IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

S207173

TUOLUMNE JOBS & SMALL BUSINESS ALLIANCE,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF TUOLUMNE

Respondent,

WALMART STORES, INC., JAMES GRINNELL, AND THE CITY OF SONORA

Real Parties in Interest.

After a Decision By the Court of Appeal,
Fifth Appellate District
Case No. F063849

ANSWER TO PETITION FOR REVIEW

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ANSWER TO PETITION FOR REVIEW

I. INTRODUCTION

After substantially completing the California Environmental Quality Act ("CEQA") environmental review process for a development project in the City of Sonora ("City"), Walmart Stores, Inc. ("Walmart") stayed its project application shortly before the City Council was scheduled to consider certifying an environmental impact report, adopting CEQA findings, and approving Walmart's project. Shortly thereafter Sonora resident James Grinnell ("Grinnell") began circulating an initiative petition that would create a new specific plan authorizing Walmart's development project ("Initiative"). Upon gathering signatures from over 15% of the City's registered voters, Mr. Grinnell presented the Initiative to the Sonora City Council which unanimously approved the Initiative without an election and without completing environmental review. Walmart expressly supported and encouraged this action – claiming the Initiative as its own work.

Tuolumne Jobs & Small Business Alliance ("TJSBA") challenged the Initiative in Tuolumne County Superior Court, alleging, among other things, that the City's approval of the Initiative absent CEQA compliance was unlawful. Walmart, et al., demurred to the Petition and the trial court sustained demurrer without leave to amend as to the CEQA cause of action and two other causes of action not relevant to the petitions before this Court. The trial court overruled the demurrer as to the second cause of action – which asserts that the Initiative is inconsistent with the Sonora General Plan.

TJSBA petitioned the appellate court to issue a writ of mandate overturning the trial court's order partially sustaining the demurrer and, after issuing an order to show cause ("OSC"), the appellate court stayed the trial court proceedings and ultimately granted the requested relief in a thorough and comprehensive 39-page partially published opinion ordering the trial court to reinstate TJSBA's CEQA cause of action ("Opinion"). The Appellate Court rejected Walmart's argument that the Initiative was exempt from CEQA as a "ministerial" approval. Walmart, et al, now ask this Court to grant review to prevent the trial court from considering the CEQA cause of action on its merits and, ultimately, to uphold their initiative strategy as exempt from CEQA.

TJSBA respectfully submits that this Court should reject the request to review the appellate court's decision overturning demurrer ruling for the reasons stated below.

II. WHY REVIEW SHOULD NOT BE GRANTED

Several factors support denying review.

First, because Grinnell did not file a return to the appellate court's OSC, appear at oral argument, request rehearing, or otherwise object in the court of appeal he should not be allowed to now request review by or to raise any new issues before this Court.

Second, although the Opinion recognizes a "split of authority" in respectfully refusing to follow the Fourth Appellate District's opinion in *Native American Sacred Site and Environmental Protection Association v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961, this split is factually limited and unlikely to be repeated in any case except those involving Walmart or its supporters circulating similar initiative petitions.

Third, the court of appeal Opinion is well-reasoned, thoroughly responds to the objections raised by Walmart and the City during the

appellate court proceedings, fosters rather than hinders initiative rights by endorsing CEQA exemptions for initiative elections (but not city council approvals), and appropriately applies CEQA to determine the City Council's decision to forego an election and adopt the Initiative as its own did not fit within a statutory or regulatory exemption for "ministerial" projects.

Fourth, the Opinion ultimately recognizes and harmonizes two competing legislative schemes – initiative powers and environmental protection – without choosing one policy over the other consistent with the separation of powers doctrine. The petitions for review, on the other hand, asks this Court to engage in a legislative capacity – ultimately finding that the policies favoring adopting initiatives without election trump and preempt policies favoring environmental review. But this analysis is best left to the legislature. To the extent the two statutory schemes are disharmonious the legislature rather than the judiciary should be the one to craft a remedy that either better harmonizes the policies or expressly chooses one over the other.

Finally, the appellate court Opinion overturned a ruling sustaining demurrer – rather than reversing a judgment on the merits entered after a trial of the issues. Thus, the remedy set forth in the Opinion simply allows TJSBA to proceed to trial on the issue. This process should be allowed to play out and then, if appropriate, any judgment could be reviewed on appeal and ultimately brought to this court for consideration.

