Case No. S188161

IN THE
SUPREME COURT OF CALIFORNIA

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

v.

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

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

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

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

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

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REPLY BRIEF ON THE MERITS

In response to Real Parties in Interest Y.T. Wong and SMI Construction, Inc.'s ("Real Party") Opening Brief on the Merits, Petitioners and Appellants Fred and D'Arcy Tomlinson ("Appellants") effectively ask the Supreme Court to create a new rule with regard to the exhaustion of administrative remedies requirement that is not provided by statutes or case law. In their Answer Brief on the Merits, Appellants concede that the exhaustion of administrative remedies doctrine applies in this action but argue that Appellants needed only to exhaust administrative remedies

procedurally, rather than substantively. This claimed distinction does not exist in the law.

Appellants' arguments are wholly predicated on an unsupported assumption that the County engaged in intentional acts to mislead the public about the applicable legal requirements for the CEQA exemption applied to the project at issue herein ("Project"). Based on that allegation, Appellants claim that the exhaustion of administrative remedies requirement is waived as to them, or that a lower threshold is required of them to satisfy the exhaustion requirement. To further confuse the Court and the Real Party herein, Appellants concurrently argue that they did not have a duty to exhaust administrative remedies because whether Real Party's project is located within city limits does not require expertise by the County.

The arguments made by Appellants miss one very important point – that the fundamental policy behind the exhaustion doctrine is not simply to foster dialogue between members of the public and the public agency, but to give the public agency an opportunity to receive and address to issues relating to a project prior to those issues being litigated. The exhaustion of administrative remedies requirement was created to address the precise situation that is involved herein – to require project opponents to make known the issues or challenges they may have regarding a public agency's

determination to approve the project, and to allow the public agency to look at the merits of those issues.

Even though the administrative record is devoid of any such evidence, Appellants attempts to attribute an intentional, wrongful intent on the part of County staff to mislead the public or conspire with others to engage in acts to the detriment of the public. As discussed below, there is no evidence in the administrative record indicating that the County set out to engage in any intentional act to mislead the public about the requirements of the exemption. In fact, it is altogether possible that the County staff made an honest error in its reading or interpretation of the CEQA exemption.[1] However, the administrative record is not complete and does not shed light on the aforementioned point because this CEQA exemption noncompliance issue was never raised by Appellants or their neighbors, and the County was never given an opportunity to address that issue.

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[1] Is is entirely possible that County staff erroneously relied on other CEQA statutes specifically defining "in-fill site" (Public Resources Code § 21061.3) as "a site in an urbanized area" (terms used by the County in its exemption determination) meeting certain criteria. "Urbanized area" is separately defined in CEQA under Public Resources Code § 21071 to include unincorporated areas meeting certain population density requirements.

Now, in an effort to justify or excuse their failure to bring the CEQA noncompliance issue in the first instance to the public agency's attention during the administrative proceedings, Appellants, with the support of the *Tomlinson* Court of Appeal's erroneous decision, attempt to add words or meaning to the plain language of the exhaustion statute (Public Resources Code § 21177) to argue that the administrative process followed by the County does not satisfy the requirements of § 21177, subd. (a), and therefore the exhaustion requirement does not apply as to Appellants.

By their arguments, Appellants ask this Court to make a wholesale change in the manner exhaustion cases are reviewed by the courts. In essence, Appellants ask that the Court ignore the fundamental bright line rule set forth in a longstanding line of exhaustion cases. Further, even though there is no evidence in the administrative record to support Appellants' claim that the County of Alameda ("County") engaged in acts to intentionally mislead members of the public, Appellants argue that the requirement to substantively exhaust their administrative remedies (i.e., to make known the "exact" CEQA non-compliance issue being contested) should be waived as to them. Appellants claim that they have "procedurally" satisfied the exhaustion of administrative remedies requirement by simply appearing at the multiple public comment hearings before the County Planning Commission and the public hearing before the County Board of Supervisors, even though neither they nor anyone

mentioned to the County the concern that the Project does not meet the CEQA in-fill development exemption because it is not located "within city limits."

Appellants' arguments are entirely inconsistent with the well-established public policy behind the exhaustion of administrative remedies requirement and are simply not supported by statutory or case law. Further, both the *Tomlinson* court of appeal's decision and the Appellants' arguments are not supported by the express language of the exhaustion statute.

Real Party again respectfully requests that this Court reverse the Court of Appeal's decision and deny Appellants' writ of mandate petition.

