty analysis and conclusions that had been provided in the minutes and staff reports from the previous hearings. (AR 2:478.) The County never provided the Tomlinsons, the public, or its own decision-makers with a complete analysis demonstrating that the County had carefully considered whether *each* of the criteria of the claimed exemption applied to the project. Most importantly, in every instance that County staff stated why the exemption was applicable, they failed to recite the full text and criteria of the exemption, notably omitting the one crucial and indisputably disqualifying requirement limiting the application of the exemption to projects located "within city limits." (AR 1:35, 49, 62-63, 82, 121-122; 2:325.) This consistent omission led the Tomlinsons reasonably to believe they had been provided with the entire list of applicable criteria and thus, they were not prompted to investigate for themselves whether any more was required.

C. Misleading information excuses a petitioner from exhausting.

The circumstances of this case are akin to those of *McQueen v. Bd. of Directors* (1988) 202 Cal.App.3d 1136, in which the petitioner was excused from raising objections at the agency hearings because the court determined that a misleading notice was equivalent to no notice at all. A later decision limited the *McQueen* holding in a way that lends further support to the Tomlinsons' position in this case. In *Temecula Band of*

*Luiseno Mission Indians v. Rancho Cal. Water Dist.* (1996) 43 Cal.App.4th 425, 434, the court clarified that a misleading notice is tantamount to no notice "only to the extent that the notice's deficiencies prevented the petitioner from invoking administrative remedies." In that case, the court did not excuse the petitioner's failure to exhaust its administrative remedies because the petitioner attended the project hearing, at which the alleged missing information was provided. Here, the information provided by the County was misleading in that it was incomplete, *and it was never corrected.* Thus, the Tomlinsons were never alerted to the critical piece of information that would have prompted them to raise during the administrative proceedings the specific claim regarding the geographic limitation of the exemption.

Nonetheless, they did thoroughly exhaust their remedies regarding the CEQA exemption issue to the extent they could, given the information they were provided, surpassing even a more rigorous exhaustion standard than applies to these circumstances. They raised concerns about the project's characterization as "infill" under CEQA in numerous letters in the context of neighborhood consistency. (See e.g., AR 1:139 ["infill projects . . . are supposed to fit into the areas that they're impacting"], 182 ["if all infill projects are in fact exempt, . . . we're really concerned that the impact to the area is not being considered"]; 2:351 [expressing confusion about the application of the infill exemption, given the intent of the Fairview Plan to require review of cumulative effects].) Even just a few days before the Board of Supervisors' hearing on their appeal, they continued to ask questions about the County's CEQA compliance:

> 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 and if you could forward the corresponding document (Appendix G, Environment Checklist etc.) that would be most appreciated.

(AR 2:478.) In response to this inquiry, County staff provided a brief explanation of why they believed the exemption applied, but failed again to precisely state the exemption's requirements, instead summarily stating (in terms that seem intentionally intended to avoid using the words "within city limits"):

> Staff has evaluated the project in terms of environmental impact per CEQA. Some environmental factors, such as impacts on agricultural or mineral resources, would not be impacted because of the location of the project. Other impacts, such as air quality, noise and water quality associated with the construction of the project, would be similar to any other construction project and would be addressed by standard conditions. The project *would be located in an established urban area* and is consistent with the applicable General Plan designation for the area, so impacts on public services, utilities, hazards, recreation, population, land use and traffic would not be significant. In terms of traffic, comments from the Traffic Division indicated that no significant traffic impacts are anticipated as a result of this project. Aesthetic impacts are generally considered from public views; since this property is not visible from a public view point, such as Don Castro Recreation Area, and the visual character of the single-family homes would be consistent with the development of the surrounding area, aesthetic impacts would not be considered significant. Biological resources (including a tree analysis), cultural resources, geological and soils issues have been analyzed by experts. While some conditions are recommended to ensure that possible impacts are avoided, the reports indicated that

> there were no significant impacts expected to occur as a result of the project.
>
> As a result of this evaluation, staff has determined that, since this development is consistent with the applicable General Plan designations and existing R-1 Zoning District standards, *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 all required utilities and public services, that this project is Categorically Exempt from the requirements of the California Environmental Quality Act per Section 15332, Infill Development Projects, and that further environmental analysis is not necessary.

