Case No. S159690

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

v.

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

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

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

REPLY BRIEF ON THE MERITS OF REAL PARTY IN INTEREST AND APPELLANT A.G. SPANOS CONSTRUCTION, INC.

John Briscoe (53223)
Lawrence S. Bazel (114641)
Christian L. Marsh (209442)
Shona L. Armstrong (191685)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
Telephone: (415) 402-2700

Attorneys for Appellant
A.G. SPANOS CONSTRUCTION, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ADMINISTRATIVE REGULATIONS

I. INTRODUCTION

The only issue in a statute-of-limitations defense is whether the suit was filed within the time allowed. Here the analysis could hardly be simpler. The Legislature authorized a notice that triggers a 35-day statute of limitations. The City of Stockton issued that notice. This suit was not filed within 35 days. This suit is therefore barred by the statute of limitations.

Respondents seem to recognize that the majority below went too far, and barely mention the decision. By asserting that they are not arguing the merits, they acknowledge that if a statute of limitations is to have any effect it must preclude a determination on the merits.

Respondents hew to the decision of the trial court, which concluded that a City letter dated December 2003 was not sufficiently definite to be an approval of the project. But Respondents err, as the trial court did, by ignoring the definite statements of approval in the City's February 2004 notice (the "Notice"), and by not applying substantial-evidence review to the City's determination that it had approved the project.

Spanos argued, in its opening brief, that the City's factual determination that it approved the project is governed by substantial-evidence review, and that anything else related to the approval goes to the merits and cannot be considered after the statute of limitations has run. Respondents argue that there is a third way in which a court can determine whether a project has been approved without either applying substantial-evidence review or reaching the merits. But there is no third way. The arguments advanced by Respondents are either factual arguments contrary to the finding of the City, or go to the merits.

With these concepts in mind, the arguments advanced by Respondents' are readily dismissed. Respondents first try to get around the notice by arguing an approval is the "statute-triggering event". (Answer Brief on the Merits

("RB") at 22.) But this argument is directly refuted by the statute, which specifies that the *notice* triggers the running of the 35-day statute: "An action or proceeding alleging that a public agency has improperly determined that a project is not subject to [CEQA] shall be commenced within 35 days *from the date of the filing...of the notice*...." (CEQA §21167(d), emphasis added.)

Respondents next argue that §21167(d) can never be triggered by a ministerial approval. This argument is also directly refuted by the statute, which provides that the notice may be issued whenever an agency determines that a project is not subject to CEQA, and specifies that ministerial projects are not subject to CEQA.

Respondents devote most of their effort to an attack on the December 2003 letter, which they contend was not an approval. But they ignore the Notice, which announced the City's approval. They also ignore an admissible declaration from the City's Community Development Director (the "Director"), who testified that he approved the project. There is no doubt that the City in fact approved the project.

Next, Respondents turn to the Notice and argue that it was defective. They argue that "[a]nyone reading the Project description would have no clue that the Project was a big-box retail store". (RB at 43.) On the contrary, the Notice specifies that the project is "a retail use... the total parcel of which will measure roughly 22.38 acres" and includes a building of more than 200,000 square feet. (CITY2283.)

Respondents also argue that the Notice "misled the public by representing [that the project was in conformity with the master development plan]" when (according to Respondents) it was not. But this argument misconstrues the purpose of the statutory notice, which is to announce a decision made by the agency. Once the decision has been announced, those who may be affected by it must decide for themselves whether the decision was properly made. The Notice here clearly announced the City's decision,

and if Respondents wanted to challenge that decision they had to file suit within the 35 days.

Finally, Respondents argue that the City's approval was made without authority. But the staff person who approved the project indisputably has authority to approve projects consistent with the master development plan. Their real argument is not that he lacked authority, but that he made the wrong decision—an argument that goes only to the merits, and should not be considered as part of a statute-of-limitations defense.

II. RESPONDENTS PROVIDED A MISLEADING STATEMENT OF FACTS

Respondents omit key facts from their factual overview.

A. The City Was Required To Approve Projects Consistent With The MDP

Respondents omit any mention of the non-discretionary standard by which the Director was required to evaluate the project. The master development plan ("MDP") *required* him to approve all applications that were consistent with it:

> [D]evelopment in the Plan Area shall be subject to review and approval [by]...the Community Development Director for consistency with the Land Uses and Development Standards of the Master Development Plan.
>
> All applications that comply with the...Master Development Plan and the [City standard specifications] *shall be reviewed and approved by the City.*

(CITY1039, 1159, emphasis added.) The Director, therefore, properly concluded that his approval of a proposed project consistent with the MDP was ministerial, not discretionary. (*See* CITY2283 (Notice announces that City's determination was "a ministerial action not subject to CEQA").)

