Case No. S159690

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In The Supreme Court of the State of California

STOCKTON CITIZENS FOR SENSIBLE PLANNING, et al.,

Plaintiffs and Respondents,

v.

CITY OF STOCKTON, et al.,

Defendants and Respondents;

A.G. SPANOS CONSTRUCTION, INC., WAL-MART STORES, INC.,

Real Parties in Interest and Appellants.

After A Published Decision By The Court Of Appeal
Third Appellate District (San Joaquin)
Civil No. C050885

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I. INTRODUCTION

This case presents this 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? The answer is no.

The reason the Legislature enacts statutes of limitation is to draw a line to end some litigation before it starts. These statutes represent legislative policy decisions to provide repose to the parties and the judicial system. They are not concerned with the merits of the underlying suit, but the process by which it was brought to court. In the Court's words: "Inasmuch as [a statute of limitations] necessarily fixes a definite period of time, it operates conclusively across the board, and not flexibly on a case-by-case basis." (*Norgart v. The Upjohn Company* (1999) 21 Cal.4th 383, 395 [internal punctuation simplified].) Below, the majority of the Court of Appeal violated this core concept by using its view of the underlying merits to avoid the otherwise applicable statutes of limitation.

With regard to claims under the California Environmental Quality Act (CEQA), the Legislature specifically chose short limitation periods. "One of the Legislative policies animating CEQA is the prompt resolution of challenges to the decisions of public agencies regarding land

use." (*Citizens for A Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 111.)

The majority's holding is thus contrary to this Court's application of statutes of limitation in general and to CEQA's statutes of limitation in particular. The limitations statute at issue does not depend on the determination of the merits of the challenged development decision. Instead, it applies to all claims "*alleging* that a public agency has *improperly* determined that a project is not subject to [CEQA requirements]." (Pub. Res. Code § 21167, subd. (d), italics added.) Thus, this statute of limitations applies to plaintiffs' allegation that the Stockton Community Development Director (Director) "improperly" approved a Wal-Mart store as consistent with the Master Development Plan (MDP) for the City of Stockton and hence was exempt from further environmental review.

Nor can the bar imposed by CEQA's limitations periods be avoided, as the majority held below, by characterizing the Director's determination as beyond the scope of his authority or "jurisdiction." Semantics aside,[1] this conclusion is wrong. The CEQA Guidelines, the

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[1] This is, after all, merely one variant of a charge that the Director "improperly determined" the project at issue was exempt from further CEQA review.

Stockton Municipal Code, and the MDP each gives the Director the authority to determine whether a project is consistent with the MDP and thus exempt from further environmental review. Right or wrong, the Director's determination approving the project in this case was thus "authorized" as a decision of a "public agency" under Public Resources Code section 21167, subdivision (d),[2] and a 180-day limitations period began to run at that time. The Notice the City filed a few months later to inform the public of the Director's approval triggered an even shorter 35-day limitations period. Because plaintiffs filed this action long after the end of either limitations period, their claims are time-barred.

The error in the decision below is evident. In all cases involving a statute of limitations, a defendant will be charged with wrongdoing. The question of whether the challenge was timely filed can never be made to depend on whether a court later concludes the defendant erred in what it did.

Particularly in the land development context, where the limitations periods are short by statutory design, courts strictly enforce statutes of limitation. The time to challenge an agency's approval of a

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[2] All further statutory references are to the Public Resources Code unless otherwise indicated.

project cannot depend on whether the approval was correct on the merits. That, however, is the approach the majority adopted to avoid applying section 21167, subdivision (d), to bar the plaintiffs' claim in this case.

Unless this Court reverses, the result will be great uncertainty for public agencies and developers alike because projects could be subject to legal challenge long after the statutorily-imposed limitations period has expired. Because these same general precepts apply to all statutes of limitation, there is also a danger the majority's merit-based statute of limitations analysis could spread to other contexts, expanding its uncertainty to California's general law.

For these reasons, the Court should reverse the decision of the Court of Appeal for remand to the trial court with instructions to dismiss plaintiffs' Petition as untimely.

II. STATEMENT OF THE CASE

A. Factual Overview

1. The A.G. Spanos Park Project

The A.G. Spanos Park Project (Project) is located on the northwestern edge of Stockton. (Administrative Record [AR] 555.)[3]

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[3] The five volumes of Administrative Record were received by the Court of Appeal on June 19, 2006 and thus were part of the record on appeal.

Interstate Highway 5 divides the Project into "Spanos Park East" and "Spanos Park West." In 1987, the San Joaquin County Board of Supervisors certified a staged environmental impact report (EIR) for the entire Project. (AR 538.) In 1988, the Stockton City Council certified a Final Supplemental EIR for the Project and approved a related General Plan amendment and tentative maps. (AR 533, 538.) Thereafter, appellant and Project applicant A.G. Spanos Construction, Inc. (Spanos) developed Spanos Park East. (AR 536.)

