Filed 4/5/07; pub. & mod. Order 5/4/07 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CAROL FIORENTINO et al., Plaintiffs and Appellants, v. CITY OF FRESNO et al., Defendants and Respondents.	F050578 (Super. Ct. No. 05CECG02617) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Rosendo Peña, Jr., Judge.

Griswold, LaSalle, Cobb, Dowd & Gin, Raymond L. Carlson and Kristine M. Howe for Plaintiffs and Appellants.

Hatch & Parent, Lisabeth D. Rothman and Robert J. Saperstein for Defendants and Respondents.

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Appellants contend that the superior court committed reversible error when it dismissed their petition for a writ of mandate to enforce the California Environmental

Quality Act (CEQA)[1] and subsequently denied them relief from the dismissal under Code of Civil Procedure section 473.

We conclude that the superior court correctly interpreted and applied the dismissal provisions contained in section 21167.4. Dismissal of the CEQA petition occurred because appellants did not file a request for hearing within 90 days of filing their petition, as was required by subdivision (a) of section 21167.4. Furthermore, filing a request for hearing on the 91st day did not cure the failure to meet the deadline, even though it was filed before the motion to dismiss.

In addition, we conclude the superior court did not abuse its discretion when it denied relief under the discretionary relief provisions of Code of Civil Procedure section 473.

Accordingly, the order dismissing the CEQA action is affirmed.

FACTS AND PROCEEDINGS

Appellant Carol Fiorentino alleged that she owned property in an unincorporated portion of Fresno County that is supplied with water by the City of Fresno at a fixed or flat rate.

Appellant San Joaquin Valley Taxpayers Association alleged that it was a nonprofit unincorporated association of taxpayers formed to fight the wrongful imposition of taxes, charges, fees, and assessments. Appellant Fiorentino is a member of the San Joaquin Valley Taxpayers Association and has acted as its treasurer and custodian of its books and records.

In 2005, the City of Fresno and its city council (collectively, City) adopted resolution No. 2005-311 titled "A Resolution of the Council of the City of Fresno, California, Certifying the Finding of Conformity for the Long-Term Renewal of the Central Valley Project ('CVP') Contract with the United States Bureau of Reclamation

[1]Public Resources Code section 21000 et seq. All further statutory references are to the Public Resources Code unless otherwise indicated.

and Authorizing the Department of Public Utilities to Execute the Long-Term CVP Contract."

Appellants allege that in 2004 representatives of City and the United States Bureau of Reclamation negotiated the renewal of a contract made in 1961 under which the United States agreed to deliver to City 60,000 acre-feet of Class I water per year from March 1, 1966, through March 1, 2006. Class I water refers to the first 800,000 acre-feet of water of the San Joaquin River, which is considered a firm water supply that is available each year.

Appellants allege that all of the actions leading to the adoption of the resolution constitute a project for purposes of CEQA. Appellants further allege that the project includes a plan to (1) fit meters on all homes located in City and (2) charge for water based on volume of water used as measured by the meters. Appellants allege City's long-standing practice has been to charge flat rates for water supplied to homes. Appellants allege this plan will raise monthly utility bills, which currently average about $66 per month in City.

Appellants challenged City's adoption of resolution No. 2005-311 by filing a petition for writ of mandate that included four causes of action. Each cause of action alleged a violation of CEQA. The first cause of action alleged the environmental review documents prepared by City in connection with the project were inadequate because they failed to consider all of the significant environmental impacts and cumulative impacts of the project. The second cause of action alleged City did not adequately address feasible mitigation measures. The third cause of action alleged City failed to adopt an environmentally superior alternative. The fourth cause of action alleged City performed an inadequate evaluation of environmental impacts of water diversion and extraction on water quality, particularly the withdrawals required to serve new development that is dependent in whole or in part on water saved by imposing metered water rates.

Appellants filed their petition for a writ of mandate to enforce CEQA on Friday, August 19, 2005.

On November 10, 2005, the parties met and conferred regarding settlement of the matter in accordance with section 21167.8. At the meeting, City requested additional time to compile the record of proceedings, and appellants agreed to the request.

Appellants filed a request for hearing under section 21167.4, subdivision (a) on Friday, November 18, 2005. November 18, 2005, was 91 days after August 19, 2005. The request for hearing proposed (1) a deadline for the service and filing of the record of proceeding, (2) a briefing schedule, and (3) a hearing on the petition during the week of May 22, 2006.

