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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

FRIENDS OF BIG BEAR VALLEY et. al.,

Plaintiffs and Appellants,

v.

COUNTY OF SAN BERNARDINO,

Defendant and Respondent;

MARINA POINT DEVELOPMENT ASSOCIATES et al.,

Real Parties in Interest and Appellants.

E067447

(Super.Ct.No. CIVDS1512175)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gilbert G. Ochoa, Judge. Dismissed in part; affirmed in part; reversed in part.

Law Office of Babak Naficy, Babak Naficy and Jamie Garretson for Plaintiffs and Appellants.

Michelle D. Blakemore, County Counsel, Bart W. Brizzee, Principal Assistant County Counsel for Defendant and Respondent.

David A. Kay for Real Parties in Interest and Appellants.

Friends of Big Bear Valley (Friends) and Center for Biological Diversity (Center) petitioned the trial court for a writ of mandate. Friends and Center asserted the County of San Bernardino (County) (1) violated the California Environmental Quality Act (CEQA) in approving changes to a development planned by Marina Point Development Associates and Irving Okovita (collectively, Developer); and (2) violated the San Bernardino County Code (County Code).

The trial court granted the writ as to County's CEQA review of the development's "size, and the corresponding traffic and water supply impacts," which the County had reviewed via a 2015 addendum to a 1991 environmental impact report (EIR). The trial court found the challenge to the alleged County Code violation was time-barred.

Developer appeals the granting of the writ on the CEQA violation. Developer contends the trial court erred in interpreting County Code section 85.12.030, subdivision (a)(4).[1] Friends cross-appeals.[2] Friends asserts: (1) the 2015 addendum is void because

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1 County filed a notice of joinder, as a respondent. The notice reflects County joins in the arguments raised in Developer's appellant's opening brief. County did not file a notice of appeal. Therefore, County is not an appellant. (See generally Code Civ. Proc., § 902.) Because County is not an appellant, County cannot argue error on appeal. (*In re Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439.)

2 The Law Office of Babak Naficy and Babak Naficy filed a notice of appeal on January 12, 2017, on behalf of Friends and Center. The civil case information statement filed by counsel on January 31, 2017, lists Center as a party to the appeal. Counsel's

there is not a 1991 EIR to which the addendum can be attached; (2) the project description in the 2015 addendum is inadequate; (3) the 2015 addendum is inadequate because it does not address climate change; and (4) the trial court erred by concluding the challenge brought under the County Code was time-barred. We reverse as to the County Code challenge being time-barred, but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. 1983

In January 1983, Developer[3] applied to build 132[4] condominiums along the eastern shore of Grout Bay, Big Bear Lake, in the community of Fawnskin. The project was known as Marina Cove. The project would cover 12.5 acres of land and 15.7 acres of the lake, for a size of 28.2 acres. The 12.5 acres of land would include 132 condominiums with ponds, two tennis courts, a pool, a "small clubhouse," a food and beverage facility

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respondents' brief and cross-appellants' opening brief filed on December 27, 2017, was filed on behalf of "Friends of Big Bear Valley, et al." Footnote No. 1 in respondents' brief and cross-appellants' opening brief says, "The Center for Biological Diversity is not part of this appeal and cross-appeal." During oral argument at this court, both sides made special note of the fact Center is not a party. However, a request to dismiss the appeal was never filed, nor is there any explanation as to why Center is suddenly not a party. Counsel is reminded that the proper way to dismiss a party is to file a separate request to dismiss, not by way of a footnote in a brief. (Cal. Rules of Court, rule 8.244(c).) On the court's own motion, we deem footnote No. 1 of the respondents' brief and cross-appellants' opening brief filed on December 27, 2017, a request to dismiss Center's appeal, filed on January 12, 2017; the request is GRANTED.

3 Developer changed its corporate structure between 1983 and the present time. For ease of reference, rather than using the entities' different names, we use the label "Developer."

4 At some points the project was referred to as including 132 condominiums, at other points it is referred to as including 133 condominiums.

and 293 parking spaces. The density would be approximately 10.5 units per acre, and there would be 2.2 parking spaces per unit. The existing marina at the property would likely stay in place as part of the project but be altered from public to private use.

An EIR revealed the Marina Cove project would have "significant" adverse effect on groundwater overdraft, traffic and schools. In March 1983, the County's planning commission approved the Marina Cove project, and certified the EIR with a statement of overriding considerations. In May 1983, the County's Board of Supervisors (the Board) approved Developer's application and certified the EIR. The project approval expired in 1990 when a tract map was not recorded and construction had not commenced.

B. 1991

In 1991, Developer modified the Marina Cove project and renamed it Marina Point. Developer filed another application for project approval. The Marina Point project was designed to utilize the same 28.2 acres. The project would consist of 3.42 acres for a commercial marina, 12.5 acres for residences, and 12.28 acres of "lake enhancements." The project would include 132 condominiums at a density of 10.6 units per acre, 264 parking spaces, 175 boat slips, community swimming pools and spas, two tennis courts, shuffleboard courts, a volleyball court, an ice skating pond, walking trails, a picnic area and a community building that contained management offices, health and spa facilities, meeting rooms and a restaurant. All existing structures would be removed from the property.

The County conducted an initial environmental study. In the initial study, the County wrote, "The current project being considered is very similar to the design of the original project approved in 1983. The current project employs the use of the 1983 Project EIR with the overriding considerations on cumulative significant traffic and water consumptions issues . . . . The Project EIR is being utilized because the present design issues, circumstances, and impacts are similar to the 1983 project. . . . The current project has been reviewed with an Initial Study using incorporation by reference of the relevant sections of both the 1983 Project EIR and relevant information from the Bear Valley Community Plan EIR."

The initial study further provided, "This project will contribute to an overall cumulative depletion of groundwater supplies, which was recognized as an unavoidable significant impact during the adoption of the both the 1983 Project EIR and the [Bear Valley Community Plan] thereby requiring adoption of statements of overriding considerations for the vegetation. This project will include the mitigation measure that it meet the 'assured water supply' provisions of the Bear Valley Planning Area General Plan standards." In regard to traffic, the initial study reflected, "This project will . . . contribute to a significant cumulative effect on traffic and circulation."

On December 9, 1991, the Board held a hearing on the Marina Point project. The Board found the traffic issues and groundwater supply issues related to the project could not be mitigated to a level of non-significance. The Board adopted a statement of overriding considerations reflecting the project would have "cumulative traffic and water

supply impacts," but the project "will provide numerous benefits to the area." The Board approved the development plan, "certifie[d] the use of a Single [EIR] and direct[ed] the Clerk to file a Notice of Determination." A notice of determination was filed on December 10.

A tract map for the Marina Point project was recorded on December 21, 2000. A grading permit for the project was issued on September 9, 2010.

