Case No. S159690

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

STOCKTON CITIZENS FOR SENSIBLE PLANNING, ROSEMARY ATKINSON, PAUL DIAZ, and SUSAN RUTHERFORD RICH,
Plaintiffs and Respondents,

v.

CITY OF STOCKTON and STOCKTON CITY COUNCIL,
Defendants and Respondents,

A.G. SPANOS CONSTRUCTION, INC. and WAL-MART STORES, INC.,
Real Parties in Interest and Appellants.

Third Appellate District No. C050885;
San Joaquin County Superior Court No. CV024375,
Honorable K. Peter Saiers And Carter P. Holly, Presiding.

OPENING BRIEF OF REAL PARTY IN INTEREST AND APPELLANT A.G. SPANOS CONSTRUCTION, INC.

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I.
STATEMENT OF THE ISSUES

The petition for review presented the following issue: "In determining whether the statute of limitations has run in a CEQA case, may the court condition the commencement of the limitations period on its determination of the merits of the plaintiff's claim?" (Petition at 1, referring to California Environmental Quality Act ("CEQA"), Pub. Resources Code § 21000 et seq.) The answer to the petition asserted that the decision below rested on an independent ground: that there had not been an "approval" of the project, as that term is used in CEQA. But, as we explain below, the question of whether there has been an approval is nothing less than a prohibited determination of the merits.

II.
INTRODUCTION

The Legislature has established a special notice procedure that cities and other CEQA agencies may use to trigger a 35-day statute of limitations for projects they determine are not subject to CEQA. The purpose of this statute is to provide certainty within a very short time. If litigation is not initiated within 35 days after the notice is filed, the agency and project proponent can proceed to implement the project without fear of extended and disruptive litigation. But here the majority of the court of appeal interpreted the statute in a way that makes uncertainty and extended litigation inevitable. The court held that the notice cannot be honored, and therefore cannot start the 35-day clock, unless the trial court fully hears and decides any challenge to the propriety of the agency action. In this way, the majority held that the merits must always be reached before deciding whether a statute of limitations has run—a holding so contrary to the intent of the Legislature that it should be reversed.

Here the project at issue (the "Project") is the construction of a Wal-Mart store of slightly more than 207,000 square feet within a 560-acre mixed-used development known as "Spanos Park West". The environmental effects of developing Spanos Park West were fully evaluated in a supplemental environmental impact report ("SEIR") that the City of Stockton certified in January 2002, almost two years before the approval at issue here. City approval of individual projects within Spanos Park West is governed by a "Master Development Plan", which requires these projects to be submitted to the City's Community Development Director (the "Director"). The Director must determine whether the projects are consistent with the Master Development Plan. If they are, he must approve them. The approval is therefore ministerial and not subject to CEQA.

The Director, after reviewing plans submitted by Wal-Mart, approved the Project. On February 17, 2004, he issued a notice (the "Notice"), consistent with CEQA, that reported (1) his approval of a 207,160-square-foot retail store within Spanos Park West, (2) his determination that the plans submitted "conform to the standards of the Spanos Park West Master Development Plan", and (3) his conclusion that the approval is "a ministerial action not subject to CEQA review". (CITY 2283.)[1] Litigation was not initiated within 35 days of the Notice.

When Respondents Stockton Citizens For Sensible Planning *et al.* ("Respondents") initiated this litigation 155 days after the Notice, it should have been dismissed. Defendants City of Stockton, Spanos Construction, Inc. ("Spanos Construction"), and Wal-Mart Stores, Inc. ("Wal-Mart") filed demurrers that should have been granted, thereby implementing the will of the legislature by bringing a quick end to a suit that was clearly filed too late.

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[1] "CITY" refers to the administrative record lodged in the trial court proceedings, which uses the word "CITY" as a prefix to the page number.

Instead, the trial court and the majority below looked behind the notice and considered whether there had been an "approval", meaning a decision that commits an agency to a definite course of action. Neither the trial court nor the majority applied substantial-evidence review to the City's factual determination that there had been an approval. Instead, they considered whether the City's approval had been proper as a matter of law. As part of its review of the City's decision, the majority considered whether the City had complied with all procedural requirements necessary for a legally proper approval, and it considered whether the Director had the authority to make the decision he made. As a result, the majority conducted a full review on the merits under the guise of determining whether there had been an approval. (*See Stockton Citizens for Sensible Planning v. City of Stockton ("Stockton Citizens")* (2007) 157 Cal.App.4th 332, 343-50, review granted February 13, 2008, S159690.) But the Legislature could not possibly have intended that a court resolve the merits of a CEQA claim after the 35-day statute of limitations had run, because the purpose of a statute of limitations is to foreclose litigation without reaching the merits. The decision below should therefore be reversed.

