



April 27, 2020

VIA E-MAIL AND U.S. MAIL

Honorable Tani Cantil-Sakauye, Chair
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102-3688

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

Dear Honorable Chief Justice Cantil-Sakauye and Members of the Judicial Council:

We appreciate the Judicial Council’s leadership in moving quickly to enact emergency rules of courts to ensure that the court system deals with the dramatic impacts of the COVID-19 crisis in as fair and as equitable a manner as possible. However, we write to express our serious concerns with Emergency Rule No. 9, and to respectfully request the Council’s immediate attention to amending the rule.

Unless it is amended, Emergency Rule No. 9 will impose a *de facto* indefinite hold on housing developments that are desperately needed to address California’s housing crisis – a crisis that is only intensified by the COVID-19 emergency. We share the concerns that others have raised regarding the effect of Emergency Rule No. 9 on housing production, but we write specifically to explain why it would be fundamentally inequitable to toll the state’s short statutory limitations for land use challenges until the COVID-19 state of emergency declaration is lifted.

To begin with, Emergency Rule No. 9 requires clarification. The rule extends statutes of limitations for “civil causes of action,” but “civil . . . actions” are distinct from petitions for writs of mandamus. See generally Code Civ. Proc. §§22-24; see also *Rosenbaum v. Board of Sup'rs* (C.C.D. Cal. 1886) 28 F. 223, 225, *aff'd sub nom. Rosenbaum v. Bauer* (1887) (“under the California Code, a mandamus is not regarded as an ‘action at law’ or a ‘suit in equity,’ in the ordinary sense in which those terms are used, but as a special proceeding.”). Until amended, the rule will create uncertainty about the applicable limitations period. **The Council should strongly consider clarifying that the rule does *not* apply to writs of mandamus to set aside agency actions.** The Council enacted the current version of Emergency Rule No. 9 out of a concern that “[i]t is necessary to allow counsel and clients to be able to conduct the necessary investigation and to gather evidence that would be necessary in order to decide whether to file suit.” This rationale is not applicable to administrative mandamus actions. These proceedings are not tried on the basis of evidence gathered by plaintiffs – the evidence is limited to the administrative record before the agency, and any petitioner with a viable claim must have participated in the agency process in order to have a viable claim. Once the agency has taken its action, any potential mandamus petitioner has enough information to know whether it has a basis to challenge the agency’s action. Local government agencies face numerous challenges responding to the COVID-19 pandemic. These agencies should be allowed to address the crisis without having to be concerned that actions they have taken in early 2020 – including but not limited to actions to approve housing – will be subject to legal challenges brought for the first time months after the state of emergency is lifted.

If the Council clarifies Emergency Rule No. 9 so that it *does* apply to mandamus actions, it is vital that the Council amend the rule so that it does not toll the very short limitations periods that the Legislature has directed to apply to land use challenges.

The Legislature has dictated that land use challenges must be brought within very short statutory deadlines, which the Legislature has taken no action to relax or eliminate. Deadlines to bring challenges under the California Environmental Quality Act (“CEQA”) are typically 30 and 35 days. (Pub. Resources Code, § 21167, subds. (b), (c), (d), & (e).)¹ As the Supreme Court has emphasized, “CEQA’s purpose to ensure extremely prompt resolution of lawsuits claiming noncompliance with the Act is evidenced throughout the statute’s procedural scheme.” *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 500. Most other land use challenges must be brought within 90 days, a limitations period the Legislature imposed after “find[ing] and declare[ing] that there currently is a housing crisis in California and it is essential to reduce delays and restraints upon expeditiously completing housing projects,” concluding that

¹ “Tolling” CEQA statutes of limitations is particularly problematic because the limitations period is calculated from the date the relevant notice is posted in the office of the county clerk (Pub. Resources Code, § 21167, subds. (b)-(e)), and the statute requires that the “notice shall remain posted for a period of 30 days.” (Pub. Resources Code, § 21152, subd. (c); see also *Latinos Unidos de Napa v. City of Napa* (2011) 196 Cal.App.4th 1154, 1167 (holding notice must be posted for a full 30 days for limitations period to apply). If the limitations period is tolled for many months, it is unclear whether local agencies must also make sure the notice remains posted in the county clerk’s office for the entirety of this period. This will create even more uncertainty about whether housing projects may proceed, since it will render the statutory limitations period contingent upon whether various county clerk offices agree to keep CEQA notices posted for many months after they would ordinarily be removed.

land use litigation has “a chilling effect on the confidence with which property owners and local governments can proceed with projects,” and finding a vital need to provide “certainty for property owners and local governments” that they can proceed with approved projects. Gov. Code § 65009, subd. (a).

