Case No. _____

S159690

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. et al.,

Real Parties in Interest and Appellants.

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

PETITION FOR REVIEW

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I. QUESTION PRESENTED FOR REVIEW

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?

II. WHY THIS COURT SHOULD GRANT REVIEW

The answer is no. To have meaning, a statute of limitations must be applied prior to any merits analysis of the underlying claim. In fact, proper application of the statute of limitations prevents such an analysis. A court cannot first determine that a claim may have merit, and then that use that determination to avoid applying the statute of limitations. Any other rule effectively would nullify the statute.

Yet, in a two-to-one published opinion, that is what the Court of Appeal did in this case. (*Stockton Citizens for Sensible Planning v. City of Stockton* (2007) 157 Cal.App.4th 332, 68 Cal.Rptr.3d 632, 647 (*Stockton Citizens*).) The plaintiff filed a petition for writ of mandate, alleging the Community Development Director (Director) had improperly approved the construction of a Wal-Mart store as being in substantial conformance with the Master Development Plan (MDP) for a development project in the City of Stockton. The majority opinion found the Director's approval was improper, and thus that neither the 180-day nor the 35-day limitations periods began running. In other words, the majority based its statute of limitations ruling on its determination of the merits of the plaintiff's claim.

The Court of Appeal's holding disregards the purpose of statutes of limitations and contradicts the plain language of the statutes of limitations under the California Environmental Quality Act. CEQA requires that an action "alleging that a public agency has improperly determined that a project is not subject to [CEQA requirements]" must be filed within 180 days from the public agency's decision to carry out or approve the project. If the public agency files a Notice of Exemption (NOE), the statute is shortened to 35 days from the filing of the NOE. The Director approved the Wal-Mart project on December 15, 2003, and the City filed its NOE on February 17, 2004. Applying either limitations period, plaintiff's July 22, 2004 petition was time-barred.

The majority, however, reasoned that because it found the Director's decision was improper, the Director lacked the authority to approve the project, and thus the statute of limitations did not begin running. The dissenting opinion noted that this merits-based analysis is unprecedented and "obliterates the statute": "The majority opinion turns the statute of limitations on its head, arguing in effect the statute does not commence to run if the agency's decision violated CEQA. No California court has conditioned the running of a statute of limitations upon the validity of the complainant's allegations, as the majority opinion does here. Applying the statute of limitations as the majority opinion does obliterates the statute." (*Stockton Citizens*, 68 Cal.Rptr.3d at p. 647 (dissent).)

CEQA's short statutes of limitations evidence legislative intent that the public interest is only served when CEQA challenges are promptly filed. Rather than encouraging resolution of challenges to an agency's environmental assessment at the earliest possible stage, as CEQA requires, the majority's holding would 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 of the project. Allowing CEQA's limitations periods to be disregarded in this way would foster abuse of CEQA "into 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.) The result will be more and protracted litigation and higher costs of development.

Additionally, as a practical implication of the majority's decision, city councils will be inclined to decide scores of ministerial decisions currently delegated to staff to avoid the risk of the staff's decision later being invalidated based on a court's merit-based determination. The majority's decision thus threatens to seriously disrupt well-established municipal procedures and customary land use practices as city councils would become bogged down and overburdened with ministerial decisions.

This Court's review also is necessary to ensure uniformity of decision. The majority's rationale that the Director only had authority to make the "right" decisions in approving projects as consistent with the MDP conflicts with long-settled precedent in *California Manufacturers Assn. v. Industrial Welfare Com.* (1980) 109 Cal.App.3d 95,

125. There, the Fourth District rejected the precise argument accepted here, i.e., a claim that a CEQA statute of limitations did not be begin running when the underlying determination approving a development project had been improperly made.

Both to resolve an important question of law and secure uniformity of decision among the courts of appeal, the Court should grant review.

III. BACKGROUND

Plaintiff Stockton Citizens for Sensible Planning filed its complaint to challenge the City of Stockton's approvals for Wal-Mart's proposed store to be constructed within the 560-acre development project known as "Spanos Park West." (Vol. 1, Appellant's Appendix, pp. 1-26 [1 AA 1-26].) The City approved the project pursuant to an MDP, which delegates to the Director the authority to determine whether proposed projects "substantially conform" to the MDP's standards. (1 AA 82, 183-195.) If that determination is made, the Director may approve the project as a ministerial act without requiring additional environmental review. (See 1 AA 119, Stockton Municipal Code [SMP] § 16-200(A)[1].)

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

Pursuant to the MDP and the City's Municipal Code, real party A.G. Spanos Construction, Inc. (Spanos) submitted an application to construct the proposed Wal-Mart store on parcels within the MDP. On December 15, 2003, after the City's design review board had approved the site plan for the proposed store, the Director approved Wal-Mart's proposed project as in substantial conformance with the MDP. (4 AA 771-772.) In February 2004, the Director confirmed in writing that his December 15, 2003 letter reflected his required approval of the project. (4 AA 774.) The City filed the NOE on February 17, 2004, which informed the public that the Director had determined the project conforms to the standards set forth in the MDP, "which determination is a ministerial action not subject to CEQA review . . . ." (4 AA 776.)

California Public Resources Code section 21167, subdivision (d), provides that any action challenging an agency's exemption determination under CEQA must be filed within 35 days following the filing of the NOE. Alternatively, if the agency does not file the NOE, the statute of limitations extends to 180 days from the date of the public agency's decision to carry out the project. At the latest, then, plaintiff was required to file its petition challenging the Director's determination by mid-June, 2004, within 180 days from the Director's December 15, 2003 letter. Plaintiff filed its petition on July 22, 2004, well after both statutes of limitations had expired. (See 1 AA 1-26.) Nonetheless, the trial court disregarded the statutes' preclusive force and granted the petition for writ of mandate. (7 AA 1540-1546.)

Wal-Mart, Spanos, and the City appealed solely on the issue of the applicability of the statute of limitations. On November 29, 2007, the Court of Appeal issued its two-to-one opinion that affirmed the trial court's issuance of the writ of mandate. (See *Stockton Citizens*, 68 Cal.Rptr.3d 632.) The majority concluded that although the MDP authorizes the Director to find that a project conforms to the MDP, it does not authorize the Director "to mistakenly find that the project is within the MDP." (*Id.* at p. 644.) Thus, the Court held that because it concluded the Director's approval was in error, there was no "authorized" approval at all. And hence the Director's letter of December 15, 2003 did not start the statute of limitations running.[2] (*Id.*)

In a strongly-worded dissent, Justice Nicholson disagreed, noting that the majority had indirectly failed to apply the statute of limitations "by (1) claiming the City did not give timely notice of its approval even though the City did in fact give notice; and (2) improperly ruling in favor of plaintiffs' claims on the merits. Neither ground is a legitimate basis for tolling the statute of limitations." (*Id.*, 68 Cal.Rptr.3d at p. 645.)

This petition followed.

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[2] The majority also finds the form of the Director's December 15, 2003 letter was not an "approval." Not so. The letter expressly states the project substantially conforms with the MDP. In any event, the Director's follow-up confirmation on February 15, 2004, not to mention the City's filing of the NOE, remove any conceivable doubt. As the Dissent noted, the Director's December 15 letter "committed the City to a definite course of action" and thus was an "approval" under CEQA. (*Stockton Citizens*, 68 Cal.Rptr.3d at p. 645 (dissent); see also CEQA Guideline § 15352(a).)

