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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FRED TOMLINSON et al.,
Plaintiffs and Appellants,
v.
COUNTY OF ALAMEDA et al.,
Defendants and Respondents;

Y.T. WONG et al.,
Real Parties in Interest and
Respondents.

A125471

(Alameda County
Super. Ct. No. RG08396845)

In 2008, respondent County of Alameda (County) approved a subdivision development proposed by real parties in interest, Y.T. Wong and SMI Construction, Inc. (Developer), finding it categorically exempt from review under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.; Cal. Code Regs., tit. 14, § 15332).¹ Appellants Fred and D’Arcy Tomlinson (the Tomlinsons)

¹ All further statutory citations are to the Public Resources Code unless otherwise specified. We refer to the CEQA regulations issued by the State Resources Agency (Cal. Code Regs., tit. 14, § 15000 et seq.), as “the Guidelines.” (*San Lorenzo Valley Community Advocates For Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1372 (*San Lorenzo*).

unsuccessfully challenged the County's decision in a petition for a writ of administrative mandate (Code Civ. Proc., § 1094.5).

We consider this case again in light of *Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281 (*Tomlinson*), in which the California Supreme Court considered whether the exhaustion of administrative remedies requirement set forth in section 21177 applies to a public agency's decision that a proposed project is categorically exempt from CEQA compliance. Our high court held that it did, "as long as the public agency gives notice of the ground for its exemption determination, and that determination is preceded by public hearings at which members of the public had the opportunity to raise any concerns or objections to the proposed project." (*Tomlinson, supra*, 54 Cal.4th at pp. 281, 291.) The court remanded the matter to this court to consider the Tomlinsons' contentions that their objections at the public hearings were sufficient to satisfy the exhaustion requirement and that the public agency misled them. (*Id.* at p. 291.)

We first consider whether the objections raised at the agency level were sufficient to satisfy section 21177's exhaustion requirement as to the Tomlinsons' argument that the proposed subdivision would not occur "within city limits" as the exemption requires. (Guidelines, § 15332, subd. (b).) Concluding they were not and that section 21177 therefore bars this argument on appeal, we proceed to the Tomlinsons' remaining challenges to the County's decision. Because we conclude the County's failure to consider whether the cumulative impact of "successive projects of the same type in the same place, over time is significant" (Guidelines, § 15300.2, subd. (b)), constitutes a prejudicial abuse of discretion, we reverse the trial court's order. The matter is remanded to the trial court with instructions to issue a writ of mandate directing the County to set aside its decision and to comply with the requirements of CEQA when reconsidering approval of the proposed subdivision, specifically, by considering whether the cumulative impact exception (Guidelines, § 15300.2, subd. (b)) precludes reliance on the categorical exemption set forth in section 15332 of the Guidelines.

FACTUAL AND PROCEDURAL BACKGROUND

The Proposed Subdivision

In December 2006, Developer filed an application with the Alameda County Planning Department (Planning Department) to merge two parcels on Bayview Avenue into one 1.89 acre parcel, subdivide it into 12 lots, and develop each with a single-family home (the proposed subdivision).² The proposed subdivision site is located in the Fairview district of unincorporated Alameda County, a residential area primarily consisting of single-family homes. The proposed subdivision is subject to two long-term development plans: the General Plan for the Central Metropolitan, Eden, and Washington Planning Units of Alameda County, and the Fairview Area Specific Plan. The property is classified for zoning purposes as R-1 residential single-family. Three older structures are situated on the site, but the rear of the property is undeveloped. There are 34 trees on or adjacent to the site. As part of the proposed subdivision, all of the structures would be demolished, and most of the trees would be removed.

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

Preliminary Plan Review

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

On July 2, 2007, the Planning Commission held a preliminary plan review for the proposed subdivision. The staff report concluded the proposed subdivision was exempt

² The Alameda County Planning Commission (Planning Commission) reviews and acts upon development applications. The Planning Department assists and advises the Planning Commission.

from CEQA review under the in-fill development exemption (Guidelines, § 15332) because it “would occur in an established urban area, would not significantly impact traffic, noise, air or water quality, and could be served by required utilities and public services.” Planning Department staff noted that the plans did not meet zoning requirements for guest parking, and one lot violated the setback requirements of a zoning ordinance. Planning Department staff believed a reduction in the number of lots might be required to resolve these issues.

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

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

On November 19, 2007, the County sent out another referral regarding the proposed subdivision, noting that it had been modified to address comments from various agencies and the public. The referral gave notice that the Planning Commission would consider the proposed subdivision again on December 17, 2007. This referral also noted that the proposed subdivision had been determined exempt from CEQA under section 15332, as it “would occur in an established urban area, [would] not significantly impact traffic, noise, air or water quality, and [could] be served by required utilities and public services.”

On November 30, 2007, the Tomlinsons sent County staff a letter signed by more than 80 local residents, expressing concerns about additional traffic congestion and related safety issues, increased taxes and utility costs, reduced property values, and

drainage problems. Noting that other single-family homes less than a quarter mile away had been on the market for a year, the letter expressed concern that the houses in the proposed subdivision could become rentals with multi-family occupancy if they did not sell, significantly increasing parking overflow and traffic in the area. Residents requested environmental review to evaluate whether the proposed subdivision was consistent with the goals of the general plan.

A few days later, the Tomlinsons pointed out the issues to be considered in reviewing new in-fill projects under the Fairview Area Specific Plan, including residential density, traffic, parking, public services and utilities, building height, natural features such as mature vegetation and creeks, and retention of existing areas of contiguous open space. The Tomlinsons were “particularly interested in the findings of (what we’ve read as required in the . . . Specific Plan) an environmental review.”