Indefinitely tolling these short limitation periods would eviscerate the Legislature’s purpose in enacting them, and this type of tolling is well beyond what is necessary to ensure that any valid challenges are heard and considered. Governor Newsom is likely to keep the state of emergency declaration in place for some time for many reasons, such to maintain funding streams for state government, or to keep “anti-gouging” regulations in effect. The emergency declaration will likely remain in effect long after courts and government agencies are able to return to something close to their normal course of business. Some superior courts are already proceeding, or may soon be proceeding, to allow plaintiffs to file any valid challenges they may have via e-filing, fax-filing or “drop box” physical filing. Many courts are very likely to open in some capacity to also allow physical filings - in a manner consistent with social distancing - long before the state of emergency is lifted. To the extent a plaintiff is located in a county where no suits can be filed, any dates the courts do not accept filings are already considered holidays. The emergency rule is not tied to the dates courts re-open but rather to an indefinite future time that the state of emergency is lifted. It would be fundamentally inequitable and contrary to public policy to allow very short land use limitations periods to be extended for many months, or even a year or more, even after there is no remaining barrier to plaintiffs filing any valid challenges they may have.²

Governor Newsom’s statewide “stay-at-home” order specifically recognizes housing construction as an “essential activity” that should proceed during this crisis – to say nothing of after it. But as the Legislature recognized when enacting short limitations periods to challenge housing approvals, developers and construction funders cannot run the risk of financing final construction documents or beginning construction until the applicable statute of limitations period has run and the relevant project approvals are final. As a result, Emergency Rule No. 9 will impose a *de facto* indefinite moratorium on much of the new housing that California desperately needed even before the COVID-19 crisis, and needs even more desperately now. Even a housing development approved in early 2020, and not challenged within months of its approval, is likely to remain paused for a year or more after the normal limitations periods would have lapsed, even if the courts are open to accept filings during most of that time. This result is not necessary, and it can be avoided.

In light of the foregoing, we respectfully request that Emergency Rule No. 9 be amended as follows (new text bold and underlined):

Notwithstanding any other law, **any** statutes of limitation **of more than 180 days** for civil causes of action are tolled from April 6, 2020, until 90 days after the Governor declares that the state of

² Since land use challenges are almost always mandamus proceedings tried to a judge and not to a jury, they also can be litigated and resolved with a minimum risk of violating social distancing requirements. But even if trial courts might need additional time to *try* such cases, there is no valid reason to unduly delay the time to *file* such actions, so that agencies and developers can have the benefit of finality by knowing whether a project will or will not be subject to challenge.

emergency related to the COVID-19 pandemic is lifted. *Any limitation periods that were tolled by the earlier version of this rule will continue to be tolled from April 6, 2020 until 30 days after the issuance of this amended rule.*

This amendment would limit applicability of the tolling procedures in the rule so that they do not affect the very short statutes of limitation that the Legislature has applied to land use challenges.

We appreciate the Judicial Council's time and attention to this important matter.

Sincerely,

**ABUNDANT HOUSING LOS ANGELES
ASSOCIATED BUILDERS AND CONTRACTORS, SAN DIEGO
ASSOCIATED GENERAL CONTRACTORS, SAN DIEGO CHAPTER
BAY AREA HOUSING ADVOCACY COUNCIL
BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY
CALIFORNIA RENTERS LEGAL ADVOCACY AND EDUCATION FUND
CALIFORNIA YIMBY
HABITAT FOR HUMANITY GREATER SAN FRANCISCO
PEOPLE FOR HOUSING ORANGE COUNTY
PLUMBING HEATING AND COOLING CONTRACTORS SAN DIEGO
SAN FRANCISCO BAY AREA PLANNING AND URBAN RESEARCH ASSOCIATION
SV@HOME
TMG PARTNERS
WESTERN COMMUNITY HOUSING, INC.
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