DISCUSSION

A. THE ADMINISTRATIVE PROCESS FOLLOWED BY THE COUNTY WAS CLEARLY SUFFICIENT TO TRIGGER THE EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIREMENT UNDER PUBLIC RESOURCES CODE § 21177.

1. Although Not Required By Statute, The Administrative Record Herein Shows That The Public Comment Hearings And The Public Hearing Held Before The County Board Of Supervisors Were Sufficient To Trigger The Exhaustion Doctrine Under Public Resources Code § 21177, subd. (a).

Appellants argue that, because CEQA does not require an agency to provide a public comment period on a proposed exemption determination, and because a public agency is not required to file a notice of determination after making a determination to approve the project, project opponents

contesting a CEQA exemption determination need not raise a CEQA noncompliance issue at all at the administrative level, irrespective of whether opportunities for public comment and/or public hearings were actually provided prior to project approval. In support of their argument, Appellants rely on *Azusa Land Reclamation Co. v. Main San Gabriel Watermaster* (1997) 52 Cal.App.4th 1165.

As previously argued in Real Party's Opening Brief on the Merits, Real Party contends the *Azusa* holding was improperly extended by the *Tomlinson* Court of Appeal. The *Azusa* decision was predicated on the court's finding that there was no public comment period or public hearing prior to the agency's determination of CEQA exemption, thus triggering the exhaustion of administrative remedies exception under Section 21177(e). *Azusa, supra,* 52 Cal.App.4th at p. 1210.

The only statutory exception to the exhaustion doctrine is set forth in California Public Resources Code § 21177(e), which provides that the exhaustion of administrative remedies requirement "does not apply to any alleged grounds for noncompliance with this division for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project, or if the public agency failed to give the notice required by law." Public Resources Code § 21177(e); emphasis added.

In *Azusa Land Reclamation Company, Inc. v. Main San Gabriel*

Basin Watermaster, et al., supra, the appellant water agencies had "timely filed a petition with [respondent] State Board arguing, *inter alia*, that (1) the exemption relied upon by the Regional Board was inapplicable and (2) even if the existing facilities exemption applied, there was an applicable exception because there was a reasonable probability that ALR's acceptance of municipal solid waste as a Class III landfill could have a significant impact due to unusual circumstances." *Id.*, at p. 1209. The State Board declined to hear the petitions, stating that the petitions failed to raise any substantial issues appropriate for review. *Id.* The *Azusa* court held that respondent State Board was estopped from arguing that the water agencies failed to exhaust its administrative requirements "because the Regional Board declared that the project was exempt from CEQA, there was *no* 'public comment period provided by [CEQA]' and there was *no* 'public hearing... before the issuance of the notice of determination.'" *Id.* The court in *Azusa* also stated that "[w]hether a party has exhausted its administrative remedies 'in a given case will depend upon the procedures applicable to the public agency in question.'" *Id.*, at p. 1211; citing *City of Sacramento v. State Water Resources Control Bd.* (1992) 2 Cal. App. 4th 960, 969.

Here, the exception to the exhaustion of administrative remedies requirements does not apply because several public hearings were held prior to approval of the Project by the County Board of Supervisors, and

the County gave proper notice required by law. In fact, Appellants do not contend that they were not given an opportunity to present their objections to the Project. In fact, the record clearly establishes that Appellants had ample opportunities to raise their claim that the Project does not conform to the requirements under the in-fill categorical exemption but Appellants simply failed to do so.

Appellants also do not contend that they were not given the proper notices regarding the public hearings held before the County's Planning Commission and, subsequently, before the County Board of Supervisors. The record shows that Appellants were actively participating during the public comment periods, and were engaged in ongoing dialogue with members of the County Planning Department and the Board of Supervisors regarding their environmental concerns.

Based on the foregoing, Appellants' argument that the administrative process followed by the County was not sufficient to trigger the exhaustion doctrine is simply without merit.

2. Public Resources Code § 21177, subd. (a), Only Requires That A Public Hearing On The Project Be Held Before A Notice Of Determination Is Issued, Not Filed.

Appellants attempt to create a distinction between a "notice of determination" (NOD) and a "notice of exemption" (NOE) by citing the statutes specifying the instances in which the filing of a notice of determination is mandatory versus optional.

As previously discussed in Real Party's Opening Brief on the Merits, CEQA statute uses the very same wording – "notice of the determination" for notice of an exemption decision, as is used for the notice of a decision to approve a project that is not exempt from CEQA. The distincton between a "notice of determination" and a "notice of exemption" appears only in the Guidelines – as a shorthand way to refer to two types of notices of determination that trigger the shortened statutes of limitation. These terms, added by the Office of Planning and Research to the Guidelines, should not be used to interpret the meaning of the phrase "notice of the determination" in the statute.

