

Legal Updates & News

Bulletins

“One Bite at the Apple” - CEQA Statute of Limitations Runs from First Discretionary Approval

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Does a second discretionary approval for a project “revive” the project opponents’ ability to sue under the California Environmental Quality Act (CEQA), even after the CEQA statute of limitations has run on the first discretionary approval? This is an issue that has been debated for years. A recent California appellate court decision, *Citizens for a Megaplex-Free Alameda v. City of Alameda*, is helpful in removing some of this uncertainty.

The court’s decision clarifies when a project is “approved” for purposes of applying the statute of limitations for challenges based on CEQA: it is at the time of “*the earliest commitment*” by a public agency to issuance of a discretionary approval for the project. The court also held that the filing of a precautionary notice of determination after the approval of subsequent discretionary approvals implementing a project already analyzed under CEQA does not trigger a new statute of limitations period.

In reaching these holdings, the court rejected a CEQA challenge alleging that the City of Alameda improperly failed to prepare an environmental impact report (EIR) for a redevelopment project involving the rehabilitation of the historic Alameda Theatre and construction of an adjacent multi-screen cineplex and parking structure. The City had adopted a mitigated negative declaration at the time it approved a disposition and development agreement (DDA) for the project. The plaintiffs did not file their lawsuit within the 30-day statute of limitations period following recording of the notice of determination for the DDA approval, but instead after the City approved subsequent design review and use permit approvals.

The court’s holdings regarding when the CEQA statute of limitations period runs arose in the context of an argument by the plaintiffs that the City’s use permit and design review decisions should be treated as new “approvals” that required preparation of a new CEQA document. In other words, the plaintiffs asserted that the “project” was not fully approved until all necessary land use approvals were in place (*i.e.*, after approval of the use permits and design review). Therefore, the plaintiffs argued, an EIR would be required if a fair argument could be made on the basis of substantial evidence that a project may have an environmental impact.

The City countered that these were not new “approvals” for CEQA purposes, but merely implemented a project approval that had already been subject to CEQA and on which the statute of limitations period had already expired. Therefore, the City argued that the test for preparation of a subsequent or supplemental EIR under Public Resources Code section 21166 applied rather than the “fair argument” standard. Section 21166 prohibits agencies from requiring a subsequent or supplemental EIR after a CEQA document has already been adopted, unless certain triggering conditions are satisfied.

The court then examined the earlier approval of the DDA to determine whether it constituted “approval” of the “project” for purposes of the project and whether filing of the notice of determination after the DDA approval would bar future challenge to the project. The court held that the filing of that notice of determination barred the plaintiffs from challenging the subsequent discretionary approvals, explaining that for CEQA purposes, the term “project” refers to the underlying activity being undertaken, rather than to each of the several approvals required for that activity. In this case, the underlying activity was the theater restoration and construction of the cineplex and parking structure, which was agreed to by the parties to the DDA. The court further explained that under the CEQA Guidelines, “approval” of a project “occurs upon *the earliest commitment*” by a public agency related to issuance of a discretionary approval for the project, and the DDA constituted such a commitment.

The court also rejected an argument by the plaintiffs that, because the City filed a separate notice of determination for the subsequent use permit and design review approvals, the statute of limitations did not begin to run until the filing of the last notice of determination. The plaintiffs' argument relied heavily on *El Dorado Union High School District v. City of Placerville*, 144 Cal. App. 3d 123 (1983). In *El Dorado*, the city at issue had filed two notices of determination. The first was issued in connection with the rezoning of a property, and the second was issued after a subdivision map approval for the same property.

The *Citizens for a Megaplex-Free Alameda* court distinguished the *El Dorado* decision, explaining that it merely held that a challenge to the decision that was the subject to the second notice of determination was not precluded because the local agency had filed an earlier notice of determination regarding a different decision. The court further explained that the subdivision map approval in *El Dorado* could not have been challenged after the filing of the notice of determination because no subdivision map was pending for consideration at the time the rezoning was approved. Thus, the *El Dorado* decision did not hold that the filing of a second notice of determination reopens the door to challenges of the decision that was the subject of the earlier notice of determination after the 30-day limitations period has expired.

Applying the test for preparation of a subsequent or supplemental EIR under Public Resources Code section 21166, the *Citizens for a Megaplex-Free Alameda* court then rejected the plaintiffs' argument that evidence post-dating the DDA approval constituted "new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time" the mitigated negative declaration was adopted, triggering the requirement for a supplemental or subsequent EIR. The court found there was substantial evidence supporting the City's determination that there was no new information showing significant environmental effects not previously discussed in the mitigated negative declaration. Although the plaintiffs had demonstrated the existence of new information (e.g., a historian's report the plaintiffs commissioned after expiration of the 30-day challenge period for the mitigated negative declaration), they had not shown why this information could not have been prepared and brought to the City's attention prior to adoption of the mitigated negative declaration.

Finally, the court rejected a challenge to the City's findings denying the plaintiffs' administrative appeals regarding the use and design approvals on the basis that they failed to support the City's refusal to prepare an EIR. The court explained that CEQA does not require the adoption of findings when an agency determines a subsequent EIR is not required, and an implied finding is sufficient if supported by substantial evidence.

The *Citizens for a Megaplex-Free Alameda* decision makes it clear that filing a notice of determination for subsequent discretionary approvals implementing but not changing a previous decision for which a notice of determination was filed does not start the CEQA statute of limitations period running anew. However, it does not resolve the questions of whether the filing of a notice of determination for a subsequent discretionary approval changing the prior decision triggers a new 30-day CEQA statute of limitations period, or what amount of change would be permissible before triggering a new challenge period. The decision also does not reverse the *El Dorado* decision to the extent that it holds that a notice of determination for a project-level decision (e.g., a subdivision map) subsequent to a prior notice for a program-level decision (e.g., rezoning) triggers a new CEQA statute of limitations period.

In any event, it is always good practice to file an additional notice of determination for a subsequent approval. The additional notice of determination provides local agencies and project proponents with protection by shortening any CEQA statute of limitations period that potentially could apply from 180 to 30 days, thus making a statute of limitations defense available. Such a defense is often the quickest and least expensive way to defeat a CEQA challenge. An additional notice of determination may also assure lenders, bond issuers, or potential purchasers that a proposed project will no longer be vulnerable to CEQA challenge once 30 days have passed after the filing.