On November 21, 2005, City filed a motion to dismiss that asserted appellants failed to request a hearing within 90 days from the date they filed the petition and, as a result, section 21167.4, subdivision (a) mandated dismissal of the petition. Appellants filed an opposition to the motion to dismiss and three declarations in support of their opposition.

The motion to dismiss was heard by the superior court on December 16, 2005, and was taken under advisement. On December 28, 2005, the superior court issued a nine-page document titled "Ruling" that ended with the following paragraph:

> "The court finds the motion to dismiss must be granted because dismissal is mandatory and, on the present record, [appellants] have failed to adequately establish grounds for discretionary relief under [Code of Civil Procedure] section 473 at this time. The CEQA writ is ordered dismissed with prejudice. However, [appellants] may file and serve a post-dismissal motion to set aside the dismissal if additional circumstances for relief exist that could not be presented in the opposition to this motion to dismiss."

Nine days later, appellants filed a motion to set aside the ruling granting the motion to dismiss. The motion was supported by the declarations of two attorneys from the law firm representing appellants. The declarations asserted, among other things, that the deadline for filing the request for hearing was miscalendared and, because the attorney responsible for filing the request was busy with other matters, the error was not discovered until late in the afternoon of the last day to file the request. One declaration asserted the belief that the wrong date was calendared "because when the days were

counted at the time of calendaring October was incorrectly counted as a 30 day month and the fact that October is a 31 day month was forgotten." The declaration also stated the calendaring error was discovered too late in the day to prepare the request and get it from Hanford to Fresno before the clerk's office closed.

Appellants' motion was argued and submitted on March 24, 2006. On April 20, 2006, the superior court issued a written ruling stating that the motion for relief under Code of Civil Procedure section 473 was denied because appellants failed to show excusable neglect. In addition, the superior court stated that the ordered dismissal was reaffirmed, "except that the order should be modified to make the dismissal 'without prejudice.'"

The attorneys representing City submitted a proposed order dismissing the action without prejudice. The superior court signed and filed the order on May 23, 2006. Notice of entry of the order was served on appellants on May 31, 2006.

On June 2, 2006, appellants filed a notice of appeal that referenced the order entered on April 20, 2006, and the order filed on May 23, 2006.

DISCUSSION

I. Appealability

We assume without deciding that the order of dismissal and the order denying relief under Code of Civil Procedure section 473 are properly before this court.

II. Motion to Dismiss

City based its motion to dismiss on section 21167.4. Appellants argue the motion to dismiss was granted improperly because they filed the request for hearing before City filed its motion to dismiss. Because the request for hearing was filed before the motion to dismiss, appellants contend the motion to dismiss was moot.

A. Applicable Statutory and Regulatory Language

Subdivision (a) of section 21167.4 provides that "[i]n any action or proceeding alleging noncompliance with [CEQA], the petitioner shall request a hearing within 90

days from the date of filing the petition or shall be subject to dismissal on the court's own motion or on the motion of any party interested in the action or proceeding."

The regulation that corresponds to section 21167.4 is California Code of Regulations, title 14, section 15232, which provides: "In a writ of mandate proceeding challenging approval of a project under CEQA, the petitioner shall, within 90 days of filing the petition, request a hearing or otherwise be subject to dismissal on the court's own motion or on the motion of any party to the suit." This regulation restates, with slight variations, the original version of section 21167.4, which was enacted in 1980. (Stats. 1980, ch. 131, § 3, p. 304, eff. May 28, 1980.)

Appellants contend that Code of Civil Procedure section 1005.5 is relevant to understanding their argument regarding the significance of filing the request for hearing before City filed its motion to dismiss. Code of Civil Procedure section 1005.5 provides:

> "A motion upon all the grounds stated in the written notice thereof is deemed to have been made and to be pending before the court *for all purposes*, upon the due service and filing of the notice of motion, but this shall not deprive a party of a hearing of the motion to which he is otherwise entitled." (Italics added.)

B. Standard of Review

Appellants' argument presents a question of statutory construction. We independently review questions of law, which include issues of (1) statutory construction and (2) the application of that construction to a set of undisputed facts. (*Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1492 (*Coburn*).)