C. 2014

1. *PROJECT REVISION*

In March 2014, Developer proposed to revise the 1991 Marina Point project. Developer asserted the revisions were minor. The 1991 project was going to including 132 condominium units in 19 multi-unit buildings. In the revised plan, the project would include 110 condominium units in 11 multi-unit buildings and 10 single-unit condominium houses. The houses would range in size from 12,000 to 14,000 square feet with average buildable footprints of 4,500 square feet. Additionally, under the 1991 project, each condominium unit was allotted 1.85 parking spaces. In the revised plan, each condominium unit was allotted two spaces. In the 1991 plan, each condominium building had seven garages. In the revised plan, each condominium building had 10 garages. The revision resulted in each condominium building having a larger footprint. The houses would have a minimum of three parking spaces each.

The clubhouse was reconfigured, and the parking spaces for the clubhouse were moved closer to the building. The recreational amenities were "revised and expanded to

include" children's play areas, a gazebo with a water feature and picnic areas, a pitch and putting greens, bocce ball courts, horseshoe areas, reflecting ponds that convert to ice skating rinks, whirlpool spas throughout, and a gatehouse for special events.

2. *OPPOSITION*

On April 9, 2014, Center wrote a letter to the County. Center requested a new EIR process commence. Center asserted that removing eight multi-unit condominium buildings and replacing them with 10 houses was a fundamental change in the project. Further, Center contended the larger clubhouse, newly added gatehouse, and altered layout of the buildings came together to change the footprint of the project and could "result in new significant environmental impacts."

On April 9, 2014, Friends wrote a letter to the County. Friends also asserted a new EIR process needed to commence. Friends expressed concern that the advertisements for the project were inconsistent with the project description Developer provided to the County. As examples, (1) the advertisements reflected new docks extending into Big Bear Lake, which were not part of the plans submitted to the County; and (2) the advertisements provided the condominium units would include "lock-off suites" with separate entrances, which were not included in Developer's application to the County. Friends asserted the inconsistencies in the project description and the advertisements were problematic because the suites could double the density of the condominium units, in that the suites could be rented separately, and the docks could have unknown environmental impacts on the lake.

Friends expressed concern that the clubhouse would be much larger than originally planned. Friends faulted Developer for not explaining how large the revised clubhouse would be. Friends explained that increases in the sizes of the buildings' footprints could result in more habitat being lost and increased stormwater runoff.

Friends expressed concern that a traffic analysis had not been conducted for the project since 1983, and that traffic conditions had changed during the last 30 years. Friends asserted the water quality of Big Bear Lake had worsened since 1983, and thus the project's impact on that issue needed to be reexamined. Friends contended the supply of drinking water in Big Bear had decreased since 1983, and the issue of sufficient water supplies needed to be reexamined. Further, Friends contended a variety of other development projects had been proposed in the vicinity of Big Bear Lake since 1991 and the cumulative impact of all the projects needed to be considered, e.g., a proposal for 92 residential lots, a proposal for 30 homes, a proposal for 67 homes, and a proposal for eight homes.

Friends contended the revised project was a new project and required a new EIR process. Alternatively, Friends asserted a subsequent EIR needed to be prepared due to the major changes in the project.

3. *PLANNING COMMISSION*

County staff approved Developer's revisions to the Marina Point project. Friends and Center appealed the staff's decision. The appeal was heard before the County's planning commission. A staff report was prepared for the planning commission. In the

report, staff explained that a supplemental or subsequent EIR did not need to be prepared because the project revisions caused the density of the project to decrease from 10.6 units per acre to 9.6 units per acre "thereby lessening every impact proportionately." Because there was no need for a subsequent or supplemental EIR, the staff prepared an addendum to the "1991 final [EIR]." The 2015 addendum reflects, "Based on the analysis of the proposed minor revisions . . . to the Project EIR, there will be no new significant environmental impacts not previously disclosed in the EIR, nor substantial increases in the severity of any previously identified significant effects, nor do the changes constitute substantial changes to the project."

In regard to traffic and water issues, the 2015 addendum provides, "Upon certification of the EIR, . . . the [Board] determined that these significant impacts were unavoidable and therefore, adopted a Statement of Overriding Considerations that mitigated the significant unavoidable impacts. This [2015] Addendum concludes that, while the project is substantially reduced (e.g., 13 fewer residential units, reduced lot coverage, and scale, the Revised Project would still result in the same 2 significant unavoidable impacts. Consistent with Section 15162(a) of the CEQA Guidelines, these significant unavoidable impacts identified in this [2015] Addendum is [*sic*] not a new or more severe impact than that identified in the EIR."

In April 2015, the County's planning commission voted in favor of the staff recommendation. The staff recommendation was as follows: "That the Planning Commission DENY the appeal of the Minor Revision to an Approved Action for the

Marina Point Final Development Plan, which includes ten (10) single unit condominium sites and eleven (11) condominium buildings, each containing ten (10) condominium units for a total of 120 condominium units for the Project."

4. *BOARD OF SUPERVISORS*

Friends and Center appealed to the Board. Friends and Center asserted, "On the eve of the Planning Commission's hearing on the first appeal by Friends . . . and the Center . . . , County staff released an Addendum to the original Marina Point EIR (last updated in 1983) and new conditions of approval for that Project. Review of these documents reveal that they do not remedy the numerous legal flaws that undermine the County's approval of the revised Project."

Friends and Center asserted the alleged decrease in the density of the project was illusory because, while the number of dwelling units had decreased, the amount of square feet of living space had increased. Friends and Center also asserted that the footprint of the revised buildings had increased. Friends and Center wrote, "[T]he Addendum's focus on the number of residential units misleads decisionmakers and the public by suggesting the revised Project is smaller when it is actually larger." Friends and Center asserted a subsequent or supplemental EIR needed to be prepared.

On July 28, 2015, at the meeting of the Board, the Planning Director said, "Staff recommends approval of the Minor Revision since it would reduce the intensity of development on the site and reduce the number of units to 120. Based on that, we have determined that that would be a reduced intensity project alternative." The Board denied

Friends's and Center's appeal, approved Developer's revision, adopted the findings recommended by the County's planning commission, and directed the clerk of the Board to file a notice of determination.

D. WRIT OF MANDATE

1. *WRIT PETITION*

On August 26, 2015, Friends and Center filed a petition for writ of mandate and complaint for declaratory and injunctive relief in the trial court. In the first cause of action, Friends and Center alleged a CEQA violation in that a new, subsequent, or supplemental EIR (SEIR) needed to be prepared due to substantial changes having been made to the project. In the second cause of action, Friends and Center alleged violations of the County Code and conditions of approval. Friends and Center requested a writ directing the County to (1) set aside its 2015 addendum and findings; (2) set aside its approval of the project revisions; and (3) prepare and certify a legally adequate EIR or SEIR.