Approval by the Planning Commission

The Planning Commission considered the proposed subdivision on December 17, 2007. Developer had modified the plans to reduce the density of the site to 11 lots. Ten of the lots ranged from 5,000 to 5,186 square feet, and one lot had an area of 7,170 square feet. Each lot would be developed with a two-story, 2900-square foot home.

Planning Department staff recommended that the Planning Commission find the proposed subdivision categorically exempt from CEQA under section 15332. The staff report explained: “Staff has evaluated the project in terms of environment 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.” The report noted that the Traffic Division had concluded “no significant traffic impacts are anticipated as a result of this project.” In addition, the staff report stated: “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 were 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, . . . this project is Categorically Exempt from the requirements of [CEQA] per Section 15332, Infill Development Projects, and that further environmental analysis is not necessary.”

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

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

The Appeal to the Board of Supervisors

On behalf of local residents, the Tomlinsons appealed from the Planning Commission’s decision to the Alameda County Board of Supervisors (Board). (See Ala.

County Gen. Ord. No. 16.08.100.) The Tomlinsons wrote a letter to the Board reiterating the concerns raised before the Planning Commission and expressing confusion that the proposed subdivision was exempt from CEQA, contending the Fairview Area Specific Plan required such review for all in-fill projects. They noted again that there were other developments within a half-mile radius of the proposed subdivision and expressed concern that the intent of the specific plan would be circumvented if the County applied the exemption to all of them. In such case, the Tomlinsons contended, analysis of each individual project and their cumulative effects would not be addressed.

The Planning Department submitted a summary of the Planning Commission's decision and the Tomlinsons' appeal to the Board, noting the residents' desire for a traffic study of the proposed subdivision's individual and cumulative impacts. The summary indicated that Public Works had found the "existing carrying capacity of the surrounding streets . . . adequate to accommodate the traffic to be generated by this project without significant traffic generation impacts."

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

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

The remainder of the email, taken directly from the December 17, 2007 staff report, simply restated the basis for the exemption.

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

A traffic expert testified that the 100 trips a day of traffic generated by the proposed subdivision would have a "comparatively minimal" impact on the existing traffic volume on Bayview Avenue, which has around 2,000 vehicles a day, and even less on the surrounding roads, which had greater volumes, and that service at nearby intersections would not be affected.

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

The Trial Court Proceedings

On July 7, 2008, the Tomlinsons filed in Alameda County Superior Court a verified petition for a writ of mandate setting aside the County's decision. As is relevant here, they alleged that the County's reliance on the categorical exemption for in-fill development violated CEQA. The trial court denied the petition, and the Tomlinsons

appealed from the trial court's order.³ On appeal, this court reversed the trial court's decision.

The California Supreme Court granted the Tomlinsons' petition for review of this court's interpretation of section 21177 and its application to the categorical exemption found in section 15332 of the Guidelines. The high court concluded section 21177's exhaustion requirement "applies to a public agency's decision that a proposed project is categorically exempt from CEQA compliance as long as the public agency gives notice of the ground for its exemption determination, and that determination is preceded by public hearings at which members of the public had the opportunity to raise any concerns or objections to the proposed project." (*Tomlinson, supra*, 54 Cal.4th at p. 291.) The court remanded the matter to this court to address the Tomlinsons' "remaining contentions that . . . were not resolved by [this] court because of [our contrary] conclusion that section 21177's exhaustion-of-administrative remedies requirement was inapplicable." (*Id.* at pp. 291-292.)

DISCUSSION

I. Relevant Legal Principles

"In considering a petition for a writ of mandate in a CEQA case, '[o]ur task on appeal is "the same as the trial court's.'" [Citation.] Thus, we conduct our review independent of the trial court's findings . . . ' . . . [and] examine the [County's] decision, not the trial court's." (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 257 (*Banker's Hill*), citation omitted.) Under section 21168.5, we review the County's exemption determination for a prejudicial abuse of discretion. (*San Lorenzo, supra*, 139 Cal.App.4th at pp. 1381-1382; *East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989)

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

210 Cal.App.3d 155, 165 (*East Peninsula*).⁴ “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.” (§ 21168.5.) “ ‘Judicial review of these two types of error differs significantly: [w]hile we determine de novo whether the agency has employed the correct procedures, “scrupulously enforc[ing] all legislatively mandated CEQA requirements” [citation], we accord greater deference to the agency’s substantive factual conclusions.’ [Citation.]” (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131.)

CEQA and the Guidelines establish a three-tiered process for determining the level of environmental review required. (*Tomlinson, supra*, 54 Cal.4th at p. 286.) If the activity constitutes a “project,” as defined by statute, “[t]he public agency must then decide whether it is exempt from compliance with CEQA under either a statutory exemption [citation] or a categorical exemption set forth in the [Guidelines]. [Citations.]” (*Id.* at p. 286.) If a project is categorically exempt, it is not subject to CEQA, and no further environmental review is required. (*Ibid.*; see § 21084, subd. (a) [categorical exemptions are classes of projects found by the Secretary of the Natural Resources Agency not to have a significant effect on the environment]; Guidelines, § 15300 [same].) If the project is not exempt, the agency must conduct an initial study to determine whether the project may have a significant effect on the environment.

⁴ Both Developer and the Tomlinsons incorrectly contend that section 21168 provides the standard of review here, but that section applies in actions to set aside a public agency’s decision “made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency” The County was not required to hold a hearing in connection with its exemption determination or the Tomlinsons’ appeal. (See *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1210 (*Azusa*); Ala. County Gen. Ord. No. 16.08.100, subd. D [affording the Board discretion to reject an appeal of subdivision approval without a public hearing].) In any event, “[t]he distinction between [sections 21168 and 21168.5] ‘is rarely significant. In either case, the issue . . . is whether the agency abused its discretion.’ ” (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945.)