IV. LEGAL DISCUSSION

A. No Statute of Limitations Can be Applied by First Examining the Merits of the Underlying Controversy and Concluding that the Plaintiff Should Win

Statutes of limitations are a procedural mechanism that affect a party's right to a remedy, not the underlying substantive right or obligation. (See generally *Chase Sec. Corp. v. Donaldson* (1945) 325 U.S. 304.) Described as "arbitrary" by definition, "their operation does not discriminate between the just and the unjust claim . . . ." (*Id.*, 325 U.S. at p. 308.) Statutes of limitation 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.)

CEQA's statutes of limitations are so short that the administrative guidelines plainly alert the public that CEQA provides "*unusually short* statutes of limitation on filing court challenges to the approval of projects under the Act." (CEQA Guidelines, § 15112, subd. (a); emphasis added.)[3] "The statute of limitations periods are not public review periods or waiting periods for the person whose project has been

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[3] Statutes of limitation in the land development process are particularly short. Like the 35-day period involved in this case, they are generally measured in days, rather than the years to which lawyers are generally accustomed. (See, e.g., Gov't. Code § 65009, subd. (c) (90 days to challenge zoning or planning action); Gov.t. Code § 66499.37 (90 days for Subdivision Map Act challenges); Pub. Res. Code § 21167, subd. (d) (30 days to challenge negative declaration under CEQA); Pub. Res. Code § 30801 (60 days to challenge Coastal Commission actions).)

approved. The project sponsor may proceed to carry out the project as soon as the necessary permits have been granted. 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 expired." (CEQA Guidelines, § 15112, subd. (b).) Nothing in the Guidelines suggests the commencement of the statute is dependent upon a determination the approval of the project was proper.

Indeed, it is when the agency's approval is challenged that the legislative policies behind CEQA's short statutes of limitation apply with special force. "Allegations that the public agency failed in its duty to make an adequate environmental assessment must be expeditiously resolved, and 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 Mega-Plex Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 111.) Such challenges have an obvious potential for financial prejudice, delay, and disruption. (*Id.*) These considerations are exacerbated when the challenges are allowed to be filed late, after a project is well under way and substantial resources have been invested. (See *id.*; see also *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.").)

Review is appropriate here because the majority opinion is paradigmatic of all that can go wrong in a statute of limitations analysis. Turning proper procedure upside down, the majority first addressed the merits of plaintiff's substantive claims and then used that determination to avoid applying the statute of limitation. Specifically, the majority first determined the Director's approval of the project "violated the limited review authority delegated the Director by the City, and violated the provisions of CEQA that preclude the delegation of a public agency's authority to review a project that may have environmental consequences." (*Stockton Citizens*, 68 Cal.Rptr.3d at p. 644.) It then concluded that because no valid "approval" had taken place, "the period of limitations for challenging the determination did not commence." (*Id.*) In a proper procedural universe, no court would have reached the propriety of the Director's actions because no timely challenge was filed.

Contrary to the result below, California courts have generally applied the CEQA statutes of limitation strictly. (E.g., *Lee v. Lost Hills Water Dist.* (1978) 78 Cal.App.3d 630, 634.) In *Lee*, the plaintiff complained that he should have received personal notice of agency action, rather than the constructive notice provided by a NOD. The court disagreed, holding that project opponents have no due process right to actual notice. The statute of limitations was enforced, with the court applying general statute of limitations law in the CEQA context. (*Id.*)

A similar situation arose in *San Bernardino Associated Governments v. Superior Court* (2006) 135 Cal.App.4th 1106. There, the governmental group decided to place a sales tax on the ballot to fund transportation projects. They found the matter exempt from CEQA and filed an NOE. (*Id.* at p. 1111.) The Sierra Club filed suit more than 35 days later and persuaded the trial court that the trigger was not the NOE filing, but the ballot placement. (*Id.* at p. 1112.) The Court of Appeal disagreed. It held that the statute meant what it said, and that the limitation period began to run when the NOE was filed. Its analysis was wholly at odds with the Court of Appeal here: "Thus, in order to challenge the Measure on the substantive ground that CEQA was not complied with, the Sierra Club should have filed its challenge to SANBAG's actions within 35 days of SANBAG posting its Notice of Exemption. Because it did not do so . . . it is time-barred." (*Id.* at p. 1114.)

Even experienced counsel can be either fooled by the short land use statutes of limitation or lulled into believing that some longer statute applies. For example, in *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, the city adopted a severe restriction on the development of hillside property. The owner decided to accept the restriction, rather than challenge it by mandamus, and sued for an uncompensated taking of property. He thought he had five years to file a takings suit. He was wrong. The Supreme Court held that the 90-day limitation period to challenge the zoning action placed an outer limit on the time to sue for the possible constitutional consequences of that action as well. (See *Id.* at pp. 26-28.) *Hensler* is a good illustration of the severity of the statute of limitations

in the land development context and the strictness of court enforcement of those short periods.

In *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770 (*Kleist*), the City of Glendale improperly delegated to staff the function of reviewing an EIR. The Court held: "[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 holding in *Kleist* is not relevant to the facts of this case, however, because Stockton did not delegate to its Director the function of considering an EIR (which is expressly prohibited by Guidelines § 15025(b)(1)), but instead delegated the function of determining whether the Wal-Mart project is consistent with the MDP, and therefore exempt from further review under CEQA (a function that is expressly authorized by Guidelines, § 15025(a)(1) and (5).)

Despite these clearly distinguishable facts, the majority relies upon *Kleist* as authority for the proposition that the Director acted beyond his legally delegable authority: "CEQA places limitations on the authority of a public agency to delegate its responsibilities regarding the review of the environmental consequences of a project. (*Kleist, supra*, 56 Cal.App.3d 770, 128 Cal.Rptr. 781.) The court said: '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. . . .'" (*Stockton Citizens*, 68 Cal.Rptr.3d 643 (emphasis added).)

The majority, however, overlooks the fact that in this case, the Director determined the Wal-Mart project is not "a project involving substantial effect upon the environment," and that it is therefore exempt from further CEQA review. In addition, the Director did not review an EIR. He determined that because the Wal-Mart project is consistent with the previously approved MDP, it is exempt from further CEQA review. As shown, the Director is expressly authorized to make this determination under CEQA and the Stockton Municipal Code.

But the precise nature of the Director's authority and his action are really beside the point. The point is that he *did* act and that no one timely challenged his action. Simply stated, whether the Director made the *correct* determination is irrelevant. If the Director makes an incorrect determination, the remedy is to challenge it – within the applicable CEQA statutes of limitation. This, plaintiff did not do.

In addition, the Court of Appeal's conclusion that the Director acted outside of his authority, and thus his decision finding the project was within the MDP was not a decision of a "public agency," is demonstrably wrong based on the plain language of CEQA and the Stockton Municipal Code. It is the actions of "a public agency" in either approving a project or in filing an NOE that start the limitations period in Pub. Res. Code section 21167, subdivision (d). The CEQA Guidelines define "public agency" to include "local agency," and "local agency" may include an organizational subdivision. (Guidelines, §§ 15379, 15368.) The Guidelines also recognize that many of the tasks required by CEQA will be performed by subordinate departments and individuals. And,

they specifically acknowledge a "public agency may assign specific functions to its staff," including the functions of "determining whether a project is exempt" and "filing of notices." (Guidelines, § 15025(a)(1) and (5).)