Friends and Center filed a brief in support of their writ petition. Friends and Center asserted, "[F]rom the evidence that the Revised Project includes an almost additional 100,000 square feet of additional residential space, the Court can and should reasonably infer that the Revised Project would bring more residents to the Project, thereby increasing the Project's overall water consumption and traffic." Additionally, Friends and Center contended the 2015 Addendum "fails as informational document"

because it "misleadingly claims it relates to a 1991 EIR, where the record shows such an EIR does not exist."

2. *OPPOSITION*

Developer opposed the writ petition. Developer contended, "[T]here is no substantial evidence to support [the] contention that [the] Amended Plan is significantly larger. Hence, the petition must be rejected." Developer asserted a lot coverage analysis established that the "total site coverage of structures in [the] revised Project is reduced to 3.26 acres from 3.30 acres." Further, Developer contended "[t]he Project engineer established that the Alternative plan was smaller and had less density." Developer asserted the foregoing evidence "ends the inquiry, and the court need read no further."

Developer then went on to address arguments raised by Friends and Center. Developer wrote, "[Friends and Center] argue that the overall site coverage (footprints) of structures is 3.37 acres, or 146,797 square feet (1 acre = 43,560 square feet) instead of 3.3 acres, or 143,748 square feet noted on the original Project. The alleged difference of 3,049 square feet would translate into a 2.12% increase from the original Project. (3,049 sf / 143,748). Hence, even if [Friends' and Center's] calculation were correct, the County Development Code considers up to a 10% increase of the site coverage of structures from the original Project to be a minor revision. (CDC § 85.12.030; AR 18:458.) Hence, the County was required to approve the Minor Revision and no discretionary review was involved."

In regard to impacts on the water supply, Developer asserted, "[T]he Project EIR addressed the[] issue[]," and the revisions did not cause the project to increase in size. Developer concluded the County's decision was supported by substantial evidence.

In regard to the 2015 addendum citing a nonexistent 1991 EIR, Developer asserted the "assertion is patently false as the record clearly establishes the existence of the 1991 EIR." Developer contended the "1991 EIR relied upon the 1983 EIR" and an " '[a]gency may use an earlier EIR prepared in connection with an earlier project to apply to a later project, if the circumstances of the projects are essentially the same.' "

7. *RULING*

The trial court granted the writ of mandate "as to the adequacy of the 2015 Addendum in analyzing the Revised Project with regards to its size, and the corresponding traffic and water supply impacts."

In its ruling, in regard to the issue of the revised project's size, the trial court explained that (1) in Developer's letter attached to its revised project application, Developer asserted (a) each of the multi-unit condominium buildings would have " 'a slightly larger footprint,' " and (b) the 10 houses would " 'range in size from approximately 12,000 to 14,000 square feet with buildable footprints of approximately 4,500 square feet' "; (2) the revised project map showed (a) the multi-unit condominium buildings would increase from 12,200 square feet to 19,624 square feet, and (b) the 10 houses would range from 3,500 to 6,500 square feet with the average being 5,000 square feet, although it was unclear if those numbers represented the footprint or the livable

space; (3) Developer's project engineer (a) said during the planning commission meeting that the 10 houses would have a 4,500 square foot footprint, but (b) said during the board of supervisors meeting that the 10 houses would have building envelopes[5] that averaged 5,000 square feet; and (4) the County's Planning Director said the 10 houses would be within 3,500 to 6,500 square feet of " 'floor area, which she interpreted as the 'square footage of the unit.' "

In its ruling the trial court wrote, "[The] County's determination that the revisions to the Project were 'minor,' and thus, only required an Addendum to the EIR is not supported by substantial evidence. Notwithstanding the array of numbers attributed as the size of the 10 single family units, [Developer] point[s] to the Lot Coverage Analysis provided on the Revisions Map, which states the original Project covered 3.30 acres while the Revised Project covers 3.26 acres—with the multi-unit condominium buildings covering 2.26 acres, and the 10 single family units covering 1.0 acres. [Citation.] According to [Developer], these figures, which were calculated by the engineer, support their contention that the Revised Project is smaller than the original Project. [Citation.] However, [Developer has] not provided the underlying calculations upon which these

5 A "building envelope" is defined as "[t]he area delineated on development plans in which all clearing and land disturbance for building construction must be confined unless otherwise authorized by this Development Code. If not delineated, it is the area of a lot not included within a required front yard, rear yard, side yard or side street yard setback area, or any recorded easement, or offer of dedication." (County Code § 810.01.040(t).)

acreage figures are based. This is problematic because of the range in the size of the buildable envelopes for the 10 single family home sites.

"Indeed, if the Lot Coverage Analysis purports to represent the total amount of land within the Project site that is covered by buildings, then the buildable footprint of each of the 10 single family sites must be a fixed number. Yet, as discussed above, the testimony of [the project engineer] and [the planning director] was not consistent on this matter, and the figures used varied by 11% (difference between 4,500 and 5,000 square feet). Moreover, as shown on the Revisions Map, these 10 single family sites are not the same size, but rather have buildable envelopes which purportedly range from 3,500 square feet to 6,500 square feet. [Citation.] However, the Revisions Map does not state the actual size of each of the buildable envelopes on these 10 home sites, and [Developer does] not point to anything in the administrative record which provides this information. As a result, it cannot be determined from the record how the lot coverage figures were calculated, and whether they are accurate. Therefore, based on the evidence presented, the finding that the lot coverage of the Revised Project is smaller than the lot coverage of the original Project is not supported by substantial evidence." (Fns. and boldface omitted.)

In regard to the existence of a 1991 EIR, the trial court rejected Friends's and Center's argument. The trial court explained, "It is well settled that a lead agency may take an EIR prepared for another project and reuse that EIR for the project under review 'if the two projects' circumstances are essentially the same and if the EIR adequately

addressed the effects of the proposed project.' [Citation.] Reuse of an EIR from another project involves the incorporation of all or part of the earlier EIR as the draft EIR for the subsequent, but similar, project."

DISCUSSION

I. DEVELOPER'S APPEAL

A. CONTENTION

Developer contends the County reasonably interpreted County Code section 85.12.030, subdivision (a)(4) (hereinafter, section 85.12.030(a)(4)) as meaning that (1) expanding a project's footprint square footage by 10 percent or less is a minor change, or (2) not increasing the number of units within a project is a minor change. Developer contends the trial court made a legal error by misinterpreting section 85.12.030(a)(4) as including livable square footage as a factor when determining whether a revision to a project is substantial.

B. STANDARD OF REVIEW

We interpret county codes in the same manner we interpret statutes. (*Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 928.) "When interpreting a statute we begin with the plain meaning of its language. If that language is unambiguous the plain meaning controls." (*County of Los Angeles v. Financial Casualty & Surety, Inc.* (2013) 216 Cal.App.4th 1192, 1196.)

