MILLER STARR REGALIA

Timing Remains Everything: Sixth District Holds CEQA Notice of Determination Filed Before County's Final Project Approval Decision Does Not Trigger Short Limitations Period

By Matthew C. Henderson and Arthur F. Coon on August 12, 2024

The Sixth District Court of Appeal filed on July 24, and later certified for publication on August 6, 2024, its opinion in *Center for Biological Diversity et al. v. County of San Benito, et al.* (2024) __ Cal.App.5th __. The case involves the application of CEQA's short 30-day statute of limitations for challenging an EIR's sufficiency in the context of multiple CEQA lawsuits brought against a multi-use "roadside attraction" project in San Benito County.

The trial court had ruled that the time to file suit ran from the date of filing of the notice of determination (NOD) that was filed following approval of the project by the County's Planning Commission, rather than from the date of filing of the later NOD that followed the County Board of Supervisors' denial of petitioners' administrative appeals and final approval of the project. Thus, the trial court sustained without leave the demurrers filed by real parties in interest, and joined by the County, on statute of limitations grounds.

Applying clear rules and principles of CEQA and writ law to a factual and procedural scenario that rather commonly occurs in the world of land use practice – i.e., an administrative appeal of an approval that would otherwise be final absent that appeal – the Sixth District reversed. It held that the time to file the lawsuit ran from the second, operative NOD following the Board of Supervisors' rejection of the petitioners' administrative appeals, which resulted in a final County decision approving the project. The writ petitions were thus reinstated such that the CEQA actions challenging the EIR and related project approval will proceed to be litigated on their merits in the trial court.

Project Background and Litigation History

The case involves the "Betabel Project," a mixed-use development including a gas station, convenience store, restaurant, "amusement buildings," motel, banquet hall, pool, and outdoor event center and movie theater on 26 acres of land in San Benito County west of US 101. Real parties Henry Ruhnke, Thomas John McDowell and Victoria Knight McDowell Charitable Remainder Unitrust, and Thomas John McDowell and Victoria Knight McDowell, trustees, filed their application for a conditional use permit (CUP) for the project in 2021. Subsequent site surveys revealed that the project site included a number of tribal cultural resources for the Mutsun people (whose descendants now constitute the Amah Mutsun Tribal Band).

The County released a draft EIR for the project in July 2022, with the final EIR being released in September of that year. The County Planning Commission held its hearing on the CUP and EIR on October 12, 2022, voting to approve the former and certify the latter. The County then filed an NOD for the actions taken by the Commission on October 14, 2022.

Center for Biological Diversity and Protect San Benito County (CBD) and the Amah Mutsun Tribal Band appealed the Planning Commission's approval to the County Board of Supervisors, which heard the appeals on November 8, 2022, and voted to deny them, adopting a resolution to that effect that approved the project, and also certified the final EIR, and adopted a mitigation monitoring and reporting program and a statement of overriding considerations. The County filed an NOD for the Board's action on November 10, 2022.

CBD and the Amah Mutsun Tribal Band filed separate lawsuits, asserting CEQA and other claims, against the project on December 9, 2022, within 30 days of the filing of the NOD for the Board's action. The cases were then consolidated in the trial court. Real parties and the County demurred to both petitions, arguing that they were untimely brought under Public Resources Code section 21167(c), which requires a writ petition challenging the sufficiency of an EIR to be brought within 30 days after the filing of the NOD announcing the project approval. The linchpin of that argument was the contention that the 30-day limitations period ran from the filing of the first NOD filed after the Planning Commission's action, rather than from the filing of the later NOD following the Board of Supervisors' action.

Surprisingly, the trial court agreed with real parties and the County and sustained the demurrers without leave to amend. Petitioners then dismissed their non-CEQA causes of action and appealed from the ensuing final judgment. The Court of Appeal reversed.