C. Rules of Statutory Construction

The principles for determining the meaning of a statute have been set forth in detail by this court in *Coburn*, *supra*, 133 Cal.App.4th at pages 1494 through 1496. We will not restate those principles here.

D. Meaning of Section 21167.4, Subdivision (a)

1. Deadline for requesting a hearing

First, we conclude that the statutory language that provides a "petitioner shall request a hearing within 90 days from the date of filing the petition" is not ambiguous on its face with respect to creating a filing deadline. Second, appellants have not shown that the language contains a latent ambiguity. In short, it means what it plainly says—the request for a hearing must be filed within 90 days from the date the petition was filed. (See *Coburn*, *supra*, 133 Cal.App.4th at p. 1495 [facial and latent ambiguity].)

The undisputed facts of this case establish that appellants failed to comply with this statutory language.

2. "Or"

The mandatory 90-day deadline is connected to the clause about dismissal by the word "or." The plain and ordinary meaning of the word "or" is "to mark an alternative such as 'either this or that' [citations]." (*Houge v. Ford* (1955) 44 Cal.2d 706, 712.) Therefore, the use of the word "or" in section 21167.4, subdivision (a) is not ambiguous. It plainly means that if the mandatory requirement for filing a request for hearing is not met, then the statutory alternative applies.

3. Dismissal

The alternative to the timely filing of a request for hearing is that the petitioner "shall be subject to dismissal on the court's own motion or on the motion of any party interested …." (§ 21167.4, subd. (a).) This language is plainly mandatory. (§ 15 ["'Shall' is mandatory"]; *Guardians of Elk Creek Old Growth v. Department of Forestry & Fire Protection* (2001) 89 Cal.App.4th 1431, 1435.) It is also conditional. The condition is that a motion must be made by an interested party or by the court itself. No other conditions for dismissal are set forth in the statutory language. Consequently, under the plain meaning of the statutory language, a CEQA action must be dismissed when a timely request for hearing is not filed, provided that a motion is made by any interested party or the court.

The undisputed facts of this case establish that City is an interested party and that City made a motion to dismiss. Thus, the conditional language expressed in the statute was satisfied, and dismissal was mandatory.

4. Appellants' arguments

First, appellants argue that City's motion to dismiss was made and pending "for all purposes" as of November 21, 2005, as that phrase is used in Code of Civil Procedure section 1005.5. Appellants contend the motion "was filed after the Request for Hearing and was therefore moot, as the condition complained of, failure to file a request for hearing within 90 days of filing the action, no longer existed when the dismissal motion was filed and served."

We disagree. This argument is wrong on the facts. When City filed and served its motion to dismiss, a request for hearing had not been filed *within 90 days* from the date the petition was filed. In other words, a violation of the 90-day deadline existed at the time the motion to dismiss was filed and the violation still exists today. The late-filed request for hearing did not cure the violation. Section 21167.4 does not mention any cure for late-filed requests. Furthermore, we will not conclude the Legislature intended to imply a cure provision because such a provision would directly contradict the language used to create the 90-day deadline. (See Code Civ. Proc., § 1858 [when construing a statute, judges may not insert what Legislature has omitted].)

Stated otherwise, appellants' argument has it exactly backwards. City has not sought the retroactive application of its motion to dismiss. Rather, appellants have asked, in effect, that their late-filed request for hearing be given retroactive effect so that the violation of the mandatory 90-day deadline is deemed to no longer exist.

Second, appellants argue that the "phrase 'shall be subject to dismissal' suggests that a CEQA claimant risks dismissal if the request for hearing is not filed by the 90th day, but that this risk may be cured if the request is filed before the motion to dismiss." Appellants point out that section 21167.4 does not address the specific circumstances where the request for hearing is filed after the 90-day deadline but before the motion to

dismiss. Because the statutory language does not explicitly address this specific factual situation, appellants contend the only fair import of the statutory language is that the request may be filed after the 90-day deadline.

These arguments are not convincing. The literal language of subdivision (a) of section 21167.4 applies to the factual situation presented in this case as well as others. Furthermore, a statute need not identify explicitly all of the factual situations that might fall within its general rule. Only relevant facts need be expressed by the Legislature when creating a general rule. It follows that, if the Legislature had intended the filing of a request for hearing after the deadline to be relevant to whether the CEQA proceeding was dismissed, it would have said so. Thus, we will not create an exception to the 90-day deadline where the Legislature did not express one. (Code Civ. Proc., § 1858.)