Here, the City of Stockton delegated to the Director the authority to determine if projects are exempt from CEQA. (SMC §16-410.050(B).) The Municipal Code vests with the Director the authority to approve projects that are consistent with the MDP. (SMC § 16-208(C)(F)(2).)[4] This broad authority includes the right to approve minor changes to the MDP. In addition, section 16-208(C) of the Municipal Code expressly authorizes the Director to interpret the language of the MDP.[5]

In sum, in a published opinion that has a binding effect on trial courts throughout California, the Court of Appeal refused to apply the statutes of limitation under CEQA because of its view of the substantive merits of the plaintiff's claim. To say that this has a substantial impact on CEQA would be an understatement. But it is more

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[4] Section 16-208(f)(2) states that "[t]he Community Development Director shall have the authority to approve an implementing site plan review that is consistent with the adopted Master Development Plan." In accordance with section 16-208(B), the Director may also "authorize minor changes to a Master Development Plan as provided in the Master Development Plan."

[5] Likewise, this section states that the "Director shall have the authority to interpret the precise language of the Master Development Plan to determine if the proposed use, while not specifically listed as an allowable use, would be consistent with and share the same or similar characteristics of an allowed use identified in the adopted Master Development Plan."

important than one statutory scheme. If this Court of Appeal is correct, then *any* statute of limitation can easily be evaded by a court in this same fashion. Statutes of limitation are not so malleable. If they are to have meaning, they must be applied. This Court's review is needed now.

B. Review Is Also Necessary to Resolve a Split Between the Courts of Appeal

The majority reasoned that if the Director correctly approved the project as within the MDP, he was acting within his authority and the limitations period began running. But if his approval was incorrect, he exceeded his authority and the limitations period did not begin running. In other words, the majority concluded the MDP "does not authorize the Director to mistakenly find that the project is within the MDP." (*Stockton Citizens*, 68 Cal.Rptr.3d at p. 644.)

This analysis – that the applicable statutes of limitations under CEQA begins running only if the Director has made the correct determination – was squarely rejected by the Fourth District in *California Manufacturers Assn. v. Industrial Welfare Com.*, *supra*:

> 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.

(109 Cal.App.3d at p. 125.) That is precisely the alleged basis for plaintiff's claims here. (See Pub. Res. Code § 21167, subd. (d).) The two opinions are wholly at odds and incompatible. To resolve this split of authority between the Third and Fourth Districts, the Court should grant review.

V. CONCLUSION

For these reasons, petitioner respectfully urges the Court to grant this petition and resolve the important question of law it presents.

DATED: January 7, 2008

SHEPPARD MULLIN RICHTER & HAMPTON LLP

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.504 (1)(d))

The text of this petition consists of 3,843 words, including all footnotes, as counted by the computer program used to generate this petition.

DATED: January 7, 2008

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Stockton Citizens for Sensible Planning v. City of Stockton
Cal.App. 3 Dist.,2007.

Court of Appeal, Third District, 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. et al., Real Parties in Interest and Appellants.
No. C050885.

Nov. 28, 2007.

Background: Citizens organization brought mandamus action against city, seeking to set aside approval for construction of a retail store in a commercial and residential development on grounds of alleged noncompliance with California Environmental Quality Act (CEQA). The Superior Court, San Joaquin County, No. CV024375,K. Peter Saiers, J., Retired, sitting by assignment, and Carter P. Holly, J., granted peremptory writ of mandamus. Contractor and owner, as real parties in interest, appealed on limitations grounds.

Holdings: The Court of Appeal, Blease, Acting P.J., held that:

(1) letter to contractor from director of city's community development department did not constitute "approval" of project, and thus a later filing of notice of determination that project was exempt CEQA did not start limitations period for challenging that determination;

(2) date of city's decision to carry out project, and the commencement of the project, occurred at the earliest when city granted owner a use permit to sell alcoholic beverages in store; and

(3) director's letter was not a determination by a "public agency," and thus subsequent notice of exemption did not trigger limitations period for challenging exemption.

Affirmed.

Nicholson, J., Dissenting.

West Headnotes

[1] Environmental Law 149E 671

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek668 Time for Proceedings
149Ek671 k. Accrual, Computation, and Tolling. Most Cited Cases

Letter from director of city's community development department to contractor, stating that an initial staff review had determined that plans for retail store were in substantial conformance with master development plan (MDP), did not constitute "approval" of project, and thus a subsequently filed notice of determination that project was exempt from California Environmental Quality Act (CEQA) did not start 35-day limitations period for challenging the exemption; letter was labeled a "status report," record did not show it was made available to the public at that time, and letter did not contain information that would have put public on notice of nature and consequences of project. West's Ann.Cal.Pub.Res.Code §§ 21080(b)(1), 21167(d, e).

See 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, §§ 836, 851 et seq.; 9 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 25:182 et seq.; Cal. Jur. 3d, Pollution and Conservation Laws, §§ 514 et seq., 553 et seq.; Cal. Civil Practice (Thomson/West 2003) Environmental Litigation, §§ 8:9, 8:31 et seq.

[2] Environmental Law 149E 608

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek607 Effect of Deficiency
149Ek608 k. In General. Most Cited Cases

Environmental Law 149E 667

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek667 k. Record of Administrative Proceeding. Most Cited Cases

Consequences of providing a record to the courts that does not evidence public agency's compliance with California Environmental Quality Act (CEQA) in approving a project are severe, namely, reversal of

project approval. West's Ann.Cal.Pub.Res.Code § 21167.6(e).

[3] Environmental Law 149E 671

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek668 Time for Proceedings
149Ek671 k. Accrual, Computation, and Tolling. Most Cited Cases
Date of city's decision to carry out project, and the commencement of the project, which involved construction of a retail store, occurred at the earliest when city granted owner a use permit to sell alcoholic beverages in new store, for purposes of triggering 180-day limitations period that governs challenges to an agency's decision on grounds of noncompliance with California Environmental Quality Act (CEQA) in instances when no notice of determination of exemption from CEQA has been filed. West's Ann.Cal.Pub.Res.Code §§ 21080(b), 21167.6(d).

[4] Environmental Law 149E 671

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek668 Time for Proceedings
149Ek671 k. Accrual, Computation, and Tolling. Most Cited Cases
Letter from director of city's community development department to contractor, stating that an initial staff review had determined that plans for a retail store on parcels designated solely for high-density residential development were in substantial conformance with master development plan (MDP), was not a decision by a "public agency," and thus a later filing of notice of determination that project was exempt from California Environmental Quality Act (CEQA) did not start 35-day limitations period for challenging determination; MDP did not delegate authority to director to approve projects, such as the present one, that required environmental review. West's Ann.Cal.Pub.Res.Code §§ 21062, 21063, 21167(d).

***633** Steefel, Levitt & Weiss, Judy V. Davidoff, San Francisco, Michael D. Early, and Beth C. Tenney; Sheppard, Mullin, Richter & Hampton, Arthur J. Friedman, San Francisco, for Real Party in Interest and Appellant Wal-Mart Stores, Inc.
Briscoe Ivester & Bazel, John Briscoe, Lawrence S. Bazel, San Francisco, and Christian L. Marsh, for Real Party in Interest and Appellant A.G. Spanos Construction, Inc.
William D. Kopper, Davis, for Plaintiffs and Respondents.
BLEASE, Acting P.J.
Real Parties in Interest A.G. Spanos Construction Co., Inc. (Spanos) and Wal-Mart Stores, Inc. (Wal-Mart) appeal from a judgment granting a peremptory writ of mandate that set aside the approvals for a 207,000 square foot Wal-Mart retail store to be constructed in the mixed use (M-X) zone of a Spanos commercial and residential development in the City of Stockton (City) called Spanos Park West (also known as The Business Park).[FN1] The approvals***634** were based on a letter to Spanos from the City's Community Development Department Director (Director) stating that "it has been determined" by an "[i]nitial staff review" that the plans for the store were "in substantial conformance" with a Master Development Plan adopted by the City.