The majority relied on the *County of Amador* case, which looked behind the notice issued in that case and determined that the agency had not approved the project at issue. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 962-65.) The court in *County of Amador* held that the notice does not trigger the 35-day statute of limitations when there has not been a prior approval. (*Id.* at 962-65.) The court below split on whether *County of Amador* held only that there must be an approval *as a matter of fact*, or whether the approval must be proper *as a matter of law*. The majority believed that the approval must be legally proper in every respect, and proceeded to determine first whether the Director had complied with all procedural requirements necessary for a legally proper approval, and second whether he was authorized to make to make a wrong decision. (*Stockton*

Citizens at 343-345, 347-349.) The dissent, however, believed that *County of Amador* held only that there must be an approval as a matter of fact: "the issue was not whether the statute of limitations ran because the approval was procedurally defective; it was whether the statute ran when there had been no approval at all." (*Id.* at 351, dissenting opn. of Nicholson, J.)

Because *County of Amador* appears to prohibit a court from enforcing the statute of limitations without determining whether there was an approval—and therefore determining the case on the merits—it should be disapproved on this ground. If this Court chooses not to disapprove *County of Amador*, it should treat that case, in accordance with the dissent's characterization, as holding only that a court can determine whether there was an approval *as a matter of fact*. Because courts hearing CEQA cases do not determine issues of fact, their role would be limited to determining whether substantial evidence in the record supports the agency's determination that it did in fact approve the project.

For these reasons, the decision below should be reversed.

III.
STATEMENT OF THE CASE

A. Facts

The A.G. Spanos Park is located in northwestern Stockton. (CITY 555.) CEQA review was initially performed on the park in the 1980s. (CITY 533, 538.) The western portion of Spanos Park is a 560-acre business, residential, and retail mixed-use development known as "Spanos Park West". (CITY 535, 552, 569.) The environmental effects of developing Spanos Park West were fully evaluated in a supplemental EIR ("SEIR") that the Stockton City Council certified on January 29, 2002. (CITY 2168-2169.) On the same day, the City Council also (1) approved a development agreement with Spanos Construction, (2) adopted the Spanos Park West Master Development Plan,

and (3) approved the necessary planning and zoning amendments to implement the Master Development Plan. (CITY 2083-2084, 2101-2103, 2130-2131, 2144-2146, 2170-2177.)[2] On January 30, 2002, the City filed a notice of determination for the SEIR. (CITY 2208-2209.) No one challenged the SEIR or the City's other approvals within the applicable limitations periods.

The purpose of the Spanos Park West Master Development Plan, which is specifically authorized by the City's MX zoning ordinance, is to allow flexibility in the planning process and streamlined review of projects consistent with the plan. (*See* CITY 1939, 1986; AA 116, Stockton Municipal Code § 16-200(A).)[3] Projects the Director determines to be consistent with the plan are fully approved and not subject to any further environmental review. (*See* CITY 2219-2220; AA 119, Stockton Municipal Code § 16-208(F)(2).)

In the fall of 2003, a Wal-Mart consultant initiated the review process identified in the Master Development Plan by submitting Project documents to a design review board. (*See* CITY 2053 (describing documents required for application).) These documents included a site plan, grading plan, landscape plan, and building elevations for a 207,160 square-foot retail store. (CITY 2269-2270.) The design review board determined that the Project was consistent with the plan, and transmitted the submission to the Director. (*Id.*) On December 15, 2003, the Director wrote Wal-Mart's consultant Doucet & Associates, Inc. that he had found the Project to be in "substantial conformance" with the Master Development Plan, subject to several "corrections". (CITY 2273-2274.)

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[2] The Master Development Plan covers 220 acres within Spanos Park West. (CITY 2173.)

[3] Citations to the Stockton Municipal Code are to the code as it existed at the time. It has since been revised.

On February 5, 2004, Wal-Mart's attorney wrote the Director to confirm that his "letter of December 15, 2003, constituted [his] approval" of the Project documents "subject to certain specified conditions that must be completed as part of the project", and that the letter was the "decision" for purposes of the administrative-appeals process. (AA 899 CITY 2576.) The Director confirmed this understanding by initialing the letter. (*Id.*)[4]

On February 17, 2004, the City filed the Notice with the San Joaquin County Clerk's office. (CITY 2283-2284.) The Notice, which was signed by the Director, refers to the "Site Plan, Grading Plan, Landscape Plan, Building Elevations and Design *Approval*". (*Id.*, emphasis added.) It reports that (1) the City has determined that the Project elements "conform to the standards set forth in the Spanos Park West Master Development Plan", (2) the conformity determination is ministerial, and (3) the "action [is] not subject to CEQA review". (*Id.*) The clerk posted the notice on February 17, 2004. (*Id.*)

Counsel for Respondents was aware during the 35 days following the Notice that the Project was to be a Wal-Mart Supercenter; he wrote and asked to be put on the mailing list. (CITY 2314.) But Respondents did not file their petition until 155 days after the Notice was filed, well beyond the 35 days allowed. (*Compare* AA 92 *with* AA 1.)