The original entitlements also allowed Spanos to develop Spanos Park West, consisting of about 560 acres, into two broad components: a commercial/office component and a primarily medium-density and high-density housing component. (AR 536, 541, 560.) By the late 1990s, however, because of changing market conditions, Spanos concluded it needed greater flexibility in developing the site. (AR 536, 552.) As a result, it sought approval to develop the commercial/office component under Stockton's Mixed-Use (MX) General Plan and zoning designation, which allows for "considerable development flexibility in land use, design, development concepts, and standards" and enables development to respond to "ever-changing market demands." (AR 536,

553; Stockton Mun. Code §§ 16-075 *et seq.*, §§ 16-200 *et seq.* (hereafter SMC), at Appellants' Appendix [AA] 783-787.1 and RJN,[4] Ex. A.)

The City's MX ordinance requires a project applicant to submit a proposed project-specific Master Development Plan to implement the municipal code's MX zoning within the project area. (SMC, §§ 16-075.1, 16-200 *et seq.*, at AA 783, 785-787.1 and RJN, Ex. A; AR 579.) The proposed Master Development Plan is then subjected to environmental review in compliance with CEQA and the City's own environmental guidelines, including public hearings before the Planning Commission and City Council. (SMC, § 16-204, subds. (D.2), (E), at AA 786 and RJN, Ex. A.) If the City approves, the MDP governs all future development within the project area. (SMC, § 16-200, at AA 785 and RJN, Ex. A.)

One of the objectives of the City's MX ordinance is to minimize the review of later site-specific projects once an MDP has undergone environmental review and been approved by the City Council. (SMC, § 16-200, subd. (A), at AA 785 and RJN, Ex. A.) The ordinance therefore authorizes the Director to approve any proposed use and site plan

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[4] "RJN" refers to "Request for Judicial Notice in Support of Opening Brief on Appeal of Wal-Mart Stores, Inc. and Opening Brief of Appellants City of Stockton, Stockton City Council, and A.G. Spanos Construction, Inc.," filed in the Court of Appeal.

that he determines are consistent with an approved MDP and thus exempt from additional environmental review. (SMC, § 16-208, subds. (C), (F)(2), at AA 787.1 and RJN, Ex. A.)

Spanos also sought approval to change the residential component from medium-density and high-density housing to single-family housing. (AR 533, 536-537, 541.) A portion of the originally-approved housing had been intended as Spanos' contribution toward the City's objective of providing a minimum amount of high-density housing within City limits. (AR 694, 712.) To maintain that contribution, Spanos submitted for approval a "Density Transfer Development Agreement" under which it agreed to construct high-density housing units within the new MX component. (AR 687, 688, 1192-1193.)

The City prepared a Draft Supplemental EIR[5] for Spanos Park West that addressed the potential environmental effects of the 219-acre business, residential, and retail mixed-use development. (AR 562, 505-1551.) The Supplemental EIR extensively analyzed Spanos' proposed MDP, Development Agreement, Density Transfer Development Agreement, and related planning and zoning amendments. (AR 505-1551.)

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[5] This was a supplement to the 1988 Supplemental EIR that had been prepared and certified for the A.G. Spanos Park Project. (AR 543.)

After thorough environmental review and evaluation of public comment, the City Council certified the Final Supplemental EIR (SEIR) on January 29, 2002. (AR 1661-1765, 2168-2169, 2208-2209.) It also approved the Spanos Park West MDP, Development Agreement, and Density Transfer Development Agreement, along with the planning and zoning amendments necessary to implement the MDP. (AR 2083-2207.) The next day it filed a Notice of Determination stating that it had approved the Spanos Park West Project. (AR 2208-2209.) No one challenged the validity of the City's approvals or the adequacy of the SEIR, and the time for doing so expired. (Pub. Res. Code § 21167 (30, 35, and 180 day limitations periods for CEQA-related challenges); Gov. Code § 65009, subd. (c) (90-day limitations period for challenges to various land use decisions).)

2. The Director Approves the Store as Consistent with the MDP

In October 2003, Wal-Mart's consulting engineer Doucet & Associates, Inc. (Doucet) submitted to the MDP's Design Review Board a site plan, grading plan, landscape plan, and building elevations for a 207,160 square foot commercial retail development (the Store) to be constructed within the MX Component. (See AR 2269-2270.) The Board determined that the proposed Store was consistent with the MDP and wrote a letter to the Director describing its findings and confirming it had

approved the Store. (*Ibid.*) Thereafter, the Director conducted his own review of the submitted plans and elevations. In a letter to Doucet dated December 15, 2003, the Director confirmed that he, too, found the Store to be in substantial conformance with the MDP, subject to a few minor corrections. (AR 2273-2274.)

According to the MDP, these were the only determinations needed for Store approval. (AR 1159.) Any party wishing to challenge the Director's final approval to the Planning Commission could do so by filing an appeal within ten days. (AR 1161.) No party did so.

3. The Director Confirms His Approval, and the City Files the Notice

In early February 2004, the Director countersigned a letter from Wal-Mart's attorney confirming that he had approved the Store on December 15, 2003, pursuant to the approval procedure set forth in the MDP, and that the ten-day appeal period for challenging his decision to the Planning Commission had expired. (AR 2576, AA 774.)

On February 17, 2004, the City filed and posted a Notice of Determination (Notice) with the San Joaquin County Clerk's Office confirming that the Director, "as authorized and directed" under the MDP, had determined that the site plan, design, and related plans for Spanos Park West conformed to the MDP. (AR 2283, AA 776.) The Notice also stated that such determination was "a ministerial action not subject to CEQA

review. . . ." (*Ibid.*) Anyone wishing to challenge the Store approval on CEQA grounds was required to do so within 35 days from the filing of the Notice. (See Pub. Res. Code § 21167, subdivision (d).) No one did so.