Further, there is no language in Section 21177, subd. (a), requiring that a notice of determination be "filed" before the exhaustion of administrative remedies requirement is triggered. The exhaustion requirement simply states that the exhaustion doctrine is triggered if there is a "public hearing on the project before the issuance of the notice of determination." Public Resources Code § 21177, subd. (a). Appellants incorrectly equate the term "issuance" with the term "filing" of a notice of determination. The American Heritage Dictionary defines the term "issuance" as follows: "*n.* An act of issuing; issue." The word "issue" is defined as: "*n.* 1. a. An act or instance of flowing, passing or giving out. b. An act of circulating, distributing, or publishing by an office or official group: *government issue of new bonds.* 2. Something produced, published,

or offered as: . . . d. A final result or conclusion as a solution to a problem...."

The only pertinence to whether a notice of exemption or notice of determination is "filed" is its effect on the limitations period for project opponents to commence judicial proceedings to review administrative decisions (i.e., 35 days or 180 days, depending on whether the optional notice is filed; Public Resources Code § 21167).

It should also be noted that CEQA statutes or Guidelines do not require that public hearings be held before a notice of exemption or notice of determination is issued. Thus, the language in Section 21177, subd. (a) requiring that project opponents exhaust their administrative remedies at any public hearing prior to the public agency's decision to approve a project is consistent with the long-established policy purpose of the exhaustion doctrine – to provide the public agency an opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review. *Porterville Citizens for Responsible Hillside Development v. City of Porterville et al., supra,* 157 Cal.App.4th at 910.

Based on the above, Appellants' argument that they were not required to exhaust administrative remedies simply because no formal public comment period was required by CEQA, and/or because the County did not "file" a notice of determination, is without basis where ample

opportunities were provided to Appellants for public comment and noticed public hearings were held on the Project prior to its approval.

B. APPELLANTS' CLAIM THAT THEY ONLY HAD TO EXHAUST THE ADMINISTRATIVE REMEDIES REQUIREMENT PROCEDURALLY, AND NOT SUBSTANTIVELY, IS NOT SUPPORTED BY LAW AND IS CONTRARY TO THE WELL-ESTABLISHED POLICY PURPOSE BEHIND THE DOCTRINE.

In their Answer Brief on the Merits, Appellants concede that they had a duty to exhaust administrative remedies but argue that they only had to do so procedurally, and not substantively, because the County allegedly misled them by failing to recite the "in-fill development" exemption requirements under CEQA Guidelines, Section 15332. Appellants' argument is simply not supported by law and is contrary to the policy purpose behind the exhaustion of administrative remedies doctrine.

If the Court determines that the County's administrative process was sufficient to trigger the exhaustion of administrative remedies requirement, Appellants have the burden to establish that they exhausted both procedurally and substantively. The exhaustion requirement is jurisdictional and not a matter of judicial discretion. *Coalition of Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197.

The petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level. *Porterville Citizens for Responsible Hillside Development v. City of*

Porterville et al. (2007) 157 Cal.App.4th 885, 909-910. This Court has previously stated that "[i]t is axiomatic that judicial review is precluded unless the issue was first presented at the administrative level." *Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894; citing *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412.

1. To Satisfy the Exhaustion of Administrative Remedies Requirement, The "Exact Issue" Must Be Raised At The Administrative Level.

Simply objecting in general terms to a project will not suffice. Instead, an individual must raise a challenge specifically indicating what factual or legal basis it believes are inappropriate so that the agency can address that challenge. *Coalition of Student Action v. City of Fullerton, supra,* 153 Cal.App.3d at p. 1198. The rationale behind this rule is that the public agency should have the opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review. *Porterville Citizens for Responsible Hillside Development v. City of Porterville et al., supra,* 157 Cal.App.4th at 910.

As the court noted in *Coalition of Student Action* case:

> "The [exhaustion] doctrine was not satisfied here by a relatively few bland and general references to environmental matters. [...] Mere objections to the *project*, as opposed to the procedure, are not sufficient to alert an agency of 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.*"

Coalition of Student Action, supra, 153 Cal.App.3d at p. 1198. In addressing such a deficiency in *Coalition of Student Action*, the court explained, "[p]etitioners rely on generalized environmental comments at public hearings to satisfy the exhaustion doctrine. It is difficult to imagine any derogatory statement about a land use project which does not implicate the environment somehow. More is obviously required." *Id.,* at p. 1197.