We apply the independent standard of review. However, a county's interpretation of its own ordinance is entitled to deference. (*Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, 434.) "[T]he degree of deference accorded an agency's interpretation is ' " 'not susceptible of precise formulation, but lies somewhere along a continuum,' " ' or, in other words, is 'situational.' [Citations.] Greater deference should be given to an agency's interpretation where ' "the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion." ' [Citation.] Greater deference is also appropriate where there are 'indications of careful consideration by senior agency officials.' " (*Id.* at pp. 434-435.)[6]

C. BACKGROUND LAW

6 At oral argument in this court, Developer cited *Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898 for the first time and orally requested leave to file supplemental briefing for the purpose of discussing *Boling*. *Boling* provides: " 'How much weight to accord an agency's construction is "situational," and greater weight may be appropriate when an agency has a " 'comparative interpretive advantage over the courts,' " as when " 'the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion.' " ' " (*Id.* at 911.)

Developer failed to file a notice of new authority prior to oral argument. (Cal. Rules of Court, rule 8.254.) The cause was submitted at the end of oral argument. Developer's request was implicitly denied by this court's submission of the matter. (See *Gilbert v. National Enquirer, Inc.* (1996) 43 Cal.App.4th 1135, fn. 2 ["We granted defendants additional time to file a letter brief in response to this new appellate contention, and stayed the submission of this matter"].) Developer has not moved to vacate the submission. (*People v. Perez* (1993) 21 Cal.App.4th 214, 223 ["After submitting this matter, [defendant] moved to vacate the submission in order to file a supplemental brief"].) Accordingly, Developer's request remains denied.

The following is the law concerning when the SEIR process should commence: "When an [EIR] has been prepared for a project pursuant to this division, no subsequent or supplemental [EIR] shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs: [¶] (a) Substantial changes are proposed in the project which will require major revisions of the [EIR]. [¶] (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the [EIR]. [¶] (c) New information, which was not known and could not have been known at the time the [EIR] was certified as complete, becomes available." (Pub. Res. Code, § 21166; see also Cal. Code Regs., tit. 14, § 15162, subd. (a).)

An agency may prepare an addendum, rather than a SEIR, "if some changes or additions are necessary" but none of the foregoing three conditions have occurred. (Cal. Code Regs., tit. 14, § 15164, subd. (a).) " 'An addendum need not be circulated for public review . . . .' [Citation.] A leading treatise on property law explains: 'When there are changes in a project after the certification of a Final Report, the agency can prepare an Addendum to the Report if the changes do not substantially modify the analysis in the original Report. The Addendum is acceptable, rather than a new or supplemental EIR, when there are only minor technical changes or additions which do not raise important new issues about the significant effects on the environment.' " (*Ventura Foothill Neighbors v. County of Ventura* (2014) 232 Cal.App.4th 429, 435.)

"The central purpose of CEQA is to ensure that agencies and the public are adequately informed of the environmental effects of proposed agency action." (*San Mateo*, *supra*, 1 Cal.5th at p. 951.) "The subsequent review provisions [in CEQA] are accordingly designed to ensure that an agency that proposes changes to a previously approved project 'explore[s] environmental impacts not considered in the original environmental document.' " (*Ibid.*)

D. COUNTY CODE

County Code section 85.12.030, subdivision (a), provides, "A Minor Revision may be used to approve minor changes to an already approved project based on the following criteria: [¶] (1) An approved plot plan is on file in the Land Use Services Department. [¶] (2) The proposed use is consistent with the current land use zoning district regulations. [¶] (3) Parking and design standards are not affected. [¶] (4) The proposal is an expansion of the use of up to 1,000 square feet or 10 percent of the ground area covered by the use or square footage of the structure, whichever is greater."

E. NUMBER OF UNITS

1. *SECTION 85.12.030*

Developer contends the County reasonably interpreted section 85.12.030(a)(4) as meaning that a decrease in the number of residential units created by a project is a minor change, and the trial court erred by not following the County's interpretation of section 85.12.030(a)(4).

Section 85.12.030 provides, "A Minor Revision may be used to approve minor changes . . . based on the following criteria . . . ." Section 85.12.030 does not define what qualifies as a minor change. Rather, section 85.12.030 explains under what circumstances a minor change can be approved by the process known as a Minor Revision. Because section 85.12.030 does not define anything, it was not reasonable for the County to interpret it as providing a definition of "substantial change" under CEQA (Pub. Res. Code, § 21166; see also Cal. Code Regs., tit. 14, § 15162, subd. (a)). Because section 85.12.030 does not assist in understanding what qualifies as a substantial change under CEQA, it is not useful in determining whether the County erred in not ordering a SEIR. (Pub. Res. Code, § 21166; see also Cal. Code Regs., tit. 14, § 15162, subd. (a)). Therefore, we conclude section 85.12.030(a)(4) is of no consequence to the issue presented because section 85.12.030(a)(4) does not provide a definition of substantial change or minor change.

Moreover, to the extent County interpreted section 85.12.030 as providing a definition, it is unreasonable to read that definition as including the number of dwelling units because section 85.12.030(a)(4) does not mention dwelling units. The criteria included in section 85.12.030(a)(4) for determining whether the Minor Revision process may be used for approving a minor change are: (1) expansion of the use by up to 1,000 square feet; (2) expansion of the ground area covered by the use by up to 10 percent; and (3) expansion of the square footage of the structure by up to 10 percent. The number of

planned units is not part of the criteria. (See *County of Los Angeles v. Financial Casualty & Surety, Inc.*, *supra*, 216 Cal.App.4th at p. 1196 [plain language controls].)

Because there is no mention of the number of units in the plain language of section 85.12.030(a)(4), it would be unreasonable to interpret section 85.12.030(a)(4) as including the number of units as a criterion. Accordingly, we conclude the trial court did not err.

2. *SECTION 85.10.090*

Developer contends a different section of the County Code supports using the number of dwelling units as a metric for measuring change, in particular, County Code section 85.10.090, subdivision (c) (section 85.10.090(c)).

Section 85.10.090(c) provides, "Minor changes in the Planned Development Permit that do not involve an increase in structure area, an increase in the number of dwelling units, or a change of use may be approved by the director in compliance with § 86.06.070."

Section 85.10.090 explains when permit changes can be approved by the Director. Section 85.10.090 does not provide a definition. Section 85.10.090 does not define what constitutes a minor change. Because section 85.10.090 does not provide a definition, it would be unreasonable to interpret it as defining "substantial change" under CEQA. Because section 85.10.090 does not assist in understanding what qualifies as a substantial change under CEQA, it is not useful in determining whether the County erred in not ordering a SEIR. (Pub. Res. Code, § 21166 ["substantial changes"]; see also Cal. Code

Regs., tit. 14, § 15162, subd. (a) ["substantial changes"]). Therefore, we conclude the trial court did not err.