B. Proceedings

Respondents initiated this action by filing their petition on July 22, 2004. (AA 1.) Spanos Construction, Wal-Mart, and the City of Stockton demurred to the petition on the grounds that the suit was barred by the statute of limitations. (AA 44-218.) The trial court denied the demurrers. (AA 452-453.) It reasoned that the statute of limitations would run only if there had

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[4] The majority mistakenly believed that Judy Davidoff, who sent the letter dated February 5, 2004, was representing Spanos Construction rather than Wal-Mart. (*See Stockton Citizens*, 157 Cal.App.4th at 342-343.)

been an approval of the Project; that the letter approving the project was "equivocal"; and that therefore the issue "must be decided on the entire record." (*Id.*) On July 21, 2005, one year after the petition was filed, after a full set of CEQA briefs and a hearing, the trial court entered judgment in favor of Respondents. (*See* AA 1540-1541.) The City of Stockton, Spanos Construction, and Wal-Mart filed appeals on September 28-29, 2005. (AA 1551-1561.)

On April 6, 2007, the City of Stockton, after filing an opening and reply brief on appeal, requested dismissal of its appeal.

The majority issued its decision in favor of Respondents on November 28, 2007, nearly four years after the Project had been approved.

IV.
STANDARD OF REVIEW

When the relevant facts are not in dispute, the application of a statute of limitations is decided as a question of law. (*International Engine Parts v. Feddersen & Co.* (1995) 9 Cal.4th 606, 611.)

In a CEQA case, an appellate court reviews the agency's action:

> An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: The appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo.

(*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.)

V.
RESPONDENTS' CEQA CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

A. The Legislature Authorized Agencies To Trigger A 35-Day Statute of Limitations By Issuing Notice

The Legislature established, as part of CEQA, a special procedure that can be used when an agency determines that a project is not subject to CEQA. When the agency files a written notice of that determination, it triggers a 35-day statute of limitations:

> Any action or proceeding alleging that a public agency has improperly determined that a project is not subject to this division pursuant to subdivision (b) of Section 21080 . . . shall be commenced within 35 days from the date of the filing by the public agency . . . of the notice authorized in . . . subdivision (b) of Section 21152.

(Pub. Resources Code § 21167(d).)

Section 21080(b) identifies projects, including ministerial projects, that are excluded from the scope of CEQA:

> This division does not apply to any of the following activities:
> (1) Ministerial projects proposed to be carried out or approved by public agencies.

(Pub. Resources Code § 21080(b).

Section 21152(b) authorizes an agency to file a notice of its determination that a project is not subject to CEQA:

> Whenever a local agency determines that a project is not subject to this division pursuant to subdivision (b) of Section 21080 . . . and it approves or determines to carry out the project, it . . . may file a notice of the determination with the county clerk of each county in which the project will be located.

(Pub. Resources Code § 21152(b).

Here the City of Stockton followed the statutory procedure exactly. In accordance with Section 21080(b), it determined that the Project was ministerial and was not subject to CEQA. In accordance with Section 21152(b), it filed notice of its determination. The City therefore triggered the 35-day statute of limitations provided by Section 21167(d).

Because the Notice was filed on February 17, 2004 (CITY 2283), the statute ran 35 days later, on March 23, 2004. Respondents filed their petition on July 22, 2004 (AA 1), 155 days after the filing of the Notice and long after the statute had run. The demurrer should therefore have been granted by the trial court, and the CEQA claims should have been dismissed.[5]

B. The Legislature Intended The Statute Of Limitations To Provide Quick And Certain Protection Against CEQA Litigation

A reviewing court's "role in interpreting or construing a statute is to ascertain and effectuate the legislative intent." (*Laurel Heights Improvement Ass'n v. Regents of University of California* (1993) 6 Cal.4th 1112, 1127.) "When the Legislature has spoken, the court is not free to substitute its judgment as to the better policy." (*City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 121.) The court is "obliged to carry out the intent of the Legislature if it can be ascertained." (*Id.*)

The general rule that CEQA is to be interpreted to afford the fullest possible protection to the environment does not apply in cases in which the Legislature has, for reasons of policy, excluded a category of activity from CEQA review. (*Napa Valley Wine Train v. Public Utilities Commission* (1990) 50 Cal.3d 370, 376.) A court "does not sit in review of the

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[5] Appellants argued below that Respondents' zoning and constitutional claims were barred by the 90-day statute of limitations in Government Code Section 65009(c). (AA 1363-1364.) Neither the trial court nor the court of appeal ruled on this issue. (AA 1542-1546; *Stockton Citizens*, 157 Cal.App.4th 332.)

Legislature's wisdom in balancing these policies against the goal of environmental protection because, no matter how important its original purpose, CEQA remains a legislative act, subject to legislative limitation". (*Id.*)

Here the 35-day statute of limitations can have only one purpose. The Legislature intended to provide certainty to those projects an agency determines are outside the scope of CEQA. The written notice provides a definite starting date, which otherwise might be difficult to determine. The short 35-day length expresses the Legislature's sense of urgency, and its intent that ministerial projects should be freed from the threat of CEQA litigation as soon as possible.