B. The MDP Allowed For A Retail Store Of 207,000 Square Feet

Respondents do not provide a fair characterization of the MDP. They argue that each parcel within the plan area was "meant to be developed according to the primary use" identified in the plan. (RB at 4.) But although the plan specifies an intended "primary" use for each parcel, it does not restrict the use of any parcel to the primary use. On the contrary, it provides a list of "optional" land uses for each parcel, declares that its primary purpose is to provide "maximum flexibility", and describes the conceptual site plan (on which Respondents rely) as only a "possible pattern of uses". (CITY1046, 1071; *see* RB at 4, citing CITY1072.) Table 3-1, which Respondents cite in support of their assertion about primary use, includes a column marked "Optional Land Uses" next to the one marked "Primary Land Use". (CITY1073-1076; *see* RB at 4, citing CITY1075-1076.) Among the optional uses identified for parcels 17 and 17a are "Office". (CITY1075-1076.) The "Office" use is specifically defined to include retail stores:

> The permitted uses in the Office land use designation in the Plan Area are set forth in Section 6.6, infra. Office uses developed in this area include business or professional office, research and development and *retail*.
>
> ....
>
> **6.6 Office**
>
> *Permitted Uses*
>
> ...
>
> ▪ *Retail stores*

(CITY1099, 1100, some emphasis supplied.) Table 3-1 in the master development plan authorizes 90,000 square feet for Office uses in parcel 17, and 135,000 square feet for Office uses in parcel 17a. (CITY1075-1076.) The

total for these two parcels is 225,000 square feet of Office uses, more than the approximately 207,000 square feet to be used by the project. (*See* CITY2283.)

When reviewing the project, the Director would have known that he was required to approve the project if it was consistent with the MDP. He would have observed that the MDP established flexibility as its principal purpose, provided for optional uses on each parcel, allowed for 225,000 square feet of Office uses on parcels 17 and 17a, and defined Office uses to include retail. He would have concluded that the project consisted of 207,000 square feet of Office uses (as defined by the MDP), which was well within the 225,000 square feet allowed. In these circumstances, it is not surprising that he found the project to be consistent with the MDP.

Respondents argue that "[t]he retail square foot limit for parcels 17 and 17a *as shown on Table 3-1* of the MDP was zero for parcel 17 and 50,000 square feet for parcel 17a—well below the 207,000 square feet of the Wal-Mart plans." (RB at 9, emphasis added.) But although table 3-1 refers to a "Retail" use, the master development plan does not provide for a Retail use, but rather allows for retail development under either of two use designations, Office and Commercial. (CITY1099, 1100.) When table 3-1 refers to "Retail" uses, it can only be referring to the use designated as "Commercial", which does not appear in the table. Because the plan allows for 225,000 square feet of retail under the Office designation, the argument that retail is limited to 50,000 square feet is wrong. The trial court made the same error in its analysis of the total square footage allocated to retail uses. (*See* AA1544.)

C. The Density Agreement Is Irrelevant

Respondents argue that Spanos entered into a density agreement with the City, and that the project "necessitate[ed] a request to amend the Density Agreement". (RB at 4, 18.) But the Director was required to approve projects consistent with the MDP, and nothing in the MDP made approval contingent

on the density agreement. The density agreement was therefore irrelevant to the determination of whether the project was consistent with the MDP, and to the City's approval of the project.[1]

III. THE LEGISLATURE ESTABLISHED THE NOTICE PROCEDURE TO ELIMINATE DISPUTES ABOUT WHEN A PROJECT HAD BEEN APPROVED

In its opening brief, Spanos argued that the 35-day statute of limitations in CEQA §21167(d) could only have been enacted for the purpose of providing certainty for projects not subject to CEQA. (Opening Brief Of [Spanos] ("SpanosOB") at 10, 9-12.) Respondents do not disagree. In fact, Respondents say nothing about Legislative intent, other than a passing reference to the general rule that CEQA is to be interpreted broadly. (RB at 21; *but see* SpanosOB at 9-10 (discussing exceptions to general rule.)

