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Gov. Code Section 65009 Bars Challenge to Agreement Authorizing PG&E to Cut Trees on ROW; Plaintiff Failed to Serve Complaint within 90 Days

The First District Court of Appeal has ruled that a suit challenging an agreement between a city and PG&E authorizing tree cutting on PG&E property, which agreement is the functional equivalent of a permit under the city's zoning ordinance, was barred by the Plaintiffs' failure to file and serve the suit within 90 days pursuant to Government Code Section 65009(c)(1). However, the CEQA claim was not barred because the Plaintiffs had timely served the suit within 10 days pursuant to Public Resources Code Section 21167.6. (*Save Lafayette Trees v. City of Lafayette* (Cal. Ct. App., Feb. 8, 2019, No. A154168) __ Cal.App.5th __ [2019 WL 493957] [[Click here to read more](#)].

The City of Lafayette's zoning ordinance requires permits for tree removals. PG&E sought to remove 272 trees on its natural gas pipeline right-of-way. PG&E asserted that it was exempt from the ordinance, but it was willing to enter an agreement that was consistent with the content of the ordinance. The City Council approved the agreement. The City did not file a notice of determination or exemption under CEQA.

An association of concerned residents filed suit alleging four causes of action: (1) failure to comply with CEQA; (2) violation of state and local planning and zoning laws; (3) violation of due process; and (4) petition for writ of mandate based on the foregoing.

The Plaintiffs filed but did not serve the suit within 90 days. Service was made within 10 days. The trial court sustained the demurrers to all causes of action without leave to amend.

The First District upheld the judgment of dismissal, except as to the CEQA claim.

First, the Court held that the agreement was effectively a permit. Thus, the 90-day deadline to file and serve under Government Code section 65009(c)(1) applied. In addition, the tree ordinance, which is in the Planning and Land Use Title of the City's Municipal Code, is a land use ordinance subject to Government Code Section 65009.

The Court also held that a municipal code provision which imposed a

180-day limitations period could not apply because it was preempted by Section 65009.

Second, the Court held that the CEQA claim was not time-barred. All three justices agreed that the 90-day deadline to serve the petition under Government Code section 65009 did not apply to the CEQA claim, and that the plaintiffs timely served the suit within 10 days of filing, pursuant to Public Resources Code section 21167.6.

The lead opinion also concluded that the 180-day statute of limitations of Public Resources Code Section 21167.6(a) applied, explaining that this statute is specifically applicable to the CEQA claim and thus that Government Code section 65009 did not apply.

The concurring opinion asserted, however, that this determination was not necessary to the decision. The concurring justices would leave the question of whether Government Code Section 65009(1)(1) or Public Resources Code Section 21167.6(a) applies (90-day or 180-day statute of limitations) to a case in which resolution is necessary to the outcome.