(*Tomlinson, supra*, 54 Cal.4th at p. 286; *San Lorenzo, supra*, 139 Cal.App.4th at p. 1373; see Guidelines, §§ 15063, 15070.)⁵

II. The Tomlinsons' Contention the Project Does Not Meet the Exemption's Criteria

In this case, the County relied upon the categorical exemption for in-fill development (Guidelines, § 15332). A project is categorically exempt as "in-fill development" if:

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

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

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

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

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

The Tomlinsons' primary contention on appeal is that the proposed subdivision will not occur "within city limits" under subdivision (b) of section 15332 because it is located in unincorporated Alameda County and not "within the clearly demarcated (and commonly accepted) legal boundaries of a municipality."⁶ The trial court agreed with

⁵ "If the agency decides the project will not have such an effect, it must 'adopt a negative declaration to that effect.' [Citations.] Otherwise, the agency must proceed to the third step, which entails preparation of an environmental impact report [(EIR)] before approval of the project. [Citations.]" (*Tomlinson, supra*, 54 Cal.4th at p. 286.)

⁶ The Tomlinsons also contend the proposed subdivision "would not entirely comply with the local zoning ordinance," and would not be served by existing utilities. (See Guidelines, § 15332, subs. (a), (e).) They have not set forth all the material evidence on these issues, pointing only to evidence that supports their position, and, accordingly, have waived any error in this regard. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.)

respondents' contentions that section 21177 precludes the Tomlinsons from challenging the exemption on this ground, as they did not do so at the administrative level and, therefore, failed to exhaust their administrative remedies as to this argument. We review this determination de novo. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536 (*City of Orange*); *Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 873 (*Lodi*).

Section 21177 codifies the doctrine of exhaustion of administrative remedies in CEQA proceedings. (*Lodi, supra*, 144 Cal.App.4th 865, 875.) "Subdivision (a) of section 21177 states that a court action alleging a public agency's failure to comply with CEQA may be brought only if 'the alleged grounds for noncompliance with [CEQA] 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.' " (*Tomlinson, supra*, 54 Cal.4th at p. 289, italics omitted.) Thus, "the issues raised before a court must first have been raised during the administrative process, although not necessarily by the person who subsequently seeks judicial review." (*Lodi, supra*, 144 Cal.App.4th at p. 875.) "The petitioner itself need only have raised some objection before the agency [citation]; if it has, it may then litigate any issue raised before the agency by anyone." (*Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 711, italics omitted (*Woodward Park*).

Exhaustion under section 21177 has been described as " " "a jurisdictional prerequisite to resort to the courts." ' ' ' ⁷ (*Tomlinson, supra*, 54 Cal.4th at p. 291, quoting *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment*

Moreover, although they cite facts relating to utilities and zoning, they fail to provide a reasoned argument establishing this claim of error. (See *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

⁷ A failure to exhaust does not deprive a court of fundamental subject matter jurisdiction, however. (*Azusa, supra*, 52 Cal.App.4th at pp. 1215-1216). Properly understood, exhaustion under section 21177 is a statutory prerequisite for asserting a ground of CEQA noncompliance. (*Porterville Citizens For Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 910 (*Porterville*).

Relations Bd. (2005) 35 Cal.4th 1072, 1080.) It is designed to give an agency “the opportunity to receive and respond to articulated factual issues and legal theories before its actions are subject to judicial review.” (*Porterville, supra*, 157 Cal.App.4th at p. 910, citing *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198; see Witkin, Cal. Procedure (5th ed. 2008) Actions, § 325, p. 420 [exhaustion of administrative remedies is required because “[t]he administrative tribunal is created by law to adjudicate the issue sought to be presented to the court”].) Additionally, as the court recognized in *Tomlinson*, the exhaustion doctrine “ ‘lighten[s] the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief,’ ” and “ ‘facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.’ [Citation.]” (*Tomlinson, supra*, 54 Cal.4th at p. 291.) “It can serve as a preliminary administrative sifting process [citation], unearthing the relevant evidence and providing a record which the court may review.’ [Citation.]” (*Ibid.*)

The petitioner bears the burden of showing that the issues raised in the judicial proceeding were first raised at the administrative level. (*Porterville, supra*, 157 Cal.App.4th at p. 909.) The exact issue asserted in the trial court must have been presented to the administrative agency. (*Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894, disapproved on another ground as stated in *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 529.) Nonetheless, “[l]ess specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding because in administrative proceedings parties generally are not represented by counsel. [Citation.] 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 for them. [Citation.]” (*East Peninsula, supra*, 210 Cal.App.3d at pp. 176-177.) Citizens are not expected to bring legal expertise to the administrative proceeding (*Woodward Park, supra*, 150 Cal.App.4th at p. 712), but “[i]t is no hardship . . . to require a layman to make known what facts are contested. [Citation.]” (*Citizens Assn. for Sensible Development of Bishop*

Area v. County of Inyo (1985) 172 Cal.App.3d 151, 163 (*Bishop Area*)). Thus, the comments before the agency need not refer to the specific language of the exemption. (See *East Peninsula, supra*, 210 Cal.App.3d at p. 176.) Nonetheless, “ ‘general objections to project approval,’ ” “ ‘generalized environmental comments . . . ,’ ‘relatively . . . bland and general references to environmental matters’ [citation], or ‘isolated and unelaborated comment[s]’ [citation] will not suffice.” (*City of Orange, supra*, 163 Cal.App.4th at p. 536.)

