



Real Estate & Land Use

Court Sets Strict Rules for Calculating Limitations on CEQA Challenges

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Authors: [Camas J. Steinmetz](#) | [Susan K. Hori](#)

Court Establishes Strict Rules for Calculating CEQA's 30-day Statute of Limitations and Posting Notices of Determination

The California Court of Appeal recently issued a decision that establishes two bright line rules – one for calculating when the statute of limitations for CEQA actions subject to a Notice of Determination (NOD) has run and one for calculating how long the NOD must be posted before it can be removed. The NOD is one of the most critical notices filed in the CEQA process, as it establishes the very short statutes of limitations for bringing challenges under CEQA. If a NOD is not filed and posted for the requisite 30 days, a 180-day statute of limitations applies. The Court held that the 30-day statute of limitations period for CEQA challenges under Public Resources Code Section 21167(c) and the 30 days required for posting the NOD are both counted starting from the day *after* the day the NOD is first posted. The Court also held that NODs must remain posted for the full 30 days; premature removal of a posted notice, even if by only a few hours, will result in application of the 180-day statute of limitations.

Background

After a local agency decides to approve or carry out a project for which an Environmental Impact Report (EIR) or negative declaration has been prepared, the agency must file a NOD with the county clerk within five working days after approval of the project. Public Res. Code (CEQA) § 21152(a). The NOD must be made available for public inspection and posted within 24 hours of receipt for a period of at least 30 days. CEQA § 21152(c). Where a public agency has filed a NOD in compliance with these requirements, the filing and posting of the NOD starts a 30-day statute of limitations on legal challenges under CEQA. CEQA § 21167(b), (c), (e). If a NOD is not filed, the statute of limitations period is 180 days after the public agency's decision to carry out or approve the project. CEQA § 21167(a).

Summary of Decision

In *Latinos Unidos de Napa v. City of Napa*, the Court examined the twin issues of how to calculate (1) the 30 days required for posting a NOD and (2) the 30-day statute of limitations period triggered by the filing and posting of an NOD. The *Latinos Unidos* case involved an affordable-housing group that filed a petition for writ of mandate against the City of Napa seeking to set aside the city's approval of revisions to the Housing Element of its General Plan and related General Plan and zoning amendments on the ground that an EIR was required. The trial court dismissed the petition on the ground that the 30-day statute of limitations period had run. The Court of Appeal disagreed, holding that the 180-day and not the 30-day statute of limitations period applied because the NOD was not posted for the entire 30-day period.

In reaching its decision, the Court concluded that calculation of the 30 day period for posting a NOD is governed by Code of Civil Procedure Section 12, which *excludes* the first day of posting and *includes* the last. Because the NOD at issue was removed on the morning of the 30th day and therefore not posted for the entire day, the Court held that the statute of limitations on the subject CEQA

challenge was 180 days, not 30. It rejected the city's argument that the statute of limitations period is triggered when an NOD is *filed*, as opposed to posted. The Court also demanded strict compliance with the statute and criticized the city's position that it was in substantial compliance because the NOD was posted for at least part of the 30th day, stating, "Predictability and certainty are the twin guiding virtues that enable people to comply with legal requirements. . . . [B]usy, concerned persons in a community are entitled to a full 30 days of posting in a public place"

Practice Pointers

Two important practice pointers come out of this decision:

Practice Point 1: When calculating the 30-day statute of limitations period, exclude the day the NOD is posted and begin counting from the day *after*.

Practice Point 2: Once posted, the NOD must remain posted for the *entire* 30 days, including the entire 30th day.

Since NODs for projects approved by cities and counties are sent to the county clerk for posting, lead agency staff and project proponents – as well as their counsel – should make sure that the county clerk's office is aware of this requirement and does not remove the NOD before the full 30 days has expired. There is no penalty for leaving the NOD posted after the 30 days has expired, but a severe penalty is imposed (i.e., the 180-day statute of limitations) if it is removed even a few hours before the full 30 days has expired.