A close look at the 35-day statute of limitations, in context, shows that the Legislature recognized that there would be difficulty determining when a project was approved, and devised the notice procedure specifically to eliminate those disputes. CEQA §21167(d) includes three distinct statutes of limitations that apply (1) when notice has been issued, (2) when notice has not been issued and there has been a "formal decision" to approve a project, and (3) when notice has not been issued and there has not been a formal decision. The two that apply when notice *has not* been issued both extend for 180 days, but they start from different dates. When there has been a "formal decision", the clock runs from the date of that decision. But when there has not been a formal decision, the clock runs "from the date of commencement of the project". When notice *has* been issued, however, the deadline is shortened to 35 days, and it runs from the date of the notice.

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[1] The density agreement characterizes itself as "independent" of "other land use approvals which have been or may be issued or granted by City". (CITY1926.)

These distinctions can have only one purpose, which is to establish deadlines appropriate for the nature of the event. The Legislature recognized that an interested person might not be able to learn of an approval made without a formal decision, and therefore delayed the start time until commencement of the project, which itself would provide notice. When the approval is made by a formal decision, an interested person should be able to learn of the decision, and the clock starts ticking on the date of the decision. When the agency uses the notice procedure established by the statute, all interested persons are put on notice, and the time is shortened to only 35 days from the date of the notice.

The notice, therefore, is intended to eliminate disputes about when the clock started to tick, and force anyone and everyone who has an interest in the matter to act fast or refrain forever. A court should therefore refuse to look behind the notice, and should enforce the 35-day statute of limitations as the Legislature intended it.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE CITY'S DETERMINATION THAT IT APPROVED THE PROJECT; ANY QUESTION ABOUT WHETHER THE APPROVAL WAS PROPER GOES TO THE MERITS

The Notice leaves no doubt that the City in fact approved the project. It refers to the project as "Site Plan, Grading Plan, Landscape Plan, Building Elevations and Design *Approval*", and certifies that the "record of *project approval*" is available to the general public. (CITY2283-2284, emphasis added.) But Respondents do not acknowledge that the Notice documents the City's approval. They instead present their own interpretations of the facts and law. All are wrong.

A. Factual Issues Are Subject To Substantial-Evidence Review

Respondents accuse Spanos of taking "the inconsistent position . . . that the standard of review is substantial evidence." (RB at 21 fn.20.) But, as

Spanos correctly reported, substantial-evidence review applies to factual determinations like the City's determination that it approved the project. (SpanosOB at 21, citing *Western States Petroleum Association v. Superior Court* ("*WSPA*") (1995) 9 Cal.4th 559, 571.)

B. The "Statute-Triggering" Event Is The Notice

Respondents argue that §21167(d) makes "an 'approval' the statute-triggering event". (RB at 22, capitalization removed.) This argument is not true for the 35-day statute, which provides that that an action "shall be commenced within 35 days from the date of the filing...*of the notice*...." (CEQA §21167(d), emphasis added.) The relevant statute-triggering event is therefore the notice, not the approval.

C. The Statute Of Limitations Applies To Ministerial Approvals

Respondents argue that the "statute of limitations is not triggered by a ministerial design review process". (RB at 25, capitalization removed.) This argument is directly refuted by §21167(d), which applies to projects "not subject to" CEQA, and by §21080(b)(1), which identifies ministerial projects as activities not subject to CEQA. (*See* SpanosOB at 8.)

D. No Formal Approval Is Required

Respondents imply that an approval must be a formal decision: "Beyond...references to...'a formal decision,' CEQA itself does not define the term 'approval.'" (RB at 29.) But CEQA §21167(d) specifically includes limitations that apply when the approval is not a formal decision. An approval, therefore, does not need to be a formal decision.

E. Even Under *County of Amador*, The Relevant Question Is Whether In Fact The City Approved The Project

Respondents seem to acknowledge that the question of whether the City's approval was legally proper goes to the merits, and therefore cannot be considered in a statute-of-limitations defense. But they refuse to accept substantial-evidence review. They argue instead for a third way, but there is no third way. As the dissent below recognized, the question in *County of Amador* was not "whether the statute of limitations ran because the approval was procedurally defective; it was whether the statute ran when there had been no approval at all." (*Stockton Citizens for Sensible Planning v. City of Stockton* (2007) 157 Cal.App.4th 332, 350-351, citing *County of Amador v. El Dorado Water Agency* (1999) 76 Cal.App.4th 931; *see* SpanosOB at 18-19.)

Respondents rely principally on the *Miller* case, which they cite as "one of the few cases to discuss when an 'approval' occurs for a private project". (RB at 31-33, citing *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1143.) In *Miller*, the court had to interpret an ambiguous administrative record in which either of two documents could have been an approval that started a 180-day clock. (*Miller* at 1143.) But *Miller* acknowledges that a court can engage in this kind of analysis only on an ambiguous record. If the agency had made a clear determination, then "[o]ur standard of review in that instance would have been merely to determine whether substantial evidence supported the agency's determination." (*Id.* at 1141 fn.20.) Here the City has made a clear determination, and substantial-evidence review applies.