III. SUMMARY OF RELEVANT FACTS

Walmart applied to the City for permits to expand its existing 130,166 sq. ft. Sonora store, by approximately 28,366 sq. ft. to allow the store to sell groceries and operate 24 hours a day, 7 days a week as a supercenter ("Walmart Expansion Project" or "Project"). Slip Op. p. 3. In

response to the application the City prepared a draft Environmental Impact Report ("EIR") on the Walmart Expansion Project and circulated the EIR for public comment. *Id.* The Planning Commission considered the Project application and EIR in June 2010 and recommended approval to the City Council. *Id.* The City Council never considered the Project application. *Id.*

Rather, shortly after the Planning Commission issued its recommendation, Grinnell presented the City with a Notice of Intent to Circulate an initiative petition. *Id.* The Initiative, which the City dubbed the "Walmart Initiative" proposed adopting a "specific plan" known as the "Sonora Commercial Specific Plan" at the Walmart Expansion Project site. *Id.* Unidentified parties gathered signatures in support of the Initiative and submitted them to the County Clerk for verification. *Id.* The County Clerk determined that out of 651 signatures submitted, 541 were found sufficient and this number exceeded 15% of Sonora registered voters. *Id.*

On September 20, 2010 the City Council received a staff report from the City Manager regarding the Initiative. *Id.* The City Council ordered a report pursuant to Elections Code § 9212. *Id.* At its regular October 18, 2010 meeting the City Council received the report. *Id.* p. 4. Walmart advocated that the City forego an election and instead adopt the Initiative as an alternative means of approving its Project, stating "by putting the planning commission's recommendation [on the Walmart Expansion Project] into the form of an initiative, we have given hundreds of your constituents the opportunity to express support for this project and streamline the process of approval." *Id.* The City Council decided to grant Walmart's request to forego the election and approve the Initiative as its own. *Id.*

In January 2011 TJSBA filed an action challenging the Initiative on four grounds. *Id.* The First Cause of Action alleged that the decision to approve the Project by Initiative is not a ministerial act and therefore not

exempt from CEQA and/or to the extent the Elections Code authorizes a City Council to forego submitting a site specific land use decision to a vote of the people, and instead to treat that decision as exempt from CEQA and approve that initiative as its own legislation based on the desire of a minority of registered voters, such authority conflicts with the California Constitution (Art. II, sec. 11), which reserves legislative decision making to the people regardless of cost. The Second Cause of Action alleged that the Initiative impermissibly conflicts with the Sonora General Plan by creating a new zoning district not recognized by the General Plan and not consistent with the underlying Heavy Commercial General Plan designation. The Third Cause of Action alleged that the Initiative unlawfully surrenders the City's police power. The Fourth Cause of Action alleged that, despite its "specific plan" label, the Initiative is really a quasi-judicial approval of the Walmart Expansion Project rather than a legislative action and thus is not subject to the initiative process.

City, Grinnell, and Walmart demurred to all four causes of action and in October 2011 the trial court issued a ruling sustaining the demurrers without leave to amend as to the First, Third, and Fourth causes of action. *Id.* p. 5. The trial court overruled the Demurrer to the second cause of action. *Id.*

TJSBA filed a petition for a writ of mandate with the appellate court in December 2011 requesting that the appellate court order the trial court to vacate its order sustaining the demurrer as to the three causes of action. *Id.* The petition also requested the appellate court stay the proceedings in the trial court. *Id.* The appellate court issued an order to show cause why relief should not be granted and stayed the trial, pending determination of the petition. *Id.* Walmart and the City filed returns on March 1, 2012. Grinnell did not file any return. *Id.* On Walmart's request the appellate court heard

oral argument in September 2012. Walmart and TJSBA appeared and argued. Neither City nor Grinnell appeared at oral argument.

The appellate court concluded that the trial court erred in sustaining demurrer without leave to amend as to TJSBA's CEQA claims and directed the trial court to modify its order allowing TJSBA's first (CEQA) and second (general plan) causes of action to proceed to hearing on the merits.

Walmart and Grinnell each petition this Court for review. The City joined in those petitions. Now comes TJSBA's opposition to that request.

