Case No. S159690

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

WAL-MART STORES, INC.,

Defendant and Petitioner,

v.

STOCKTON CITIZENS FOR SENSIBLE PLANNING, et al.,

Plaintiffs and Respondents.

After a Published Decision by The Court of Appeal
Third Appellate District, (San Joaquin), Civil No. C050885
San Joaquin County Superior Court Case No. CV024375
The Honorable K. Peter Saiers

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner asks the Court to review a Decision holding that a planning director's private letter was not "project approval" triggering CEQA's statute of limitations. The Court should reject the Petition for Review because the Appellate Court Decision is consistent with the facts and existing authority.

II. BACKGROUND

On December 15, 2003, the City of Stockton Community Development Director ("Director") purportedly approved a Wal-Mart Supercenter ("Project") on land designated for residential use by the area's Master Development Plan ("MDP"). (*Stockton Citizens for Sensible Planning v. City of Stockton* ("*Stockton Citizens*") (2007) 157 Cal.App.4th 332, 339-340.) The Director issued a private letter to the developer that "[i]nitial staff review" indicated the Project was consistent with the MDP. Two months later the Director filed with the County Clerk a Notice of Exemption ("NOE") from CEQA review[1]. (*Id.* at 341-342.)

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[1] In this case the Notice of Exemption is of no import because it was filed before project approval. (*Stockton Citizens*, *supra*, 157 Cal.App.4th at 337.) A Notice of Exemption is effective only if it is filed after project approval. (Guidelines, §15062(a).) "Guidelines" refers to Title 14 of the California Code of Regulations, §§15000-15387.

The Appellate Court affirmed the trial court's ruling that the December 15, letter was not a project approval and did not trigger a statute of limitations. The majority opinion provided two independent reasons to affirm the trial court: 1) "The Director's letter did not constitute an 'approval' of the Wal-Mart project," and 2) "The Director was not authorized by a 'public agency,' the City, to approve the project." (*Id.* at 336.)

The Petition for Review did not challenge the first grounds for affirming the trial court, as indeed it could not. The Appellate Court's affirmance of the trial court's ruling that the Director's letter did not constitute "project approval" was in line with the facts and previously published cases. [2]

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[2] In *County of Amador v. El Dorado County Water Agency* ("*Amador*") (1999) 76 Cal.App.4th 931, 965, the court held "the agency commits to a definite course of action [and therefore 'approves' a project within the meaning of the Guidelines] not simply by being a proponent or advocate of the project, but by agreeing to be legally bound to take that course of action." The December 15th letter did not legally bind the City to a course of action to approve the Supercenter.

Miller v. City of Hermosa Beach held that the "approval" for the 180 day statute of limitations was issuance of the building permit, and not the earlier "Approval in Concept," which 1) had numerous substantive conditions attached that, if not met, would have barred the issuance of a building permit, and 2) was not of such a "public nature" as to be subject to a mandamus proceeding. "[I]ssuance of the building permit . . . [was] the formal, legally enforceable event." (*Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1143.) The December 15th letter was labeled a Status Report and had project conditions attached. It was at most an approval in concept.

Wal-Mart asks for Review of only the second grounds for the Appellate Court's affirmance of the trial court. Wal-Mart claims that this part of the majority opinion requires a determination of the merits of the case before the statute of limitations is triggered. This contention is incorrect. The opinion reflects existing law that when an administrative agency acts without jurisdiction, the acts are void. An administrative branch of the City[3], the Planning Department, was not delegated authority by the MDP to conduct CEQA review or approve a major amendment to the MDP. (*Stockton Citizens*, *supra*, 157 Cal.App.4th at 348-349.) The Director's acts were therefore void and did not constitute "project approval." Jurisdictional determinations are not considered an adjudication of the merits of a case.

III. ARGUMENT

A. The Appellate Court Properly Held That the Director's Extra-jurisdictional Acts Were Void

Wal-Mart argues that the Appellate Court erred in failing to strictly apply Public Resources Code §21167(d), which precludes a lawsuit 35 days after an agency files an NOE on the basis "that a public agency has improperly determined that a project" is exempt from CEQA. Or, in the alternative, it contends the Court erred by not

[3] "City" refers to the City of Stockton

requiring Stockton Citizens to file its lawsuit within 180 days after the Director's letter of December 15, 2003. (Petition, p.2.)