To the extent one could read section 85.10.090 as providing a definition, we would still conclude the trial court did not err because section 85.10.090 was not relied upon by the County. In the April 2015 staff report, the County relied upon section 85.12.030. In Developer's trial court brief in opposition to the petition for writ of mandate, Developer did not cite section 85.10.090. (*Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 468 [cannot raise a new theory on appeal].)

F. FOOTPRINT AND COVERED AREA

Developer contends the trial court erred by interpreting section 85.12.030(a)(4) as requiring an evaluation of the livable square feet of a project. Developer asserts the trial court should have followed the County's interpretation of section 85.12.030(a)(4), which evaluates the square footage of a project's footprint—not the livable space.

As set forth *ante*, section 85.12.030 does not define anything. Rather, it sets forth the circumstances under which the County may use its Minor Revision process to approve a minor change. Section 85.12.030 does not define a minor change. Because section 85.12.030 does not contain a definition, it does not define a "substantial change" under CEQA (Pub. Res. Code, § 21166 ["substantial changes"]; see also Cal. Code Regs., tit. 14, § 15162, subd. (a) ["substantial changes"]). As a result, section 85.12.030 is not helpful in determining whether the SEIR process should commence.

Nevertheless, the trial court treated section 85.12.030 as providing a definition. In the trial court's ruling, it explained that one of the problems with Developer's evidence was that "the Revisions Map does not state whether the square footage figures represent the buildable footprint of each building, or the livable square footage of each building." The trial court then pointed to inconsistencies in Developer's evidence concerning the project's footprint. The trial court also faulted Developer's evidentiary presentation because Developer did not provide acreage figures that would permit a finder of fact to check the covered-acreage calculations given by the project engineer.

In summarizing its points, the trial court wrote, "Indeed, if the Lot Coverage Analysis purports to represent the total amount of land within the Project site that is covered by buildings, then the buildable footprint of each of the 10 single family sites must be a fixed number. Yet, as discussed above, the testimony of [the project engineer] and [the planning director] was not consistent on this matter, and the figures used varied by 11% (difference between 4,500 square feet and 5,000 square feet). Moreover, as shown on the Revisions Map, these 10 single family sites are not the same size, but rather have buildable envelopes which purportedly range from 3,500 square feet to 6,500 square feet. [Citations.] However, the Revisions Map does not state the actual size of each of the buildable envelopes on these 10 home sites, and [Developer does] not point to anything in the administrative record which provides this information. As a result, it cannot be determined from the record how the lot coverage figures were calculated, and whether they are accurate. Therefore, based on the evidence presented, the finding that

the lot coverage of the Revised Project is smaller than the lot coverage of the original Project is not supported by substantial evidence.

"Nevertheless, assuming the square footage figures on the Revisions Map represent the square footage of the buildable envelopes, i.e., footprint, for each of the proposed structures—with the average of 5,000 square feet for the 10 single family sites as shown, raw calculations seem to indicate that the Revised Project is larger than the original Project, not smaller. Indeed, using the numbers shown on the Revisions Map, the following calculations can be determined:

- "Original Project—19 multi-unit condo buildings @ 12,200 square feet each totals 231,800 square feet for the footprint of the buildings.
- "Revised Project—11 multi-unit condo buildings @ 19,624 square feet each, plus 10 single family units @ 5,000 square feet each, total 265,864 square feet for the footprint of the buildings.
- "Difference between footprint of original Project and footprint of Revised Project—34,064 square feet.

"Therefore, based on these calculations, the Revised Project appears to be 14.69% larger than the original Project." (Fns., underscore & boldface omitted.)

The trial court continued, "As noted above, since the exact size of each of the 10 single family home sites cannot be gleaned from the record, the difference in size between the original Project and Revised Project cannot be accurately calculated. Indeed, the testimony regarding the size of these home sites is inconsistent, and it cannot be

determined whether there is stability in the footprint of the Revised Project. [Citation.] Therefore, to the extent the County based its determination on the metric stated in the CDC, the finding that the Revised Project falls within the parameters of section 85.12.030 is not supported by substantial evidence." (Fn. & boldface omitted.)

The trial court applied the law as interpreted by the County. The trial court examined whether the County's decision was supported by substantial evidence when applying the rule that the square footage of a project's footprint for the covered area could be increased by 10 percent or less without triggering the need for SEIR. (§ 85.12.030(a)(4).) When applying that rule, the trial court found the County's decision was not supported by substantial evidence because (1) the evidence concerning the square footage of the buildings' footprints was inconsistent, (2) the inconsistent numbers could be understood as the revisions increasing the project's size by more than 10 percent, and (3) the math concerning the covered acres did not have evidentiary support. Accordingly, the record reflects the trial court applied the County's interpretation of section 85.12.030(a)(4) when making its ruling. Therefore, we are not persuaded that the trial court erred by not following County's interpretation of section 85.12.030(a)(4).[7]

II. CROSS-APPEAL

7 In Developer's appellant's opening brief, in the statement of facts, Developer asserts the trial court "erroneously calculated the size of the 'buildable envelopes' of the single family condos as 5,000 square feet of space." Developer does not raise a separate substantial evidence contention or provide legal analysis to support a substantial evidence contention. (Cal. Rules of Court, rule 8.204(a)(1)(B).) Accordingly, we do not address this evidentiary issue. (*Central Valley Gas Storage, LLC v. Southam* (2017) 11 Cal.App.5th 686, 694-695.)

A. 2015 ADDENDUM

Friends contends the trial court erred by rejecting their argument that the 2015 Addendum must be set aside because it refers to a nonexistent 1991 EIR. The trial court granted the writ sought by Friends and the Center "as to the adequacy of the 2015 Addendum in analyzing the Revised Project with regards to its size, and the corresponding traffic and water supply impacts." (Boldface omitted.) We understand Friends's contention as desiring to have the entire 2015 addendum voided, rather than the portion selected by the trial court.

Friends asserts that the Board did not certify an EIR in 1991 and no document labeled "1991 EIR" is in the record, and, therefore, there is not a 1991 EIR. Friends reasons that because there is not a 1991 EIR, there cannot be a 2015 addendum to a 1991 EIR. In other words, one cannot attach an addendum to a nonexistent document.

As set forth *ante*, the law provides, "When an [EIR] has been prepared for a project pursuant to this division, no subsequent or supplemental [EIR] shall be required by the lead agency . . . unless one or more of the following events occurs." (Pub. Res. Code, § 21166.) The law goes on to describe three circumstances under which a SEIR would be needed. The law provides further, that an agency may prepare an addendum, rather than a SEIR, "if some changes or additions are necessary" but none of the foregoing three conditions have occurred. (Cal. Code Regs., tit. 14, § 15164, subd. (a).) Thus, the law concerning an addendum begins with the premise that "an [EIR] has been

prepared for a project pursuant to this division." (Pub. Res. Code, § 21166; see also Cal. Code Regs., tit. 14, § 15162, subd. (a).)

