



CALIFORNIA BUSINESS PROPERTIES ASSOCIATION

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April 13, 2020

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JUDICIAL COUNCIL OF CALIFORNIA
455 GOLDEN GATE AVENUE
SAN FRANCISCO, CA 94102

Re: Request to Amend Emergency Rule No. 9 Announced April 6, 2020

Dear Chief Justice Cantil-Sakauye:

California Business Properties Association (CBPA) respectfully requests that the California Judicial Council modify Emergency Rule No. 9, which now extends all statutes of limitations for all civil actions until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted. CBPA specifically requests that the following new paragraph be added to Emergency Rule No. 9:

Notwithstanding the foregoing or any other law, the statute of limitations for causes of action to attack, review, set aside, void, annul, or validate a decision of a public agency, as defined in Public Resources Code §21063, are tolled from April 6, 2020 until the date the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted. If the remaining time is less than 5 days when the state of emergency is lifted, the statute of limitations is extended for 5 days.

Statutes of limitations for challenging government decisions are intentionally short in order to promote finality of their decisions. For example, under the California Environmental Quality Act (“CEQA”), the statute of limitations to challenge an environmental impact report, mitigated negative declaration or a negative declaration is 30 days when the public agency has filed a notice of determination and 180 days when a notice of determination has not been filed. (Pub. Res. Code §21167(b), (c) & (e).)

The statute of limitations to challenge a negative declaration is 35 days when notice of exemption is filed and 180 days when a notice of exemption has not been filed. (Pub. Res. Code §21167 (d).) The statute of limitations to challenge final decision under the California Coastal Act is 60 days. (Pub. Res. Code §30802.) Under the California Planning and Zoning Law the statute of limitations to challenge certain land use decisions is 90 days. (Gov’t Code §65009(c).) Under the Subdivision Map Act, the statute of limitations is 90 days. (Gov’t Code §66499.37.) Statute of limitations for an interested person to bring a validation action is 60 days. (Civ. Code §830.)

These statutes of limitations were running with respect to numerous government decisions taken before April 6. For example, on March 11 through March 13, the California Coast Commission held hearings and made decisions that are subject to legal challenge. For a decision made on March 11, on April 6 there were 34 days left before the statute of limitations expired. The effect of Emergency Order No. 9 is to add 90-days to the running of the statute of limitations once the Governor’s state of emergency is lifted. Thus, when the state of emergency is lifted, the statute of limitations to challenge a March 11 Coastal Commission decision will not be 34-days, but 124 days. Similarly, on April 6, there were 64 days remaining on the statute of limitations to challenge a general plan amendment, zone change, conditional use permit and other local land use approval under the California Planning Zoning Law. (Gov’t Code §65009(c).) Under Emergency Order No. 9, when that state of emergency is lifted, there will not be 64 days left to bring the challenge, but 154 days.

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CEQA defines a “public agency” as including “any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision.” Public agencies are continuing to render decisions that are subject to judicial review during this time. The Coastal Commission has announced on its website that it is planning to conduct a virtual meeting in May. Planning Commissions, City Councils and Boards of Supervisors, among others, are currently conducting virtual public hearings on land use approvals and other decisions. In some cases, cities and counties are required to act on pending land use applications during the state of emergency because of time limitations in the Permit Streamlining Act. (Gov’t Code §65920 et seq.)

Under Emergency Order No. 9, the statute of limitations to challenge a decision rendered during the state of emergency when the agency has filed a notice of determination under CEQA would be 120-days after the state of emergency is lifted, rather than 30 days. In the absence of a notice of determination, that statute of limitations will be 270 days, rather than 180 days. The statute of limitations to challenge a Coastal Commission approval would be 150-days after the state of emergency is lifted, rather than 60 days. A 90-day statute of limitation for a general plan amendment, zone change, conditional use permit or other land use approval would become a 180-day statute of limitations after the state of emergency is lifted.

The effect of extending the statute of limitations under Emergency Order No. 9 is to create a prolonged period of uncertainty regarding the finality of government actions that were taken prior to the tolling period and during the tolling period. The statutes of limitations for state and local decisions are generally short in order to promote finality of government action. With respect to commercial projects, in enacting the 90-day statute of limitations in the California Planning and Zoning Law the Legislature declared:

(2) The Legislature further finds and declares that a legal action or proceeding challenging a decision of a city, county, or city and county has a chilling effect on the confidence with which property owners and local governments can proceed with projects. Legal actions or proceedings filed to attack, review, set aside, void, or annul a decision of a city, county, or city and county pursuant to this division, including, but not limited to, the implementation of general plan goals and policies that provide incentives for affordable housing, open-space and recreational opportunities, and other related public benefits, can prevent the completion of needed developments even though the projects have received required governmental approvals.

(3) The purpose of this section is to provide certainty for property owners and local governments regarding decisions made pursuant to this division. (Gov’t Code §65009(a)(2) & (3).)

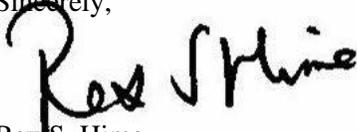
CBPA is a commercial real estate trade association that serves as the legislative and regulatory advocate for property owners, tenants, developers, retailers, contractors, land use attorneys, brokers, and other professionals in the industry. With over 10,000 members, CBPA is the largest consortium of commercial real estate professionals in California and serve in the state the umbrella organization for the Building Owners & Managers Association of California, the California Chapters of NAIOP the Commercial Real Estate Development Association, the International Council of Shopping Centers, the Institute of Real Estate Management, and the National Association of Real Estate Investment Trusts.

Emergency Order No. 9 is disrupting commercial projects and transactions that rely on the certainty that the short statute of limitations for land use and other regulatory approvals, including projects and transactions involving essential infrastructure, hospitals and medical facilities, manufacturing, research and development, and supply chain distribution that were approved before Emergency Order No. 9 or will be approved when the order is in effect. Many of these projects depend on financing that will not be available until the public agency decisions are no longer subject to legal challenge. Those projects will be frozen until the statute of limitations has run.

CBPA believes that its proposed amendment is clearer and more complete than the amendment the League of California Cities has proposed. The proposed new paragraph uses the phrase “causes of action to attack, review, set aside, void, annul...a decision of a public agency”, which tracks the language in both Government Code §65009 and Public Resources Code §21167. The proposed new paragraph adds the word “validate” to include validation actions under Civil Code §803. It uses the term “public agency” as defined in CEQA, to include all forms of government that should be encompassed by the paragraph. The provision allowing an additional five days, if there are less than five days left when the tolling expires, is patterned after Government Code §66452.6(b)(3) in the Subdivision Map Act, which governs the expiration of a development moratorium when there is less than 120 days to engineer, prepare and submit a final subdivision map.

For these reasons, CBPA respectfully requests that the Judicial Council amend its order as proposed above. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Rex S. Hime". The signature is written in a cursive, slightly slanted style.

Rex S. Hime
President & CEO