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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JAMES DeAGUILERA, Plaintiff and Appellant, v. RIVERSIDE COUNTY BOARD OF SUPERVISORS et al., Defendants and Respondents; ELLIOT LEWIS, Real Party in Interest.	E079551 (Super.Ct.No. CVRI2201040) OPINION

APPEAL from the Superior Court of Riverside County. Craig Riemer, Judge. Affirmed.

James DeAguilera, in pro. per., for Plaintiff and Appellant.

Minh C. Tran, County Counsel, Kelly A. Moran, Chief Deputy County Counsel, and Melissa R. Cushman, Deputy County Counsel, for Defendants and Respondents.

No appearance for Real Party in Interest.

Certain ministerial projects by local agencies are exempt from the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.; unlabeled statutory references are to this code). (*Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 488.) "If a local agency determines that a project it has approved or decided to carry out is exempt for this reason, it may file a 'notice of [this] determination'—otherwise known as a notice of exemption . . . ." (*Ibid.*) "An action or proceeding alleging 'that a public agency has improperly determined that a project is not subject to [CEQA]' must be commenced 'within 35 days from the date of the filing' of the" notice of exemption. (*Ibid.*, quoting section 21167, subd. (d) (section 21167(d)).)

James DeAguilera filed a petition for writ of mandate against the County of Riverside (the County), challenging its determination that a project permitting a cannabis retail facility is exempt from CEQA. DeAguilera appeals from the judgment entered against him after the trial court sustained the County's demurrer without leave to amend on the ground that DeAguilera's petition was untimely. We affirm the judgment.

BACKGROUND

On January 25, 2022, the County's Board of Supervisors (the board) adopted the planning department's recommendations and approved a conditional use permit (along with related zoning ordinance changes and a development agreement) for Elliot Lewis "to utilize an existing building to establish and operate a 900 square foot cannabis retail facility with delivery on a 0.31 acre lot" (the project). (All subsequent date references are

to the year 2022.) The board found the project exempt from CEQA. On January 31, the County filed and posted a notice that it found the project exempt under CEQA.

On March 16, DeAguilera filed a petition for writ of mandate against the County, alleging that he leased a nearby property that would be adversely affected by the County's decision. He alleged that the County approved the project on both January 22 and January 25, and issued a notice of exemption for the project on January 25. DeAguilera challenged the board's decision to exempt the project from CEQA as "a prejudicial abuse of discretion and violation of law" and "not supported by evidence." He sought a peremptory writ of mandate directing the County "to vacate and set aside and to declare void the CEQA Exemption."

The County demurred, arguing that the petition was filed too late under section 21167(d)'s 35-day limitations period and that DeAguilera had not timely served the County. The County requested that the trial court judicially notice the minutes of the board's meeting on January 25 and the notice of exemption filed by the County on January 31.

DeAguilera opposed the motion. Relying on *Coalition for Clean Air v. City of Visalia* (2012) 209 Cal.App.4th 408 (*Coalition for Clean Air*), he argued that the County had prematurely filed the notice of exemption and that the statute of limitations had not yet begun to run because the ordinance amending the zoning law had not yet become effective. DeAguilera attached a first amended petition for writ of mandate to the opposition to "address the statute of limitations and service requirements."

In July, the trial court held a hearing on the demurrer. DeAguilera did not appear at the hearing. The record on appeal does not include a transcript of the hearing.

The trial court granted the County's request for judicial notice and sustained the demurrer without leave to amend. The court reasoned: "[T]he Board of Supervisors approved the development agreement, changes of zone, and conditional use permit on [January 25], and the notice of exemption was filed [January 31]. Therefore, to be timely, the petition challenging those decisions were required to be filed within 35 days of the notice of exemption, or by [March 7]. ([§ 21167(d)].) Here, the petition was not filed until [March 16]. Therefore, the petition is untimely."

The court rejected DeAguilera's argument that under *Coalition for Clean Air*, *supra*, 209 Cal.App.4th 408, section 21167(d)'s 35-day limitations period did not apply. The court found that *Coalition for Clean Air* was distinguishable because in that case the petitioner had alleged that the notice of exemption "was filed five days before the project was approved." In contrast to the allegations in *Coalition for Clean Air*, in this case "there are no such allegations of a premature [notice of exemption]. To the contrary, the allegations of the petition establish just the opposite. The petitioner alleges that the county approved the project on either January 22 [citation] or January 25 [citation], that the county issued a [notice of exemption] for the project on January 25 [citation], and that the county filed the [notice of exemption] on an unspecified date [citation]. [¶] Those allegations are judicial admissions, which are binding on the petitioner. . . . [¶] [H]ere,

the petitioner's own allegations, and the legislative records that he does not dispute, establish that the [notice of exemption] was not filed before the project was approved."[1]

DISCUSSION[2]

DeAguilera argues that *Coalition for Clean Air*, *supra*, 209 Cal.App.4th 408, "is the controlling legal authority" and that the trial court abused its discretion by not granting leave to amend. (Boldface and capitalization omitted.) We are not persuaded.