Applying these principles, we conclude that the comments raised in the agency proceedings do not satisfy the exhaustion requirement regarding the Tomlinsons’ “within city limits” argument. In the proceedings before the agency, neither the Tomlinsons nor other local residents specifically challenged the County’s reliance on the categorical exemption on the ground that the project would not occur “within city limits.” They questioned the applicability of the exemption but did so on the ground that the Fairview Area Specific Plan required environmental review and that the project does not satisfy the requirement of subdivision (c) of section 15332 that “[t]he project site [have] no value, as habitat for endangered, rare or threatened species.” In addition, they raised a variety of concerns about the project’s impact and requested environmental review multiple times. There also are several references in the record to the non-urban character of the area in which the project is located. D’Arcy Tomlinson stated in her power point presentation to the Board that the intent of the Fairview Area Specific Plan is “to preserve existing residential areas and promote development that is sensitive to the rural residential character of the area.” Planning staff also noted in its summary of the Tomlinsons’ appeal the project’s designation as Suburban and Low-Density Residential, and Supervisor Miley commented during the Board hearing that he emphathized with residents’ desire “to keep the community semi-rural as much as possible[.]”⁸

⁸ *Woodward Park* suggests that comments made by members of the decisionmaking body may satisfy the exhaustion requirement. (See *Woodward Park, supra*, 150 Cal.App.4th at pp. 720-723 [concluding comments of members of the public and the council were enough under the circumstances to put the agency on notice].)

We conclude that these comments do not satisfy section 21177's requirement that the "grounds for noncompliance with [CEQA] [be] presented to the public agency" Although the "within city limits" requirement does not implicate the County's particular expertise, and the County concedes it was not deprived of an opportunity to offer evidence regarding this fact, the comments asserted at the administrative level did not alert the Board that the exemption is inapplicable because the proposed subdivision is not located "within city limits" or that the exemption would be challenged on this ground. The Board therefore had no opportunity to respond to "articulated factual issues and legal theories before its actions are subjected to judicial review." (*Porterville, supra*, 157 Cal.App.4th at p. 910; *East Peninsula, supra*, 210 Cal.App.3d at p. 177.)⁹

The record demonstrates that Planning Department staff knew the project was in an unincorporated area of Alameda County and not within city limits. There is no indication, however, that the Board, as the decisionmaking body, had reason to question Planning staff's determination that the exemption applied because the project is "located within an established urban area," even assuming the Board was aware of the "within city limits" requirement.

The Tomlinsons do not contend it would have been futile to challenge the County's exemption determination on the ground that the project is not "within city limits," and do not identify any other exception to the exhaustion requirement that applies here.¹⁰ They maintain, rather, that the comments before the agency were sufficient to

⁹ For this reason, the decisions the Tomlinsons cite in contending they met the exhaustion requirement are distinguishable. (*Woodward Park, supra*, 150 Cal.App.4th at pp. 701, 716-717 [the specific issue was mentioned at the meeting and was the subject of critical discussion by a council member, and the final EIR shows the city knew of this objection and had an opportunity to correct the problem]; *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1395-1396 [objections to project's impact on air quality, public services, traffic congestion, parking, and aesthetics, and to the use of an addendum to the original EIR instead of a supplemental EIR were sufficient to exhaust as to the issue of whether the City was required to prepare a supplemental EIR].)

¹⁰ The Tomlinsons argue: "[T]he County should not need the public to notify it of such self-evident criteria as the fact that the County is not a city A fundamental,

satisfy the exhaustion requirement as to their “within city limits” argument because there was no “advance notice that the County considered the project to be exempt from CEQA,” and the County misled them by failing to expressly inform them of the exemption’s criteria. Specifically, they argue the County’s failure to recite the full text of the exemption or provide a complete analysis of each of its criteria “led [them] to believe that they were being provided with the entire list of applicable criteria and . . . had no reason to check the text of . . . [s]ection 15332 for themselves to see if any more was required.” In short, they contend they “exhaust[ed] their remedies regarding the CEQA exemption issue to the extent they could, given the information they were provided”

These arguments lack persuasive force for two reasons. First, contrary to the Tomlinsons’ assertion, the County provided ample notice to the public of its intent to rely on the exemption, specifically citing section 15332, and the Tomlinsons do not provide any legal authority requiring the agency to do more.¹¹ Second, the record strongly suggests that the Tomlinsons were not misled regarding the requirements of section 15332: they challenged the exemption’s compliance with the criterion found in subdivision (c) of that section.¹²

factual criterion that can be unequivocally verified is different in nature from issues for which there may be grounds for a legitimate debate based on extrinsic information the agency may not have” Section 21177 does not make this distinction.

¹¹ *McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136 (*McQueen*) and *Temecula Band of Luiseño Mission Indians v. Rancho Cal. Water Dist.* (1996) 43 Cal.App.4th 425, 434 (*Temecula*) do not purport to require an agency to educate the public regarding CEQA’s legal requirements. Both decisions address an agency’s provision of incomplete and misleading descriptions of the project. (*McQueen*, at p. 1150 [inaccurate and misleading project description that fails to mention the acquisition of toxic, hazardous substances is “tantamount to a lack of notice [of the administrative hearings]”], citing § 21177, subd. (e); *Temecula*, at p. 434; see also *ibid.* [“an incomplete or misleading notice may be treated as equivalent to no notice only to the extent that the notice’s deficiencies prevented the petitioner from invoking administrative remedies”], italics omitted.)