(AR 2:477, italics added.) This deceptively full response merely repeats verbatim the previous explanations included in earlier staff reports and omits any mention of the crucial, second half of CEQA Guidelines Section 15332, subdivision (b), the criterion requiring the development to be located "within city limits." (See e.g., AR 1:62.) This omission cannot have been an accident. The Tomlinsons nonetheless reiterated their skepticism of the applicability of the infill exemption in their testimony at the hearing on their appeal before the Board of Supervisors. (AR 1:182.)

Beyond the Tomlinsons' specific questioning of the exemption's applicability, the record is littered with further examples of their requests for further information from the County regarding the environmental review of the project. (AR 2:331-336 ["we are particularly interested in the findings of (what we've read as required in the Fairview Specific Plan) an environmental review"]; 2:339 [noting that an environmental assessment is critical, citing specific concerns with traffic on certain streets]; 2:384-386 [voicing concern that if the project is exempt from environmental analysis

of the cumulative effects of development in the area, the original intent of the Fairview Plan would be circumvented]; 2:349-351 [noting safety-related issues that currently exist in the Project area, and their opinion that an environmental review is necessary per the Fairview Specific Plan to understand the impact of this development's cumulative effects]; 2:443-446 [wondering, "if the County does not do environmental analysis for any infill developments, how will it identify the impacts of developments to the Fairview area?"].)

In addition to the many requests for environmental review and concerns regarding unaddressed cumulative impacts (cited above), the Tomlinsons also repeatedly raised concerns regarding drainage and scenic impacts. (See, e.g., AR 1:78, 137; 2:455.) They also communicated concerns regarding wildlife in a memorandum to the Board of Supervisors (AR 2:445), an April 4, 2008, email to staff (AR 2:478), and their presentation to the Board (AR 6:1418). (See further, AR 1:72-73 [neighbors voicing concerns regarding loss of viewshed, compatibility with neighborhood, parking and traffic issues on Bayview at the July 2007 hearing]; 2:323 [email to staff requesting information regarding impacts to transportation, traffic, water, electricity, and sewage because of the significant growth in Fairview area]; AR 2:332, 334 [letter and email to staff pointing out some of the "Smart Growth" goals associated with infill developments in the area from the General Plan of Hayward, including concerns with drainage of the Project site]; 2:336-339 [letter stating, "Fairview plan specifically states that during the evaluation process which shall address traffic conditions, parking, public services, utilities, building height, natural features such as creeks, and the retention contiguous open space. Additionally densities on any site shall be determined by such

factors as site conditions and environmental constraints (topography, trees, views, etc.) traffic access ... and compatibility with existing land use patterns and protection of the integrity of the surrounding neighborhood," "New development that would result in the capacity of downstream drainage facilities being exceeded is not to be approved unless those downstream facilities are upgraded."].)

Simply put, the Tomlinsons plainly (and repeatedly) questioned whether an exemption from CEQA was appropriate here. As explained by the courts in *Woodward Park, Mani Bros., McQueen* and *Temecula Band*, that effort is sufficient to exhaust based on the County's omission of critical information.

D. The cases cited by Real Parties are distinguishable.

As the foregoing references make clear, the circumstances and facts of this case are distinguishable from those in the line of cases cited by Real Parties as holding that the petitioners therein did not sufficiently exhaust their administrative remedies, therefore barring their claims.

In *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198, one of the early cases dealing with the issue of exhaustion of administrative remedies under CEQA, the court explained that:

> [t]he 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. The doctrine was not satisfied here by a relatively few bland and general references to environmental matters. The city was entitled to consider any objection to proceeding by negative declaration in the first instance, if there was one. Mere objections to the *project*, as opposed to the procedure, are not sufficient to alert an agency to an

> objection based on CEQA. Petitioners, having failed to raise their CEQA claims at the administrative level, cannot air them for the first time in the courts.

The court in that case noted that nearly any comments objecting to a project would tend to implicate, however generally, environmental concerns; thus, more specificity is required to put agencies on fair notice of potential violations of CEQA. (*Ibid.*) Here, the Tomlinsons' comments were far from "bland and general"; rather, they provided the County with sufficiently specific comments and concerns, noted above, regarding traffic, drainage, cumulative, and other impacts, that should have prompted the County to reconsider whether the project truly was exempt from environmental review. And they specifically disputed the County's basis for relying on the exemption – that it was "in an urban area." (AR 1:181; 6:1407.) The record does not show the County ever reconsidered this conclusion in light of these many questions.