4. Plaintiffs File Their Petition

On July 22, 2004, plaintiffs Stockton Citizens For Sensible Planning and three residents of Stockton filed a Verified Petition for Writ of Mandate and Complaint for Injunction (Petition) to set aside the City's approval of a conditional use permit allowing the Store to sell alcoholic beverages,[6] as well as "all approvals for the Wal-Mart Supercenter in the Spanos West Business Park," and to require the preparation of an environmental impact report before any construction is undertaken. (AA 1-26, 5:1-4.)

Plaintiffs alleged that they had filed their Petition "within thirty (30) days of the Project approval date in compliance with Public Resources Code, § 21167(b)." (AA 7, ¶ 23.) In paragraph 63, however, plaintiffs alleged that the City "approved the Wal-Mart Supercenter Project

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[6] In late February 2004, Doucet applied for a conditional use permit for the off-sale of alcoholic beverages at the Store, which the Planning Commission later approved. (AR 2320-2321.) Plaintiffs appealed to the City Council (AR 2426), which affirmed. (AR 2426-2430.) Plaintiffs later abandoned this particular challenge. (AA 1335-1336, 1338.1-1338.36, 1507-1534.)

at a staff meeting in December of 2003" – more than six months before plaintiffs filed their Petition. (AA 23, ¶ 63.)

B. Procedural History

1. The Trial Court Overrules Defendants' Demurrers and Enters Judgment on the Petition

The defendants demurred to the Petition on the grounds that each of its causes of action was barred by the statute of limitations under CEQA. (AA 44-46, 157.1-157.5, 174-177.) The trial court concluded the "pivotal issue" was whether the Director's December 15 letter "amounts to an approval of the project." (AA 453.) If so, "then the Notice of Determination filed February 17, 2004 would require a challenge within 35 days and the present petition would be untimely." (*Ibid.*) Because it found the December 15 letter "equivocal," however, the court ruled it could not decide this issue on the pleadings and overruled the demurrers. (AA 452-453.)

On June 23, 2005, the court issued its decision granting the Petition. (AA 1542-1546.) Thereafter, it entered its Judgment Granting Peremptory Writ of Mandate (Judgment) directing the defendants to set aside all approvals for the Store and to complete a new environmental impact report. (AA 1540-1548.) The defendants timely appealed. (AA 1549-1557.)

2. In a Two-to-One Decision, the Court of Appeal Affirms the Judgment

On appeal, the only argument Wal-Mart advanced was that plaintiffs' Petition was barred by the statute of limitations in section 21167, subdivision (d), of the Public Resources Code. Nonetheless, a majority of the Court of Appeal both addressed – and decided – the merits of the plaintiffs' challenge. Using that merits determination as a basis for holding the statute of limitations did not bar the plaintiffs' Petition, the majority affirmed in a two-to-one published decision.

After briefly describing the Store and the MDP, the majority acknowledged that Section 21167, subdivision (d), precludes review of a claim "that a public agency has improperly determined that a project" was exempt from CEQA if a challenge is filed more than 35 days after the filing of a notice of determination. It concluded the limitations period did not bar the plaintiffs' claim, however, for two reasons: (1) the Director's letter did not constitute an "approval" of the Wal-Mart Store, and (2) the Director was not authorized by a "public agency," i.e., the City, to approve the Store. (*Stockton Citizens for Sensible Planning v. City of Stockton* (2007) 157 Cal.App.4th 332, 336 (*Stockton Citizens*).)

The majority held the letter was not an "approval" because it described itself as a "Status Report" and thus "failed to inform the public it was a final project approval." The majority also reasoned that because the

letter was not posted, published, or otherwise made public, it could not be an "approval" because members of the public would not know how to exercise their right under the MDP to appeal the Director's decision to the Planning Commission. (*Stockton Citizens, supra,* 157 Cal.App.4th at p. 344.)

The majority concluded the letter did not constitute a determination by a "public agency" because in its view, the Director "was not delegated and could not have been delegated authority to approve a project requiring environmental review." (*Id.* at p. 337 [citing to the MDP, § 8.2 and *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770].) Deciding on the merits that the Director did not have the authority to "*mistakenly* find that the project is within the MDP," the majority reasoned that his determination was thus not an approval by a "public agency" that would start the statute of limitations running. (*Id.* at p. 349, italics added.)

In dissent, Justice Nicholson concluded that "[n]either ground is a legitimate basis for tolling the statute of limitations." (*Stockton Citizens*, *supra*, 157 Cal.App.4th at p. 351. (dis. opn. of Nicholson, J.).) On the issue of whether the Director's December 15 letter constituted an "approval," the dissent noted there was no dispute that the letter committed the City to a definite course of action and therefore was a CEQA approval: "By approving the project, rightly or wrongly, as a ministerial project, the City bound itself to allowing the development to proceed. Except for the

building permit, which is also ministerial, no other approvals were needed from the City before the project could be built." (*Id.* at p. 351.)