Courts of appeal have recognized that the Legislature intended to require CEQA challenges to be promptly filed:

> The Legislature has obviously structured the legal process for a CEQA challenge to be speedy, so as to prevent it from degenerating into a guerilla war of attrition by which project opponents wear out project proponents.

(*County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 12.)

> One of the legislative policies animating CEQA is the prompt resolution of challenges to the decisions of public agencies regarding land use. (*E.g.*, *Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1121.) ". . . CEQA contains a number of procedural provisions evidencing legislative intent that the public interest is not served unless CEQA challenges are promptly filed and diligently prosecuted." (*Nacimiento Regional Water Management Advisory Com. v. Monterey County Water Resources Agency* (2004) 122 Cal.App.4th 961, 965; accord, *Oceanside Marina Towers Assn. v. Oceanside Community Development Com.* (1986) 187 Cal.App.3d 735, 741.) Such challenges, "with their obvious potential for financial prejudice and disruption,

> must not be permitted to drag on to the potential serious injury of the real party in interest." (*Board of Supervisors v. Superior Court* (1994) 23 Cal.App.4th 830, 837.)

(*Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 111, parallel citations omitted.)

Commentators have also recognized that the short statutes of limitations common in CEQA and other land-use statutes are intended to provide certainty:

> The legislative purpose of these short statutes of limitations is to give governmental land use decisions certainty, permit them to take effect quickly, and give property owners the necessary confidence to proceed with approved projects.

(Lindgren & Mattas, 2 *California Land Use Practice* (CEB 2007) § 21.22, at 1022-1023 [citations omitted].)

Statutes of limitations are strictly imposed without considering the merits of the case:

> [S]tatutes [of limitation] are intended to set controversies at rest by foreclosing consideration thereafter as to the merits of the claim. To reject a strict application of the law in favor of 'broad principles of justice and equity' would make a statute of limitation meaningless.

(*Freeman v. State Farm Mutual Auto. Ins. Co.* (1975) 14 Cal.3d 473, 484, internal quotation marks omitted.)

> [T]he statute of limitations "necessarily fix[es]" a "definite period[ ] of time" (*California Sav. and Loan Soc. v. Culver* [(1899)] 127 Cal. [107,] 110), and hence operates conclusively across-the-board. It does so with respect to *all* causes of action, both those that do not have merit and also those that do. That it may bar meritorious causes of action as well as unmeritorious ones is the "price of the orderly and timely processing of litigation" (*Sanchez v.*

> *South Hoover Hospital* [(1976)] 18 Cal.3d [93], 103)—a price that may be high, but one that must nevertheless be paid.

(*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 410, parallel citations omitted, emphasis in original, some square brackets in original.)

Trial and appellate courts should therefore implement the Legislature's intent by enforcing the 35-day statute of limitations.

C. Respondents' CEQA Claims Are Barred

Here Respondents alleged that the City improperly determined that the Project was not subject to CEQA. (AA 9 (alleging that CEQA review was required).) The statute of limitations prohibits actions "alleging that a public agency has improperly determined that a project is not subject" to CEQA unless they are filed within 35 days of the statutory notice. (Pub. Resources Code § 21167(d).)

The City of Stockton filed the Notice on February 17, 2004. (CITY 2283-2284.) Respondents did not file their petition until 155 days after the Notice was filed, well beyond the 35 days allowed. (*Compare* CITY 2283 *with* AA 1.) Nothing else is needed to determine that the petition was not filed within the statute of limitations.

The demurrers filed by the City of Stockton, Spanos Construction, and Wal-Mart should have been granted, and the CEQA claims dismissed.

VI.
WHEN APPLYING THE 35-DAY STATUTE OF LIMITATIONS, COURTS SHOULD NOT CONSIDER WHETHER THERE HAS BEEN AN "APPROVAL"

The trial and appellate courts did not dismiss the CEQA claims. They looked behind the Notice and considered whether there had been an "approval" of the Project, which CEQA Guidelines define as "the decision by a public agency which commits the agency to a definite course of action" (14 Cal. Code

Regs. ("Guidelines") § 15352(a)). In making the determination that there had not been an approval, they reached the merits of the case—thereby, in the words of the dissent below, "nullifying the statute of limitations." (*Stockton Citizens* at 352.)

The majority concluded that the statute of limitations does not begin to run unless there has been an approval. (*Id.* at 346-347.) There may at first appear to be a difference between a consideration of whether an agency approved a project, and a consideration of whether the agency "has improperly determined that a project is not subject" to CEQA. (*See* Pub. Resources Code § 21167(d).) But unless a court limits itself to the factual question—i.e. whether substantial evidence supports the agency's determination that there was *in fact* an approval— there is no limit to what it can review. Once a court begins to consider whether the agency's approval was legally proper, it can consider any argument that could be raised on the merits. It can consider whether the agency followed all applicable procedures, whether the agency properly interpreted any regulation or ordinance, whether the agency made the decision at the appropriate time, and whether the agency delegated authority to make the decision to the person who made it. In this way, a court's consideration of whether there has been an approval becomes a full review of any issue that could have been raised if the action had been filed before the statute of limitations had run.