¹² The Tomlinsons contend requiring citizens “to inform the County specifically how to comply with the black letter requirements of the law” “would put CEQA and any law aimed at encouraging public participation on its head,” as the agency bears the burden of

We conclude, accordingly, that the Tomlinsons are precluded from asserting their “within city limits” argument, and proceed to their remaining contentions.

III. The Tomlinsons’ Contention the County Failed to Consider Applicable Exceptions to the Use of Categorical Exemptions

“The categorical exemptions are not absolute. Even if a project falls within the description of one of the exempt classes, it may nonetheless have a significant effect on the environment based on factors such as . . . cumulative impact, or unusual circumstances.” (*Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 689 (*Carmel River*)). Accordingly, section 15300.2 of the Guidelines precludes an agency from relying on a categorical exemption if “there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances” (unusual circumstances exception), or if “the cumulative impact of successive projects of the same type in the same place, over time is significant” (cumulative impact exception). (Guidelines, § 15300.2, subs. (b), (c).) The Tomlinsons contend the County abused its discretion in failing to “consider . . . whether any of the exceptions to the exemption applied”

“ ‘[W]here the agency establishes that the project is within an exempt class, the burden shifts to the party challenging the exemption to show that the project is not exempt because it falls within one of the exceptions listed in Guidelines section 15300.2.’ [Citation.]” (*Banker’s Hill, supra*, 139 Cal.App.4th at p. 261.)

A. The Unusual Circumstances Exception

Section 15300.2, subdivision (c) states: “A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” In this case, the Board made no specific findings regarding the applicability of this exception. An express

demonstrating that substantial evidence supports the exemption. The Tomlinsons fail to provide legal authority or analysis harmonizing the substantial evidence standard of review of an agency’s exemption determination with the requirement of section 21177 that a ground for noncompliance may not be asserted during judicial review of an agency’s decision unless it was first presented to the agency.

finding in this regard is not necessary, however; “[a] determination by the agency that a project is categorically exempt constitutes an implied finding that none of the exceptions applies. [Citation.]” (*Carmel River, supra*, 141 Cal.App.4th at p. 689; see Guidelines, § 15332, subd. (d) [exemption requires finding “[a]pproval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality”].)

To the extent the Tomlinsons argue that the County erred in failing to apply the unusual circumstances exception, they have failed to meet their burden to demonstrate the error they allege. As the parties challenging the exemption, the Tomlinsons have the burden “to ‘produce substantial evidence that the project has the potential for a substantial adverse environmental impact’ [citation]; in other words, that one of the exceptions to categorical exemption applies.’ [Citation.]” (*Banker’s Hill, supra*, 139 Cal.App.4th at p. 261.) “The application of Guidelines section 15300.2(c) involves two distinct inquiries. First, we inquire whether the Project presents unusual circumstances. Second, we inquire whether there is a reasonable possibility of a significant effect on the environment due to the unusual circumstances. [Citation.] . . . ‘A negative answer to either question means the exception does not apply.’ [Citation.]” (*Banker’s Hill*, at p. 278, italics omitted; see *Azusa, supra*, 52 Cal.App.4th at p. 1207 [the unusual circumstances test is satisfied “where the circumstances of a particular project (i) differ from the general circumstances of the projects covered by a particular categorical exemption, and (ii) those circumstances create an environmental risk that does not exist for the general class of exempt projects”].)

Whether a circumstance is “unusual” is a question of law that a court determines de novo. (*Azusa, supra*, 52 Cal.App.4th at p. 1207.) There is a split of authority, however, regarding the appropriate standard of judicial review of an agency’s decision there is no reasonable possibility of a significant effect on the environment. (*Banker’s Hill, supra*, 139 Cal.App.4th at p. 261, italics omitted.) “ ‘Some courts have . . . [held] that a finding of categorical exemption cannot be sustained if there is a “fair argument” based on substantial evidence that the project will have significant environmental impacts, even where the agency is presented with substantial evidence to the contrary.

[Citation.] Other courts apply an ordinary substantial evidence test . . . deferring to the express or implied findings of the local agency that has found a categorical exemption applicable. [Citations.]’ [Citations.]” (*Hines v. California Coastal Com.* (2010) 186 Cal.App.4th 830, 856; see generally *Banker’s Hill, supra*, 139 Cal.App.4th at pp. 261-263.) We need not decide this question, as we conclude that the Tomlinsons have failed to make the requisite showing under either standard.

The Tomlinsons argue: “The ‘unusual circumstances’ exception [citation] was evinced by the documented possibility of special-status wildlife habitat, the pre-existing parking constraints and traffic congestion, and the unprecedented obstruction of viewsheds.” The Tomlinsons do not provide substantial evidence showing the site of the proposed subdivision is a special-status wildlife habitat, and they provide no analysis demonstrating that the alleged circumstances differ from the circumstances of the projects generally covered by the in-fill development exemption. (See *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 801 [“[W]hether a circumstance is ‘unusual’ is judged relative to the typical circumstances related to an otherwise typically exempt project”], italics omitted.) Indeed, traffic congestion, inadequate parking, and the obstruction of viewsheds are precisely the circumstances one would expect to see in a “proposed development [that] occurs within city limits on a project site [that is] substantially surrounded by urban uses” (Guidelines, § 15332.2, subd. (b); see *Banker’s Hill, supra*, 139 Cal.App.4th at p. 279, fn. 26 [urban in-fill construction that might result in blocked views is not an unusual circumstance, as such construction normally takes place in an already built-up urban environment].) In any event, the Tomlinsons do not provide any discussion of the environmental risk created by the alleged circumstances or what constitutes a “significant environmental impact,” and have failed to demonstrate that the evidence satisfies even the broader fair argument standard, i.e., that it raises a fair argument the proposed subdivision may have a significant effect on the environment. (*Azusa, supra*, 52 Cal.App.4th at p. 1207; accord, *Banker’s Hill, supra*, 139 Cal.App.4th at p. 278.)