A well-established line of cases set forth the level of specificity required to satisfy the exhaustion requirement. In *Porterville Citizens for Responsible Hillside Development v. City of Porterville, supra,* the Court held that petitioners' contention that the City failed to comply with CEQA's notice provisions could not be raised in the judicial proceeding because they were not first raised at the administrative level. *Id.,* at p. 909. After reviewing the comments made during the two public hearings, and giving them a generous interpretation, the court in *Porterville Citizens* found that the grounds of CEQA noncompliance were not presented to the City and the City did not have an opportunity to evaluate and respond to these alleged grounds for noncompliance. *Id.,* at p. 910.

In *Coalition for Student Action, supra,* the court of appeal held that petitioners' failure to raise the issues regarding nonconformity with, or

violations of, CEQA statutes at the administrative level precluded them from seeking judicial review. *Coalition for Student Action v. City of Fullerton, supra,* 153 Cal.App.3d 1194, 1197.

Likewise, in *Banker's Hill, et al. v. City of San Diego* (2006) 139 Cal.App.4th 249, petitioner Preservation Group argued that the City impermissibly approached the CEQA analysis of the project in a "piecemeal" manner because the City issued shoring, grading and pad footings permits before it undertook its analysis of whether the project was exempt from CEQA. *Banker's Hill, et al. v. City of San Diego, supra,* 139 Cal.App.4th at p. 281. The *Banker's Hill* court explained that petitioner was precluded from raising the aforementioned "piecemeal" issue on appeal because it failed to exhaust its administrative remedies requirement because it was not fairly presented to the City. *Id.*, at p.282. Even though petitioner argued that it clearly objected that the initial permits were issued without environmental review, the court stated that such argument cannot be interpreted as raising a piecemeal project argument. *Id.* "An objection that all of the permits issued to date were issued without environmental review does not equate to an objection that those permits were treated as *separate* from the rest of the Project." *Id.*, at fn. 28.

In present case, the concerns or objections raised by Appellants and their neighbors were limited to concerns about traffic, parking and views.

At no time during the various public hearings did a member of the public raise the issue regarding this Project's qualification for the "in-fill development" categorical exemption under CEQA Guidelines Section 15332 because the Project is not "within city limits." This appeal does not involve a situation where Appellants did, in fact, raise concerns about the applicability of the in-fill exemption but those concerns were raised in a "bland and general" manner. This appeal involves a claim of noncompliance that was never raised at all prior to the judicial proceedings.

In fact, Appellants cannot point to one time in their many appearances before the Planning Commission and the Board of Supervisors when they objected to the County using the "infill" categorical exemption. Appellants appeared before the Planning Commission and the Board of Supervisors many times, and a summary of those appearances demonstrates their repeated failure to raise the issue:

- On July 2, 2007, the Planning Commission held a noticed "preliminary review" hearing regarding the Project. (AR 6:1297.) The staff report indicated that the "infill" categorical exemption applied. (AR 1:35.) Appellants attended this hearing and spoke against the Project, but did not mention the categorical exemption. (AR 1:102-103.)

- On December 17, 2007, the Planning Commission approved the Project at a duly noticed hearing. (AR 6:1366.) Appellants attended and spoke against the Project. Petitioners mentioned the Project's "infill" exemption status but failed to raise a challenge based on

the Project's location within an unincorporated area and instead asked for additional environmental review. (AR 1:134-138, AR 1:138-141.)

- On February 19, 2008, the Planning Department held an informal neighborhood meeting relating to the Project. Appellants were in attendance and participated in the meeting without challenging the Project's location within an unincorporated area. (AR 2: 427.)

- On April 8, 2008, the Board of Supervisors heard Appellants' appeal at a noticed hearing. Appellants attended and testified, but did not challenge the use of the "infill" categorical exemption. (AR 1:187-183.)

Appellants' written comments similarly did not raise the issue. In a three page letter dated January 9, 2008, Appellants explain the grounds of their appeal but do not challenge the Planning Commission finding that the Project was a categorically exempt "infill development" under Section 15332. Instead, Appellants listed generalized concerns such as "traffic" and "residential density" as the reasons for their appeal. (AR 2:384-386.) Moreover, nowhere in the transcript of the Board hearing on the appeal is there such a challenge. (AR 1:176-219.)

2. Cases Cited By Appellants In Their Argument That A Lower Threshold Is Required To Satisfy The Exhaustion Requirement Do Not Support A Finding Of Exhaustion Where A Project Opponent Failed To Raise The Specific Noncompliance Issue At All.

