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"Permanent Vacation" In Palm Springs? – Fourth District Holds CEQA's Short 35-Day Statute of Limitations Does Not Apply Despite City's Filing of NOE Due To Subsequent Material Change In Street Vacation Project Which Triggered Maximum 180-Day Limitations Period

By Arthur F. Coon on March 6, 2023

In a published opinion filed on February 23, 2023, the Fourth District Court of Appeal reversed a judgment of dismissal after the sustaining of a demurrer and held that an amended writ petition challenging a city's street closure project sufficiently stated claims against the city for Vehicle Code, local ordinance, and CEQA violations. *Committee to Relocate Marilyn v. City of Palm Springs (PS Resorts, Real Party in Interest)* (2023) ___ Cal.App.5th ___. As relevant here, it held the operative petition was not time-barred despite its first alleging CEQA violations more than 35 days after the City's filing of a Notice of Exemption ("NOE") because the City subsequently changed its project from a *street vacation* to an allegedly *temporary street closure* and Petitioner (the "Committee" or "Petitioner") filed its amended petition alleging a CEQA claim within 180 days of learning of the change.

The Project And Procedural Background

The City of Palm Springs' ("City") project was closing off one of its downtown streets (Museum Way between Museum Drive and Belardo Way) to vehicle traffic for a three-year period to create a pedestrian-only "art walk." More specifically it would allow PS Resorts, a non-profit tourism organization, to place a 26-foot tall, 34,000-pound statue of Marilyn Monroe, known as "Forever Marilyn," directly on the street for public view at a site adjacent to a downtown park "with a picturesque mountain backdrop and visibility from a major downtown thoroughfare." The iconic actress was reportedly first discovered in Palm Springs in 1949, and Forever Marilyn (which was previously displayed at an empty lot in downtown Palm Springs and at other sites in the US and abroad) depicts her in a famous scene from 1955's "The Seven Year Itch," in which her "white dress is lifted up by a gust of wind from a New York City subway grate." (The Opinion, seemingly with tongue-in-cheek, attaches a photo of the statue as "Figure 1.")

The City Council approved the project at a regular November 12, 2020 meeting, directing the City Manager to execute a 3-year license with PS Resorts for the statue's location, and authorizing the City Engineer to proceed with the process of vacating the public's vehicular access rights on the subject street segment. The City filed its NOE with the County Clerk on December 29, 2020, invoking the Class 1 "existing facilities" exemption. (CEQA Guidelines, § 15301.) The NOE identified PS Resorts as the project applicant, accurately stated the project's location, and described the project as the placement of Forever Marilyn "within an existing street, which requires the City to enter into a License Agreement with P.S. Resorts to authorize placement [sic] the statute *and vacate the public's vehicular access rights on a portion of Museum Way*." (Emph. Court's.)

On February 24, 2021, in response to the Committee's letter requesting clarification, the City Attorney wrote "a letter stating the City [only] planned to temporarily restrict access to Museum Way, rather than vacating the street… because it was unlikely the City could meet the statutory requirements [for vacation]." On March 22, 2021, there followed the City's Development Services Director's more formal determination authorizing a temporary closure pursuant to the Vehicle Code and local code sections for no longer than the three-year license period.

Apparently not fans, the Committee filed its original writ petition on March 19, 2021, challenging the street closure; it alleged the City lacked authority to close the street for three years under Vehicle Code § 21101(e), which permits temporary closures for certain types of events for the safety of pedestrians, or under its local equivalent, Palm Springs Municipal Code § 12.80.010. The Committee's original petition did not assert a CEQA cause of action.

The trial court initially issued a TRO, but later denied a preliminary injunction and dissolved the TRO, allowing the installation of Forever Marilyn and closure of Museum Way to vehicles to proceed. On April 22, 2021, the Committee filed its operative first amended petition, adding allegations including a CEQA claim that the City failed to conduct environmental review despite the project's adverse environmental impacts on traffic, aesthetics, and historical resources.

After the trial court sustained without leave the City's demurrer to the Committee's Vehicle Code, Municipal Code, CEQA, and Highway Code causes of action, the Committee dismissed its remaining declaratory relief and Government Code causes of actions, resulting in the final judgment from which it appealed.

The Court of Appeal's Opinion

Much of the Court's Opinion dealt with the statutory basis and nature of the state's preemption over the field of traffic control, under which a city only has such authority over vehicular traffic control as the Legislature expressly provides. Since the use of streets and highways for public travel and transportation is "not a mere privilege, but a common and fundamental right," it is unsurprising that the Legislature's partial delegation of traffic control to local authorities is significantly limited. As relevant here, local authorities are provided by Vehicle Code § 21101(e) with the authority to "adopt rules and regulations by ordinance or resolution… [t]emporarily closing a portion of any street for celebrations, parades, local special events, and other purposes when, in the opinion of local authorities having jurisdiction or a public officer or employee that the local authority designates by resolution, the closing is necessary for the safety and protection of persons who are to use that portion of the street during the temporary closing."