Accordingly, we examine whether there is a 1991 EIR, such that there was a document for the 2015 addendum to be attached. We apply the substantial evidence standard of review. (*Benetatos v. City of Los Angeles* (2015) 235 Cal.App.4th 1270, 1281.) In 1991, the law provided, "The lead agency may employ a single EIR to describe more than one project, if such projects are essentially the same in terms of environmental impact. Further, the lead agency may use an earlier EIR prepared in connection with an earlier project to apply to a later project, if the circumstances of the projects are essentially the same." (Former Cal. Code Regs., tit. 14, § 15153, subd. (a).)

The law goes on to explain, "When a lead agency proposes to use an EIR from an earlier project as the EIR for a separate, later project, the lead agency shall use the following procedures:" (1) review the project with an initial study; (2) if the agency determines the earlier EIR is adequate for the later project, then the agency shall use the earlier EIR as the draft EIR for the later project and provide notice and a public comment period; (3) respond to the public comments; (4) consider the EIR, comments, and responses; (5) decide whether the earlier EIR is adequate for the later project; and (6) certify the EIR. (Former Cal. Code Regs., tit. 14, § 15153, subd. (b).)

In June 1991, Developer submitted to the County a development plan for the Marina Point project. In August 1991, the County prepared a "Notice of Preparation of a

Draft [EIR]" for the Marina Point project. The notice was to be sent to the "State Clearinghouse" in Sacramento.

The County conducted an environmental review of the Marina Point project via an initial study. On November 26, 1991, in the initial study, the County concluded, "The proposed project MAY have a significant adverse effect on the environment, and an [EIR] should be required. (It is proposed to use the prior 1983 Project EIR for this project also)."

On December 9, 1991, the Board held a meeting concerning the Marina Point project. It does not appear from the administrative record that the 1983 EIR was circulated as a draft EIR in 1991, given the timeline that the conclusion about using the 1983 EIR was made on November 26, and the meeting about the project was held on December 9. At the December 9 meeting, one person complained of "never [having] received notice of this particular project." At the meeting, the Board approved the project, adopted a statement of overriding considerations, "certifie[d] the use of a Single [EIR] and direct[ed] the Clerk to file a Notice of Determination." A notice of determination for the Marina Point project was filed on December 10, 1991.

It appears from the record that, in November 1991, the County was following the procedure for reusing an earlier EIR for a later project; this inference is based upon the County conducing an initial study. However, in December 1991, the County ended the process by following the procedure for using a single EIR to describe more than one project; this inference is based upon the Board certifying "the use of a Single [EIR]"

seemingly without circulating the 1983 EIR as a 1991 draft EIR. (Former Cal. Code Regs., tit. 14, § 15153, subds. (a) & (b).) The law did not set forth a separate procedure for using a single EIR to describe more than one project because, presumably, the two projects were to be described simultaneously, e.g., together in 1983, under the usual procedures for environmental review.

Therefore, we are left in a situation wherein proper procedures for environmental review were not followed in 1991, e.g., failing to circulate the 1983 EIR as the draft 1991 EIR; but, the Board certified the use of the 1983 EIR for the 1991 Marina Point project and a notice of determination was filed. Given the procedural shortfalls, we turn to the substance of the 1983/1991 EIR to determine if it addresses the impacts of the 1991 Marina Point project.

The 1983/1991 EIR describes the project as "132-condomunium units on 12.5 acres [that] includes interior ponds, tennis courts and parking." The overall density would be 10.5 units per acre. There would be 293 parking spaces, averaging 2.2 parking spaces per unit. "An existing marina with a rock jetty will probably remain as a major feature associated with the proposed use. General public use of the marina will terminate after project buildout."

The 1991 development plan for the Marina Point project describes the project as consisting of 3.42 acres for a 175-slip commercial marina, 12.28 acres for "lake enhancements," and 12.5 acres for "land use." All existing structures would be removed from the property. The "land use" would include "community swimming pools and spas,

two tennis courts, shuffleboard courts, a volleyball court, and ice skating pond along with walking trails and picnic areas that are scattered throughout the community. The Community Building incorporates management offices, health and spa facilities, meeting rooms and a small restaurant." The 12.5 acres would also include 3.3 acres for 132 residential units, and the density would be 10.6 units per acre.[8] The condominium units would range from 1,400 to 1,800 square feet.

In substance, the 1983/1991 EIR does not match the 1991 development plan. The 1983/1991 EIR describes a condominium project with a few amenities, while the 1991 development plan describes a 28.5-acre resort complex. Also, the EIR describes likely retention of the existing marina, while the 1991 development plan describes removal of all structures and construction of a 3.42-acre marina.

In sum, the 1991 EIR is procedurally and substantively problematic; however, substantial evidence reflects it is final. In 1991, the County certified the 1983 EIR for the 1991 Marina Point project and filed a notice of determination. (Pub. Res. Code, § 21152; Cal. Code Regs., tit. 14, § 15094; *Graf v. San Diego Unified Port Dist.* (1988) 205 Cal.App.3d 1189, 1193.) There is nothing indicating anyone sued over the inadequate 1991 EIR,[9] therefore, at this point, substantial evidence supports the finding that the 1991 EIR is final. (See Pub. Res. Code, § 21167 [30-day and 180-day statutes of limitations].)

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8 We infer the density did not change because the calculation remained 132 units on 12.5 acres (132 divided by 12.5 is 10.56).

9 The record reflects there was a CEQA lawsuit involving the project in 2004; however, it is unclear what issues were in that lawsuit.

In sum, substantial evidence reflects there is a 1991 EIR to which the 2015 addendum can be attached.[10]

B. PROJECT DESCRIPTION

Friends asserts the project description in the 2015 addendum is inadequate because it does not accurately describe the square footage of the project's residential footprint and livable space. The trial court granted the "Writ of Mandate as to the adequacy of the 2015 Addendum in analyzing the Revised Project with regard to its size, and the corresponding traffic and water supply impacts [because the County did not meet its] burden of demonstrating that substantial evidence supports [its] findings." (Boldface omitted.) The trial court agreed with Friends and Center that the 2015 addendum was inadequate in regard to the size of the project. Accordingly, because the trial court has already decided this issue in favor of Friends, we do not address it further.

C. CLIMATE CHANGE

Friends contends the 2015 addendum is inadequate because it does not address climate change. The trial court denied the writ on the issue of greenhouse gases because "the potential environmental impact of GHG emissions was known and/or could have been known at the time the 1991 EIR was certified."