A demurrer tests the legal sufficiency of the factual allegations in the operative pleading and "'not the truth of its factual allegations or the [petitioner's] ability to prove those allegations.'" (*Title Ins. Co. v. Comerica Bank—California* (1994) 27 Cal.App.4th 800, 807.) "We review a ruling sustaining a demurrer de novo, exercising independent judgment as to whether the complaint states a cause of action as a matter of law." (*Abatti v. Imperial Irrigation Dist.* (2020) 52 Cal.App.5th 236, 294.) "We may also consider matters that have been judicially noticed." (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) "'"A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar . . . to be raised by demurrer, the defect must clearly and

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[1] The judgment and the notice of entry of judgment are not included in the appellant's appendix, in violation of the rules of court. (Cal. Rules of Court, rules 8.122(b)(1)(B) & 8.124(b)(1)(A).)

[2] We deny DeAguilera's request for judicial notice of certain local ordinances, email communications between DeAguilera and the County in 2023, and a cannabis license issued in 2023. None of the documents is relevant to our analysis of the issues in this appeal. (*People ex rel. Lockyer v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2 ["any matter to be judicially noticed must be relevant to a material issue"].)

affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred."'" (*Ibid.*) We review for abuse of discretion the trial court's denial of leave to amend. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

The only legal argument that DeAguilera makes about the trial court's ruling concerning the statute of limitations is that *Coalition for Clean Air*, *supra*, 209 Cal.App.4th 408, controls. In support of the argument, DeAguilera summarizes *Coalition for Clean Air*. But the only arguable contention that he makes about how *Coalition for Clean Air* applies in this case is the following statement: "The Conditional Use Permit and Development Agreement for the marijuana business cannot, by law, be approved before enactment of the zone changes." The argument is not sufficient to carry DeAguilera's burden on appeal of affirmatively demonstrating error. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 609; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) It is not "supported by legal analysis and citation to the record." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287; Cal. Rules of Court, rule 8.204(a)(1)(B) & (C).) We will not develop an appellant's argument. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.) Because DeAguilera does not develop the argument about how or why section 21167(d)'s limitations period does not apply, we consider the argument forfeited.

In any event, we agree with the trial court's assessment of *Coalition for Clean Air*, *supra*, 209 Cal.App.4th 408. *Coalition for Clean Air* held that "filing a notice of

exemption before project approval does not begin the running of the 35-day limitations period set forth in" section 21167(d). (*Coalition for Clean Air*, at p. 423.) The petitioners in *Coalition for Clean Air* alleged that the notice of exemption was filed five days before the project was approved. (*Id.* at pp. 425-426.) Assuming the allegations to be true, *Coalition for Clean Air* concluded that the "noncompliant notice of exemption did not trigger the 35-day limitations period and the demurrer to the CEQA cause of action should have been overruled." (*Id.* at p. 426.) Here, according to the allegations in the petition for writ of mandate and the legislative documents judicially noticed by the trial court, the notice of exemption was filed six days *after* the project was approved. Thus, unlike *Coalition for Clean Air*, here the notice of exemption complied with the applicable requirements that it be filed after the project's approval. The limitations period in section 21167(d) accordingly was triggered on January 31, when the County filed and posted the notice of exemption six days after the project was approved.

DeAguilera also argues that the trial court abused its discretion by not granting him leave to amend to allege that equitable estoppel or equitable tolling applies. He contends that he "timely" filed the petition for writ of mandate on March 8, but it was rejected by the clerk's office. The argument is forfeited because DeAguilera did not make it in the trial court. (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 920, fn. 3.) The argument lacks merit in any event, because Tuesday, March 8 was the 36th day after the notice of exemption was filed. Accordingly, even the rejected filing was not timely filed within the 35-day limitations period. (§ 21167(d).)

DeAguilera makes several new arguments in his reply brief but makes no showing of good cause for his failure to raise them in his opening brief. We consider the arguments forfeited. (*Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 559.) The arguments do not merely elaborate on issues that DeAguilera raised in the opening brief or rebut arguments that the County made in its respondent's brief. (*Ibid.*) "'Fairness militates against allowing an appellant to raise an issue for the first time in a reply brief because consideration of the issue deprives the respondent of the opportunity to counter the appellant by raising opposing arguments about the new issue.'" (*Ibid.*)

DISPOSITION

The judgment is affirmed. The County shall recover its costs of appeal.

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MENETREZ
J.

We concur:

MILLER
Acting P. J.

RAPHAEL
J.