More recently, in *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 909-911, the court held the petitioners' claim regarding the agency's failure to comply with a key procedural notice provision was barred by the failure of any speaker or commenter to raise the issue during the comment period on the mitigated negative declaration at issue or during public hearings on the project. In contrast to those found in this case, the facts described in the *Porterville Citizens* decision do not indicate that the agency failed to provide sufficient or accurate public information to put interested parties on notice of the potential relevance of the procedural provision at issue. Therefore, the court did not excuse the petitioners' failure to raise the issue during the administrative process. Here, however, the inexplicably curtailed

description of exemption criteria the County provided in response to repeated questions about the applicability of the claimed exemption understandably led the Tomlinsons to assume there *were* no other potentially relevant criteria the County should consider in determining whether the exemption was applicable. Thus, the holding in *Porterville Citizens* is not dispositive or instructive in this case.

Real Parties further assert that in *Stockton Citizens for Sensible Planning v. City of Stockton, supra,* 48 Cal.4th at p. 514, the Court held that a public agency is not required to provide a full recitation of the language of the exemption. (OB, p. 41.) Real Parties do not fairly characterize the facts and holding of that case. In *Stockton Citizens*, the Court dealt with the petitioners' contention that the *notice of exemption* filed after project approval was defective and misleading. The Court did not address the issue of an agency's duty *during the administrative process* to provide reasonably fair and accurate information regarding a project's qualification for a claimed exemption. The Court was only addressing whether the statute of limitations was triggered by the filing of the notice of exemption. Furthermore, the case does not support the proposition that defective notice can be excused; rather, the Court appeared to believe that the notice itself was not defective and therefore determined it was not necessary to review the merits of the exemption because the statute of limitations had passed. That decision is separate from the issue of exhaustion raised here. In this case, the Tomlinsons do not challenge the content of a notice of exemption, because none was ever filed, and the statute of limitations is not at issue. Rather, the record is clear that the County failed throughout the administrative process to demonstrate with substantial evidence that the

project met *every* mandatory criterion of the infill exemption, as the law requires. (*Magan v. County of Kings, supra,* 105 Cal.App.4th at p. 475.)

To determine that the Tomlinsons failed to adequately exhaust their remedies with respect to the crucial claim that the project does not lie "within city limits" would be to approve of and reward the County for failing to make *any* good-faith effort to comply with CEQA in the face of significant and vocal public concerns. The County artfully tip-toed around the issue by discussing a few environmental issues to some extent, but did so in a cursory and conclusory manner, and not in the context of the precise language of the exemption. (AR 1:40, 59-62, 84-88 [County staff reports and testimony to the Board of Supervisors].) In spite of numerous questions as to the applicability of the infill exemption and the need to consider whether the exceptions to a categorical exemption potentially applied here, the County omitted critical information from the start of the process and continued that deception through the rest of the process, thereby failing to inform the public of all of the requirements needing to be met. Nowhere in the record did the County staff ever disclose to the public or the County's decision-makers the fact that Section 15332, subdivision (b), requires not just the existence of an "urban area" but a location within city boundaries, not unincorporated territory in a county. Thus, the Tomlinsons, and apparently also the County's own Board of Supervisors (as well as, so they claim, the Real Parties) were not fairly alerted to the fact that an additional criterion was required to be met, and instead reasonably trusted that the information they were provided was complete. In retrospect, perhaps they should have been cynical and distrustful. As the Court of Appeal rightly noted, however, it is not unreasonable to charge an agency with the implicit knowledge of such a basic, fundamental fact as what kind of

government entity it is (here, a county), without needing to be reminded of that fact by its own citizenry. (Opinion, p. 13.)

### 5. The Court of Appeal correctly determined the County was not deprived of an opportunity to consider the location criterion of the infill exemption.

In reaching the conclusion that the exhaustion requirement did not extend to the proceedings challenged here, the Court of Appeal acknowledged the underlying purpose of the exhaustion requirement – to afford agencies the opportunity to respond to factual issues and legal theories within its area of expertise before being reviewed by a court – but it distinguished the particular issue here from other concerns. The court agreed with the Tomlinsons' point that the location restriction of the infill exemption and the undisputed fact that the project does not lie "within city limits" is not an issue that implicates the County's particular expertise and "does not require an evidentiary determination." (Opinion, pp. 13-14.) The court further noted that "[t]he County conceded at oral argument that it had not been deprived of an opportunity to offer evidence of this fact." (*Ibid.*) Thus, even if the Court of Appeal had reached a different conclusion regarding the reasoning of the *Azusa* decision and its interpretation of Public Resources Code section 21177, subdivision (a), this portion of the decision indicates that the Court of Appeal would have reached the same end result.