Wal-Mart does not disagree with the Appellate Court that, "[a]n approval is [] a necessary requirement for the commencement of the limitations period pursuant to section 21167." (*Stockton Citizens*, *supra*, 157 Cal.App.4th at 347.) Instead, Wal-Mart states, "[n]othing in the Guidelines suggest the commencement of the statute [of limitations] is dependent upon a determination *the approval of the project was proper*." (Petition, p. 8, emphasis added.) Wal-Mart incorrectly characterizes the Director's actions as an "improper approval" of the Project.

The Director's actions were void because he had no jurisdiction to act on the Wal-Mart. "If the Director was not delegated authority by the City to approve the Wal-Mart project his letter of 'approval' did not constitute a 'decision by a public agency,' as required by section 21167 and CEQA Guidelines section 15352." (*Stockton Citizens*, *supra*, 157 Cal.App.4th at 348.)

In the context of an administrative proceeding, "[a]n administrative agency has only such powers as have been conferred upon it by the Constitution or statute. An administrative agency may not validly act in excess of, or in violation of, the powers conferred

upon it. If it does so, the action taken is void and subject to being set aside through a proceeding in administrative mandate." (*Larson v. State Personnel Board* (1994) 28 Cal.App.4th, 265, 273-274; *Wilmot v. Commission on Professional Competence* (1998) 64 Cal.App.4th 1130, 1144.)

In the same vein, the Planning Department, an administrative branch of the City, was not allocated authority by the MDP, and did not have authority under CEQA to approve the Project. CEQA provides only the decision-making body of the City with the authority to conduct and rule on the adequacy of CEQA review of a project. "Neither CEQA nor the state guidelines authorize the city council to delegate its review and consideration function to another body. Delegation is inconsistent with the purpose of the review and consideration function since it insulates the members of the council from public awareness and possible reaction to the individual member's environmental and economic values." (*Kleist v. City of Glendale* (1976) 56 Cal.App.3d. 770, 787.)

In issuing the December 15th letter, the Director acted without jurisdiction. He did not "improperly approve" the Project as Wal-Mart argues. The MDP, the City municipal code, and CEQA did not allow delegation of authority to the Director to approve a project that required

a major amendment to the MDP. "Although the MDP authorizes the Director to 'find[]' that a project conforms to the MDP, it does not authorize the Director to approve a project which is not within the MDP or has environmental consequences. That is, it does not grant authority to the director to determine his own jurisdiction and hence mistakenly find the project is within the MDP." (*Stockton Citizens*, *supra*, 157 Cal.App.4th at 349.)

The Appellate Court's holding is well-supported by the framework of California law. Even if the Court were to accept Wal-Mart's argument that the Director "improperly approved" the Project, the statute of limitation may still be tolled under California law. Wal-Mart and the dissent's contention that "[n]o California court has conditioned the tolling of the statute of limitations on the validity of complainant's allegations" is incorrect. (See, Petition p.2.)

When an agency substantially changes a project without public notice, the CEQA statute of limitations is tolled. (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist, Agric. Ass'n* ("*Concerned Citizens*") (1986) 42 Cal.3d 929, 937-938.) For the court to determine whether the project has been "substantially changed," the court must review the validity of complainant's allegations. In *Concerned Citizens*, the Supreme Court addressed the applicability of CEQA's statute of

limitations in the context of the very type of "merit-based determination" that Wal-Mart complains about in its Petition. The Supreme Court disagreed with the agency determination that the changes to amphitheatre project were insubstantial, and therefore ruled that the CEQA statute of limitations was tolled because the public did not know of the changes. (*Id.*)

Similar to *Concerned Citizens*, in this case City staff privately made substantial changes to the MDP by allowing an impermissible project (the Wal-Mart), and amended the development agreement for the MDP; all without CEQA review. (See, *Stockton Citizens*, *supra*, 157 Cal.App.4th at 339 fn. 8, 342.) The Appellate Court's decision should not be reviewed because it is correctly reasoned and provides guidance to agencies and lower courts.

B. Wal-Mart's Policy Arguments Are Without Merit

In a "sky-is-falling" argument, Wal-Mart claims that the Appellate Court's decision would bog down and overburden city councils with ministerial decisions. (Petition, p. 3.) The Decision does nothing of the sort. Every day planning departments apply the requirements of specific plans and zoning ordinances to proposed projects. Planning staffs of most agencies are trained to discriminate between determinations assigned to staff by governing ordinances and

plans, and the discretionary determinations that are outside the scope of staff jurisdiction and require CEQA review. If in a rare instance staff provides an approval that over steps its jurisdiction, it is now clear that the approval may be void. The Decision serves to alert local agencies that planning staffs must act within the law.