FN1. The appeal of the City of Stockton and the Stockton City Council was dismissed with prejudice on the motion of the City.

The Master Development Plan (MDP) is based upon the provisions of the California Environmental Quality Act (CEQA) that apply to projects that will be carried out pursuant to a development agreement. (Pub. Resources Code, § 21157, subd. (a)(4).)[FN2] The MDP is an alternative to a project or program EIR. (§ 21157, subds. (a)(4) and (b)(2); Cal.Code Regs., tit. 14, § 15175, subd. (a), hereinafter CEQA Guidelines.) The anticipated projects are not subject to further environmental review if considered in a master Environmental Impact Report (EIR). (§ 21157, subd. (b)(2).)

FN2. A reference to a section is to the Public Resources Code unless otherwise designated or implied from the context.

The City approved the 560 acre Spanos Park West pursuant to the MDP and allied enactments that condition the application of the MDP, including a Density Transfer Development Agreement (Density Agreement) that requires the construction of high density housing in the MX zone. The original project was to include business and residential development but was later changed to retail and residential development. The environmental review of the project was contained in a master EIR and a supplemental EIR. After the environmental review

had been completed, Spanos informed the City it desired to build a Wal-Mart store on parcels of The Business Park designated solely for high density residential development by the Density Agreement and the MDP.

The plaintiffs challenge the validity of the Director's letter as an approval of the Wal-Mart project and the trial court agreed. Real parties argue that the plaintiffs may not do so because the period of limitations expired 35 days after the filing, on February 17, 2004, of a notice of determination that the project was exempt from CEQA. The complaint was filed July 22, 2004, more than 35 days after the filing of the notice of determination. In such a case section 21167 precludes review of a claim "that a public agency has improperly determined that a project" was exempt from CEQA. (§§ 21167, subd. (d), 21080, subd. (b)(1).)

Under CEQA Guidelines section 15112, subdivision (c)(2), the 35 day period of limitations runs "[w]here the *public agency* filed a notice of exemption in compliance with Section 15062...." (Italics added.) Subdivision (a) of CEQA Guidelines section 15062 conditions the filing of the notice of exemption on the approval of the project by a public agency.

Thus, under section 21167 and the CEQA Guidelines the limitations period will not run if (1), the Director's letter did not constitute an "approval" of the Wal-Mart project, or (2), the Director was not authorized by a "public agency," the City, to approve the project.

The Director's action was contained in a letter to Spanos, labeled "status report," that said "it has been determined" by an "[i]nitial staff review" that the Wal-Mart plans were in substantial conformance with the MDP. The letter was not posted, published or otherwise made public, notwithstanding that the MDP authorizes an appeal by "[a]ny interested person" to the City Planning Commission of any decision ***635** of the Director within 10 days of the decision. (MDP § 8.4.)

For these reasons we shall conclude that the Director's letter did not constitute an "approval" of the Wal-Mart project.

We also conclude that the Director's letter did not constitute a determination by a "*public agency* " since the Director was not delegated and could not have been delegated authority to approve a project requiring environmental review. (MDP § 8.2; *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770, 128 Cal.Rptr. 781.) The trial court found that "[t]he change from residential to a Superstore retail unit is a major change in the Development Plan that requires a discretionary act that triggers a CEQA review."

Real parties assume that plaintiffs may not challenge whether the Director "improperly determined" that he had authority to act for the City. They misread section 21167. The term "improperly determined" does not modify "public agency" and hence the limitations period of that section does not apply to the jurisdictional question whether the Director had authority to act for the City.

We shall affirm the judgment.

DISCUSSION

I

Introduction and Facts [FN3]

FN3. In Part II of the Discussion we consider and reject real parties' argument that we are bound by the Director's determination of the ultimate fact that his action constituted an approval of the Wal-Mart project.

The real parties do not challenge the trial court's findings of fact and we include them as appropriate.

A. Overview of the Project

The trial court described the Spanos Park West project as follows:

"This lawsuit involves the development of Spanos Park West, which is located on the southwest corner of Eight Mile Road and Interstate 5 [in Stockton]. The Project involves the development of 560 acres with the original intent that the primary components would be business and residential. After a period of time, the primary components were changed to retail and residential due to the decline of business activity at that time. The Initial Environmental Document Transmittal form called for 2,514 residential units on

361.5 acres. It also provided for 1,700,000 sq. ft. of office space on 92.12 acres. The Spanos Park West [MDP] also contemplates two primary land use policies: 1) commercial/office policy, and 2) high density residential development policy. The same [MDP] also states that residential uses represents approximately 25 per cent of the proposed land use in the Plan area with four separate parcels for potential residential development. These four parcels are identified ... as Parcel[s] 17, 17A, 18 and 19." The Wal-Mart store is to be located on parcels 17 and 17A.

B. The Spanos Park West Planning Approvals

On December 20, 2001, Spanos requested that the City Council amend the City General Plan and zoning regulations and adopt a development agreement that would transfer Spanos' "obligation to construct ... High-Density Residential (minimum of 935 multi-family residential units) from the existing High Density Residential sites within the Residential Component to [a] proposed Mixed Use (MX) portion of the Spanos West Project."

The request was approved by the City Council on January 29, 2002, by the adoption*636 of an integrated set of enactments in compliance with the City Planning Code.[FN4] They conditioned the application of the MDP because the transfer of the multi-family units to the mixed use zone required an amendment to the City's General Plan, amendments to the City zoning ordinances, and a Density Agreement, which mandates that Spanos construct 935 multi-family residential units within the M-X zone in order to comply with the policy of the General Plan.[FN5]

FN4. City Planning and Zoning Code, section 16-204 B., provides that "[f]or projects that will be designated as Mixed Use ... applications for a General Plan and Zoning Map amendments shall be submitted concurrently with the application for a Master Development Plan."

FN5. As relevant here, the following resolutions and ordinance jointly were adopted by the City Council on January 29, 2002. (1) "Resolution Approving the Master Development Plan Regarding the Mixed Use (MX) Component (A.G. Spanos Business Park) of the Spanos Park West Project." (Resolution No. 02-0054.) (2) "Resolution Approving the General Plan Amendment Regarding the Spanos Park West Project-Mixed Use (MX) Component, A.G. Spanos Business Park."(Resolution No. 02-0053.) (3) "Ordinance Approving the Density Transfer Development Agreement for the Spanos Park West Project." (Ordinance No. 007-02.) "Resolution Certifying The Final Environmental Impact Report ... for the Spanos Park West Project."(Resolution No. 02-0052.)

For this reason the MDP states that it provides a "comprehensive description of all land uses proposed for The Business Park consistent with the objectives, policies, general land uses, and programs of the City's General Plan." [FN6] The MDP also provides: "All development within the Plan area ... is meant to be developed according to the *primary use* identified by A.G. Spanos Business Park Conceptual Site Plan, Figure 3-1, and Table 3-1, Land Use Summary." (Italics added.)

FN6. To this end the General Plan Amendment, as noted by the trial court, recites that "[t]he proposed Development Agreement is consistent with and necessary for the consideration and approval of the related discretionary General Plan Amendment rezoning and [MDP] applications...."

Table 3-1 lists Multi-family as the *Primary Land Use* for parcels 17, 17a, 18 and 19. In the text following the table, the MDP provides that "[t]he residential development program for A.G. Spanos Business Park consists of multifamily units. Four parcels (43.56 gross acres) within the Plan Area are proposed for multifamily [high density] residential development. The residential density would be 20+ units per gross acre."