" '[B]ecause of the global scale of climate change, any one project's contribution is unlikely to be significant by itself. The challenge for CEQA purposes is to determine

10 The 2015 addendum discusses a "2003 EIR." We have not located a 2003 EIR in the record.

whether the impact of the project's emissions of greenhouse gases is cumulatively considerable, in the sense that "the incremental effects of [the] individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." [Citations.] "With respect to climate change, an individual project's emissions will most likely not have any appreciable impact on the global problem by themselves, but they will contribute to the significant cumulative impact caused by greenhouse gas emissions from other sources around the globe. The question therefore becomes whether the project's incremental addition of greenhouse gases is 'cumulatively considerable' in light of the global problem, and thus significant." ' " (*Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 512.)

"In 2010, the Natural Resources Agency promulgated a guideline for assessing the significance of greenhouse gas emissions[']impacts under CEQA. Guidelines section 15064.4, subdivision (a) provides in part that '[a] lead agency should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project.' Subdivision (b) states that '[a] lead agency should consider the following factors, among others, when assessing the significance of impacts from greenhouse gas emissions on the environment: [¶] (1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting; [¶] (2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project;

[¶] (3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions.' " (*Cleveland National Forest Foundation v. San Diego Assn. of Governments*, *supra*, 3 Cal.5th at p. 512.)

In *Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal.App.4th 788, 806 (*Citizens*), the appellate court examined whether a 2010 addendum was insufficient for failing to adequately discuss greenhouse gasses. The 2010 addendum was attached to a 1997 final EIR and 2003 supplemental EIR for an airport master plan. (*Id*. at p. 792.)

The appellate court explained, "[I]nformation about the potential environmental impact of greenhouse gas emissions was known or could have been known at the time the 1997 EIR and the 2003 SEIR for the Airport Master Plan were certified. . . . [U]nder, [Public Resources Code] section 21166, subdivision (c), 'an agency may not require a SEIR unless "[n]ew information, which was not known and could not have been known at the time the [EIR] was certified as complete, becomes available." ' [Citation.] Since the potential environmental impact of greenhouse gas emissions does not constitute new information within the meaning of section 21166, subdivision (c), City did not violate section 15064.4 of the [CEQA] Guidelines by failing to analyze greenhouse gas emissions in the [2010] addendum." (*Citizens*, *supra*, 227 Cal.App.4th at pp. 807-808.)

We apply the substantial evidence standard of review. We examine whether the administrative record includes substantial evidence reflecting the potential environmental

impact of greenhouse gas emissions was known or could have been known in 1991. (*Citizens*, *supra*, 227 Cal.App.4th at p. 797.)

The 1991 initial study includes an "Air Quality" section. Subsection (c) of the "Air Quality" section asks if there will be "[a]lteration of air movement, moisture or temperature, or any change in climate, either locally or regionally." The County marked the "no" response to that question. To substantiate its "no" response, the County wrote, "The new development will have to comply with newer emissions requirements."

The foregoing evidence reflects climate change was a known issue in 1991 because the initial study specifically discussed whether the project would negatively impact the climate. Accordingly, because the record contains evidence reflecting climate change was known in 1991, we conclude substantial evidence reflects the County did not err.

At oral argument in this court, Friends asserted relying on the climate change section of the 1991 EIR is problematic because the 1991 EIR was not properly circulated for comments. As explained *ante*, the 1991 EIR is final. Accordingly, we are not persuaded by Friends's assertion that it is improper to rely on the 1991 EIR.

D. EXPIRED PERMIT

1. *PROCEDURAL HISTORY*

a. Prior Case

In a separate case, in June 2014, Friends sought a writ of mandate in the trial court. (*Friends of Fawnskin v. County of San Bernardino* (*Fawnskin*) (June 2, 2017,

E065474) [nonpub. opn.] [2017 Cal. App. Unpub. LEXIS 3801, *1], as modified on den. of rehearing (Jun. 28, 2017.)[11] In the 2014 case, Friends asserted the development permit for the 1991 Marina Point project expired because Developer went too long without acting on the project. Friends contended the County erred by issuing grading and demolition permits for the project in 2011, 2012, and 2014, because the 1991 development permit had expired. (*Id.* at pp. *2-3.)

Developer opposed Friends's petition asserting Friends had to bring its challenge within 90 days of December 2005, which was the time when the permit allegedly expired, and Friends missed that deadline. (Gov. Code, § 66499.37.) The trial court denied the writ petition citing the statute of limitations. (*Fawnskin*, *supra*, 2017 Cal. App. Unpub. LEXIS 3801 at p, *3.)

Friends appealed. (*Fawnskin*, *supra*, 2017 Cal. App. Unpub. LEXIS 3801 at pp. *3-4.) This court concluded Friends's challenges to the permits needed to be brought within 90 days of the issuance of the permits. Therefore, Friends missed the 90-day deadline for the 2011 and 2012 permits, but it satisfied the 90-day deadline for the permits issued in 2014. In June 2017, this court reversed the judgment as to the 2014 permits, holding the challenge was not time-barred by Government Code section 66499.37. (*Fawnskin*, at pp. *1-2.) .

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11 Friends requests this court take judicial notice of the unpublished appellate opinion in the prior case. We grant the request. (Evid. Code, § 452, subd. (d); *McClintock v. West* (2013) 219 Cal.App.4th 540, 543, fn. 2.)

Further, in the opinion, this court wrote, "At oral argument in this court, Developer asserted the statute of limitations for all of Friends's permit challenges began to run in 2011, when the first permit was issued, thus placing Friends on notice that the 1991 project approval had not expired." Developer asserted there is evidence reflecting Friends had notice in 2011 that the 1991 project approval had not expired. In particular, Developer referred to a letter that would provide proof of notice in 2011. This court cannot decide the evidentiary issue of whether Friends had notice in 2011. [Citation.] Moreover, the parties did not brief the legal issue of whether notice in 2011 would trigger the statute of limitations so as to bar suits concerning subsequent acts. Accordingly, we will not examine the legal or factual issues related to notice." (*Fawnskin*, *supra*, 2017 Cal. App. Unpub. LEXIS 4530 at pp. *2-3.)

b. Current Case

The writ petition in the current case was filed in the trial court in August 2015. In the second cause of action, Friends and Center alleged the development permit for the Marina Point project expired because Developer went more than five years without acting on the project. Friends and Center contended that because the development permit had expired, the County erred by approving a revision to the project.

The trial court issued its ruling in the instant case in September 2016. The trial court wrote that it "fully considered and ruled on this issue in the related case of *Friends of Fawnskin v. County of San Bernardino*, CIVDS 1409159." The Court explained that, in the prior case, it concluded " 'petitioners should have mounted a challenge within 90

days to the first discretionary decision by County—the issuance of the 2011 grading permit—that allegedly violated the code on this ground. Under the applicable statute of limitations, the statu[t]e began to run when the first post-expiration permit was issued.' "

The trial court continued, "In keeping with this Court's earlier decision, since County's discretionary decision to issue the 2011 grading permit allegedly violated the CDC, then the 90-day limitations period under [Government Code] Section 66499.37 began to run at that time because the issuance of the permit imparted notice of County's non-compliance with the Code. This clock was not reset with subsequent County action." The trial court denied the writ petition as to the second cause of action.

