

November 12, 2015

VIA FEDERAL EXPRESS

Chief Justice Tani Cantil-Sakauye and Associate Justices
CALIFORNIA SUPREME COURT
350 McAllister Street
San Francisco, CA 94102

**Re: *Simonelli v. City of Carmel-by-the Sea*,
California Supreme Court Case No.: S230027
Sixth Appellate Case No.: H040488
Depublication Request**

Dear Honorable Chief Justice Cantil-Sakauye and Associate Justices:

The League of California Cities writes to respectfully request that the Court depublish the opinion in *Simonelli v. City of Carmel-by-the-Sea*, 240 Cal.App.4th 480 (6th Dist., Sept. 28, 2015), or alternatively, depublish Section II(C) of the opinion. In *Simonelli*, the Court of Appeal held: (1) in Section II(B) that a developer was a necessary and indispensable party in writ proceedings challenging approval of the developer's project; and (2) in Section II(C) that Code of Civil Procedure (CCP) § 1094.6's 90-day statute of limitations did not bar the writ because petitioner challenged the city's decision to grant—not deny—a land use permit.

Simonelli, however, fails to discuss Government Code § 65009. Government Code § 65009 creates a 90-day limitations period for legal challenges to a city's decision to *grant* or *deny* a land use application and does not impose any notice requirement. Gov't Code § 65009(c)(1). The Opinion not only fails to consider or apply Government Code § 65009, it also fails altogether to consider the Legislature's imperative for Government Code § 65009—that challenges to land use decisions must be brought expeditiously. As a result of these failures, *Simonelli* will create uncertainty and confusion regarding the statute of limitations applicable to actions challenging a city's land use decisions. *Simonelli* should thus be depublished, or alternatively, Section II(C) should be depublished.

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The League's Interest

The League of California Cities is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The Opinion

In *Simonelli*, the petitioner challenged the City of Carmel-by-the-Sea's approval of a development application for a vacant parcel. The petitioner, however, did not name the applicant as a real party in interest. The City demurred to the petition and the trial court sustained the demurrer without leave to amend on the grounds that the developer was an indispensable party and it was too late to add the developer to the action because CCP § 1094.6's 90-day limitations period had run.

The Court of Appeal reversed, concluding that the demurrer should have been sustained with leave to amend. The Court held that the developer was an indispensable party and the League agrees with that holding. But the Court also concluded that CCP § 1094.6 did not bar the action because the granting of a permit is not a decision within the meaning of § 1094.6. This holding will cause confusion and uncertainty because it does not address Government Code § 65009.

The Legislative Imperative That Actions Challenging Land Use Decisions Be Promptly Filed And Served

The Legislature has mandated that actions challenging land use decisions must be promptly filed and served. Government Code § 65009 creates a short 90-day statute of limitations to challenge a city's land use decisions. The choice of a short limitations period was deliberate. In enacting Government Code § 65009, the Legislature found that there was a housing crisis in California and it was thus "essential to reduce delays and restraints upon expeditiously completing housing projects." Gov't Code § 65009(a)(1). The Legislature further found that legal actions challenging land use decisions have a chilling effect on "the confidence with which property owners and local governments can proceed with projects." Gov't Code § 65009(a)(2). In light of the housing crisis and the chilling effect of litigation, Government Code § 65009's purpose was "to provide certainty for property owners and local governments" regarding land use

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decisions. Gov't Code § 65009(a)(3). The Legislature adopted the short 90-day period "despite heated opposition claiming that it unreasonably limited the time for challenges" to land use decisions. *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 388.

Section 65009 thus states that "no action or proceeding" may be brought to "attack, review, set aside, void, or annul the decision of a legislative body to" adopt or amend a general plan, specific plan, zoning ordinance, or development agreement, or to approve, deny or impose conditions on a land use permit, unless the action is filed and served "within 90 days after the legislative body's decision." Gov't Code § 65009(c)(1). The term "decision" is to be interpreted broadly. *General Development Co., L.P. v. City of Santa Maria* (2012) 202 Cal.App.4th 1391, 1395.