IV. OPPOSITION TO PETITIONS FOR REVIEW

A. GRINNELL WAIVED OBJECTIONS AND HIS PETITION – WHICH RAISES NEW ISSUES – SHOULD NOT BE CONSIDERED.

Walmart urges this Court to address whether a city must comply with CEQA before adopting a voter-sponsored initiative. Grinnell raises this issue and a slightly different issue – whether the Election Code preempts CEQA compliance. While Walmart presented its issue to the appellate court, Grinnell did not and therefore should not be allowed to do so for the first time here. Specifically, Grinnell failed to file a return to the OSC raising this or any other objection to TJSBA's petition. Only Walmart and the City filed returns.[1] Slip Op. p. 5. Grinnell also failed to appear at oral argument even though he was represented then by the same counsel who now file this petition on his behalf. Nor did Grinnell or any other party request rehearing. *See*, Walmart Petition p. 8. In fact, Grinnell even

[1] Grinnell did file an "Informal Response" to the Petition for Writ of mandate in January 2012 prior to the appellate court issuing the OSC. Therein Grinnell argued against writ review and/or a stay of the trial court proceedings on three grounds: (1) lack of irreparable injury, (2) because "[t]he decision of a city council whether to adopt an initiative or to set an immediate election is a political, not judicial decision", and (3) TJSBA had an adequate remedy by appeal.

unsuccessfully moved the trial court to dismiss him from the action altogether "asserting that he was not a proper real party in interest." Slip Op. p. 5.

"As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." Cal. Rules of Court, rule 8.500 subd. (c)(1). *See also*, *People v. Bransford* (1994) 8 Cal.4th 885, 893, fn. 10; *Associated Builders and Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2. After waiving objection and affirmatively asserting he had no interest in the outcome of the underlying litigation, Grinnell should not be allowed to now raise new issues and objections for the first time in asking this Court to review the appellate court's decision. Accordingly, this Court should disregard and summarily deny Grinnell's Petition for review.

B. THE "SPLIT OF AUTHORITY" IDENTIFIED BY COURT OF APPEAL DOES NOT JUSTIFY SUPREME COURT REVIEW.

The Opinion creates an express "split of authority, as we respectfully decline to follow *Native American Sacred Site & Environmental Protection Assn. v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961." Slip Op. at pp. 2-3. Notwithstanding the split of authority recognized by the court of appeal, TJSBA submits that the issue is not sufficient to justify review by this Court.

The issue of CEQA compliance where a public agency decides to forego election and adopt an initiative as its own is neither a common practice nor a rampant issue in land use and environmental arenas. Indeed, as Walmart notes "for more than 100 years, voters who qualified an initiative had the right to have a city either adopt an initiative without alternation or present it for decision to an election of the voters", *Native*

American Sacred Site was the first case to "squarely [address] the question of whether a city must comply with CEQA in order to enact an initiative proposed by the voters." Walmart Pet. at p. 1. CEQA turned 42 this year. To the extent there is a conflict between the 100-year-old Elections Code and 42-year-old CEQA it took over three decades after the enactment of the latter until the issue resulted in a published appellate decision. Nor did *Native American Sacred Site* result in an onslaught of citing decisions. In fact, the Opinion is the first and only published decision to cite *Native American Sacred Site* on the issue of whether adopting a land use initiative without election is exempt from CEQA.[2] Thus, the issue presented is one of limited application.

Notwithstanding the limited appearance of this issue in only two reported appellate decisions since CEQA's inception in 1970, Walmart asserts that the issue is likely to recur. In support of this Walmart cites *Milpitas Coalition for a Better Community v. City of Milpitas* pending in the Sixth District Court of Appeal (No. H0838380) and another pending in San Bernardino Superior Court. Walmart Pet. at p. 4. What Walmart fails to disclose is that these two case involve not only the same issue but, for all intents and purposes, the same initiative and nearly identical facts. As with Sonora, Walmart supporters circulated nearly identical petitions which the respective city councils adopted without election or compliance with CEQA. Thus, to the extent this is a recurring issue that is the case only

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[2] Two opinions have cited the case on other grounds. *MHC Financing Ltd. Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, 1383 cited *Native American Sacred Site* for the principle that a city's failure to either adopt a qualified voter initiative or place it on the ballot within the statutory time periods does not preclude the city from exercising its duty to take such action beyond the deadline. *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 779 cited the case for the same proposition. TJSBA does not dispute and the Opinion does not upset this principle.

because Walmart has engineered the identical process in other communities. Walmart does not cite to any pending matters not involving its stores. And TJSBA is unaware of any further attempts by Walmart or its supports in 2011 or 2012 to authorize development via the process employed in Sonora. That is, this is not a process likely to be repeated by zealous city councils but rather a process that Walmart and/or its supporters have employed elsewhere (and no longer seem to pursue). Thus, the trilogy of cases allegedly showing a widespread issue is really limited to the common facts unique to those three disputes.