These concepts are consistent with judicial review in CEQA cases filed before the statute of limitations has run. When evaluating an agency decision for compliance with CEQA, a court considers (1) whether the agency's factual determinations are supported by substantial evidence, and (2) whether the administrative record demonstrates legal error. (*Vineyard Area Citizens*, 40 Cal.4th at 427.) In a timely challenge to an agency's approval, a court could consider (1) whether an agency's determination that there has in fact been an

approval is supported by substantial evidence, or (2) whether the agency's approval is defective because it has committed legal error.

Here the majority did not consider whether the City's factual determination was supported by substantial evidence, and must therefore be taken as conceding that *in fact* the City approved the Project. The majority instead evaluated whether the approval was legally defective, i.e. whether in making the approval the City had committed legal error. The majority considered whether the Director had complied with all procedural requirements before making his approval, and concluded that he had not. (*Stockton Citizens* at 343-345.) The majority also considered whether the Director had authority to make the decision, and concluded that he had authority to make the right decision (i.e. that *a project* was consistent with the Master Development Plan), but he did not have authority to make the wrong decision (i.e. that *the Project here* was consistent with the Master Development Plan). (*Id.* at 347-349.) Because the majority explicitly considered whether the Director's determinations were proper, there can be no doubt it resolved the merits of an action "alleging that a public agency has improperly determined that a project is not subject" to CEQA. The majority reached the merits despite the statute of limitations. In this way, the majority considered and resolved the merits of the case under the guise of considering whether there "had" been an approval.

The majority relied on the *County of Amador* decision, which held that a notice is invalid if the agency did not approve the project before it issued the notice. (*See County of Amador* at 962, 965.) *County of Amador* thereby allows any petitioner to avoid the statute of limitations by arguing that a project was not approved in fact, or that in making the approval an agency committed legal error. (*See* Section II above.)

The following sections explain that (a) *County of Amador* was wrongly decided, (b) *California Manufacturers Association v. Industrial Welfare*

Commission, which is in conflict with *County of Amador*, was properly decided, and (c) *County of Amador* should be disapproved.

A. *County of Amador* Was Wrongly Decided

In *County of Amador*, the court of appeal considered whether a CEQA suit was barred by the same 35-day statute of limitations at issue here. (*County of Amador* at 962-65.) The board of directors of an irrigation district authorized staff to make a "conditional offer" to PG&E to purchase a hydroelectric project known as "Project 184". (*Id.* at 964, 940.) District staff understood this authorization to constitute a project approval, and issued a notice that, the district asserted, triggered the 35-day statute of limitations. (*See id.* at 941, 943.)

The court of appeal disagreed. It recognized that an agency action is an approval when it commits an agency to a definite course of action, and acknowledged that the authorization would have been an approval if it referred to an "award" of a contract rather than a conditional offer. (*Id.* at 964, distinguishing *Chula Vista v. County of San Diego* (1996) 23 Cal.App.4th 1713, 1716-1717.) The court of appeal concluded, however, that "this resolution does not constitute project approval. . . . It is simply a resolution authorizing negotiations with that possibility in mind." (*Id.* at 964.) The court's conclusion seems to ignore the district's directions to staff "to prepare a conditional offer to PG&E to be submitted to PG&E as soon as possible". (*Id.*) It seems obvious that tendering an offer can lead, if the offer is accepted, to the formation of a contract, which would commit the district to a definite course of action.

Although the court seems to have focused on the conditional nature of the offer, it did not explain what those conditions were or why they might transform a conditional offer to something as wholly nonbinding as negotiations. Under these circumstances, it was reasonable for the district staff

to conclude that a sufficiently definite commitment had been made, and to issue a notice triggering a statute of limitations. The Court should have respected the district staff's judgment, not to mention the legislature's decision to measure the period of limitations from the date of filing the Notice, and enforced the statute of limitations.[6]

County of Amador does not explain whether the court had conducted a substantial-evidence review and concluded that no substantial evidence supported staff's determination that there was an approval, or whether it was independently determining that as a matter of law the board's acts were not sufficient to have the effect of an approval. What is clear is that the court of appeal concluded that the notice was "premature", and refused to enforce it. The court relied on a provision of the Guidelines providing for the filing of notice after the approval. (*Id.* at 963, citing Guidelines § 15062(a).) But nothing about this provision suggests that it could or should be used to override the intent of the Legislature and nullify the statute of limitations.

The court also reasoned that enforcing the statute of limitations would "thwart efforts to resolve disputes" and "foment prophylactic litigation":

> Requiring project approval before filing a notice of exemption and triggering the challenge period comports with general principles underlying CEQA. A contrary conclusion would be tantamount to requiring opponents to bring challenges before a project is finally approved, lest they be barred by the statute of limitations. It would also thwart attempts to resolve disputes over a project. (*Endangered Habitats League, Inc. v. State Water Resources Control Board* [1997] 63 Cal.App.4th [227] at p. 242.) "It is not the purpose of CEQA to foment prophylactic litigation." (Ibid.)