The dissent also rejected the majority's finding that the letter was not an approval because it was not made public when it was issued: "Contrary to the majority opinion's holding, nothing in CEQA or the City's own rules specifies that the failure to give public notice of a ministerial approval voids the approval." (*Id.*) It noted that even if the Director were required to give public notice, his failure to do so merely excused the plaintiffs from exhausting their administrative remedies by appealing the Director's approval to the Planning Commission; it did not excuse them from complying with the statute of limitations once the City gave notice by posting the Notice. (*Id.*)

Addressing the issue of whether the Director's letter constituted an approval by a "public agency," the dissent highlighted the circular nature of the majority's reasoning, explaining that it "posits the very issue the complaint sought to resolve as the basis for determining whether the limitations period ran. The Director's purported abuse of authority is not a valid ground for nullifying the statute of limitations." (*Id.* at p. 352.)

Readily distinguishing the majority's reliance on *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770, the dissent pointed out that nothing in *Kleist* prohibited the City from delegating to the Director the authority to

determine that a project was exempt from CEQA. There was also no question the City had, in fact, delegated to the Director the "authority to determine the project was exempt from CEQA and was consistent with the MDP, and to approve the project." (*Stockton Citizens, supra,* 157 Cal.App.4th at p. 352 (dis. opn. of Nicholson, J.) [citing Stockton Mun. Code, § 16-410.050, subd. B].) "Indeed, the adopted MDP *requires* the Director to approve a project that complies with the MDP. Thus, the Director had lawful authority to determine the Wal-Mart project was exempt from CEQA and to approve it as consistent with the MDP, and his decision was a decision of the public agency." (*Id.* at p. 353, original italics.)

The dissent reasoned that alleging the Director exceeded his authority and reached a decision not supported by substantial evidence were grounds for challenging the approval, but only "*if* the legal action raising those grounds is filed on a timely basis. . . . The statute applies to any decision the agency *improperly* made, not just to decisions properly made." (*Id.* at p. 353 (italics in original).) Otherwise, "[t]he majority opinion turns the statute of limitations on its head, . . . and obliterates the statute." (*Id.*)

This Court granted review and characterized the issue as follows: "Was plaintiffs' challenge to the approval of a Wal-Mart Supercenter project filed within the applicable statute of limitations on the

theory that the approval was invalid and thus did not trigger the running of the limitations period?"

III. SUMMARY OF ARGUMENT

The Legislature has recognized the expeditious resolution of land use disputes as an important public policy in California. To advance this policy, it has enacted "unusually short" statutes of limitation that apply to CEQA proceedings, to provide developers with certainty and assurance that once the limitation period to challenge the land use approvals has expired, development can proceed and continue to completion without interruption.

On December 15, 2003, the Director approved the construction of a Wal-Mart Store as consistent with the MDP; and on February 17, 2004, the City filed its Notice reflecting this approval. Under Public Resources Code section 21167, subdivision (d), plaintiffs had 35 days from the filing of the Notice to bring an action challenging the Director's determination. If no Notice had been filed, plaintiffs would have had 180 days from the Director's approval. Plaintiffs did not file their Petition until July 22, 2004, long after both of these limitation periods had expired.

The majority of the Court of Appeal gave two reasons why plaintiffs' challenge was not time-barred. First, it held that because the

Director had not actually "approved" the Store, the Notice was invalid and the statute of limitations never started to run. This was error. The Director's December 15, 2003 letter plainly said that the Wal-Mart Store substantially conformed to the MDP and committed the City to a definite course of action regarding the Store. The City reaffirmed the approval two months later by countersigning a letter to that effect and by filing the Notice. The trial court and the Court of Appeal should have deferred to the City's determination on this factual issue.

Second, the majority held that even if the Director had approved the Store, such approval was beyond the scope of his authority and thus could not constitute an approval by a "public agency" that would start the CEQA statute of limitations running. It thus determined the statute of limitations issue by first deciding the merits of the plaintiffs' challenge. This, too, was error. Whether a statute of limitations bars a claim does not depend on which party is correct on the merits but whether the complaint was timely filed. As the dissent noted, the majority's reasoning "posits the very issue the complaint sought to resolve as the basis for determining whether the limitations period ran."

For all these reasons, the Court should reverse the decision of the Court of Appeal for remand to the trial court with instructions to dismiss plaintiffs' Petition as untimely.

IV. ARGUMENT

A. Statutes of Limitation Represent Legislative Policy Choices and Promote Fundamental Fairness in Litigation

Statutes of limitation do not depend on the merits of the underlying substantive right or obligation at issue but are a procedural mechanism that affects a party's right to a remedy. (See generally *Chase Sec. Corp. v. Donaldson* (1945) 325 U.S. 304, 314.) Described as "arbitrary" by definition, "their operation does not discriminate between the just and the unjust claim . . . ." (*Id.*) Instead, they are to be applied strictly, not flexibly, and should be upheld and enforced "regardless of personal hardship." (See *California Standardbred Sires Stakes Com. v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 751, 756.) Because statutes of limitation are enacted by statute, they "represent a public policy about the privilege to litigate." (*Chase Sec. Corp. v. Donaldson*, *supra*, 325 U.S. at p. 314.)