The Tomlinsons contend “the wildlife and valuable trees that would be lost are not typical of dense, urban areas . . . ,” but fail to support this conclusion with a discussion of the wildlife and valuable trees that will be lost, or even a record citation, and fail to provide any analysis showing that these circumstances would not normally occur with a typical in-fill development project. There is evidence in the record that 34 trees are located either on or adjacent to the site of the proposed subdivision, including two large, mature trees, and that “deer and other wildlife use this open space daily as a corridor to get to Don Castro Regional Park.”¹³ There also is evidence that most of the trees would have to be removed but that the two mature trees and possibly two others would be preserved, and that removal of trees and structures could possibly impact birds of prey and special status bat species. Again, however, the Tomlinsons have not shown this evidence is sufficient to raise a fair argument the proposed subdivision may have a significant effect on the environment.¹⁴

Having rejected the Tomlinsons’ assertions of error regarding the unusual circumstances exception, we turn to their assertion that the Board erred in failing to consider whether the cumulative impact exception applies.

¹³ In determining whether the Tomlinsons have identified substantial evidence supporting the exemption, we consider “[r]elevant personal observations of area residents on nontechnical subjects . . . ,” but not “dire predictions by nonexperts regarding the consequences of a project,” or “[u]nsubstantiated opinions, concerns, and suspicions about a project” (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 932; *Banker’s Hill*, *supra*, 139 Cal.App.4th at p. 274, italics omitted.)

¹⁴ The Tomlinsons also assert: “The courts have held that inconsistency with an agency’s land use policies regarding density constitutes substantial evidence supporting a fair argument that the project may have a significant impact on the environment” They do not specifically contend on appeal, however, that the proposed subdivision is inconsistent with the County’s land use policies regarding density and do not identify residential density as an unusual circumstance that may cause a significant environment impact. Moreover, although they discuss in their statement of facts the issues raised in the agency proceedings regarding the number of homes the general and specific plans allow on this site, they do not provide analysis demonstrating that the proposed subdivision is inconsistent with the County’s land use policies.

B. The Cumulative Impact Exception

Categorical exemptions are “inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.” (Guidelines, § 15300.2, subd. (b).) The Guidelines define “cumulative impacts” as “two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.” (Guidelines, § 15355.) “The individual effects may be changes resulting from a single project or a number of separate projects.” (Guidelines, § 15355, subd. (a).) “The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” (Guidelines, § 15355, subd. (b).)

1. The Board Did Not Decide Whether the Cumulative Impact Exception Applies in This Case.

Although an agency’s exemption determination generally supports an implication that it found the exceptions in section 15300.2 of the Guidelines inapplicable (*Carmel River, supra*, 141 Cal.App.4th at p. 689), the record in this case affirmatively demonstrates that the Board did not consider the cumulative impact of the proposed subdivision and other nearby projects of the same type over time. Throughout the agency proceedings and in their appeal to the Board, the Tomlinsons expressed concern about the cumulative impact of the proposed subdivision and several other new residential developments in the vicinity on traffic, parking, and the current infrastructure.

At the Board hearing, Supervisor Miley addressed these concerns: “[W]hat just disturbs me is this project—if we have this similar project and we multiply and we have . . . ten of these, we can use the same argument. ¶¶ And if we have a project that comes in with 50 houses then we’d say, ‘Oh, it’s going to have an impact because its [sic] got 50 houses. It’s going to have a hundred cars and traffic trips’ So how do we assess how multiple little projects have an effect on an entire community? Because I think

that's what I'm kind of concerned about because . . . I know Fairview and I know there's a lot of traffic, and it's sort of like you keep putting in little projects, little infill projects and ultimately, . . . 10 projects of 10 houses is a hundred houses as opposed to one project of a hundred houses. So how do you evaluate that or when do you evaluate it?"

Planning Department staff responded: "[Q]uite frequently when we have projects in front of you, you do see some CEQA analysis [T]his qualifies as an infill project, which is specifically governed by state law, and state law specifically says you have a categorical exemption for this sort of project. Meaning, the state is telling you, you do not do CEQA for this because they want [to] facilitate infill." [¶] What that means is that . . . there would be a degree of analysis that you would typically see on this sort of project albeit perhaps minimal But CEQA does get you to a cumulative impact discussion, typically." [¶] The problem here . . . is that the state is specifically saying, 'We don't want you to analyze that because we want to facilitate this type of development. We want infill in the [S]tate of California.'" Planning Department staff advised the Board that Fairview residents would have to amend the specific plan if they wanted to deal with cumulative impacts on small projects, but that "they could not put something in there that countermanded state policy on infill developments."¹⁵

Supervisor Miley noted: "I have . . . empathy for Fairview in terms of the feeling that people would like to keep the community semi-rural as much as possible, but I do see a lot of development popping up in Fairview, and I do think it has an effect." He also expressed concern that "this project is having an impact on the community" Nonetheless, relying on the representations of Planning Department staff that the Board could not consider the cumulative impact of the proposed subdivision and other nearby

¹⁵ Planning Department staff appears to have confused categorical exemptions, which are subject to the exceptions in section 15300.2 of the Guidelines, with statutory exemptions, which "have an absolute quality not shared by categorical exemptions: a project that falls within a statutory exemption is not subject to CEQA even if it has the potential to significantly affect the environment." (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 128-129, fn. omitted.)

developments, Supervisor Miley cast the deciding vote in favor of denying the Tomlinsons' appeal and approving the proposed subdivision. (See Ala. County Charter, § 4 [establishing five-member Board], § 10 ["A majority of the members shall constitute a quorum, and no act of the Board shall be valid or binding unless a majority of the members concur therein"].)