The trial court concluded: "Table 3-1 [AR 001410-13] only designates Parcel [s] 17, 17A, 18 and 19 for residential use. Of these lots only Parcel 18 has been used for residential use. Lot 19 was used for office space and of course Parcels 17 and 17A are used for this Superstore.[FN7] For this reason alone the writ [of mandate] should issue."

FN7. Parcels 17 and 17A provide, respectively for 350 and 250 Multi-family units.

Lastly, the Density Agreement notes that the "City of Stockton's General Plan ... provides that City shall maintain an adequate supply of land designated as high-density residential to meet the requirements of General Plan's Housing Element." For that reason it states that Spanos "has agreed to provide for and construct a minimum of Nine Hundred Thirty Five (935) multi-family units within the Mixed Use component of the Project." The Density Agreement recites that City "Code section 16-204.C requires that a development agreement be completed to implement the [MDP]...." (Recitals G.) And it recites Spanos' "commitment to ***637** construct a minimum of [935] multi-family units as part of the development of The Business Park" and that "[i]n exchange for the[ ] benefits to the public ... of the multi-family residential development within The Business Park, [Spanos] desires to receive assurance that City shall grant permits and approvals for the development of the Project. In order to effectuate these purposes, the parties desire to enter in this Agreement." [FN8]

FN8. In recognition that the Wal-Mart store displaced residential housing mandated by the Density Agreement, on October 9, 2003, Spanos filed a Development Agreement Application to "[a]llow Spanos to further develop the Spanos Park West power center by transforming Spanos *obligation* to construct high density residential units within Spanos Park West to other locations within the City."(Italics added.)
On December 16, 2004, the day following the date of the Director's letter at issue in this case, Spanos sent a letter to the Director titled "Amendment to Density Transfer Develop Agreement" informing him that "Spanos presently lacks the space within the M-X component of Spanos Park West necessary to accommodate the ... Six Hundred Twenty Seven (627) [multi-family] Units." In it Spanos requested a delay in the construction of the 627 units mandated by the Density Agreement and the approval of the Director to construct the units within 10 years within the corporate limits of the City of Stockton. The letter reflects that the Director signed the letter as approved on December 17, 2003.
The approval of the amendment to the Density Agreement was not authorized by the MDP since it was not preceded by approval by the Design Review Board, as consistent with the MDP, and was not within the authority granted the Director by the MDP. (MDP §§ 8.1-8.3.)

For these reasons the trial court found that the Wal-Mart store was to be placed on lots 17 and 17A and that "[b]y approving this retail complex on Lot[s] 17 and 17A it not only exceeds the retail limit [of the MDP] [FN9] but it also prevents the construction of residential units." That led the court to find that "[t]he change from residential to a Superstore retail unit is a major change in the Development Plan that requires a discretionary act which triggers a CEQA review." [FN10]

FN9. The retail square foot limit of the MDP for parcels 17 and 17A is shown on Table 3-1 as zero for parcel 17 and 50,000 for parcel 17A, well below the 207,000 square feet of the Wal-Mart proposal.

FN10. CEQA requires an EIR "whenever substantial evidence supports a fair argument that a proposed project 'may have a significant effect on the environment.' " (*Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1993) 6 Cal.4th 1112, 1123, 26 Cal.Rptr.2d 231, 864 P.2d 502.)

C. The Environmental Review

As noted, the MDP is based upon the provisions of CEQA that apply to projects that will be carried out pursuant to a development agreement. (§ 21157, subd. (a)(4).)

To meet the requirements of CEQA, "[a] master environmental impact report may be prepared for ... [¶] (4) [a] project that which will be carried out or approved pursuant to a development agreement."(§ 21157, subd. (a)(4).) [FN11] The report must "descri[be] [the] anticipated subsequent ***638** projects that would be within the scope of the master environmental impact report," including "[t]he maximum and minimum intensity of any anticipated subsequent project, such as the number of residences in a residential development" and "[t]he anticipated

location and alternative locations for any development projects."(§ 21157, subd. (b)(2)(B) & (C).) "It is the intent of the Legislature ... that a master environmental impact report shall evaluate the cumulative impacts, growth inducing impacts, and irreversible significant effects on the environment of subsequent projects to the greatest extent feasible."(§ 21156.) Environmental review thereafter is limited to projects not considered by the master report.

> FN11. "The Master EIR procedure is alternative to preparing a project EIR, staged EIR, or program EIR for certain projects which will form the basis for later decision making. It is intended to streamline the later environmental review of projects or approval included within the project, plan or program analyzed in the Master EIR. Accordingly, a Master EIR shall, to the greatest extent feasible, evaluate the cumulative impacts, growth inducing impacts, and irreversible significant effects on the environment of the subsequent projects." (CEQA Guidelines, § 15175, subd. (a).) It includes "Projects that will be carried out or approved pursuant to a development agreement." (*Id.*, subd. (a)(5).) The required contents of a Master EIR are specified in Guidelines section 15176.

The Spanos Park West Project involves the "redesign, development and operation of the previously approved A.G. Spanos Park (West) Project in northwest Stockton," that was reviewed in a prior EIR. Consequently, it is the subject of a Supplemental Environmental Impact Report/Initial Study (SEIR 3-87/IS 13-00) that "focus[es] on the proposed project revisions...."

The SEIR reviewed the environmental consequences of an integrated set of documents, the "proposed [MDP], Development Agreement, Density Transfer Development Agreement, and related planning and zoning amendments" that were jointly approved by the City Council on January 29, 2002.[FN12] Since the Wal-Mart project was not authorized by these documents, it was not subject to environmental review in the SEIR.[FN13]

> FN12. The Notice of Preparation of Supplemental EIR for Spanos Park West states that "the Supplemental [EIR] Study ... will focus on the proposed project revisions that will require various discretionary approvals including: General Plan Amendments, Rezonings, Specific Plan Amendment for Eight Mile Road, Master Development Plan, Development Agreement, new Tentative Subdivision Maps, Special Use Permits, and/or Site Plan Reviews, etc."
> The notice further states that one of the goals for the M-X component of The Business Park is "high density residential apartment uses."
> The SEIR reviewed the noise and traffic impacts of the proposed multi-family residential units.

> FN13. The record contains a memorandum to Spanos from Fehr & Peers, transportation consultants, dated July 8, 2003 (after the adoption of the MDP and allied agreements), that purports to "document [a] trip generation comparison between the *currently proposed* Spanos Park West development [including the Wal-Mart project] and the *previously approved* project." (Italics added.) However, it is not included in the documents reviewed by the A.G. Spanos Business Park Design Review Board, dated October 29, 2003, a predicate to a determination by the Director (MDP § 8.4) and is not within the Director's determination at issue in this case. Moreover, as to this document, the trial court found it failed to make the correct traffic generation comparison.

The Notice of Preparation of the SEIR for the MDP recites that the "Development Agreement specifies the terms and conditions for the development of the M-X component and will ensure that applicant will develop the M-X component consistent with the [MDP]." The draft SEIR states that "[h]igh density residential uses will be provided on Parcels 17, 17a, 18 and 19. These high-density residential uses are intended to serve residents seeking the convenience of a highly concentrated urbanized setting that minimizes the reliance on personal vehicles and optimizes the relationship between home and the workplace."

