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COURT OF APPEAL UPHOLDS PREVIOUS DECISION, FINDING THAT THE REQUIREMENTS FOR EXHAUSTING ADMINISTRATIVE REMEDIES BEFORE CHALLENGING CEQA EXEMPTION DID NOT APPLY

Tomlinson v. County of Alameda, No. A125471 (1st Dist. Div. 5, October 6, 2010)

By Misty L. Calder

In *Tomlinson v. County of Alameda*, the First Appellate District reexamined its decision in *Tomlinson v. County of Alameda* (2010) 185 Cal.App.4th 1029, where the Court found that the County of Alameda ("County") abused its discretion in deeming a proposed subdivision project exempt from the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) ("CEQA"), under the categorical exemption for in-fill development (Cal. Code Regs., tit. 14 (CEQA Guidelines), § 15332). After the publication of the case, Division Two of the First Appellate District certified its opinion in *Hines v. California Coastal Com.* (2010) 186 Cal.App.4th 830 for publication, which held that Public Resources Code section 21177's exhaustion requirement did apply in circumstances similar to those presented in this case. The Division Five court granted rehearing on its own motion to allow for further consideration of the *Hines* decision.

After supplemental briefing by the parties, the Court of Appeal found that, although factually similar, the *Hines* case was distinguishable in notable respects. The court explained that while the *Hines* court cited *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165 in support of its holding, it did not purport to construe the language of subdivision of section 21177, and did not consider the *Azusa* analysis holding that section 21177 applies only: "where (1) CEQA provides a public comment period, or (2) there is a public hearing before a notice of determination is issued." (*Azusa*, *supra*, 52 Cal.App.4th at p. 1210.) Although a public hearing had been held for the exemption determination in this case, none was required, nor was a notice of determination issued or required to be issued. On that basis, the court found there was nothing in *Hines* that required the Court to alter its prior conclusions that section 21177's exhaustion requirement had no preclusive effect in the present case.

The next issue the Court of Appeal reviewed was whether or not there was substantial evidence to show that the proposed subdivision satisfied the "within city limits" requirement of the in-fill development exemption. The homeowners contended that the exemption did not apply, because the site is located in unincorporated Alameda County. The County sought a broader construction of the phrase "within city limits," arguing that the proposed subdivision would occur in an "established urban area."

The Court of Appeal held that substantial evidence did not show the proposed subdivision satisfied the “within city limits” requirement of the in-fill development exemption, and therefore, CEQA review was necessary. The Court opined that the plain meaning of the phrase "within city limits," as it is used in CEQA Guidelines section 15332, requires that a project occur within the boundaries of a municipality. Furthermore, the Secretary for Resources could have specified that a project must occur "within an urbanized area," like it had used in other categorical exemptions, but used the phrase "within city limits" instead. Therefore, the Court of Appeal reversed the trial court's order and remanded the matter with instructions to issue a writ of mandate directing the County to set aside its decision.

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