2. *ANALYSIS*

a. Contention

Friends contends (1) Government Code section 66499.37 does not reflect a lawsuit could only be brought against the first act by the County, which indicated the County's belief that the development permit was still active; and (2) there is no evidence in the record reflecting Friends received notice of the 2011 grading permit.

b. Government Code section 66499.37

We apply the independent standard of review when interpreting statutory language. (*Union Bank of California v. Superior Court* (2004) 115 Cal.App.4th 484, 488.) " 'When interpreting a statute, we must ascertain legislative intent so as to effectuate the purpose of a particular law. Of course our first step in determining that intent is to scrutinize the actual words of the statute, giving them a plain and

commonsense meaning. [Citation.] When the words are clear and unambiguous, there is no need for statutory construction or resort to other indicia of legislative intent, such as legislative history." (*Ibid.*)

In relevant part, Government Code section 66499.37 concerns challenges to "the decision of an advisory agency . . . or any of the proceedings, acts, or determinations taken, done, or made prior to the decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, including, but not limited to, the approval of a tentative map or final map."[12]

We understand the plain language of Government Code section 66499.37 as providing that the following have to be challenged within 90-days of the agency decision that is the focus of the lawsuit: (1) the decision itself; (2) any proceedings, acts, or determinations that led up to the decision; and (3) any conditions attached to the decision.

Our conclusion that a challenge to an agency's decision must be brought within 90 days of the decision having been made is based on the following statutory language:

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12 The full text of Government Code section 66499.37 is: "Any action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations taken, done, or made prior to the decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, including, but not limited to, the approval of a tentative map or final map, shall not be maintained by any person unless the action or proceeding is commenced and service of summons effected within 90 days after the date of the decision. Thereafter all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the decision or of the proceedings, acts, or determinations. The proceeding shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain, forcible entry, and unlawful detainer proceedings."

"Any action . . . to attack . . . the decision of an advisory agency . . . shall not be maintained . . . unless the action . . . is commenced . . . within 90 days after the date of the decision." (Gov. Code, § 66499.37.)

Our conclusion that a challenge to any proceedings, acts or determinations that led up to the decision has to be brought within 90 days of the decision is based on the following statutory language: "Any action . . . to attack . . . any of the proceedings, acts, or determinations taken, done, or made prior to the decision . . . shall not be maintained . . . unless the action . . . is commenced . . . within 90 days after the date of the decision." (Gov. Code, § 66499.37.)

Our conclusion that a challenge to any conditions attached to the decision must be brought within 90 days of the decision is based upon the following statutory language: "Any action . . . to determine the reasonableness, legality, or validity of any condition attached thereto . . . shall not be maintained . . . unless the action . . . is commenced . . . within 90 days after the date of the decision." (Gov. Code, § 66499.37.)

c. Evidence

With the foregoing understanding of the law, we turn to the record to examine whether there is evidence reflecting, prior to the issuance of the 2011 grading permit, County engaged in a proceeding, act, or determination concerning the expiration status of the 1991 development permit. (Gov. Code, § 66499.37.) We review the record in this manner because Friends is attacking an issue underlying the approval of the Minor Revision application, i.e., that the 1991 development had expired. Developer is asserting

that issue is time-barred because the statute of limitations was triggered on that underlying issue when the 2011 grading permit was granted. In order for the statute of limitations to have been triggered, County would have needed to have engaged in a proceeding, act, or determination concerning the expiration-status of the 1991 development permit prior to issuing the 2011 grading permit. (Gov. Code, § 66499.37.)

We apply the substantial evidence standard when examining a statute of limitations defense. (*Pacific Shores Property Owners Assn. v. Department of Fish & Wildlife* (2016) 244 Cal.App.4th 12, 34.) In reviewing the record in the light most favorable to Developer, it is unclear if (1) County had a reasoned discussion about the expiration of the development permit, wherein it weighed evidence and made an informed determination as to whether the 1991 development permit was still valid, prior to issuing the 2011 grading permit; (2) County hosted proceedings concerning the expiration-status of the 1991 development permit; or (3) County neglected to determine if the 1991 development permit was still valid prior to issuing the 2011 grading permit. For example, the 2011 grading permit does not mention any determinations or proceedings related to the expiration-status of the 1991 development permit. Developer does not point this court to where, in the record, we can find evidence of a proceeding, act, or determination by County concerning the expiration-status of the 1991 development permit. (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 888 ["It is neither practical nor appropriate for us to comb the record on [appellant's] behalf"].)

Because we have not been directed to evidence reflecting there was a "proceeding[], act[], or determination[]" concerning the expiration-status of the 1991 development permit (Gov. Code, § 66499.37), it cannot be concluded that substantial evidence supports the finding that the challenge is time-barred. Accordingly, we conclude the trial court erred.

Developer contends the trial court did not err because the record reflects Friends received notice that County issued the 2011 grading permit, which would have informed Friends, in 2011, of County's belief that the 1991 development permit was active. Developer does not explain what portion of Government Code section 66499.37 includes, as a factor, notice of a permit that is not the subject of the lawsuit. For example, Developer does not explain what evidence supports the finding that issuance of the 2011 grading permit constituted a proceeding, act, or determination on the expiration-status of the 1991 development permit. As explained *ante*, due to the lack of evidence, one can speculate that the 2011 grading permit was issued without County checking the expiration-status of the 1991 development permit. Because Developer fails to explain how Friends's notice of the 2011 grading permit would support a Government Code section 66499.37 statute of limitations defense against Friends, we find Developer's argument to be unpersuasive.

In sum, because the record does not reflect if there was a proceeding, act, or determination concerning the expiration-status of the 1991 development permit that led up to the decision to issue the 2011 grading permit, we conclude the trial court erred in

finding the challenge under the County Code was time-barred by Government Code section 66499.37.[13]

DISPOSITION

The appeal of Center for Biological Diversity is dismissed. The judgment is reversed in regard to the ruling that the second cause of action is time-barred. In all other respects, the judgment is affirmed. Respondent is awarded its costs on Developer's appeal. (Cal. Rules of Court, rule 8.278(a)(1).) The parties are to bear their own costs on the cross-appeal. (Cal. Rules of Court, rule 8.278(a)(3); see *King v. State of California* (2015) 242 Cal.App.4th 265, 298 [differing award of costs on appeal and cross-appeal]).

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

McKINSTER
Acting P. J.

SLOUGH
J.

13 Developer moved to file a supplemental cross-respondent's brief. Friends opposed the motion. We deny Developer's motion.