This situation should not give rise to review by this Court.

C. THE COURT OF APPEAL DECISION IS WELL REASONED AND FULLY ADDRESSED WALMART'S CLAIMS.

Walmart, et al. challenge the merits of the Opinion and urge this Court to adopt the *Native American Sacred Site* ruling as its own. TJSBA submits that the Opinion is well reasoned in reaching its conclusion, fully addresses all objections raised by Walmart and City during the appellate court proceedings, and need not be upset by this Court.

While *Native American Sacred Site* disposed of the issue and concluded the initiative in that situation was exempt from CEQA in a single-heading four page discussion, the Opinion's discussion of the issue includes 21 pages of analysis with 8 sub-headings and several sub-sub-headings explaining its reasoning and rebutting each and every concern raised by City and Walmart. Slip Op. pp. 8-28. This included addressing arguments raised by Walmart for the first time in oral argument. Slip. Op. p. 20, FN 5.

1. The Opinion Protects Rather than Hinders Reserved Initiative Rights.

Walmart starts by asserting that the Opinion would deprive people of the reserved power of initiative. Walmart Pet. P. 10-12. Yet this is simply false. The Opinion merely concludes that because the Sonora City Council decided to adopt the Initiative as its own rather than allow the electorate to weigh in the City Council cannot absolve itself of complying with CEQA. The Opinion applies this Court's decision in *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165 (which held the submission to the electors of a voter-generated initiative is exempt from CEQA but the submission of a city-generated initiative is not) and noted "even if an election is held [following a city council placing an initiative on the ballot] and a majority of voters expresses its will to let a project go forward, CEQA review is still required if it was the city council that chose to put the initiative on the ballot." Thus reasoned the appellate court, "It is even clearer that CEQA applies when a mere 15 percent of the voters has expressed support of the initiative and the city council chooses to approve the project without an election." Slip Op. p. 13.

Indeed the Opinion does not foster deprivation of the reserved right of initiative at all. Rather, if anything, it ensures those reserved rights by exempting only decisions by the electorate from CEQA compliance. "Real parties' argument on this point reveals, once again, their failure to appreciate the importance of elections in the initiative process. The results of an election represent the will of the people. A petition signed by 15 percent of the voters does not. Without an election, it simply is not possible to say that the people's will requires the important legislative objectives of CEQA to be set aside so a project can be expedited." Slip Op. at 27-28. If anything, the Opinion deters developers or public officials from enlisting registered voters to propose legislation for in order to circumvent CEQA all

the while upholding the rights of the people to enact legislation via elections.[3]

2. The Opinion Correctly Holds that Adopting an Initiative in Lieu of Holding an Election is Not Subject to a Ministerial Exemption from CEQA.

Walmart argues that "CEQA does not define 'ministerial'" and the Opinion runs afoul of *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105 and *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259 by concluding the City's decision to adopt the Initiative is not subject to a ministerial exemption under Pub. Res.C. §21080 subd. (b)(1). Walmart Pet. p. at 13-15.

But CEQA Guideline §15369 does, in fact, define "ministerial" and the Opinion cited and relied on this definition in its analysis. Slip Op. at 16. As relevant, a ministerial decision is one "involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project...A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal,

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[3] Walmart and Grinnell also imply that the elections code controls and preempts compliance with state land use and environmental laws. Yet this argument fails to reconcile the holding of this Court and others that a zoning ordinance that conflicts with a general plan is "invalid at the time it is passed," regardless of whether it is adopted by the legislative body or approved by the electorate through the initiative process. *Lesher Communications Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 544. *See also, deBottari v. City Council* (1985) 171 Cal.App.3d 1204, 1213 ("Judicial deference to the electoral process does not compel judicial apathy towards patently invalid legislative acts. Nor are we persuaded that a zoning ordinance inconsistent with the general plan constitutes little more than a mere technical infirmity. On the contrary, the requirement of consistency is the linchpin of California's land use and development laws...")

subjective judgment is deciding whether or how the project should be carried out." CEQA Guideline §15369. And critical here – the City Council rather than the electorate made the ultimate decision to carry out the project.