Appellants rely on *Citizens for Association for Sensible Development of Bishop Area*, *Woodward Park*, and *Mani Brothers*, in support of their contention that the level of specificity required of

Appellants to satisfy the exhaustion of administrative remedies requirement is minimal. A review of the cited cases indicates, however, that Appellants' reliance on the aforementioned case law is simply without basis and that those cases do not support a finding of exhaustion of the administrative requirement where Appellants failed to raise the CEQA noncompliance issue at the administrative level at all. None of the above-cited cases support Appellants' claim that Appellants are not required to present the exact issue at the administrative level merely because the County did not fully cite the requirements of the Section 15332 exemption.

In *Citizens for Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, the court of appeal stated that, "[i]t is no hardship, however, to require a layman to make known what facts are contested." *Id.*, at p. 163. In that case, the court found that project opponents sufficiently "raised the failure to consider the *cumulative effect* of the project by articulating their concerns about the deterioration of the downtown area and the increase in traffic in a letter... ." Id., at p. 163, emphasis added. The court explained that, because the concerned citizens sufficiently articulated their concerns regarding all substantive issues except one by letters and/or oral comments at the administrative hearing, those citizens had properly exhausted their administrative remedies requirement. *Id.* The one issue that was not

raised at the administrative level was determined not to be a necessary part of the court's judgment. *Id.*

The *Woodward Park* case also does not apply here because it is factually distinguishable. In *Woodward Park Homeowners Assn. v. City of Fresno* (2007) 150 Cal.App.4th 683, the court of appeal found that petitioners had properly exhausted their administrative remedies, and that the purpose of the exhaustion doctrine had been met, when the petitioner local organizations submitted comment letters to the public agency raising objections regarding the agency's adoption of the subject "statement of overriding considerations." *Woodward Park, supra,* 150 Cal.App.4th at p. 720-721. The *Woodward Park* court held that access to the documents on the day of consideration was insufficient to hold project opponents to the exhaustion of remedies doctrine. *Id.,* at p. 720. Further, the *Woodward Park* court found that non-specific comments were sufficient to exhaust administrative remedies with respect to claimed deficiencies in an agency's statement of overriding considerations because the agency presented the statement for review at the last possible moment before approval. *Id.,* at p. 722.

This Court should note that more recent case law has questioned the holding in *Woodward Park, supra,* and found the *Woodward Park* decision to be unpersuasive with regard to whether general complaints regarding environmental matters satisfy the "exact issue" requirements for

the exhaustion of administrative remedies doctrine. *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536-539.

In *Sierra Club v. City of Orange, supra,* the court stated that, "[i]n applying *section 21177*, we must assume the Legislature meant what it said and interpret the statute according to its plain meaning." *Sierra Club v. City of Orange, supra,* 163 Cal.App.4th at p. 537; citing *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1121. The court of appeal in *Sierra Club* held that, "[e]ven as to the comments submitted by agencies and members of the public either in response to the draft SEIR/EIR or before the city council's hearing on project approval, the bulk of the materials cited in the opening brief involve only 'generalized environmental comments,' 'relatively ... bland and general references to environmental matters' (Co*alition for Student Action v. City of Fullerton, supra,* 153 Cal. App. 3d at pp. 1197, 1198), 'isolated and unelaborated comment[s]' (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego, supra,* 139 Cal.App.4th at p. 282), or '[g]eneral objections to project approval....' [Citations.]' (*Porterville Citizens for Responsible Hillside Development v. City of Porterville, supra,* 157 Cal.App.4th at p. 910.)." *Id.*, at p. 538-539. The court held that "[t]his comment fails to satisfy the 'exact issue' requirement for the exhaustion of administrative remedies doctrine. (*Mani Brothers Real Estate Group v. City of Los Angeles, supra,*

153 Cal.App.4th at p. 1394.)" *Id.*; emphasis added.

The *Mani Brothers* case relied upon by Appellants is also factually distinguishable from the case at hand. The court in *Mani Brothers Real Estate Group v. City of Los Angeles* held that petitioners sufficiently met their exhaustion of administrative requirement by their repeated voiced objections to the City's adoption of the 2005 Addendum. Unlike the case herein, the objections raised by the petitioners in *Mani Brothers* related directly to the claims being made on appeal, i.e., objections to an addendum to a previously certified environmental impact report which modified the project. *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1395-1396.