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[6] "[A] reviewing court will resolve reasonable doubts in favor of the administrative decision, and will not set aside an agency's determination on the ground that the opposite conclusion would have been equally or more reasonable." (*County of Amador* at 945-946, citations omitted.)

(*Id.* at 963 n.16.) But this reasoning simply substitutes the court's policy preferences for those of the Legislature. The purpose of the special notice procedure and short statute of limitations is to provide a method of obtaining certainty for those projects that agencies determine are not subject to CEQA. Certainty is not obtained when the courts look behind the notices and second-guess every agency decision—even the decision to issue notice.

B. *California Manufacturers Association* Properly Implements The Statute Of Limitations

The argument that a court must look behind the notice was raised and rejected in *(CMA)*, which interpreted the statutes of limitations in Public Resources Code Sections 21167(b) and 21167(e). (*California Mfrs. Ass'n v. Indus. Welfare Comm'n "CMA"* (1980) 109 Cal.App.3d 95, 125.) Section 21167(b) requires actions alleging "that a public agency has improperly determined whether a project may have a significant effect on the environment" to be filed within 30 days (rather than 35) after the agency issues notice. Section 21167(e) establishes the same 30-day limit for actions alleging "that another act or omission of a public agency does not comply" with CEQA. These were the allegations made by plaintiffs in *CMA*. (*CMA* at 123-24.)

The plaintiffs in *CMA* argued, as Respondents argue here, that the statute of limitations did not begin to run because the notice was not valid and because the underlying determination was improper, but the court refused to consider these arguments:

> [Plaintiff] contends that subdivisions (b) and (e) [of CEQA § 21167] are not applicable because neither the notice of determination nor the negative declaration is valid; each one is a nullity; that those statutes of limitations apply only if the agency has made the determination and has undertaken the investigation required by law.
>
> As the trial court noted, the association's argument amounts to a contention that only if the agency has

> filed valid notices of determination and negative declarations will the 30-day statute apply. This flies in the face of the clear language of the statutes which provide that they apply in (b), where it is alleged that the agency has "improperly determined" whether there will be a significant impact and in (e), where it is alleged that agency action or omission "does not comply" with statutory requirements.
>
> That is precisely what the association has alleged in this case.
>
> . . .
>
> The trial court correctly held that the association was barred from asserting these alleged defects by the 30-day statute of limitations.

(*CMA* at 125.)

CMA resisted the temptation to look behind the notice, and it properly applied the statute of limitations.

C. *County of Amador* Should Be Disapproved

For the reasons described in Sections VI and VI.A above, *County of Amador* has improperly allowed for full review on the merits of cases filed after the statute of limitations has run, despite the clear intent of the Legislature to provide certainty and protection against CEQA litigation. *County of Amador* is also in conflict with the *CMA* case, which properly implemented the CEQA statutes of limitation. *County of Amador* should therefore be disapproved on this ground. Courts should be prohibited from looking behind the notice and determining whether there has been an approval.

If this Court chooses not to disapprove *County of Amador*, then it should limit a court's authority to a review of the factual determination—i.e. to whether substantial evidence in the record supports the agency's determination that it has approved a project. This suggestion is consistent with the dissent

below, which read *County of Amador* as deciding only that the statute did not run "where there had been no approval at all." (*Stockton Citizens* at 351.)

Why prohibit a court from conducting substantial-evidence review of an agency's factual determination? Because any authority to look behind the notice will necessarily cause delay and increase uncertainty, thereby conflicting with the intent of the Legislature to provide certainty, and to provide it quickly. Courts may be tempted to second-guess agency decisions. This case and *County of Amador* provide good examples.

Here the trial court reviewed the Director's letter dated December 15, 2003, and concluded that it was too vague to be an approval. (AA#1544.) Spanos Construction argued on appeal that the trial court was engaging in fact-finding and substituting its judgment for the City's, contrary to *Western States Petroleum Ass'n.* (*Stockton Citizens* at 343, citing *Western States Petroleum Assoc. Superior Ct.* ("*WSPA*") (1995) 9 Cal.4th 559, 571.) But the majority disagreed. It concluded that the trial court:

> did not review the facts . . . . [r]ather, it reviewed the legal question of whether the form of the Director's purposed decision . . . constituted a final determination of a public agency. The letter was sufficiently unclear to prompt Spanos to seek a 'confirm[ation]' that the letter 'was the decision' . . . .

(*Id.* at 344.) It is difficult to understand, from this language, what the majority understood the trial court to have done. Is the majority saying that the trial court determined that the City committed legal error by putting the approval in a "form" that did not constitute "a final determination"? Is it saying that the trial court determined that the letter was "sufficiently unclear" that it did not provide substantial evidence in support of the City's factual determination? When there is so much doubt about what trial courts are deciding, allowing them to conduct substantial-evidence review is certain to increase uncertainty.