D. The Director's Letter

On October 29, 2003, the Director received approval

from the A.G. Spanos Business Park Design Review Board (MDP § 8.2) "of [Spanos'] site plan for ***639** construction of a 207,160 sq. ft. two-phased retail development ... on approximately 22.38 acres within the Spanos Business Park...." [FN14]

> FN14. The document recites that "[a] written finding of consistency and compatibility of the terms of the [MDP], Development Agreement and all applicable policies and regulations for the building permit process will follow with subsequent submissions." However, we have found nothing in the record that shows any subsequent submissions other than the plans for the structure and associated landscaping and parking configurations.

The Director responded with a letter labeled "Status Report Regarding Site Plan, Landscape Plan, Elevation and Design Approval-retail store," dated December 15, 2003, that said, in effect, that an "[i]nitial staff review" has determined that the site plan and elevations "are in substantial conformance with the" MDP. The letter was addressed to Doucet & Associates, representing Spanos, and ccd to Spanos and various employees of Stockton. The letter was not posted, published or otherwise made public.

The Director was informed by letter from Spanos, dated the next day, December 16, 2003, and headed "Amendment to Density Transfer Development Agreement,"[FN15] that Spanos "presently lacks the space within the M-X component of Spanos Park West necessary to accommodate the ... Six Hundred Twenty Seven (627) Units." The letter from Spanos to the Director was signed as approved by the Director on December 17, 2003. (See fn. 16, *infra.*)

> FN15. As noted above, on October 9, 2003, Spanos filed an "Amendment to Development Agreement Application [to] [a]llow Spanos to further develop the Spanos Park West power center by transforming Spanos *obligation* to construct high density residential units with Spanos Park West to other locations within the City."(Italics added.) So far as the record shows, the application was not acted upon and is not part of the Director's determination.

Apparently, it was unclear to Spanos whether the December 15, 2003, letter from the Director to Spanos constituted an approval of the Wal-Mart project. Spanos sent a reply to the December 15 letter, dated February 5, 2004, from Spanos' lawyers, to the Director, stating Spanos' "understanding that [the] letter of December 15, 2003 constituted your approval of the Site Plan" and seeking "to *confirm* that your December 15, 2003 letter was the 'decision' required by Section 8.2[and] that as a result the 10 day period for filing an appeal of that decision has expired." [FN16] (Italics added.)

> FN16. The copy of the letter in the file does not show an affirmance by the Director.

Thus, the public was not informed of the Director's decision on December 15, 2003,[FN17] the form of the letter was such as to induce Spanos to seek a confirmation that it constituted an approval, and the only formal notice of the decision was the filing with the County Clerk two months later, on February 17, 2004, of a notice of determination, also signed by the Director, which recites that it is in compliance with section 21152, subdivision (b) of the Public Resources Code, and that the Director "has determined [inter alia] that the Site Plan ... applicable to the Project conform[s] to the standards set forth in the [MDP], which determination is a ministerial action not subject to CEQA review under [§]21080(b)(1) and CEQA Guidelines [§]15369."

> FN17. In the light of the lack of notice to the public and the Spanos letter to the Director on December 16, 2003, we find it odd that Spanos argues that plaintiffs failed to exhaust the appeal rights provided by the MDP.

We will consider the remaining facts when appropriate to the Discussion.

***640** II

The Director's Determination Did Not Constitute an Approval

[1] The trial court ruled that the Director's "letter [is] not a formal order of approval" and for that reason "the [notice of determination], filed February 17, 2004 does not start the 35-day limitation to challenge the Government action."

Spanos argues that the trial court did not have authority to substitute its decision for that of the Director in determining that the letter did not constitute an approval. It cites to *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571, 38 Cal.Rptr.2d 139, 888 P.2d 1268.However, *Western States* concerns a review of the record of a "quasi-legislative" administrative decision.

The case is inapposite. The trial court did not review the facts determined in a quasi-legislative action of a public agency. Rather, it reviewed the legal question whether the form of the Director's purported decision, a letter denominated "status report" stating that "an initial staff review" had determined that the Wal-Mart project was in substantial conformance with the MDP, 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' required by Section 8.2...."

The formal requirements of an approval turn on the nature of that which is decided. CEQA Guidelines section 15352, subdivision (a) provides in relevant part: "The exact date of approval of any project is a matter determined by each public agency according to its rules, regulations, and ordinances."

The rules and conditions of the MDP, section 8.4, provide that "[a]ny interested person" aggrieved by the decision of the Director approving a proposal for compliance with the MDP has 10 days to appeal to the planning commission.[FN18] Since the rule provides for appeals 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.

> FN18. Section 8.4 provides in relevant part: "Any interested person dissatisfied with any decision of the Community Development Director ... required by the Master Development Plan, may, within ten (10) days of such decision[ ], appeal such decision[ ] to the Planning Commission, by the filing, with the Community Development Director, of a written notice of appeal. Such notice of appeal shall [inter alia] (1) specify the decision ... being appealed [and] (2) the reasons for such appeal...."

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. Moreover, the letter, although it did state that the status report concerned a retail store, did not state the size of the store or its location on specific parcels in the MX zone of Spanos Park West, or that it displaced 627 units of high-density housing required by the Density Agreement, or other information that would have put the public on notice of the nature and consequences of the project.

If the letter of December 15, 2003, was, in fact, made public at the time, it was the City's duty to include that fact in the administrative record. Section 21167.6, subdivision (e), provides in pertinent part: ***641** "(e) The record of proceedings shall include, but is not limited to, all of the following items: [¶] ... [¶]; (2) All staff reports and related documents prepared by the respondent public agency with respect to its compliance with the substantive and procedural requirements of this division and with respect to the action on the project. [¶] ... [¶]; (5) All notices issued by the respondent public agency to comply with this division or with any other law governing the processing and approval of the project."

[2] In keeping with this statute, it has been held that the duty to prepare an administrative record demonstrating compliance with CEQA falls "squarely" on the public entity. (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 372-373, 1 Cal.Rptr.3d 726.) "The consequences of providing a record to the courts that does not evidence the agency's compliance with CEQA is severe-reversal of project approval. [Citations.]" (*Id.* at p. 373, 1 Cal.Rptr.3d 726.)

Here, the administrative record was prepared by the City of Stockton. (See § 21167.6, subds. (a) and (b).) It fails to show that the "approval" letter of December 15, 2003, was made public at the time so as to allow members of the public to appeal to the planning commission. At oral argument, counsel for real party

Spanos conceded the letter of December 15 had not been made public. The administrative record therefore fails to demonstrate a timely valid project approval.

[3] 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.[FN19] (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 963, 91 Cal.Rptr.2d 66.) Rather, the statute of limitations was "180 days from the date of the public agency's decision to carry out ... the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project."(§ 21167, subd. (d); see *County of Amador, supra,* 76 Cal.App.4th at p. 963, 91 Cal.Rptr.2d 66.)

FN19. Section 21167, subdivision (d), provides: "(d) An 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 or Section 21172 shall be commenced within 35 days from the date of the filing by the public agency, or person specified in subdivision (b) or (c) of Section 21065, of the notice authorized by subdivision (b) of Section 21108 or subdivision (b) of Section 21152. If the notice has not been filed, the action or proceeding shall be commenced within 180 days from the date of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project."

In this case, "the date of the public agency's decision to carry out ... the project" and the "commencement of the project" occurred at the earliest on June 22, 2004, if then, when the City granted Wal-Mart a use permit to sell alcoholic beverages in the new store. (See *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1143, 17 Cal.Rptr.2d 408 [issuance of building permit].) Plaintiffs filed their petition on July 22, 2004, well within the 180-day period.