The Court of Appeal's Opinion

Appellants' argument was essentially that, under CEQA and the County Code, the filing of the first NOD effectively triggered the 30-day statutory limitations period. The Sixth District had little trouble disposing of this argument. CEQA requires the local agency's filing of an NOD with the County Clerk "within five working days ***after the [project] approval or determination becomes final***[.]" (Pub. Resources Code, § 21152(a), emph. and bracketed text added.) The finality of a substantive land use approval is, of course, governed by the lead agency's rules and procedures. (CEQA Guidelines, § 15352(a).) As is common in local jurisdictions throughout the state, the County's Code states that a Planning Commission approval of a CUP is not final until the ten day appeal period also provided by the Code has run, and that if an appeal to the Board of Supervisors has been filed within that period, the CUP is deemed not to be approved until the Board acts on the appeal. Because CBD and the Amah Mutsun Tribal Band had timely appealed the Planning Commission's approval of the CUP, it was not actually finally approved until the

Board of Supervisors acted on those appeals by denying them and certifying the final EIR. As the Court of Appeal explained:

> [I]t is apparent that the Planning Commission's approval of the conditional use permit for the Betabel Project did not constitute a final approval, since the Center and the Amah Mutsun Tribal Band timely appealed the approval to the Board of Supervisors during the 10-day period to appeal after the Planning Commission's decision. (See [Pub. Resources Code] § 21152, subd. (a); San Benito County Code, § 25.02.003, subd. (K)(1) & (2).) Consequently, the October 14, 2022 NOD filed by the Planning Commission did not follow a final approval, and for that reason, the October 14, 2022 NOD was not effective to commence the 30-day limitations period provided by section 21167, subdivision (c) for an action challenging the adequacy of an EIR. (See *Committee for Green Foothills*, *supra*, 48 Cal.4th at p. 47.)
>
> We therefore determine that the 30-day limitations period provided by section 21167, subdivision (c) began to run on November 10, 2022, the date the Board of Supervisors filed a NOD after its final approval of the Betabel Project and denial of the appeals of project opponents the Center and Amah Mutsun Tribal Band. Accordingly, the writ petitions of the Center and the Amah Mutsun Tribal Band were timely filed within the 30-day limitations period on December 9, 2022.

In reaching this conclusion, the Court distinguished *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481 (*Stockton Citizens*), which Real Parties and the County had cited in support of their position. Real Parties apparently argued that *Stockton Citizens* stands for the proposition that a notice of exemption (NOE) (and thus, by analogy, an NOD) triggers the running of the statute of limitations irrespective of the validity of the underlying action. Thus, even if the Planning Commission approval were not "valid" because of the superseding action by the Board of Supervisors, the NOD for that approval still started the clock running. The Court of Appeal gave this position short shrift, noting that *Stockton Citizens* did not involve an appeal to a final decisionmaker, nor multiple NOEs, and so was factually distinguishable. The Court distinguished *Committee for Green Foothills v Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32 on similar grounds, noting that it did not involve a second NOD following an administrative appeal. The Court then turned to the recent decision of *Guerrero v. City of Los Angeles* (2024) 98 Cal.App.5th 1087 (this blog's 1/29/24 post on which can be found here), holding that it, too, was inapposite as it did not involve multiple NODs filed for the same entitlement, nor an administrative appeal of an approval to a final decisionmaker.

Finally, the Court also noted that the real parties' and County's argument ran afoul of the well-established rule requiring the exhaustion of administrative remedies as a fundamental prerequisite to bringing any mandamus action. Because the petitioners were required to appeal the Planning Commission's approval to the Board of Supervisors in order to exhaust their available administrative remedies under the County's Code, suing in court on the non-final Planning Commission action prior to doing so would have been premature and jurisdictionally defective. Thus, it was the NOD filed after the final action of the Board of Supervisors that served to trigger the CEQA statute of limitations, not the NOD on the Planning Commission's intermediate and nonfinal approval.

The Court of Appeal therefore reversed and remanded the case to the trial court with directions to enter new orders denying the demurrers in the consolidated cases.