In the present case, the MDP allows the Director to find a project is consistent with the MDP or to make minor amendments to the MDP to accommodate a project. Minor amendments include lot line adjustments, a compatible land use change, or adjustments to the local street system. (*Stockton Citizens*, *supra*, 157 Cal.App.4th at 349, fn. 21.) The MDP clearly states the Director cannot approve an alternative project or use which does not share the same or similar characteristics of an allowed use identified within the MDP. (*Stockton Citizens*, *supra*, 157 Cal.App.4th at 349.) Planning staff of most agencies are not likely to provide a ministerial approval for a Wal-Mart Supercenter on land designated by the governing plan for high density residential housing. Most planners have not and will not provide project approvals that exceed staff jurisdiction.

The weight of public policy arguments are on the other side of the coin. If a planning director may mistakenly approve a Wal-Mart Supercenter on land designated for housing, may he not also mistakenly approve a meat processing plant or chemical manufacturing facility? Is

an agency to be fully protected from a CEQA challenge to all of staff's "planning mistakes" by the filing a Notice of Exemption?

If an NOE is the only notice to the public of a massive staff-approved project, in violation of governing planning documents, there is little protection for the public. An agency need not provide the public or other agencies with notice or an opportunity to review its exemption determination. (See, Guidelines, §15061.) Notices of Exemption are only filed with the County Clerk, and are then posted for 30 days. (Pub. Res. Code §21152(b); Guidelines, §15062(b)&(c).) In a case like the Stockton Supercenter, where staff purportedly approved the project by a private letter, the public's only means of discovering the project would be to regularly check postings at the County's Clerk's office.

CEQA's policies support the Appellate Court decision, which discourages private staff approvals of major projects with environmental consequences. A fundamental purpose of CEQA is to provide information to decision makers and the public concerning the environmental effects of a proposed action. (Guidelines, §15002(a)(1) and (4).) Public participation is an essential part of the CEQA process. (Guidelines, §15201.) The Supreme Court has stated that the CEQA process "protects not only the environment but also informed self-government." (*Citizens of Goleta Valley v. Board of Supervisors* (1990)

52 Cal3d 553, 564 (quoting *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 392).)

C. The Decision Does Not Create a Split of Authority

Wal-Mart contends that the Appellate Court's decision conflicts with long settled precedent in *California Manufacturers Assn. v Industrial Welfare Com.* (1980) 109 Cal.App.3d 95, 125. (Petition, p. 3) In *California Manufacturers Assn.*, the court considered whether the Industrial Welfare Commission complied with CEQA in adopting orders regulating wages, hours, and conditions of employment. The court rejected challenges to the Commission's adoption of a negative declaration on the grounds that Manufacturers Association did not bring its challenge within 30 days of the Commission's filing of a Notice of Determination.

In contrast to *Stockton Citizens,* the Commission in *California Manufacturers Assn.* conducted public hearings on the orders that were subject to CEQA review. (*Id.* at 117.) Likewise, the Commission provided public notice that it intended to adopt a negative declaration as the environmental document for the orders. (*Id.* at 124.) A case where an agency notices a public hearing prior to adopting the project's environmental document is not similar to the facts of *Stockton Citizens.* After citizens are provided public notice and an opportunity to comment

on an environmental document, the courts have held the CEQA statute of limitations precludes a lawsuit more than 30 days after the Notice of Determination is filed, even if the agency erred in adopting the environmental document. That is not the *Stockton Citizens* case.

CONCLUSION

Wal-Mart does not present a sufficient argument for the Court to review the decision of the Appellate Court. The Decision correctly applies the law to the facts, and conforms to existing law. To the extent that the Decision adds modestly to the body of CEQA law, it is well within the mainstream.

Dated: 1/23/08

William D. Kopper
Attorney for Respondents

Certification of Length of Brief (Rule 8.504(d)(1))

I, William D. Kopper, certify that this answer, including footnotes, contains 2,328 words as counted by the word count tool of Microsoft Word.

Dated: 1/23/08

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I am a citizen of the United States, employed in the City of Davis, County of Yolo. My business address is 417 E Street, Davis, California 95616. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with this company's practice whereby the mail, after being placed in a designated area, is given the appropriate postage and is deposited in a U.S. mailbox in the City of Davis, California, after the close of the day's business.

On January 23, 2008, I served the following:

ANSWER TO PETITION FOR REVIEW

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 23, 2008, at Davis, California.

Kristin Rauh

KRISTIN RAUH

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