III

The Period of Limitations is Dependent Upon Approval of a Project by a Public Agency

Section 21167, subdivision (d), provides that "[a]n action or proceeding alleging ***642** that a *public agency* has improperly determined that a project is not subject to [CEQA] pursuant to subdivision (b) of Section 21080 [subdivision (b)(1) is applicable to ministerial projects] ... shall be commenced within 35 days from the date of the filing by the *public agency*... of the notice of determination authorized by ...subdivision (b) of Section 21152." (Italics added.) [FN20] A failure to meet this deadline precludes review of a claim "that a *public agency* has *improperly determined* that a project" is exempt from CEQA. (See §§ 21167, subd. (d), 21080, subd. (b)(1); italics added.)

FN20. A "Public agency" is defined in section 21063 as "any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision." It is somewhat differently defined in CEQA Guidelines section 15379 as "any state agency, board, or commission and any local or regional agency, as defined in the guidelines." Section 21063 is cited as authority for this definition.
"Local agency" is defined in the Guidelines as including "but is not limited to cities ... and any board, commission, or organizational subdivision of a local agency when so designated by order or resolution of the governing legislative body of the local agency."(§ 15368.)
The authority for CEQA Guidelines section 15368 is Public Resources Code section 21062. It provides that " 'Local agency' means any public agency other than a state agency, board or commission. For purposes of this division a redevelopment agency and a local agency formation commission are local agencies, and neither is a state agency, board or commission."

Section 21167, subdivision (d), is amplified by the CEQA Guidelines. Under CEQA Guidelines section 15112, subdivision (c)(2), the 35 day period of limitations runs "[w]here the *public agency* filed a notice of exemption in compliance with Section 15062...." (Italics added.) Section 15062, subdivision

(a), applies only "[w]hen a *public agency* decides that a project is exempt from CEQA ... and the *public agency approves* or determines to carry out the project...." (Italics added.) An approval is therefore a necessary requirement for the commencement of the limitations period pursuant to section 21167.

Wal-Mart argues that "Public Resources Code section 21167, [subdivision] (d) requires that an objector challenge a determination that a project is exempt from CEQA within 35 days of the agency's filing of a notice of exemption. The filing and posting of a notice of determination or exemption constitutes constructive notice to all potential challengers, and no further notice is needed to trigger the limitations period." The notice of determination was filed on February 17, 2004. The complaint was filed July 22, 2004.

Alternatively, Wal-Mart argues that plaintiffs' claims are barred by the 180-day "catchall" deadline measured from the date of the approval by the Director, December 15, 2003. (§ 21167, subd. (a); CEQA Guidelines § 15062, subd. (d).) CEQA Guidelines section 15112, subdivision (c)(5)(A), provides that the period of limitations runs from the date of the "public agency's decision to carry out or *approve* the project...." (Italics added.) The complaint, filed on July 22, 2004, did not meet this deadline.

Thus, in either case advanced by the real parties, "approval" by a public agency is a predicate to the commencement of the statute of limitations. (See *County of Amador v. El Dorado County Water Agency, supra,* 76 Cal.App.4th at p. 963, 91 Cal.Rptr.2d 66.)

Accordingly, we next address whether the Director's determination constituted an action by a public entity, the City.

***643** IV

The Director Was Not Delegated Authority to Approve the Wal-Mart Project

[4] As noted, the statute of limitations under CEQA Guidelines section 15112, subdivision (c)(2) does not begin to run from the filing of the notice of exemption of the Wal-Mart project unless the City, a public agency, has approved the project and that turns on whether the Director was delegated or could have been delegated the authority by the City to make the determination.

CEQA places limitations on the authority of a public agency to delegate its responsibilities regarding the review of the environmental consequences of a project. (*Kleist, supra,* 56 Cal.App.3d 770, 128 Cal.Rptr. 781.) The court said: "The state guidelines require that the decision-making body or administrative official having final approval authority over a project involving a substantial effect upon the environment review and consider an EIR before taking action to approve or disapprove the project. ([CEQA] Guidelines, § 15085, subd. (g).) The requirement exists in part because 'only by this process will the public be able to determine the environmental and economic values of their elected and appointed officials....' "(*Id.* at p. 778, 128 Cal.Rptr. 781; see also *Vedanta Society of So. California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 525, 100 Cal.Rptr.2d 889; *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 907, 100 Cal.Rptr.2d 173 ["Delegation is inconsistent with the purpose of the review and consideration function since it insulates the members of the council from public awareness and possible reaction to the individual members' environmental and economic values."]).

Although the CEQA Guidelines say that a public agency may delegate its decision making authority to "any person ... within a public agency *permitted by law* to approve or disapprove the project at issue" (CEQA Guidelines, § 15356), that does not extend to a decision to approve a project with environmental consequences. A footnote to CEQA Guidelines section 15356 regarding the meaning of "permitted by law" refers to the *Kleist* decision.

The question whether the Director was "permitted by law" to approve the Wal-Mart store is critical to this case. If the Director was not delegated authority by the City to approve the Wal-Mart project his letter of "approval" did not constitute a "decision by a public agency," as required by section 21167 and CEQA Guidelines section 15352.

Section 8.3 of the MDP sets out the procedures by which a proposed project is deemed within the matters considered in the master EIR for the MDP. It authorizes the Director to approve a project which

substantially conforms to the MDP, i.e., is within the uses permitted by the MDP, and thereby has been considered for its environmental consequences. By contrast, a project which is not within the uses permitted by the MDP has not been reviewed for environmental sufficiency.

Section 8.3 provides: "Amendments to the Land Uses and Development Standards contained within the [MDP] can be separated into two classes. (1) Minor Amendments, i.e., amendments that the [Director] finds are consistent with the intent and purpose of [the MDP] [FN21] and (2) ***644** Major Amendments, i.e., [include] a request for an alternative project or use that the [Director] finds is not presently included as an alternative project or use within the [MDP] and is a project or use which is inconsistent with and does not share the same or similar characteristics of an allowed use identified within the [MDP]."

> FN21. Minor Amendments are not subject to public hearings. They include "[c]hanges in development intensity or residential density that do not exceed the intensity or density established by the [MDP] and considered by the [MDP] EIR, such as lot line adjustments, a compatible land use change as provided in Section Three or adjustments to the local street system, are examples of minor adjustments that shall not require an extensive amendment process and shall be subject to the approval of the [Director] based on an approval recommendation of the Design Review Board."

Although the MDP authorizes the Director to "find[ ]" that a project conforms to the MDP, it does not authorize the Director to approve a project which is not within the MDP or has environmental consequences. That is, it does not grant authority to the Director to determine his own jurisdiction and hence does not authorize the Director to mistakenly find that the project is within the MDP.[FN22]

> FN22. As noted above, the MDP, as it provides, must be read in the light of the enactments adopted by the City Council jointly with the MDP and which condition its application, such as the Density Agreement, which requires the construction of multi-family units within the MX zone of Spanos Park West.

Thus, section 8.3 of the MDP provides that "[m]ajor site specific changes, such as a request for a project or use which is not consistent with and does not share the same or similar characteristics of an allowed use identified within the [MDP] may be approved, provided: (1) the Design Review Board for A.G. Spanos Business Park recommends to the City of Stockton that the City issue a Conditional Use Permit for the project or use; and (2) that the City of Stockton City Planning Commission approves the proposed project or use and issue a Conditional Use Permit." If the Planning Commission determination is appealed to the City Council its decision is subject to the conditions, *inter alia,*"[t]hat the proposed project is in conformance with the City's General Plan; [and] [t]hat the proposed project of use would not adversely impact the environment...." [FN23]

> FN23. The MDP does authorize the Planning Commission to review a proposed project for its environmental consequences but only if "all significant adverse impacts of the proposed project or use can and will be mitigated to less than significant." (MDP, § 8.3.)