Appellants are correct in observing that the phrase "shall be subject to dismissal" is consistent with the existence of one or more conditions that must be met before dismissal is mandatory. Appellants are wrong, however, in identifying the applicable condition. It is plainly set forth in the statute—a motion by the court or an interested party. Nothing in the statute also conditions dismissal on the filing of a motion to dismiss before a late-filed request for hearing.

5. Summary

The meaning of the language used in section 21167.4, subdivision (a) is unambiguous. It requires superior courts to grant a motion to dismiss filed by an interested party when a CEQA petitioner has failed to file a request for hearing within 90 days from the date of filing the petition. Furthermore, dismissal is mandatory regardless of whether a request for hearing was filed before the motion to dismiss.

Accordingly, the superior court correctly applied the language in section 21167.4, subdivision (a) to the facts presented in this case.[2]

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[2]The statutory language of section 21167.4 does not parallel the statutory language that addresses judgments on default. Code of Civil Procedure section 585, subdivision (a) states that if no answer or other responsive pleading "has been filed with the clerk, … within the time

III. Motion for Relief Under Code of Civil Procedure Section 473

Appellants contend that their attorneys' calendaring error and any mistake of law regarding the requirements for filing a request for hearing were sufficient grounds for relief from the dismissal under the discretionary provision of Code of Civil Procedure section 473.

A. Statutory Language

1. Discretionary relief

Pursuant to Code of Civil Procedure section 473, subdivision (b), a superior court "may, upon any terms as may be just, relieve a party or his or her legal representative from a … dismissal … taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." The procedures for obtaining such relief are set forth in the second sentence of that subdivision, which provides:

> "Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the … dismissal … was taken." (*Ibid*.)

The discretionary relief provisions of Code of Civil Procedure section 473 have been applied to grant relief from a dismissal entered pursuant to section 21167.4. (*Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118 [superior court abused discretion in denying relief under Code Civ. Proc., § 473 from dismissal entered under § 21167.4].)

2. Mandatory relief

Code of Civil Procedure section 473, subdivision (b) also contains a mandatory relief provision for attorney fault. (*Zamora v. Clayborn Contracting Group, Inc.* (2002)

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specified in the summons, *or such further time as may be allowed*, the clerk … upon written application of the plaintiff, … shall enter the default of the defendant …." (Italics added.) When a responsive pleading is filed before a plaintiff's application for default, courts have applied the italicized language to the facts and concluded that the plaintiff, in effect, has *allowed* the defendant *further time*. (E.g., *Goddard v. Pollack* (1974) 37 Cal.App.3d 137, 141.) Because section 21167.4 does not contain any language that permits City to impliedly extend the 90-day deadline by not filing a motion to dismiss, we reject appellants' attempt to analogize dismissals under section 21167.4 to defaults under Code of Civil Procedure section 585.

28 Cal.4th 249, 257.) The superior court, relying on *Nacimiento Regional Water Management Advisory Com. v. Monterey County Water Resources Agency* (2004) 122 Cal.App.4th 961, concluded that the mandatory relief provision of Code of Civil Procedure section 473 was not available for a dismissal entered under section 21167.4. Appellants do not challenge this aspect of the superior court's ruling. Accordingly, application of the mandatory relief provision of Code of Civil Procedure section 473 is not an issue raised in this appeal.

B. Standard of Review

A superior court's ruling on a motion for discretionary relief under Code of Civil Procedure section 473 is reviewed on appeal for an abuse of discretion. (*Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th at p. 257; *Miller v. City of Hermosa Beach*, *supra*, 13 Cal.App.4th at p. 1136.)

Generally, the abuse of discretion standard of review is a deferential one. Deference, however, is not appropriate where a superior court exercises its discretion to *deny* relief under Code of Civil Procedure section 473. (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 235.) Because of the strong public policy preference for the resolution of disputes on their merits,[3] "[d]oubts are resolved in favor of the application for relief from default [citation], and reversal of an order denying relief results [citation]." (*Elston*, at p. 235.) "Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails." (*Ibid*.; cf. *Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th at p. 258 [superior court did not abuse its discretion in *granting* relief].)