Statutes of limitation are also designed to provide repose to the judicial system and potential defendants. (See, e.g., *Jordache Enterprises v. Brobeck, Phleger & Harrison* (1998) 18 Cal.App.4th 739, 756; *Norgart v. The Upjohn Company, supra,* 21 Cal.4th at 397; *Hebrew Academy of San Francisco v. Goldman* (2007) 42 Cal.4th 883, 894.) In cases involving decisions of public entities, they also provide repose to the general public, which needs to know that it can depend on the finality of

government decisions. (See, e.g., *Boelts v. City of Lake Forest* (2005) 127 Cal.App.4th 116, 121.)

As a matter of legislative policy, limitations periods can be measured in days, as in the present case, or in months or years. What period to attach to which sorts of claims is a question for the Legislature. (*Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861, 872.) Underlying all statutes of limitation, however, are concepts such as "protecting settled expectations; giving stability to transaction; promoting the value of diligence; encouraging the prompt enforcement of substantive law; . . . and reducing the volume of litigation. [Citations.]" (*Id.* at p. 892.)

As the Court has recognized, statutes of limitation are "vital to the welfare of society and . . . are found and approved in all systems of enlightened jurisprudence." (*Shain v. L.G. Sresovich* (1894) 104 Cal. 402, 406 [quoting *Wood v. Carpenter* (1879) 101 U.S. 135, 139].)

B. CEQA Statutes of Limitation Are Intentionally Short and Strictly Enforced

In the CEQA context, public policy favors short statutes of limitation. (Cal. Code Regs., tit. 14, § 15112, subd. (a) (hereafter CEQA Guidelines Guidelines, § 15112, subdivision (a) [administrative guidelines alert the public that CEQA provides "unusually short statutes of limitation on filing court challenges to the approval of projects under the Act"].) "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." (*Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 111.) The potential such challenges have for financial prejudice, delay, and disruption is exacerbated when such challenges are allowed to be filed late, after a project is well under way and substantial resources have been invested. (*Ibid.*)

To avoid these problems, statutes of limitation in the land use context in general, and under CEQA in particular, are generally measured in days. (See, e.g., Pub. Res. Code § 21167, subdivision (d) (35 days to challenge negative declaration under CEQA, applicable here).)[7] These shortened limitations periods "are not public review periods or waiting periods for the person whose project has been approved. . . . The statute of limitations cuts off the right of another person to file a court action challenging the approval of the project after the specified time period has

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[7] See also Government Code section 65009, subdivision (c) (90 days to challenge zoning or planning action); Government Code section 66499.37 (90 days for Subdivision Map Act challenges); Public Resources Code section 30801 (60 days to challenge Coastal Commission actions); and *County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 12 ("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.").

expired." (CEQA Guidelines, § 15112, subdivision (b).) The Court has noted the importance of such short limitation periods in CEQA matters to "permit and promote sound fiscal planning by state and local governmental entities." (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 27.)

Nothing in CEQA or its Guidelines suggests the start of the CEQA limitations period depends upon a determination of the merits of the underlying approval. Indeed, it is when a public agency's approval is challenged as improper that the legislative policies behind CEQA's short statutes of limitation apply with special force. (*Calif. Manufacturers Ass'n v. Industrial Welfare Comm'n.* (1980) 109 Cal.App.3d 95, 125.)

C. Plaintiffs' Petition Was Untimely Under Section 21167, Subdivision (d)

The statutes of limitation for CEQA challenges are set forth in section 21167 of the Public Resources Code, which applies to "[a]n action or proceeding to attack, review, set aside, void, or annul the following acts or decisions of a public agency on the grounds of noncompliance with this division . . ." Under the plain language of the statute, it is enough that the plaintiff *seeks* to set aside, void, or annul the decisions of a public agency. The merits of the plaintiff's claim are irrelevant. Nothing in the statute suggests a court may condition the start of the limitations period on its view of the merits of the underlying challenge.

The specific subdivisions of section 21167 also demonstrate that CEQA statutes of limitation are to be applied based on the allegations, not the merits, of the plaintiff's challenge. Each specific limitation period begins with the same language: "An action or proceeding alleging" that a public agency engaged in an improper act or reached a wrong decision under CEQA must be brought within a certain time. Section 21167, subdivision (d), at issue here, applies to "[a]n action or proceeding *alleging* that a public agency has improperly determined that a project is not subject to this division . . ." (italics added.) In such a case, if a public agency files a Notice authorized by CEQA, the statute runs 35 days later. (*Ibid.*) If not, the statute runs 180 days after the agency's decision to approve the project. Applying either limitations period, plaintiffs' Petition was untimely.

The procedure under CEQA is thus in complete harmony with the settled precepts of general statutes of limitation law. In each case the trial court's task is to examine a complaint's allegations at the outset and determine whether the stated claim has been timely brought. Merits are dealt with later, if at all.

The City filed its Notice regarding the Wal-Mart Store on February 17, 2004. (AR 2283, AA 776.) The filing and posting of such a Notice constitutes constructive notice to all potential challengers, and no further notice is needed to start the limitations period. (See, e.g., *Lee v. Lost Hills Water Dist.* (1987) 78 Cal.App.3d 630, 634 [lack of personal

notice does not render the limitations period inapplicable]; *International Longshoremen's & Warehouseman's Union, Local 35 v. Bd. of Supervisors of San Bernardino County* (1981) 116 Cal.App.3d 265, 274 [actual knowledge is not required to trigger notice of determination's 35-day limitations period].) Therefore, under section 21167, subdivision (d), plaintiffs' Petition filed 155 days later on July 22, 2004, was time-barred.