In *County of Amador* the court concluded that making a conditional offer did not commit the agency to a definite course of action. (See Section VI.A, above.) But surely a conditional offer can be accepted to form a contract, and entering into a contract commits an agency to a definite course of action, as *County of Amador* recognized. With such a vague boundary between commitment and non-commitment, courts will be hard pressed to determine whether there is substantial evidence to support an agency's finding that it has approved a project.

When a CEQA action is filed after the statute of limitations has run, the defendant and real party in interest should be able to defeat it by demurrer. If a trial court must review the administrative record for substantial evidence, the case is likely to proceed to full briefing and review, as it did here. The courts are likely to find reasons to conclude that there was not an approval. As a result, the only way to implement the Legislature's intent is to keep the analysis simple. If the action was not filed within 35 days of the notice, it should be dismissed.

VII.
THE COURT OF APPEAL SHOULD BE REVERSED

There is no doubt that the City approved the Project. The City's factual determination is supported by substantial evidence in the record.

The majority concluded that the City nevertheless erred because the Director did not satisfy all procedural requirements, and because the Director approved a project he did not have authority to approve. (*See* Section VI, above.) These conclusions go beyond what a court may permissibly consider when applying the statute of limitations in Section 21167(d). *(See id.)* For this reason, the decision below should be reversed.

The decision below should also be reversed because the majority improperly interpreted a City rule to invalidate all ministerial approvals not publicly announced. The reasoning used by the majority could be used to

invalidate ministerial approvals throughout California, and to block the application of statutes of limitation unrelated to CEQA.

The following two sections explain that the City in fact approved the Project, and that the majority improperly imposed a requirement that could invalidate ministerial approvals throughout California.

A. The City In Fact Approved The Project

Here there is no doubt that substantial evidence supports the City's factual determination that it approved the Project.

CEQA Guidelines define an approval as "the decision by a public agency which commits the agency to a definite course of action". (Guidelines § 15352(a).) When a finding is attacked as being unsupported, "the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," that will support the finding. (*WSPA* at 571.) "When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions" for those of the agency. (*Id.*)

Here the Notice alone provides all the evidence needed. (CITY 2283.) The Notice was issued by the Director, the same person who was responsible for determining whether a project was consistent with the Master Development Plan, and (if it was consistent) for approving it. Nothing required him to use any particular form of consistency determination or approval. As a result, when the Director announced in the Notice that he had determined that the Project was consistent with the Master Development Plan, and when in the Notice he referred to the approval of the Project, he announced his decision and approval to the world. (CITY 1984, 1986, 2053; CITY 2219-2220 (establishing that if the Director finds a "proposed development project" consistent with the MDP, the development application "shall thereby be approved.") Nothing more was needed to establish that the City had approved

the project. (*Cf. County of Amador* at 962, 965 (holding notice invalid when District adopted and filed a notice of exemption that interpreted prior resolution of district board as project approval).)

The City confirmed that it had in fact approved the Project on at least four other occasions. First, by initialing a letter written on February 5, 2004, the Director confirmed that he had approved the project in the letter dated December 15, 2003. (CITY 2273-2274; AA 899.) Second, staff reports to the City Council confirmed that the Project was "consistent with the MDP" and was "approved-by-right". (CITY 2338, 2383.) Third, the Director referred to the project as "approved by-right" when appearing before the City Council. (CITY 2533.) Fourth, the City Council referred to the Project as "approved by-right". (CITY 2426.)

Although the majority below avoided the question, the dissent recognized that the City of Stockton had approved the Project:

> Here, there is no dispute that the Planning Director's letter of December 15, 2003 . . . committed the City to a definite course of action. By approving the development, rightly or wrongly, as a ministerial project, the City bound itself to allowing the project to proceed.

(*Stockton Citizens* at 351.)

For these reasons, the City's factual determination that it had approved the Project is supported by substantial evidence.

B. The Majority's Interpretation Of The Stockton 10-Day Rule May Invalidate Ministerial Approvals Throughout California

In support of its conclusion that the Director did not properly approve the Project, the majority below improperly interpreted a Stockton rule of limitations establishing a 10 day deadline for administrative appeals of decisions made by the Director. (*Stockton Citizens* at 344-345.) The majority interpreted this rule to require public notice of all ministerial approvals, and to

invalidate the approval because the letter dated December 15, 2003 was not made public. (*Id.*) But this interpretation does not fairly implement the intent of the rule, and has negative consequences far beyond the approval here.