The Court interpreted the relevant Vehicle Code section (and the City's mirroring Code provision) employing standard principles of statutory construction, dictionary definitions, and the doctrine of *ejusdem*

generis, and concluded that it "grants local authorities the power to 'temporarily' close portions of streets, but only for limited reasons – for 'celebrations, parades, local special events, and other purposes [involving short-term events], where the closure is necessary to safeguard, and protect persons using the street." The Court found the "list of short-term events" preceding the word "temporarily" contributes to its intended meaning and indicates that "the [authorized] street closures must be brief in duration," lasting for only a relatively brief period of time depending on the need or purpose of the closure at issue. Accordingly, the Court concluded the statute does "not authorize local authorities to close streets to vehicular traffic for whatever non-permanent duration of time they desire[,]" and did *not* authorize the City's "temporary" *three-year* closure here.

Turning to the CEQA issue, the Court held the City's filing of the NOE did not trigger a 35-day statute of limitations that barred the amended petition because the project materially changed *after* the City filed the NOE. While the project and NOE originally contemplated a street vacation, the City later abandoned that plan and instead "temporarily" closed the street under Vehicle Code § 21101(e). While the filing of a facially valid NOE triggers a 35-day CEQA statute of limitations to challenge the project described in the NOE, "if substantial changes are made to the 'project' *after* the NOE filing or approval by the agency, a 'new' 180-day period may begin to run from the time a plaintiff knew or should have known the project substantially differed from the original 'project.'" (Quoting *City of Chula Vista v. County of San Diego* (1994) 23 Cal.App.4th 1713, 1720.)

Here, the City's election not to proceed with street vacation materially changed the project to a "temporary" three-year closure, and the Court agreed with petitioner that this "was a substantial change that frustrated CEQA's goal of informed public participation," and thus triggered a new limitation period – CEQA's 180-day maximum – running from the date petitioner knew or should have known of the change. (Citing and discussing at length, *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929, and *Ventura Foothill Neighbors v. County of Ventura* (2014) 232 Cal.App.4th 429, my 12/29/14 post on which can be found ***here***.)

The Court rejected the City's arguments that the change from vacation to temporary closure was not significant and would likely result in lesser environmental impacts as "miss[ing] the mark." A street vacation involves a permanent abandonment of the public right to use the street whereby beneficial use or title usually reverts to private parties, whereas with a temporary closure the pubic regains its right to use the street once the closure ends. The Court reasoned that, given the materially different natures and durations of each type of closure, they could have significantly different environmental impacts; but perhaps more importantly, the change in the project without public notice deprived the public of any meaningful opportunity to evaluate and decide whether to challenge the actual project. Having already noted the key role of public notice of an agency's action underlying both a valid NOE's trigger of CEQA's short 35-day limitations period, and the exception reverting to a 180-day period where a project later changes without public notice, the Court stated: "Irrespective of whether the City believes the project it pursued will be less impactful to the environment than the one described in the [NOE], the City's failure to notify the public about the change effectively deprived the public of the chance to evaluate the changed project for itself and to make its own decisions as to whether to challenge the project."

The Court elaborated on its reasoning supporting this point as follows: "A member of the public might sensibly decline to pursue a costly and time-consuming legal challenge if he or she does not think the legislative body of the local agency will be able to make the findings necessary to vacate the street[, which include the evidence-supported finding, after a hearing, that the street is unnecessary for present or prospective public use. …] Indeed, in this very case, the City ultimately declined to pursue vacation because, according to the City Attorney, the City did not believe it could make the showing necessary for vacation."

Thus, the Court held that the City's post-NOE material project change precluded application of the 35-day statute of limitations (Pub. Resources Code, § 21167(d)), and that "the applicable statute of limitations was 180 days, measured from the date the Committee knew or reasonably should have known the project differed substantially from the one described in the [NOE.]" Since the amended petition asserting the CEQA claim was filed within 180 days of the date of the City Attorney's letter to the Committee stating the City would pursue temporary closure rather than vacation of the street, the claim was not time-barred.

Conclusion and Implications

At first blush, the City's "no harm, no foul" position here – that a three-year street closure was clearly less environmentally impactful than a "permanent vacation" – has superficial appeal. But the Court's Opinion illustrates the extremely important roles that courts ascribe to public participation in the process and accurate notice of – and meaningful ability to evaluate – the project actually being pursued. In sum, public agencies should be aware that "hiding the ball" in terms of accurately describing the Project actually being pursued is no more permissible in the NOD/NOE/statute of limitations context than it is in the context of a full EIR.

And so, while it appears that Forever Marilyn's "temporary" stay on Museum Way may soon come to an end, let's all hope that she finds an appropriate permanent Palm Springs home where her unique attributes will be properly welcomed and appreciated.

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