2. The Board Abused Its Discretion in Not Considering Cumulative Impact.

Contending the County abused its discretion in failing to consider the cumulative impact exception, the Tomlinsons rely on *Association for Protection Etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720 (*City of Ukiah*), which states that an agency must "consider the issue of significant effects and cumulative impacts of a proposed project in determining whether the project is exempt from CEQA where there is some information or evidence in the record that the project might have a significant environmental effect." (*Id.* at p. 732; see *Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1187 (*Hollywoodland*) [City may not rely on CEQA exemption when it failed to consider whether the unusual circumstances exception applies and the record contained evidence that the activity is different from the typical activity contemplated by the exemption and could significantly impact the environment].) Respondents do not dispute that this standard governs our analysis.¹⁶

In their discussion of this exception on appeal, the Tomlinsons do not directly discuss evidence of a potential cumulative impact, but the record citations in their briefing and the testimony at the public hearings reveal the following evidence:

The Fairview Area Specific Plan reflects residents' concerns regarding the cumulative impact of increasing development in the area as early as 1977, noting that it was adopted in 1980 in response to such concerns and amended in 1997. In order to "preserve existing residential areas, protect and preserve important environmental resources and significant natural features in the Fairview area, and promote development

¹⁶ Respondents do not directly address the Tomlinsons' contention that the Board abused its discretion in failing to consider the cumulative impact exception and appear to contend only that this exception does not apply.

that is sensitive to variations in topography and the rural residential character of the area,” the specific plan requires the decisionmaking body to evaluate neighborhood character and external influences which affect that character prior to approval of in-fill development applications, considering a number of factors, including “traffic conditions, street width, [and] parking[.]” The specific plan also identifies a need for improvements in both the internal street system and key intersections in the City of Hayward in order to adequately accommodate existing and future vehicular traffic,” noting “major deficiencies in the internal street system as well as critical external intersections.” The specific plan requires the County and the City of Hayward to “continue to carefully analyze” and to “maintain information on traffic in the area in order to fully and quickly evaluate effects of new developments and timing of improvements.” The specific plan also notes “the policy and preference of the community to avoid traffic signals in the Fairview area where possible.”

Comments of the Tomlinsons and other objecting residents provide substantial evidence of existing problems with traffic in the area of the proposed subdivision. These include: (1) heavy traffic on Bayview Avenue and other nearby streets during peak commute times and a dangerous left turn on Kelly Street, requiring residents to use an alternate route¹⁷ (2) a preschool on the alternate route that resulted in additional traffic of 50 cars and traffic congestion during pickup times in the early morning and afternoons; and (3) insufficient street width where Bayview curves into Ralston Way. The Tomlinsons indicated that intersections identified in the specific plan “already [have] serious problems.”¹⁸ A planning commissioner acknowledged that Bayview is a collector

¹⁷ Kelly Street intersects Bayview Avenue three streets east of the proposed subdivision, less than a quarter mile away.

¹⁸ One resident stated that there was a blind left turn exiting Bayview to Kelly, requiring cars to pull forward to see oncoming traffic, but that he had to hurry when making this turn during rush hour because five to ten cars were behind him, with others coming down the hill. The comments also indicate that cars “fly down the street,” there are no stop signs or speed bumps on Bayview Avenue, and that Bayview Avenue has no continuous sidewalk access to Kelly Street. One resident stated: “[T]raffic is a concern . . . you see all of the cars go by on Bayview. They go by fast. It’s busy. If you went

street, and that Hayward Hills “dumps” into it. Supervisor Miley also stated: “I know Fairview and I know there’s a lot of traffic” (See *Pocket Protectors*, *supra*, 124 Cal.App.4th at p. 923 [relevant personal observations are properly considered].)

In addition, residents noted existing problems with parking, indicating the area already experiences parking overflow from a residential development across the street from the proposed subdivision. One resident noted parking overflow “we are now dealing with from the completed Reyna Street development project,” a residential development across the street from the proposed subdivision. A planning commissioner stated: “All it’s going to take is one or two children to be driving, and this whole entire project’s going to be jammed up just like the rest of them are that have been approved in the past that are absolutely terrible.” (See *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 155 [planning commissioner’s fact-based opinions, stemming from commission’s experience in planning and development, are substantial evidence]; accord, *Pocket Protectors*, *supra*, 124 Cal.App.4th at p. 932.) We observe that the homes in the proposed subdivision have guest parking, Planning Department staff assured the Planning Commission that the proposed subdivision would not require street parking, and the Planning Commission imposed a condition, which the Board adopted, precluding conversion of the garages in the subdivision for other uses. Nonetheless, one resident reported: “Most families in the [area] have more than two vehicles, and generally they end up parked on the street in that area” There also is evidence that new homes in a nearby development in the same price range had been on the market for over 12 months and that, if the houses in the proposed subdivision did not

down there at rush hour you wouldn’t want to stand on the corner of Jacob Street and Bayview The traffic on Bayview is crazy. The traffic turning out of Bayview onto Kelly on any weekday morning is just something that you would have to be there to see.” This resident also indicated: “[T]here is a dip in the street,” so “you’re taking a chance turning left out onto Bayview as it is” Another resident reported: “[T]he traffic going from Bayview onto Kelly, it’s backed up. Every morning, every evening, people going to work, coming home.” “[T]he traffic is horrendous.”

sell and became rentals with multi-family occupancy, each home in the proposed subdivision could require parking for five to seven cars.