Furthermore, where (1) the errant party acts promptly to correct the error and seek relief and (2) the opposing party will suffer little or no prejudice, "'very slight evidence

[3]In *Leavitt v. County of Madera* (2004) 123 Cal.App.4th 1502, this court recognized the general policy preference for resolving controversies on their merits had added importance in CEQA cases because dismissal deprives the petitioners as well as other members of the community of a resolution of the merits of an environmental issue. (*Leavitt*, at p. 1524.)

will be required to justify a court in setting aside the default.' [Citations.]" (*Elston v. City of Turlock*, *supra*, 38 Cal.3d at p. 233.)

C. Excusable Neglect and Mistakes

An attorney's mistake, inadvertence, or neglect is "excusable" when the error is one that a reasonably prudent person under the same or similar circumstances might have made. (*Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th at p. 258.) "Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable." (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 682.)

1. Mistakes of fact

In this case, the attorneys for appellants made a series of factual errors that led to the late filing. First, the 90-day deadline was miscalendared. The attorney declaration stated that the incorrect date may have been calendared because October was counted as having only 30 days instead of 31. Second, when the calendaring error was discovered the afternoon of November 17, 2005, the attorney mistakenly believed he could not get the request for hearing filed in time because the clerk's office closed at 4:00 p.m. The superior court found "there was no reason he could not have gotten the 'request for hearing' timely filed." The superior court observed that there was a drop box outside the clerk's office where documents deposited before 5:00 p.m. are deemed filed on the day deposited. Also, the document could have been filed timely if transmitted by facsimile to the clerk's office before 5:00 p.m. The superior court summarized its findings by stating, "It appears that [appellants] simply missed the deadline, without any excusable basis for doing so."

A number of California cases have addressed what is excusable in situations where an attorney miscalculates the time to perform a task or miscalendars a critical date.[4]

[4]One treatise observes that "[a] number of cases deal with the realities of office practice, including the inevitable misfiling of papers or erroneous clerical entries, and usually this neglect

In *Nilsson v. City of Los Angeles* (1967) 249 Cal.App.2d 976, 980, the Court of Appeal stated "calendar errors by an attorney or a member of his staff are, under appropriate circumstances, excusable. [Citations.]" To support this statement, the Court of Appeal cited eight cases.

In *Nilsson*, the claimant's law firm failed to calendar the applicable 100-day statute for filing a tort claim. (*Nilsson v. City of Los Angeles*, *supra*, 249 Cal.App.2d at p. 978.) The trial court denied the claimant's request to file a late claim. The Court of Appeal concluded the trial court abused its discretion by denying relief. (*Id*. at p. 983.) The attorney's affidavit stated the claim was presented late "'because of an error in calendaring in affiant's office.'" (*Id*. at p. 978.) The attorney's affidavit did not show how the calendaring error occurred, who made the error, or what office procedures were followed to enter deadlines on the calendar. (*Id*. at p. 982.) Despite the conclusory nature of the affidavit, the Court of Appeal determined it was sufficient to establish that the calendaring error was excusable. (*Ibid*.; see generally 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 278, pp. 353-354 [calendaring mistakes related to filing notice of claim against public entity; same standards as used under Code Civ. Proc., § 473 are applied to determine if late filing is excusable].)

One of the cases relied upon in *Nilsson* was *Hagenkamp v. Equitable Life Assur. Soc.* (1916) 29 Cal.App. 713. In *Hagenkamp*, the trial court granted relief from a judgment entered after the attorney for an intervening party failed to appear for trial. (*Id*. at p. 714.) The Court of Appeal affirmed on two grounds. One ground was the "excusable neglect of counsel for the intervener in making a wrong entry in his office diary of the date set for the trial of the cause." (*Id*. at pp. 716-717.) Specifically, the attorney failed to appear because he inadvertently entered the trial on the page of his office diary dated August 8, 1913, instead of August 7, 1913. (*Id*. at p. 715.)

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is considered excusable." (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 167, p. 671.)

In *Segal v. Southern California Rapid Transit Dist.* (1970) 12 Cal.App.3d 509, the trial court denied the claimant's application for leave to file a late claim. The Court of Appeal determined the trial court abused its discretion and reversed its ruling. (*Id*. at p. 512.) In *Segal*, the claimant suffered injuries while riding on a bus on October 12, 1968. (*Id*. at p. 511.) The attorney counted the 13th through 31st of October as 18 days instead of 19 when calculating the expiration of the 100-day claim period. (*Id*. at p. 511.) The Court of Appeal determined that the attorney's error in performing a routine arithmetical calculation and filing the claim for damages one day late constituted excusable neglect. (*Id*. at p. 512.)