The Opinion explains, "A city council's decision about whether to approve a development project or instead to let the voters make the decision is not 'ministerial' under this definition...It is a policy decision supported on the one side by many considerations relevant to whether the project is good for the community and on the other side by all the reasons why it might be desirable for the voters to be able to make the decision for themselves. It also involves a weighing of the costs of holding an election against its benefits. Even real party in interest Grinnell recognizes, in his informal response, (albeit in another context), that the council's decision whether to adopt the initiative or hold an election is 'political.' He says, '[a] city council may base its decision on its perception of the will of its constituents, economic considerations, policy, budget or any of the myriad of other considerations which go ingot political decisions.' The role of all these considerations shows that the decision was not ministerial." Slip Op. p. 16.

The Opinion continues, "The definition in Guidelines section 15369 specifies that an action is ministerial if public official cannot use discretion or judgment in deciding '*whether* or how the project should be carried out.' Here, the city council did decide that the project should be carried out, and in so doing used its discretion and political judgment in concluding that the decision about whether it should be carried out or not should be left to the electorate." Slip Op. at 17 (emphasis in original). That is, the elected officials rather than the electorate made the final decision to carry out the project by approving the Initiative and, as such, that decision is not exempt

from CEQA. And nothing in that reasoning conflicts with the holdings in *Mountain Lion Foundation* or *Friends of Westwood.*

D. THE PETITIONS ASK THE COURT TO ENGAGE IN A LEGISLATIVE CAPACITY.

The petitions for review really ask this Court to articulate a new CEQA exemption not found in the statute or the Guidelines: an exemption when a public agency adopts land use entitlements proposed by developers through the initiative process. Yet such a request ultimately conflicts with Public Resources Code section 21083.1 which states: "It is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret this division or the state guidelines... in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines."

To the extent the Opinion brings to light an imperfect confluence of state elections statutes and state environmental statutes, under the doctrine of separation of powers, the legislature should be given the opportunity to cure the legislative imperfections rather than asking the judiciary to assume this role as Walmart now does. As this Court explains, "The California Constitution establishes a system of state government in which power is divided among three coequal branches (Cal. Const., art. IV, § 1 [legislative power]; Cal. Const., art. V, § 1 [executive power]; Cal. Const., art. VI, § 1 [judicial power]), and further states that those charged with the exercise of one power may not exercise any other (Cal. Const., art. III, § 3). Notwithstanding these principles, it is well understood that the branches share common boundaries (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 338, 178 Cal.Rptr. 801, 636 P.2d 1139), and no sharp line between their operations exists." *People v. Bunn* (2002) 27 Cal.4th 1, 14.

To this end, "separation of powers principles compel courts to effectuate the purpose of enactments [citation], and limit judicial efforts to rewrite statutes even where drafting or constitutional problems may appear. [citations] The judiciary may be asked to decide whether a statute is arbitrary or unreasonable for constitutional purposes [citation], but no inquiry into the 'wisdom' of underlying policy choices is made [citation]." *Id.* at 16-17.

In enacting both CEQA and Elections Code §9214, the Legislature has expressed its determination that both statutes represent important policies affecting the public interest. CEQA, itself, include numerous legislative policy declarations regarding the importance of maintaining environmental quality for the people (Public Resources Code section 21000, subd. (a)-(d)), ensuring "that major consideration is given to preventing environmental damage" (*Id.*, subd. (g)), and ensuring that CEQA "is an integral part of any public agency's decision making process." Public Resources Code section 21006.

The Opinion merely applies these overarching policies and attempts to best harmonize both statutes to without doing violence to either. Walmart, et al. ask this Court to do the opposite and declare one legislative policy (enacting initiative without election) superior to the other (protecting the environment). The success of this argument ultimately hinges around the Supreme Court acting in a legislative capacity by challenging the "wisdom of the underlying policy choices" and choosing one legislative policy over the other. Rather than pursue this endeavor, TJSBA submits the better course of action is to allow the legislature to evaluate and cure any perceived disharmony between the two statutes stemming from the appellate court's opinion in the way the legislature deems most appropriate.