Even if the Notice were invalid, however, the record as a whole demonstrates that the City's "earliest commitment" to the Store occurred when the Director approved the Project on December 15, 2003. Thus, at the latest, the statute expired 180 days from that date on June 13, 2003, more than a month before plaintiffs filed their Petition. The CEQA statute of limitations, indeed, any statute of limitations, runs from the date an act occurred or a decision was made, "correct" or not. All complaints charge defendants with wrongful acts or incorrect decisions, but that cannot eliminate the statute of limitations. Here, by charging that an incorrect decision was made outside the applicable limitations period, the complaint made itself subject to demurrer.

D. Neither of the Majority's Reasons Has Merit

As a matter of law and substantial evidence, neither of the reasons the majority offered below to avoid the section 21167, subdivision (d) time bar – that (1) there was no "approval" by a (2) "public agency" that would start the limitations period running – has merit.

1. The City "Approved" the Project

Plaintiffs sought to avoid the 35-day limitations period by arguing that the Director's December 15 letter was not an "approval" of the Project, thus rendering the Notice invalid or void. Contrary to the plain meaning of CEQA and its statutes of limitation, both the trial court and the Court of Appeal erroneously adopted this reasoning.

The CEQA Guidelines define "approval" as "the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." (CEQA Guidelines, § 15352, subd. (a).) Further, "[t]he exact date of approval of any project is a matter determined by each public agency according to its rules, regulations, and ordinances." (*Ibid.*) Thus, for a public agency's action to be deemed a project approval under CEQA it need only (1) commit the agency to a definite course regarding a project, and (2) conform to the approval process set forth in the agency's own rules, regulations, and ordinances. (*Ibid.*)

Both these steps were taken here. The Director's December 15, 2003 letter, and the events leading up to it, satisfy the CEQA Guidelines and constitute an "approval" under Section 21167, subdivision (d). And, the City's approval process for the Project was defined in 2002, when the City approved the MDP. With the MDP's mandatory development review process, the City agreed to be bound by any proposed site-specific

development the Design Review Board and the Director determined was consistent with the MDP. (AR 1159.)

In October 2003, Doucet submitted to the MDP's Design Review Board a site plan, grading plan, landscape plan, and building elevations for the Project. (See AR 2269-2270.) The Board determined that the proposed Store was consistent with the MDP and confirmed this in writing to the Director. (*Ibid.*) In his December 15, 2003 letter, the Director stated that he, too, had found the Store to be in substantial conformance with the MDP, subject to certain minor corrections. (AR 2273-2274.) The Director's letter, copied to eight City officials, concludes with the comment that the City "look[s] forward to working with Doucet & Associates, and the Spanos Companies in a collaborative effort to see that this retail project realizes its maximum potential to the benefit of all the parties involved." (*Id.*, at p. 2274.)

In addition, several later events remove any doubt that in the City's view, the Director's December 15 letter committed the City to a definite course of action. In early February 2004, the Director countersigned a letter confirming that his December 15 letter constituted his approval of the Store. (AR 2576, AA 774.) On February 17, 2004, the City filed and posted the Notice, which publicly declared the Director had determined the Project conformed to the MDP and that this determination

"is a ministerial action not subject to CEQA review. . . ." (AR 2293, AA 776.)

Still later, in response to Doucet's application for a Use Permit, City staff advised the Planning Commission that the Store itself had already been "approved by-right" (AR 2383), and the resulting Use Permit notes the same (AR 2507). And, in denying Stockton Citizen's appeal of the Use Permit approval, the Stockton City Council's adopted resolution observes several times that the Store itself had already been "approved by-right." (AR 2426, 2429.)

Contrary to the majority's reasoning below, the Director's approval in his December 15, 2003 letter is not nullified because it was not made public until the Notice was filed and posted seven weeks later. Nothing in CEQA or the City's rules voids an approval if it is not made public. Were there such a requirement, however, the failure to give notice would only excuse plaintiffs from exhausting their administrative remedies. (See Pub. Resources Code, § 21177, subd. (e).) As the dissent noted, the lack of public notice of the letter "did not excuse plaintiffs from complying with the statute of limitations once the City in fact gave notice of its approval by posting the notice of exemption on the project." (*Stockton Citizens, supra,* at p. 351 (dis. opn. of Nicholson, J.).)

Likewise, the majority's reliance on *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931 is misplaced. In

that case, the court considered whether a resolution adopted by a local agency constituted an approval of the purchase of a hydroelectric generation project. Holding that it did not, the court noted that the resolution only committed the agency to "exchanging confidential information, consulting with neighboring counties, and preparing an initial, conditional offer" for a potential, later purchase. (*Id.* at p. 964.) As the dissent noted below, the issue in *County of Amador* "was not whether the statute of limitations ran because the approval was procedurally defective; it was whether the statute ran where there had been no approval at all." (*Stockton Citizens*, *supra,* 157 Cal.App.4th at p. 351 (dis. opn. of Nicholson, J.).) That the City filed a Notice of Determination made no difference because such could not give effective "notice" of an event that did not actually take place until the City ratified the purchase agreement nine months later. (*County of Amador, supra,* 76 Cal.App.4th at p. 965.)