Based on the foregoing cases, we conclude that the court in *Nilsson* accurately stated the law when it said that calendar errors by an attorney are excusable "under appropriate circumstances." (*Nilsson v. City of Los Angeles*, *supra*, 249 Cal.App.2d at p. 980.) Therefore, we must determine whether "appropriate circumstances" exist in this case.

The superior court found that it was not appropriate to excuse the late filing in this case because the request for hearing could have been filed on time by placing it in the deposit box or sending it to the clerk by facsimile before 5:00 p.m. on November 17, 2005. Therefore, this case involves more than a calendaring error that was not discovered until after the deadline expired. As a result, it is distinguishable from those cases in which the calendaring error was not discovered before the scheduled event had been held or the deadline had expired.

In this case, the calendaring error was discovered before the deadline expired and the means were available to file the required document on time. The superior court determined, in effect, that an attorney, acting in accordance with the professional standard of care, would have used one of the available means and gotten the request for hearing filed on time. In other words, by ruling the attorney's mistakes were not excusable, the superior court effectively determined that the attorney's failure to timely file the request was "[c]onduct falling below the professional standard of care[.]"

(*Garcia v. Hejmadi*, *supra*, 58 Cal.App.4th at p. 682.) The superior court's factual description of the clerk's use of a deposit box and facsimile filing and its analysis of the use of these filing methods provides an adequate factual foundation for its finding regarding excusability. Accordingly, we will not disturb that finding on appeal.

2. Mistakes of law

Appellants appear to argue that they are entitled to discretionary relief under Code of Civil Procedure section 473 because the order dismissing their CEQA petition was based on a new rule of law of which they had no notice. Appellants contend that no published case addressed the situation where a request for hearing was filed late but *before* the motion to dismiss was brought under section 21167.4.

We conclude that appellants' theory that the dismissal of the petition occurred because of an excusable mistake of law by their attorney is without merit. The facts of this case show that the attorney's incorrect view of the legal effect of a late-filed request for hearing did not cause the request for hearing to be filed after the 90-day deadline.

In contrast, in *Miller v. City of Hermosa Beach*, the attorney mistakenly believed that her noticed hearings regarding a temporary restraining order and a preliminary injunction during the 90-day period satisfied the "request for hearing" requirement of section 21167.4. (*Miller v. City of Hermosa Beach*, *supra*, 13 Cal.App.4th at p. 1136.) As a result of this mistake, the attorney did not file a separate request for a hearing on the merits of the petition.

Here, the attorneys' mistake as to the interpretation and application of section 21167.4 was not the cause of the request for hearing being filed one day late. The declarations submitted show the causes were a mistake in calendaring the due date followed by a mistake about the ability to file documents after 4:00 p.m. Thus, the mistake of law advanced by appellants in this appeal cannot serve as a basis for relief under Code of Civil Procedure section 473.

Therefore, the superior court did not err in denying relief under Code of Civil Procedure section 473.

IV. Dismissal Without Prejudice

City's appellate brief argues the superior court erred when it modified its ruling to provide that the dismissal was without prejudice. City's brief requested that this court "direct the Superior Court to withdraw its Order designating the dismissal as 'without prejudice.'"

City did not file a notice of cross-appeal and, at oral argument, counsel for City stated that City waived this argument. Therefore, we will not consider it.

V. Motion to Augment Record

City's renewed motion for augmentation of record filed on March 13, 2007, is denied.

DISPOSITION

The order of dismissal is affirmed. Respondents shall recover their costs on appeal.

_____
DAWSON, J.

WE CONCUR:

_____
VARTABEDIAN, Acting P.J.

Filed 5/4/07

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CAROL FIORENTINO et al., Plaintiffs and Appellants, v. CITY OF FRESNO et al., Defendants and Respondents.	F050578 (Super. Ct. No. 05CECG02617) **ORDER MODIFYING OPINION AND CERTIFYING OPINION FOR PARTIAL PUBLICATION** [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on April 5, 2007, be modified as follows:

1. On page 2, the second full paragraph, beginning "In addition" is deleted and the following paragraph inserted in its place:

> In addition, in an unpublished part of this opinion, we conclude the superior court did not abuse its discretion when it denied relief under the discretionary relief provisions of Code of Civil Procedure section 473.