The rule interpreted, part of the Master Development Plan, specifies that "[a]ny interested person dissatisfied with the decision" of the [Director] "may, within ten (10) days" of the decision, appeal the decision to the Planning Commission. (CITY 1161; *Stockton Citizens* at 344 n.18, quoting MDP § 8.4.) Plainly, the purpose of this rule of limitations is to cut off late challenges. Nevertheless, the majority interpreted this rule of limitations to invalidate any approval not made public:

> Since the rule provides for appeal by members of the public, it contemplates that such an approval by the Director must be capable of being known by the public, either because the approval is posted or published or otherwise distributed to the public.
>
> The letter of December 15, 2003, was not such an approval, because: (1) The letter was described as a "Status Report," thereby failing to inform the public that it was a final project approval, as the trial court found, and (2), so far as the administrative record shows, the letter was not posted, published, or otherwise made public at the time, so members of the public would not know to exercise their appeal rights.

(*Stockton Citizens* at 344.) Neither the wording of the rule, nor anything else in the record, suggests that the City intended this rule to invalidate any approval that is not, in the court's words, "posted or published or otherwise distributed to the public." (*See id.*) Nevertheless, the majority concluded that the Director's "failure" to make the approval public invalidated both the approval and the Notice:

> Since there was no valid approval of the project, there was no valid notice of exemption, and the 35-day statute of limitations set out in section 21167, subdivision (d), did not begin to run.

(*Id.* at 345.)

Here there is no evidence in the record to suggest that the Director has ever made any ministerial decision public, even though the 10-day rule of limitations in the Master Development Plan mirrors a general ordinance of limitations in the Stockton Code. (AA 118, citing Stockton Municipal Code § 16-208(A) (administrative appeals process for General Plan compliance).) His ministerial decisions may therefore all be invalid, at least if the majority's reasoning applies to the 10-day ordinance. Nor is there any other evidence that anyone within the City ever suspected that the 10-day rule might be interpreted to require public notice, or to invalidate approvals that were not posted. Even when it is not binding on the courts, "agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts". (*Bonnell v. Medical Bd. of California* (2003) 31 Cal.4th 1255, 1265.) Here the majority gave no consideration or respect to the City of Stockton. And its review of the City's approval procedures constitutes a merits determination that should be barred by the statute of limitations. Nevertheless, the court chose to consider and interpret the City's 10-day rule of limitations even though the issue was never raised by Respondents—and even though the parties never had an opportunity to brief the issue.

Nor does the harm stop at the city limits of Stockton. No doubt most other cities allow interested persons to file administrative appeals, subject to time limits, without making ministerial approvals public. If the decision of the court of appeal is applied to these approvals, they too will be found to be invalid. Because cities make countless numbers of ministerial approvals—even covering such minor matters as the replacement of a toilet—the court of appeal may have invalidated countless approvals.

VIII.
CONCLUSION

The Legislature has provided agencies with a simple notice procedure for triggering a 35-day statute of limitations. The Legislature intended agencies to use this procedure to cut off CEQA litigation and achieve finality. Here the City of Stockton used the procedure as it was designed, but has not achieved the finality the Legislature intended.

The City properly issued the Notice, which triggered the 35-day statute of limitations. Respondents did not file within those 35 days. Respondents' CEQA claims are therefore barred by the 35-day statute of limitations.

The court below held that a court could, and must, consider whether an agency's approval was legally proper before deciding whether the statute of limitations had run. But this holding requires the merits of a case to be decided even after the statute of limitations has run, contrary to the Legislative intent. The decision below should therefore be reversed.

The decision in *County of Amador* to the same effect should be disapproved, or at least limited to allow only a determination of whether substantial evidence in the record supports an agency's factual finding that a project has been approved.

Dated: April 14, 2008 BRISCOE IVESTER & BAZEL LLP

By: _____

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 7,408 words as counted by Microsoft Office Word 2003.

Dated: April 14, 2008

BRISCOE IVESTER & BAZEL LLP

By: _____
Christian L. Marsh

PROOF OF SERVICE

CALIFORNIA SUPREME COURT

I am employed in the County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is 155 Sansome Street, Suite 700, San Francisco, California 94104.

On **April 14, 2008** at San Francisco, California, I served the attached document(s):

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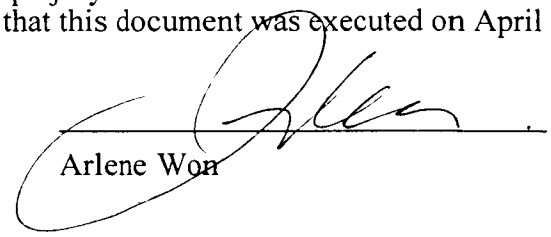
X **BY OVERNIGHT MAIL:** I am readily familiar with my employer's practice for the collection and processing of correspondence for overnight delivery. In the ordinary course of business, correspondence would be deposited in a box or other facility regularly maintained by the express service carrier or delivered to it by the carrier's authorized courier on the day on which it is collected. On the date written above, following ordinary business practices, I placed for collection and overnight delivery at the offices of Briscoe Ivester & Bazel LLP, 155 Sansome Street, Suite 700, San Francisco, California 94104, a copy of the attached document in a sealed envelope, with delivery fees prepaid or provided for, addressed as shown on the service list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on April 14, 2008, at San Francisco, California.



Arlene Won