

## **Speak Now or Forever Hold Your Peace — Issue Exhaustion Applies to CEQA Exemptions.**

The California Supreme Court has issued a landmark decision holding that the exhaustion doctrine – which requires parties to raise their claims at the administrative level before litigating them in court -- applies to challenges to an agency decision that a project is exempt from CEQA. Overturning a 15-year-old precedent, the court ruled that if the decision-making agency holds a hearing on the project, prospective litigants must apprise the agency of the relevant issues before they can bring them to court. *Tomlinson v. County of Alameda*, Case No. S188161, 2012 WL 2145906 (Cal. June 14, 2012) The issue exhaustion rule has been murky ever since a 1997 case, *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 52 Cal. App. 4th 1165, stated that the exhaustion requirement did not apply to a challenge to a decision that a project was exempt from CEQA. More recently, there have been conflicting opinions—the court of appeal's decision this case, which sided with *Azusa*, and a two-year-old decision holding that exhaustion was required (*Hines v. California Coastal Com.*, 186 Cal. App. 4th 830 (2010)). The Supreme Court made the issue seem easy. The court explained that CEQA expressly states that a proposed project can be challenged only on grounds that "were presented to the public agency orally or in writing by any person during the public comment period . . . or prior to the close of the public hearing on the project before the issuance of the notice of determination." (Pub. Res. Code 21177(a)) The court acknowledged that when an agency determines a project is exempt from CEQA, there is no public comment period, so that aspect of this test does not apply. But if the public agency holds a hearing on the project before deciding it is exempt from CEQA, the court ruled the statutory requirement applies. It does not matter whether the hearing was required by law. Nor does it matter whether the agency ultimately filed a notice of determination. In *Tomlinson*, Alameda County held multiple hearings on a proposed housing project. The County provided notice before each hearing that the project fit within the infill housing CEQA exemption. The County also provided notice that if parties did not raise issues during the agency proceedings, they could not raise those issues in court. The litigants appeared at the county's hearings, and lodged several complaints. But no one ever argued that the project did not fit within the infill housing exemption because it was located on unincorporated county land rather than within city limits. Nevertheless, this was the issue the litigants chose to highlight when they challenged the County's approval in court. The court of appeal excused the litigants' oversight, ruling that the requirement to first raise issues at the agency level does not apply to exemption decisions. The Supreme Court disagreed, holding that the requirement to first raise issues at the agency level is a necessary prerequisite to litigation whenever the agency holds a hearing on the project before making its decision. The California Supreme Court has not been reluctant to apply CEQA's litigation prerequisites to dismiss suits in which litigants have failed to comply with the applicable requirements. While the court recognizes CEQA's importance, it also has read statutory prerequisites to litigation strictly, providing greater certainty to agencies and developers that issues will be resolved according to CEQA's timelines and issues will be restricted to those raised during the agency proceedings.

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