Here, the County's documentation throughout the approval process, including notices of hearings and staff reports, sufficiently advised members of the public of the County staff's determination that the Project qualified as categorically exempt as an "in-fill development" under CEQA Guidelines § 15332. As early as its first Preliminary Plan Review meeting held on July 2, 2007, the County's Planning Department stated its findings as follows:

> "Environmental Impact: This project is Categorically Exempt from the requirements of the California Environmental Quality Act, Article 19, Section 15332 In-fill Development Projects, as the proposed development would occur in an established urban area, would not significantly impact traffic, noise, air or water

> quality, and could be served by required utilities and public services. A tree survey and a biological assessment of the site were conducted and are discussed in the Analysis portion of this report." (AR 1:35.)

At the aforementioned July 2, 2007 Planning Commission meeting, Appellants' expressed main concern was the loss of view, compatibility with neighborhood, and traffic problems; and other neighbors discussed parking, removal of mature trees and traffic problems. (AR 1:72-78.) At the subsequent hearing held by the County's Planning Commission, and after reviewing Planning Staff's report and recommendation before December 7, 2007 meeting, Appellants appeared at a public hearing and again only conveyed concerns regarding traffic. (AR 1:47, 134.) And, finally, at the Board of Supervisors' Planning Meeting held on April 8, 2008, no member of the public brought up the issue relating to the applicability of the categorical exemption. Rather, the topics discussed were again limited to density calculation, environmental impact due to cumulative effects of various developments, and traffic and parking. (AR 1:177-185.) None of the letters submitted by Appellants and/or their neighbors specifying the grounds for their appeal to the County Board of Supervisors contained any challenge to the Planning Commission's finding that the project was categorically exempt as an "in-fill development" under Section 15332. All of the documentary evidence cited by Appellants pertains to Appellants' general concerns or comments

relating to the Project's potential impact on the neighborhood (i.e., traffic and parking) and the environment in general.

Based on the above, this Court should conclude that Appellants failed to exhaust their administrative remedies requirement because they failed to raise any challenge of the Project's noncompliance with CEQA Guidelines § 15332 at the administrative level.

Appellants argue that "the County never provided Appellants or the public with a complete analysis demonstrating that the County had carefully considered whether each of the criteria of the claimed exemption applied to the project." (Appellants' Answer Brief on the Merits, pp. 28-29, 32-33.) However, Appellants fail to cite any authority supporting their contention that the County was required to fully recite the requirements of the applicable exemption, or that it failed to comply with any statutory requirement by not providing a full analysis of its determination that the categorical exemption applied herein. Appellants cannot now claim that they were unaware of the requirements of the exemption, or that County failed to notify Appellants of the exemption requirements.

3. Appellants' Claim That The Exhaustion Requirement Is Waived As To Them Because They Were Not Informed Or Were Mislead About The Exemption Requirements Is Also Not Supported by Law Or The Facts Herein.

Appellants now raise a creative argument that the County somehow failed to comply with the notice requirement under Public Resources Code

§ 21177(e) by arguing that the County misled the public about the requirements for the in-fill categorical exemptions and, therefore, that the public did not have notice that an issue existed. Appellants further argue that they cannot be held to the knowledge or understanding to be able to articulate precise legal requirements. Appellants further argue that County's failure to recite the full text and criteria of the exemption for in-fill development is equivalent to no notice at all. (Appellant's Answer Brief On The Merits, pp. 33-34.) As explained below, the facts do not support Appellants' arguments.

In support of their aforementioned contention, Appellants cite two additional cases – *McQueen v. Bd. of Directors* (1988) 202 Cal.App.3d 1136 and *Temecula Band of Luiseno Mission Indians v. Ranch Cal. Water District* (1996) 43 Cal.App.4th 425 – for the proposition that misleading notice is equivalent to no notice at all.

It should be noted that the administrative record here is devoid of any evidence that the County engaged in any intentional act, or conspiracy with other parties, to mislead the public about the application of the "infill development" exemption. If anything, Real Party believes that the County staff was operating under an honest, but possibly mistaken, belief that the "infill development" exemption under CEQA Guidelines, § 15332 was

properly applied herein.[2]

This Court should also note that the issue in *McQueen v. Bd. of Directors, supra,* turned on the statutory exception stated in Section 21177(e) (and discussed above) which states that the exhaustion of administrative remedies is not required of project opponents who did not receive proper notice of administrative hearings. *McQueen v. Bd. of Directors, supra,* 202 Cal.App.3d at p. 1150. Appellants' reliance on *McQueen* is misplaced because a statutory exception was the underlying reason the *McQueen* court did not hold the project opponents to the exhaustion of remedies doctrine. *Id.*