In the present case, however, both the Design Review Board and the Director approved the Project as consistent with the MDP, and hence exempt from further CEQA review. Under the MDP, this was the only "approval" necessary and committed the City to a definite course of action. Unlike *County of Amador*, there were no later events that raised any doubt in this regard. Instead, all of the City's later actions showed that it regarded the Director's December 15 letter as an approval that started the section 21167, subdivision (d) statute of limitations running.

In addition, the City's interpretation of its own actions is controlling, and there is no question the City regarded the decision as having been made. A reviewing court may not substitute its views for the agency whose determination is being reviewed. (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497.) And, as *County of Amador* makes clear, "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 opposition conclusion would have been equally or more reasonable." (*County of Amador*, *supra*, 76 Cal.App.4th at pp. 945-946.)

So, even if the December 15 letter was arguably equivocal, substantial evidence supports the City's interpretation that it constituted an approval. And the first reason the majority gave to avoid the time bar created by section 21167, subdivision (d) – that the Director's December 15 letter was not an "approval" – is legally and factually incorrect.

2. The Approval Was Made By a "Public Agency"

The majority also held the Director's December 15 letter did not constitute an approval by a "public agency," as required to start the statute running under section 21167, because the Director did not have the authority to approve the Store. According to the majority, the MDP "does not grant authority to the Director to determine his own jurisdiction and

hence does not authorize the Director to mistakenly find that the project is within the MDP." (*Stockton Citizens*, *supra*, 157 Cal.App.4th at p. 349.)

In reaching this conclusion, the majority erroneously allowed its view of the merits of plaintiffs' challenge to determine whether the claim was time-barred. As noted above, section 21167 establishes statutes of limitation for proceedings brought to "attack, review, set aside, void or annul" acts or decisions of a public agency on the grounds that they are at odds with CEQA. Plaintiffs' Petition challenging the City's approval of the Store is a classic example. Section 21167 makes no exception for actions to set aside an agency decision on the ground the agency acted outside of its "authority." A challenge based on the theory that the Director "acted outside of his authority" is still an action to set aside his decision within the meaning of Section 21167.

Even if the Director had acted outside his authority, however, any challenge on that ground was still governed by the time limitations periods in section 21167. As the dissenting justice noted, "[a]lleging the Director exceeded his authority and reached a decision not supported by substantial evidence are grounds for voiding the approval if the legal action raising those grounds is filed on a timely basis." (*Stockton Citizens*, *supra*, 157 Cal.App.4th at p. 353 (dis. opn. of Nicholson, J.) original italics.)

The majority's decision to examine the substance of the complaint's allegations to determine whether the complaint was time-barred

is directly contrary to the well-established principle that a statute of limitations "operates conclusively across the board and not flexibly on a case-by-case basis." (*Norgart v. The Upjohn Company, supra,* 21 Cal.4th at p. 395.) If each case must be tried on the merits to determine the timeliness of filing, statutes of limitation would become pointless and fail their essential purpose.

As discussed above, the fact that plaintiffs' challenge arises under CEQA does not change this rule. It reinforces it. (See, e.g., *San Bernardino Associated Governments v. Superior Court* (2006) 135 Cal.App.4th 1106, 1114 [suit filed more than 35 days after notice of determination is time-barred].) Thus, in *California Manufacturers Association v. Industrial Welfare Commission, supra,* 109 Cal.App.3d at p. 125, the court rejected the same reasoning the majority used below, i.e., that an allegation that a notice of determination was not valid would prevent the statute of limitations from running. Indeed, that concept is foreign to California jurisprudence and makes no sense.

Were it appropriate to address the merits of the plaintiffs' claim, however, the CEQA Guidelines, applicable City ordinance, and the MDP all provide that the Director did, in fact, have the authority to determine the Wal-Mart Project was exempt from further environmental review. Thus, his approval constituted an approval by a "public agency"

that starts the limitations periods running under section 21167, subdivision (d).

The CEQA Guidelines define "public agency" to include "local agency," and "local agency" may include an organizational subdivision. (CEQA Guidelines, §§ 15379, 15368.) The Guidelines also recognize that many of the tasks required by CEQA will be performed by subordinate departments and individuals. They also acknowledge that a "public agency may assign specific functions to its staff," including the functions of "determining whether a project is exempt" and "filing of notices." (CEQA Guidelines, §§ 15025, subd. (a)(1), (5).)

In addition, the City expressly delegated to the Director the authority to determine whether projects are exempt from CEQA. (SMC § 16-410.050, subd. (B).) The governing ordinance is SMC 16-208 of the City's MX ordinance, which sets forth the procedures for approving site-specific projects governed by an MDP. (AA 787-787.1 and RJN, Ex. A.) In keeping with the ordinance's objective of minimizing further review after the City has determined that an MDP complies with CEQA and the City's own environmental guidelines, Section 16-208 authorizes the Director to interpret the MDP and approve projects he determines are consistent with, or share similar characteristics with, an allowed use.

> The Community Development Director shall have the authority to interpret the precise language of the Master Development Plan to determine if a proposed use, while not specifically listed as an allowed use, would be consistent with and share the same or similar characteristics of an allowed use identified in the adopted Master Development Plan.