The Fairview Area Specific Plan notes problems in both private and public storm drainage systems in the area, stating that “increases in development could create additional problems or exceed the capacity of many of the antiquated systems.” Residents reported existing problems with stormwater drainage.¹⁹

Evidence in the record also demonstrates significant growth in the area. One resident reported that he has lived in the Fairview district since 1979 and has “seen the area grow.” There also is evidence that at least three large new developments were underway within a half mile of the proposed subdivision and several other developments were underway within a one-mile radius. At the hearing before the Board, Fred Tomlinson indicated that there were four current developments within a half mile and estimated “in excess of a hundred cars that are going to go onto these areas” The record notes new homes on the west side of Kelly that had been on the market over 12 months, and other new homes that were being built on the east side of Kelly, less than a quarter mile away.

The evidence paints a picture of a semi-rural area that has had concerns about the adequacy of its infrastructure to support increased development since at least 1997, that residents face serious existing problems with traffic congestion, parking overflow, and drainage, and that at the time of the Board hearing, at least three large residential developments and several others were underway in the area surrounding the proposed subdivision. Given the long history of concern regarding the sufficiency of the infrastructure in the Fairview district to support traffic and drainage, the serious nature of

¹⁹ Several residents sent letters to the Planning Department, Planning Commission, and Board in February 2008, stating: “There are a significant number of residents in this area that have experienced severe drainage problems following rainfall including flooding in the lower level of homes (crawl spaces, etc.). Many of us have installed French drains and made other necessary enhancements to stop the flooding of our homes [A]ny movement of land, introducing new elements to the land always impacts it”

the existing problems with these issues and parking, and the number of other projects of the same type under construction recently in this area, we conclude that this evidence is sufficient to reasonably support a conclusion that the proposed subdivision might have a significant environmental effect due to the cumulative impact of successive projects of the same type in the same place, over time. We note that Planning Department staff acknowledged during the Board hearing that the proposed subdivision's potential cumulative impact was concerning: "[I]f you're generally looking at that area and saying ['[A]re there some impacts that accumulated over the years based on a whole array of projects and just various factors['] . . . I wouldn't dispute what some of the testimony suggested in terms of some issues that [the traffic expert] and others may be concerned about. [¶] I think . . . we have to look at [whether] those attributable to this particular project this size in a way that they can have some specific responsibility."

The Board therefore was required to consider whether "the cumulative impact of successive projects of the same type in the same place [as the proposed subdivision], over time is significant." (*City of Ukiah, supra*, 2 Cal.App.4th at p. 732; see *Hollywoodland, supra*, 161 Cal.App.4th at p. 1187.) In so holding, we confine our analysis to whether the Board was required to decide this question and express no opinion as to whether the cumulative impact exception applies in this case.

We conclude, accordingly, that the Board failed to proceed in the manner required by law in failing to consider the cumulative impact of the proposed subdivision. In such case, "we cannot exercise our independent judgment on whether the ultimate decision of the lead agency would have been different had CEQA been properly implemented because such a decision is for the discretion of the agency." (*Bishop Area, supra*, 172 Cal.App.3d at pp. 167-168; *Rural Landowners Assn. v. City Council* (1983) 143 Cal.App.3d 1013, 1022-1023.) Nonetheless, "a failure to proceed in the manner prescribed by law may alone be a prejudicial abuse of discretion. [Citations.] . . . [W]here that failure to comply with the law results in a subversion of the purposes of CEQA by omitting information from the environmental review process, the error is prejudicial." (*Id.* at pp. 1022-1023 [failure to discuss in the final EIR and present to the

city council at least two areas raised by the comments]; accord, *Bishop Area, supra*, 172 Cal.App.3d at p. 167 [“The purposes of CEQA were subverted because the lead agency never considered whether the environmental effects of the total shopping center project, properly defined, were significantly adverse and thus required an EIR”].)

As the Tomlinsons have demonstrated a prejudicial abuse of discretion, the trial court’s order must be vacated.²⁰

DISPOSITION

The order denying the petition is reversed, and the matter is remanded to the trial court with instructions to issue a writ of mandate directing the County to set aside its decision approving the proposed subdivision and to comply with the requirements of CEQA when reconsidering approval of the proposed subdivision, specifically, by determining whether the cumulative impact exception found in section 15300.2,

²⁰ In light of our decision in this regard, we need not decide the Tomlinsons’ contention the County “tried to mitigate its way into the exemption” by imposing conditions of approval to bring the project within the exemption’s criteria and eliminate the possibility of a significant environmental effect precluding the applicability of an exception. (See *Azusa, supra*, 52 Cal.App.4th at pp. 1199-1200 [agency must make exemption determination during preliminary review, not in the initial study phase when mitigation measures are evaluated]; *id.* at p. 1200 [agency cannot avoid exception to exemption by taking a minor step in mitigation].) We could not decide this issue, in any event, as it was not presented in the agency proceedings, and section 21177 precludes the Tomlinsons from raising it on appeal. The Tomlinsons point to nothing in the record that would alert the Board that it could not impose conditions to mitigate the project’s impact in determining whether the exemption applied. The Board therefore had no opportunity to respond to this argument and develop a record addressing the issue. (*Porterville, supra*, 157 Cal.App.4th at p. 910; *Tomlinson, supra*, 54 Cal.4th at p. 291.)

subdivision (b) of the Guidelines renders the categorical exemption for in-fill development inapplicable. The parties shall bear their own costs.

Jones, P.J.

We concur:

Simons, J.

Needham, J.