In *McQueen, supra,* the court held that respondent district gave notice of the proposed property acquisition but failed to mention the acquisition of toxic, hazardous substances as part of the project, and proceeded with the purchase of the property after claiming the purchase exempt from CEQA requirements. *McQueen v. Bd. of Directors, supra,* 202 Cal.App.3d at p. 1150. As a result of the aforementioned facts, the

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[2] As mentioned above, the County staff may have erroneously relied on other CEQA statutes specifically defining "in-fill site" (Public Resources Code § 21061.3) as "a site in an urbanized area" meeting certain criteria. "Urbanized area" is separately defined in CEQA under Public Resources Code § 21071 to include unincorporated areas meeting certain population density requirements.

courts of appeal in *McQueen* held that petitioners were not required to exhaust their administrative remedies where the relevant public agencies failed to give proper notice.

Here, Appellants do not argue that the County failed to notify the public about the fact that the Project herein was determined to be exempt from CEQA under the "infill development" exemption under CEQA Guidelines, Section 15332. Rather, the County informed the public on numerous occasions which specific exemption was being applied to the Project.

Additionally, Appellants misapply the holding in *Temecula Band of Luiseno Mission Indians v. Ranch Cal. Water District, supra.* In the *Temecula Band of Luiseno Mission Indians* case, the court applied the reasoning in *McQueen* but nevertheless held that petitioners had failed to exhaust their administrative remedies because the water district had made it clear at the public hearing that the project was a modification to an earlier 1984 program and petitioners did not object that the project description was inaccurate. *Temecula Band of Luiseno Mission Indians v. Ranch Cal. Water District, supra,* 43 Cal.App.4th at p 434. The court in *Temecula Band, supra,* explained as follows:

> "We read *McQueen* as holding that 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. The petitioner still must raise the objections and exhaust the administrative remedies available at the time." *Id.*; emphasis added.

By claiming that the County failed to notify Appellants of the exemption requirement, Appellants attempt to shift the burden regarding the exhaustion of administrative requirement on the County, when in fact the burden is on the Appellants to demonstrate that "the issues raised in the judicial proceeding were first raised at the administrative level." *Porterville Citizens for Responsible Hillside Development v. City of Porterville, supra,* 157 Cal.App.4th at p. 909.

It is unclear how *McQueen* places an affirmative duty on the County to legally advise Appellants on the requirements of the "infill" exemption. Appellants fail to cite any authority providing that the public agency is required to recite the full exemption language in the CEQA Guidelines and/or that failure to recite the statutory language constitutes failure to provide the public with proper notice. If Legislature intended to burden public agencies with such notice requirements, it would have enacted a statute or regulation requiring public agencies to provide notice of all applicable statutes or regulations prior to every public hearing. Presumably, if the Court were to follow Appellants' argument, then every public agency would have to ensure that the full language of all applicable statutes is cited in order to avoid a later reversal of that public agency's

decisions. In fact, this Court has previously held in another jurisdictional case, *Stockton Citizens for Sensible Planning et al. v. City of Stockton et al.* (2010) 48 Cal.4th 481, that a public agency is not required to fully recite the statutory language of an applicable exemption when that agency decides to file a Notice of Exemption. "[A]n NOE need only provide a 'brief' description of the approved project, state its location, and set forth reasons for the agency's finding of exemption. (CEQA Guidelines, § 15062, subd. (a).) Once the agency files a notice satisfying those basic requirements, thus alerting the public to the agency's decision and its basis, it is the public's obligation thereafter to determine whether a challenge to the project approval is appropriate. The CEQA Guidelines do not demand that the NOE itself disclose and explain all the arguable environmental implications, or all the grounds upon which such a challenge to the exemption determination might be based." *Stockton Citizens for Sensible Planning et al. v. City of Stockton et al., supra,* 48 Cal.4th 481, 514 (emphasis added).

Appellants' argument that they cannot be held to the knowledge or understanding to be able to articulate precise legal requirements is also without merit. As stated above, the Planning Department informed the public as early as its first Preliminary Plan review meeting of July 2, 2007 that the Project was determined to be exempt from CEQA environmental impact review requirements under Section 15332 of CEQA Guidelines as

an in-fill development project. (AR 1:35.)