(SMC, § 16-208, subd. (C), at AA 787.1 and RJN, Ex. A.)

> The Community Development Director shall have the authority to approve an implementing Site Plan Review that is consistent with the adopted Master Development Plan.

(SMC, § 16-208, subd. (F)(2), at AA 787.1 and RJN(F)(2).)[8]

Nor does *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770 (*Kleist*), upon which the majority relied below, compel a different conclusion. In *Kleist*, the City of Glendale improperly delegated to staff the function of reviewing an EIR. The court held that "[n]either the CEQA statute nor the state guidelines authorize the city council to delegate its review and consideration function [of an EIR] to another body [an environmental and planning board.]" (*Id.* at p. 779.)

The City of Stockton, however, did not delegate to its Director the function of considering an EIR (which is prohibited by CEQA

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[8] This broad authority includes the right to approve minor changes to the MDP. (See Section 16-208, subd. (B) [stating the Director may also "authorize minor changes to a Master Development Plan as provided in the Master Development Plan"].)

Guidelines § 15025, subdivision (b)(1)). It merely delegated the ministerial function of determining whether the Wal-Mart Store was consistent with the MDP and thus exempt from further CEQA review – a delegation the Guidelines expressly authorize. (CEQA Guidelines, § 15025, subd. (a)(1), and (5).)

In *Kleist*, the court observed that the "state guidelines require that the decision-making body or administrative official having final approval authority over a project involving substantial effect upon the environment review and consider an EIR before taking action to approve or disapprove the project. . . ." (*Kleist v. City of Glendale, supra,* 56 Cal.App.3d at p. 778.)

In the present case, however, the Director did not review an EIR. He merely performed the ministerial task of determining that because the Wal-Mart project is consistent with the previously approved MDP, which had itself been the subject of an EIR, it was exempt from further CEQA review. This task was entrusted to him by the Guidelines, the City ordinances, and the MDP, and his determination was well within his authority. Because of this radical difference in the facts, *Kleist* provides no support for the majority's opinion below.

E. The Majority's Approach Would Disrupt Well-Established Land Development Processes in California

As discussed above, the short statutes of limitation under CEQA demonstrate a legislative intent that the public interest is served if CEQA challenges are promptly asserted and resolved. The majority's opinion, if allowed to stand, would substantially disrupt this important objective and create significant uncertainty and added expense in the land use approval process.

By conditioning the start of the CEQA limitations period on a determination of the merits, as in the present case, the majority's holding would often permit a party to wait until after a project is well under way, and substantial resources have been invested, before contesting an agency's environmental approval. This, in turn, raises the risk that CEQA can be used as "an instrument for the oppression and delay of social, economic, or recreational development and advancement." (See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576.)

In addition, if courts are permitted to avoid the statute of limitations by finding that an approval is "mistaken" or "outside proper jurisdiction," any staff-level agency action intended to serve as an approval under CEQA could be vulnerable to challenge long after the statute of limitations has expired. If the majority's opinion is allowed to stand, city councils will be inclined not to delegate even ministerial decisions, or do so

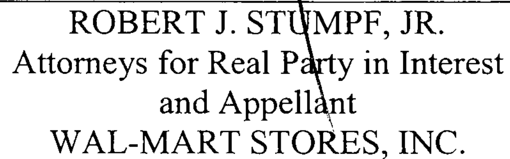
only at the peril of having such decisions invalidated on "jurisdictional" grounds. This, too, would seriously disrupt well-established procedures and land use practices.

V. CONCLUSION AND REQUESTED DISPOSITION

For these reasons, Wal-Mart respectfully requests the Court to reverse the decision of the Court of Appeal for remand to the trial court with instructions to dismiss plaintiffs' Petition as untimely.

Dated: April 14, 2008

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP



By ______________________________
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c), I certify that the foregoing Brief is proportionately spaced, has a typeface of 13 points, and contains 7,617 words, according to the counter of the word processing program with which it was prepared.

Dated: April 14, 2008

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By ______________________________

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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 Four Embarcadero Center, 17th Floor, San Francisco, California 94111-4109.

On **April 14, 2008**, I served the following document(s) described as

OPENING BRIEF ON THE MERITS

on the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

See attached list.

☒ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

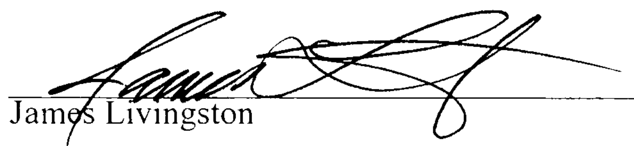
☐ **BY OVERNIGHT DELIVERY:** I served such envelope or package to be delivered on the same day to an authorized courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier.

☐ **BY FACSIMILE:** I served said document(s) to be transmitted by facsimile pursuant to Rule 2.306 of the California Rules of Court. The telephone number of the sending facsimile machine was 415-434-3947. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The sending facsimile machine (or the machine used to forward the facsimile) issued a transmission report confirming that the transmission was complete and without error. Pursuant to Rule 2.306(g)(4), a copy of that report is attached to this declaration.

☐ **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the office of the addressee(s).

☒ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **April 14, 2008**, at San Francisco, California.



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