Government Code § 65009's limitation period begins to run from the date of the agency's decision, with no notice requirement. Gov't Code § 65009(c)(1) (stating that the 90 days runs from decision and including no notice requirement).

The "short limitations period . . . serves the important legislative purpose of permitting the rapid resolution of legal challenges to local zoning and planning decisions." *Honig v. San Francisco Planning Department* (2005) 127 Cal.App.4th 520, 528. Government Code § 65009's "express and manifest intent is to provide local governments with certainty, after a short 90-day period for . . . [legal] challenges, in the validity' of . . . their planning decisions." *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 775. The California Supreme Court explained in *Travis* that the "legislative policy of requiring a prompt challenge, running from the earliest date the action could be brought, nonetheless remains clear in section 65009." *Id.* at 775. Many courts interpreting Government Code § 65009 have reiterated that the statute's purpose is to foster prompt resolution of legal challenges to local zoning and planning decisions. *Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1048; *General Development Col., L.P., supra*, 202 Cal.App.4th at 1394; *Haro v. City of Solano Beach* (2011) 195 Cal.App. 4th 542, 551.

Simonelli creates confusion and uncertainty regarding the statute of limitations

Simonelli muddies the statute of limitations waters. *Simonelli* may now be cited for the proposition that according to CCP § 1094.6, the 90-day limitations period does not apply when an action challenges the grant of a land use application, as opposed to the denial of the application. This creates uncertainty and confusion because *Simonelli* does not mention Government Code § 65009 at all, much less explain how its holding is

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consistent with Government Code § 65009. Nor does *Simonelli* acknowledge the Legislature's mandate that land use challenges be filed expeditiously.

Thus, where it was previously clear that Government Code § 65009's 90-day limitations period applied to actions challenging the grant or denial of a land use application,¹ now there will be confusion and uncertainty regarding the statute of limitations.

It does not appear that the Court's intent was to create confusion over whether there exists an exception to the applicability of Government Code § 65009. Nevertheless, that is the result. *Simonelli's* rule will cause confusion and mischief in a manner that undermines the Legislature's emphatic purpose in enacting Government Code § 65009. Future petitioners will inevitably cite to the ruling to avoid Government Code § 65009.

Uncertainty regarding the limitations period will lead to increased litigation as parties argue over which statute of limitations applies. Such increased litigation is costly for cash-strapped cities and burdensome for the courts. It also undermines Government Code § 65009's purpose to create certainty in the planning and development process and to allow development to proceed without undue delay.

¹ Government Code § 66499.37 imposes a 90-day limitations period for challenges to subdivisions, including approval of final and tentative maps and conditions placed on such maps.

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Conclusion

Simonelli will cause confusion, uncertainty and more costly and unnecessary litigation regarding statute of limitations issues in land use actions. The League thus respectfully requests that the Court depublish *Simonelli*, or in the alternative, depublish Section II(C) of the opinion.

Sincerely,

Burke, Williams & Sorensen, LLP



Amy E. Hoyt

AEH:meh

cc: See Attached Service List

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PROOF OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action.
My business address is 1600 Iowa Avenue, Suite 250, Riverside, California 92507.

On **November 12, 2015**, I served the following document(s): **LEAGUE OF CALIFORNIA CITY'S REQUEST FOR DEPUBLICATION** on the interested parties in this action by placing a true and correct copy of such document, enclosed in a sealed envelope, addressed as follows:

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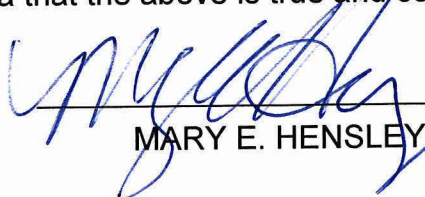
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- (X) **BY U.S. MAIL.** I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Riverside, California.
- () **BY EMAIL.** I caused the document (without enclosures) described above, to be sent via email in PDF format to the above-referenced person(s) at the email addresses listed.
- () **BY PERSONAL SERVICE.** I caused such envelope to be delivered by hand to the above-referenced person(s) at the above address(s).

Executed **November 12, 2015**, Riverside, California.

- (X) **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



MARY E. HENSLEY