For these reasons the MDP, read in the light of *Kleist* and its progeny, marks the line of review authority between projects that previously have been reviewed for their environmental consequences, which the Director may approve, and projects that have not, which he may not approve.

CONCLUSION And DISPOSITION

For the reasons set forth above, the Director's non-public determination that the Wal-Mart project was in substantial conformance with the MDP violated the multi-family residential requirements of MDP, as mandated by the General Plan and Density Transfer Development Agreement, violated the limited review authority delegated the Director by the City, and violated the provisions of CEQA that preclude the delegation of a public agency's authority to review a project that may have environmental consequences.

Accordingly, the Director's determination did not constitute an approval by a public agency as required by Public Resources Code section 21167, subdivision (a), and CEQA Guidelines. For that reason neither the determination nor the notice of determination

were valid and the period of limitations for challenging the determination did not commence.

***645** The decision of the trial court granting a peremptory writ of mandate barring all approvals of the development of the Wal-Mart superstore is affirmed. The plaintiffs are granted their costs on appeal. (Cal. Rules of Court, rule 8.276(a)(1).)

SIMS, J., concurs.

NICHOLSON, J., Dissenting.

The majority opinion reached its conclusion that the 35-day statute of limitations did not run by wrongly voiding a CEQA "approval." It did this by (1) claiming the City did not give timely notice of its approval even though the City did in fact give notice; and (2) improperly ruling in favor of plaintiffs' claims on the merits. Neither ground is a legitimate basis for tolling the statute of limitations. I therefore dissent.

1. *Approval and lack of notice*

Relying on *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 91 Cal.Rptr.2d 66(*County of Amador*), the majority opinion concludes a public agency's approval must not be defective procedurally in order for it to trigger the 35-day limitations period. *County of Amador*, however, did not so hold. There, the issue 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. We concluded there was no approval in that case because the public agency's action did not, as required by CEQA, " 'commit[ ] 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).)" (*County of Amador, supra,* 76 Cal.App.4th at p. 964, 91 Cal.Rptr.2d 66.)

Here, there is no dispute that the Planning Director's letter of December 15, 2003, which *was* included in the administrative record, committed the City to a definite course of action. 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. This was so even though the Director denoted his letter as a "Status Report." Thus, for purposes of CEQA, the letter was an approval.

Despite CEQA's clear definition of an approval, the majority opinion claims the Director's letter was not an approval because it was not made public at the time it was issued and thereby deprived the public of an opportunity to exercise its appeal rights under the MDP. 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.

Assuming the Director was required to give public notice of his ministerial approval, the failure to give notice excused plaintiffs only from having to exhaust their administrative remedies before bringing this action. CEQA requires no party to exhaust administrative remedies where "the public agency failed to give the notice required by law." (Pub. Resources Code, § 21177, subd. (e).) Thus, plaintiffs were under no requirement to appeal the Director's decision to the Planning Commission, as otherwise required by City ordinance, before bringing this action.

However, the failure to give notice 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. (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1150-1151, 249 Cal.Rptr. ***646** 439,disapproved on other grounds in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576, fn. 6, 38 Cal.Rptr.2d 139, 888 P.2d 1268 [posting of notice of exemption triggered 35-day statute of limitations even though plaintiff received inadequate notice of project and was excused from exhausting available administrative remedies].) The statute of limitations begins to run once the notice of exemption is posted following the agency's approval, regardless of whether plaintiffs had notice of the approval at the time it happened or had notice of administrative remedies accompanying that approval. (CEQA Guidelines, § 15112, subd. (c).)

Indeed, the Director not giving public notice here at the time of his approval is a red herring. The City's notice of exemption gave the plaintiffs notice of the approval and cured the Director's omission. Moreover, it extended to plaintiffs *35 days* to challenge the approval in court from the date of *the notice of exemption,* instead of the 10 days allowed from the approval date to challenge the approval before the planning commission. Plaintiffs suffered

no prejudice from not being notified of the Planning Director's letter prior to the posting of the notice of exemption.

In short, the majority opinion relies on an inapplicable case and the specious ground of notice to void an approval that meets the requirements of CEQA. The opinion's conclusion is contrary to CEQA.

2. *Ruling on the merits*

Besides improperly voiding the approval on the basis of notice, the majority opinion unacceptably rules on the merits of the case to overcome the bar imposed by the statute of limitations. It asserts the Director's decision was not an approval because he could not have been delegated authority, and in fact was not delegated authority, to approve a project such as this *that is inconsistent with the MDP and required further environmental review.* (Majority at pp. 634-35, 644.) This reasoning 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.

The majority opinion reaches its conclusion on this argument based on faulty premises. Contrary to the opinion's assertions, CEQA authorized the City to delegate limited authority to the Director, and the City in fact delegated that authority to the Director. First, CEQA authorizes the City to "assign specific functions to its staff," including the authority to determine "whether a project is exempt" and the "[f]iling of notices." (CEQA Guidelines, § 15025, subds. (a)(1), (6).)

Kleist v. City of Glendale (1976) 56 Cal.App.3d 770, 128 Cal.Rptr. 781, relied upon by the majority opinion, is not to the contrary. That case held the functions of considering an EIR or a negative declaration (prepared for projects not exempt from CEQA) and making findings in response to significant effects identified in a final EIR cannot be delegated. (*Id.* at pp. 775, 779, 128 Cal.Rptr. 781.) Nothing in *Kleist* prohibits a lead agency from delegating the authority the City delegated to the Director here-determining a project is exempt from CEQA.

Second, the City 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. A City ordinance assigns to the Director the responsibility to determine whether a project is exempt from CEQA. (Stockton Mun. Code, § 16-410.050, subd. B.) Also, the City's zoning ordinances vest in the Director the authority to approve projects that are consistent with an adopted MDP. (Stockton Mun. Code, § 16-208, subd. F.) Indeed, the ***647** 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.

Alleging 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. These allegations are not, however, grounds for tolling the statute of limitations. The statute applies to any decision the agency *improperly* made, not just to decisions properly made. The 35-day statute states it applies to an action "alleging a public agency has improperly determined that a project is not subject to [CEQA]," and that the statute commences to run upon the filing of a notice of exemption. (Pub. Resources Code, § 21167, subd. (d).) The majority opinion turns the statute of limitations on its head, arguing in effect the statute does not commence to run if the agency's decision violated CEQA. No California court has conditioned the running of a statute of limitations upon the validity of the complainant's allegations, as the majority opinion does here. Applying the statute of limitations as the majority opinion does obliterates the statute.

The majority opinion concedes the action was not brought within the 35-day limitations period. For the reasons expressed, I would conclude the Director's December 15 letter was an approval for purposes of CEQA, and I would reverse the decision of the trial court due to plaintiffs' failure to file their action within the time allotted by the applicable statute of limitations.

Cal.App. 3 Dist.,2007.
Stockton Citizens for Sensible Planning v. City of Stockton
157 Cal.App.4th 332, 68 Cal.Rptr.3d 632, 07 Cal. Daily Op. Serv. 13,624, 2007 Daily Journal D.A.R. 17,567

END OF DOCUMENT

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CALIFORNIA COURT OF APPEAL – THIRD APPELLATE DISTRICT

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 **January 7, 2008**, I served the following document(s) described as

PETITION FOR REVIEW

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

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Executed on **January 7, 2008**, at San Francisco, California.

James Livingston