E. THE PENDING CASE IS STILL IN THE PLEADING STAGES AND SHOULD BE ALLOWED TO PROCEED TO FINAL JUDGMENT.

It is important to reiterate that the case is still in the pleading stages and the Opinion merely allows TJSBA to take its first cause of action forward to judgment on the merits after trial. That is, the court of appeal did not review a judgment rendered after a hearing on the merits of TJSBA's action. Instead, the appellate court merely issued a writ of mandate directed to the trial court overruling its dismissal one of the causes of action at the pleading stages. The trial court already overruled the demurrer as to the second cause of action -- which will proceed to a hearing on the merits/bench trial whether or not review is granted -- and which decision was not challenged by Walmart, et al. The appellate court's decision now merely allows two of the four causes of action to proceed to trial and final judgment from which an appeal may be taken by any dissatisfied party. Cal. Rules of Court, rule 8.100. Walmart fails to explain why it did not object to the second cause of action proceeding to judgment on the merits but now adamantly objects to the first cause of action following the parallel path.

As relevant here, the standard of review for sustaining demurrer without leave to amend on a CEQA cause of action is markedly different from the standard of review for upholding the decision of a public agency on the merits. This Court imposes the following standard of review in considering a trial court's order sustaining demurrer without leave to amend: "The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer

is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" *Aubry v. Tri–City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967, 9 Cal.Rptr.2d 92, 831 P.2d 317.

In contrast, in reviewing a judgment on appeal regarding a CEQA challenge, the reviewing court must determine whether the agency prejudicially abused its discretion. "[A]n agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. (§ 21168.5.) Judicial review of these two types of error differs significantly: while we determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements' (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564, 276 Cal.Rptr. 410, 801 P.2d 1161), we accord greater deference to the agency's substantive factual conclusions. In reviewing for substantial evidence, the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,' for, on factual questions, our task 'is not to weigh conflicting evidence and determine who has the better argument.'" *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

Walmart, et al. urged the appellate court to summarily deny the petition for writ of mandate on the basis that TJSBA's claim was premature and unnecessarily delayed prosecution of the case and therefore should be addressed on appeal. Slip Op. p. 6. They now abandon this philosophy in zealously encouraging this Court to grant review of the appellate court's

opinion reversing the dismissal of the first cause of action and fail to explain why an issue they believed was unworthy of review by the court of appeal should now be resolved by the Supreme Court.[4]

Rather TJSBA submits that this Court should allow the matter to proceed to judgment on the merits in the trial court and, if appropriate, to the court of appeal for further review.

V. CONCLUSION

For the foregoing reasons, TJSBA respectfully submits that the Opinion is sound – despite any split of authority reflected therein – and need not be further reviewed by this Court.

Respectfully submitted,

DATED: December 21, 2012

HERUM CRABTREE
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[4] Interestingly, Walmart still complains about delay in this case: "because the Second Cause of Action will still need to be decided by the trial court, the Court of Appeal's justification for writ review was unfounded. In fact, by reviewing the order partially sustaining the demurrers, the Court of Appeal has added at least a year to the resolution of this litigation without saving any time in the trial court." Walmart Petition p. 8, note. 6. Yet asking the Supreme Court to review the appellate court's decision allowing the first cause of action to proceed to trial could further delay resolving the merits of the underlying action by a year or more. 2 Cal. Civil Appellate Practice (Cont. Ed. Bar 3rd ed. 2012) §22.11, p. 1120-1 ("[I]f the petition is granted, or taken on grant and hold, the case may not be decided for another 1 to 3 years…").

CERTIFICATE OF WORD COUNT
(California Rules of Court, Rule 8.204(c)(1))

The text in this brief (including footnotes) consists of 5,137 words as counted by the Microsoft Office Word 2007 word processing program used to generate this brief. The font is 13 point Times New Roman.

Dated: December 21, 2012

Brett S. Jolley

PROOF OF SERVICE

I, Laura Cummings, certify and declare as follows

I am over the age of 18 years, and not a party to this action. My business address is 5757 Pacific Avenue, Suite 222, Stockton, California 95207, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing. On December 21, 2012, at my place of business a copy of **ANSWER TO PETITION FOR REVIEW** was placed for deposit following the ordinary course of business as follows:

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[ ] **BY ELECTRONIC MAIL (EMAIL).** By sending the document(s) to the person(s) at the email address(es) listed below.

[ ] **BY PERSONAL SERVICE/HAND DELIVERY.**

[ ] **BY FACSIMILE** By use of facsimile machine telephone number (209) 472-7986. I caused the facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration. The transmission was reported as complete and without error. [Cal. Rule of Court 2.301 and 2.306.]

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: December 21, 2012

LAURA CUMMINGS