It begs disbelief that a county should have to be told, by its own citizens, that it is not a city and therefore that a project located in an unincorporated area does not qualify for an exemption that by its express terms only applies to projects "within city limits." But that is Real Parties' contention in claiming that if only the Tomlinsons had detected this issue early enough, the County "would have had the opportunity to *consider*

whether the categorical exemption was correctly applied." (OB, p. 22, italics added.) What could there have been to "consider?"

## CONCLUSION

The Tomlinsons respectfully request that this Court uphold the Court of Appeal's result and determine that, based on the language of the exhaustion statute itself, and circumstances of the case here, they were not required to have raised the fact that the County could not comply with the "within city limits" criterion of the infill exemption.

Public Resources Code section 21177 requires that for an exhaustion requirement to arise, there must have been either a public comment period provided by CEQA or a public hearing followed by the issuance of a notice of determination. Neither of those requirements was met here and the plain language of the statute cannot be ignored to promote a policy favoring exhaustion under different circumstances.

Furthermore, because the one clearly disqualifying criterion exemption was not fairly disclosed to the public by the County in the first instance (or ever), it imposes too high a hurdle on citizens to insist that the Tomlinsons should have been required to first suspect and then discover, on their own without the assistance of counsel, that the County had omitted the one criterion that would undeniably banned reliance on the exemption and to bring that discovery to the County's attention. Doing so would improperly shift the informational burden away from the agency in the first instance, where it belongs.

Real Parties and their supporters may argue in reply and amicus briefs that upholding the appellate court's result in this case will negate the purpose or duty of the public to comply with local agency appeal procedures and lead to petitioners sitting idly by while agencies approve

projects and then playing "gotcha" in the courts with impunity. That is would be an overly and unnecessarily broad characterization of the appellate court's result, and one that could be easily avoided in this Court's ultimate decision by distinguishing between petitioners' duties to follow the appeal *procedures* offered to them by local agencies and any obligation to provide *substantive* details regarding the grounds for disagreement with a proposed agency determination. As the line of cases dealing with exhaustion make clear, the latter obligation is a minimal one, and is ultimately commensurate with the level of environmental review provided for public consumption and the lay public's abilities to formulate factual and legal arguments without the assistance of legal counsel.

To require sophisticated legal sleuthing by public as is asserted by Real Parties to have been required here in order to successfully challenge an unquestionably invalid exemption determination could encourage unscrupulous agencies to mislead the public and even decision-makers by omitting key information in the hopes of avoiding a more expensive or time-consuming environmental review. Such result is clearly not intended under CEQA and should not be allowed to occur here. The County should not profit from its own wrong.

Dated: March 21, 2011

REMY, THOMAS, MOOSE & MANLEY, LLP

By: Sabrina Teller

SABRINA V. TELLER
Attorneys for Plaintiffs and Appellants FRED and D'ARCY TOMLINSON

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.520(c)(1)

I, Sabrina V. Teller, declare as follows:

1. I am an attorney at law duly licensed to practice before the courts of the State of California, and am one of the attorneys for Real Parties in Interest in this action.

2. California Rules of Court, rule 8.520(c)(1), states that an answering brief on the merits produced on a computer must not exceed 14,000 words, including footnotes.

3. This Answer Brief on the Merits ("Answer Brief") was produced on a computer using a word processing program. This Answer Brief consists of 12,283 words, including footnotes but excluding the caption page, tables and this certificate, as counted by the word processing program.

Dated: March 21, 2011

REMY, THOMAS, MOOSE & MANLEY, LLP

By: Sabrina Teller
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FRED and D'ARCY TOMLINSON

*Fred and D'Arcy Tomlinson. v.*
*Alameda County, By and Through the Board of Supervisors*
Supreme Court Case No. S188161
(First District Court of Appeal, Division 5, Case No. A125471)

## PROOF OF SERVICE

I am a citizen of the United States, employed in the City and County of Sacramento. My business address is 455 Capitol Mall, Suite 210, Sacramento, California 95814. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with Remy, Thomas, Moose and Manley, LLP's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a U.S. mailbox after the close of each day's business.

On March 21, 2011, I served the following:

**ANSWER BRIEF ON THE MERITS**
**BY PLAINTIFFS AND APPELLANTS**
**FRED AND D'ARCY TOMLINSON**

☑ On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as follows; or

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Rachel N. Jackson

*Fred and D'Arcy Tomlinson. v.*
*Alameda County, By and Through the Board of Supervisors*
Supreme Court Case No. S188161
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