Conclusion and Implications

In our view, this case does not really break new legal ground, and was presumably published (at the request of the prevailing real parties and a law firm that regularly represents CEQA petitioners) because it explains in detail the reasons for the governing law and applies it to a fact pattern differing from that found in other published opinions. (Cal. Rules of Ct., rule 8.1108(c)(2), (3).) We note the Court could have bolstered its opinion with other relevant and analogous authority as it has long been established by published case law that the premature filing of an NOE prior to actual final approval of the project is ineffective to trigger the short 35-day statute of limitations for challenging approval of a project determined to be CEQA-exempt. (*See, Coalition for Clean Air v. City of Visalia* (2012) 209 Cal.App.4th 408, 423, this blog's 9/19/12 post on which can be found *here*.) Because CEQA's short statutes of limitations govern challenges to project approvals, and are triggered by the filing of NOEs or NODs announcing to the public that projects have been approved (Pub. Resources Code, §§ 21167(1), 21108(a), 21152(a)), and because *both* NOEs and NODs are authorized and required to be filed only *after* a project has been finally approved (*ibid*; see also CEQA Guidelines, §§ 15062, 15094), it necessarily follows that the same rule applies to determine the effect of the filing of either an NOE or an NOD before final project approval, i.e., it fails to trigger the 30-day statute of limitations. This result is straightforward and commonsense, reiterating that while CEQA's short statutes of limitation are, indeed, brief, the notice filing that triggers them must relate to and follow the *final* project approval and not an action that merely amounts to a preliminary or intermediate step along the way.

All this being said, however, the County cannot be faulted for filing an NOD within five (5) working days of the Planning Commission's approval action as it did. At the time that the first NOD was timely filed ostensibly pursuant to CEQA's mandatory provisions, it could not have been known with any certainty whether the Planning Commission's action would or would not be timely appealed to the County's Board within the 10-day appeal period and, hence, it could not have been known whether that action would or would not ultimately constitute the County's final project approval. Thus, filing the first NOD (1) was arguably required by CEQA and (2) might have been effective to trigger the short 30-day limitations period if no administrative appeal were filed.

This possibility raises further interesting albeit somewhat abstruse issues. Supposing that no timely administrative appeal had ever been filed, then the Planning Commission's approval would have ended up being the County's final project approval, although it remains unclear (at least to these authors) whether it would be considered to have been final as of its date of issuance or only following ten days thereafter when it remained unchallenged; if the former, then the first NOD would be effective to trigger the 30-day statute of limitations running from its filing date, but if the latter then the County would presumably have been required to file another NOD after the expiration of the 10-day appeal period to achieve that result. However fascinating all this might be to CEQA litigation wonks, this theoretical uncertainty as to the date of finality would appear to make little difference as a practical matter in most cases because even if a short statute of limitations did not bar a subsequent CEQA action then failure to exhaust administrative remedies presumably would.

The bottom line is that the Court of Appeal's opinion reaches a clearly correct result based on existing law. Accordingly, at first blush we were a bit puzzled as to (1) how the trial court got it wrong and (2) why the opinion was published. CEQA being CEQA, however, there is often ample "play in the joints" to create confusion and uncertainty in the law's application. Also, as noted above, this case arises from what is actually a rather common procedural scenario in land use practice because local agencies typically have 10-day administrative appeal periods for land use approvals of this type. But this case's fact pattern has apparently not previously been presented in a published decision "on all fours" with this one. Thus, this case may have been published to quell future litigation on this issue by clearly explaining

and making explicit to all CEQA practitioners and stakeholders the operation of the applicable statute of limitations rules.

Questions? Please contact Arthur F. Coon of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written Miller & Starr, California Real Estate 4th, a 12-volume treatise on California real estate law. "The Book" is the most widely used and judicially recognized real estate treatise in California and is cited by practicing attorneys and courts throughout the state. The firm has expertise in all real property matters, including full-service litigation and dispute resolution services, transactions, acquisitions, dispositions, leasing, financing, common interest development, construction, management, eminent domain and inverse condemnation, title insurance, environmental law and land use. For more information, visit www.msrlegal.com.

www.ceqadevelopments.com