Further, the requirements of the categorical exemption are easily ascertainable by a search on the internet or on any public library. In fact, evidence in the administrative record shows that Appellants were well aware of the requirements of the "infill development" categorical exemption under CEQA Guidelines, § 15332, and/or had access to said Guidelines. In an e-mail sent to County staff on April 4, 2008, 4 days prior to the Board of Supervisors hearing on appeal held on April 8, 2008, Appellants personally quoted language in Section 15332 as follows:

> "Section 15332, Item C indicates 'The project site has no value as habitat for endangered, rare or threatened species.' The Fairview Area Specific Plan indicates 'The County shall require that roadways and developments be designed to minimize impacts to wildlife corridors and regional trails.' Since deer and other wildlife use this open space daily as a corridor to get to Don Castro Regional Park, we want to make sure this is duly noted.
>
> Fred & D'Arcy" (AR 2: 466; emphasis added.)

Based on the aforementioned, the Court must have no doubt that Appellants were well aware of the requirements of Section 15332 of CEQA Guidelines, and that such requirements were easily ascertainable by a layperson. The language now being objected to by Appellants, i.e, that "[t]he proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses," is

in plain language, easily understood by a layperson. Yet, neither Appellants nor anyone else raised an objection that the "in-fill development" categorical exemption does not apply to this Project because it is not "within city limits."

Because Appellants failed to raise the issue regarding applicability of Section 15332 at the various public hearing relating to the Project, and the Board of Supervisors were deprived of the opportunity to receive and respond to Appellants' articulated factual issues and legal theories before its actions are subjected to judicial review, the Court must find that Appellants are precluded from asserting this issue for the first time in this judicial proceeding.

C. IF THE COURT DETERMINES THAT APPELLANTS HAD A DUTY TO EXHAUST ADMINISTRATIVE REMEDIES, APPELLANTS' CONTENTION THAT THE COUNTY WAS NOT DEPRIVED OF AN OPPORTUNITY TO CONSIDER THE LOCATION CRITERION OF THE INFILL EXEMPTION IS OF NO CONSEQUENCE BECAUSE THE COURT CANNOT LOOK TO THE MERITS OF THE CASE BEFORE THE JURISDICTIONAL PREREQUISITE IS MET.

Here, Appellants erroneously argue that the County was not deprived of an opportunity to consider the location criterion of the infill exemption because it is "not an issue that implicates the County's particular expertise and 'does not require an evidentiary determination.'" (Appellants' Answer Brief on the Merits, p. 42.)

As stated in cases cited by Real Party in its Opening Brief on the

Merits, the Court should not even consider the merits of the issue until it determines that Appellants have sufficiently satisfied the exhaustion requirement. Further, Appellants' argument is faulty in that it presumes the County fully understood that the "infill development" categorical exemption under CEQA Guidelines, § 15332 contained a strict requirement that the Project be located "within city limits."

As stated above, the record does not reflect an intentional act by the County to mislead the public or omit the exemption requirements. Nor does the record contain any evidence that the County was fully aware that the Project did not meet all of the requirements of the "infill development" exemption under CEQA Guidelines, § 15332, and chose to ignore that requirement. If County staff was genuinely not aware that the CEQA in-fill development exemption requires that the Project be located "within city limits," it would not have mattered whether the County knew that the Project is located in an unincorporated area, and not "within city limits," because the County and other parties would not have understood that there was an issue in the way the "infill development" exemption was applied herein.

The above situation is precisely why the exhaustion of administrative remedies requirement exists – to provide the public agency an opportunity to learn about any issues that may exist and to address those issues before they are subjected to judicial review. As explained in

this Court's *Stockton Citizens* decision, if a petitioner cannot meet the jurisdictional threshold requirement, the matter does not proceed to the merits. *Stockton Citizens for Sensible Planning et al. v. City of Stockton et al., supra,* 48 Cal.4th 481, 504.

CONCLUSION AND REQUESTED DISPOSITION

Based on the foregoing, Real Party respectfully requests that the Supreme Court reverse the Court of Appeal's decision in *Tomlinson*, and affirm the trial court's decision to deny Appellants' petition for writ of mandate.

Dated: 4/8/11

Respectfully submitted,

ABDALAH LAW OFFICES
A Professional Law Corporation

By: _____

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Real Parties in Interest,
Y.T. WONG and SMI
CONSTRUCTION, INC.

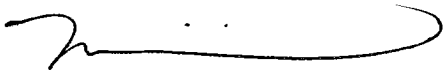
CERTIFICATE OF WORD COUNT

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

I, MIRIAM H. WEN-LEBRON, hereby certify that the word count in REPLY BRIEF ON THE MERITS BY REAL PARTIES IN INTEREST Y.T. WONG AND SMI CONSTRUCTION, INC. is 6,698 words.

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

Executed this 8th day of April, 2011 in Cupertino, California.



MIRIAM H. WEN-LEBRON

PROOF OF SERVICE

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

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

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

_____

DIANE REES