2. On page 4, above the second paragraph beginning "Appellants filed" insert the subheading **Late Request for Hearing and Resulting Dismissal**.

3. On page 4, the fourth paragraph, beginning "The motion to dismiss" and the subsequent block quote are deleted and the following subheading, paragraphs, and block quote inserted:

The motion to dismiss was heard by the superior court on December 16, 2005, and was taken under advisement. On December 28, 2005, the superior court issued a nine-page document titled "Ruling," which included the statement that "the motion to dismiss must be granted because dismissal is mandatory …."

Relief Under Code of Civil Procedure section 473

The December 28, 2005, ruling ended with the following:

"[O]n the present record, [appellants] have failed to adequately establish grounds for discretionary relief under [Code of Civil Procedure] section 473 at this time. The CEQA writ is ordered dismissed with prejudice. However, [appellants] may file and serve a post-dismissal motion to set aside the dismissal if additional circumstances for relief exist that could not be presented in the opposition to this motion to dismiss."

4. On page 5, above the second full paragraph, beginning "The attorneys" insert the subheading **Orders**.

5. On page 9, at the end of the second sentence of the the first paragraph after the subheading *5. Summary*, add as footnote 2 the following footnote, which will require the renumbering of all subsequent footnotes:

[2]This opinion does not reach a number of issues and should not be interpreted to contain implied rulings. For example, City filed its motion to dismiss four calendar days (two business days) after the 90-day deadline expired. We have concluded that City did not wait too long to file the motion. In other words, City's motion cannot be characterized by the phrase "unduly delayed," "lacking in promptness," or other words describing untimeliness. Because the motion was filed promptly in this case, we need not decide whether the law requires such a motion to be brought promptly or not. Questions such as whether it is possible to wait too long to bring such a motion and, if so, what factors are relevant to determining how long is too long must await another day.

Similarly, the facts of this case do not require us to address (1) appellants' concern that a superior court might delay (perhaps until the petition has been heard on its merits) before bringing its own motion to dismiss or (2) whether any constraints are placed on the authority of the superior court to bring its own motion to dismiss. For example, is the *bringing* of such a motion committed to the discretion of the superior court

and, as such, subject to review under an abuse of discretion standard? Again, these issues must await another day.

6. At the end of the first paragraph on page 10, add as footnote 4 the following footnote, which will require the renumbering of all subsequent footnotes:

> [4]We have received requests to publish this part of the opinion that assert it meets various criteria for publication. The purpose of the rule concerning publication is to promote the orderly development of the law. We conclude that this purpose would not be served by publishing part III. because, both in this court and below, there were a number of issues that were not raised, analyzed and decided. As a result, publication of part III. might inhibit, rather than promote, the orderly analysis of those issues and the development and adoption of the rules of law to resolve those issues.
>
> As one, and only one, example, the statutory construction that concludes the discretionary provision of Code of Civil Procedure section 473 applies to "dismissals" under section 21167.4, subdivision (a) and the mandatory provision of Code of Civil Procedure section 473 does not apply to these "dismissals" is, from a textual perspective, internally inconsistent. (See *Nacimiento Regional Water Management Advisory Com. v. Monterey County Water Resources Agency* (2004) 122 Cal.App.4th 961, 967-968 [rejecting a literal interpretation of Code Civ. Proc., § 473, subd. (b)].) It could be argued that a single word, like "dismissal," has a single, unchanging meaning throughout Code of Civil Procedure section 473. (See *Mohasco Corp. v. Silver* (1980) 447 U.S. 807, 826 [rejecting as unreasonable the argument that the word "filed" could have two different meanings in two separate subsections of the same section of a statute].)

Except for the modifications set forth, the opinion previously filed remains unchanged. There is no change in the judgment.

The opinion in the above-entitled matter filed on April 5, 2007, was not certified for publication in the Official Reports. For good cause it now appears that a portion of the opinion should be published in the Official Reports and it is so ordered. Those portions not to be published are the part subtitled **Relief Under Code of Civil Procedure section 473** under the heading **FACTS AND PROCEEDINGS**, and parts III.-V. under the heading **DISCUSSION**.

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DAWSON, J.

I CONCUR:

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VARTABEDIAN, Acting P.J.