F. The Notice Establishes The City's Approval, As Does The Director's Declaration

Respondents argue that the December 2003 letter did not provide the City's approval of the project. (RB at 32-38.) Respondents are wrong for three reasons. First, they know that the City did indeed provide its approval in the December 2003 letter. Second, the proper focus of the inquiry is not the

December 2003 letter, but rather the Notice, which clearly announced that the project had been approved. Third, despite their assertion to the contrary, Respondents argue the merits.

The City filed a declaration with the trial court in which the Director testified that he "approved the Project as being consistent with the [MDP]" and that "the City was irrevocably committed to the Project." (AA991, 990-994.) He testified that he wrote the December 2003 letter to provide notification "of [his] approval of the Project". (AA992.) In February 2004 he initialed the letter from Wal-Mart's counsel "confirming that a decision had been made by me...approving the project". (*Id.*)[2] Extra-record evidence is available for some purposes in CEQA cases. (*WSPA*, 9 Cal.4th at 575-576.) Here, extra-record evidence should have been admitted for the purpose of determining when the City provided its approval. As Respondents acknowledge, "'[t]he exact date of approval of any project is a matter determined by each public agency...'". (RB at 30, citing 14 Cal. Code Reg. (hereafter "Guidelines") §15352(a).)

Respondents come close to admitting that the City in fact approved the project when they argue that this Court is not "bound by the City's adamant, but mistaken, view of the import of the [December 2003 letter]". (RB at 32.)

Respondents argue that the December 2003 letter "was not a statute-triggering 'approval'". (RB at 32-35.) But even under *County of Amador* the relevant question is not whether *that letter* was an approval, but rather whether the City approved the project *at any time* before it issued the notice. Respondents and the trial court assert that the letter is too uncertain and conditional to be an approval. (RB at 34; AA1544.) But there is nothing

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[2] Respondents argue that the administrative record does not contain an initialed copy of the letter. (RB at 12 fn.13.) But it does. (*See* CITY2576 (located at AA1284 within City's supplement to record).)

uncertain or conditional about the Notice. If they had considered the Notice, they would have found all the certainty needed.

Respondents assert that that "whether conduct constitutes a CEQA approval presents a question of law *independent of the merits*". (RB at 21, emphasis added, capitalization modified.) But their main argument—that the Director could not have approved the project "because the MDP gave him no role in making discretionary...decisions" (RB at 34)—is squarely on the merits. Any argument beyond the pure question of whether there was in fact an approval necessarily reaches the merits because it evaluates some aspect of the legal propriety of the approval. It thereby violates §21167(d), which requires any action "alleging that a public agency has improperly determined that a project is not subject to [CEQA]" be brought within 35 days after notice is issued.

By demonstrating how easily a party can blur the line between the factual question and the merits, Respondents provide support for Spanos' argument that a court should not look behind the notice even to consider whether there was in fact an approval.(*See* SpanosOB at 12-20.)

V. THE NOTICE PROVIDED ADEQUATE NOTICE

"Whether the statutes require the type of notice claimed...[is an issue] that must be resolved by ascertaining the legislative intent." (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 919.) Here the statute required only the most minimal notice: "[w]henever a local agency determines that a project is not subject to [CEQA]...the agency may file a notice of the determination...." (CEQA §21152(b).)[3] Minimal notice is appropriate here

[3] Guidelines §15062 require notices of *exemption* to include a brief description of the project, the location of the project, and a finding that the project is exempt. Exempt projects are a subset of projects *not subject to CEQA*. (CEQA §21080(b).)

because its purpose is simply to announce the agency's determination that a project is not subject to CEQA. In *City of Santa Monica*, the Court held that the notice was in substantial compliance with the statute and did not invalidate the notice, even though it did not comply with statutory requirements. (*Santa Monica* at 925, 928.) Here the Notice complies with the statute. The Notice was valid.

Respondents argue that "[a]nyone reading the Project description would have no clue that the Project was a big-box retail store". (RB at 43.) On the contrary, the Notice specifies that the project is "a retail use...the total parcel of which will measure roughly 22.38 acres" and includes a building of more than 200,000 square feet. The Notice announces that the design of the building and site are consistent was the MDP, that this determination is a ministerial project not subject to CEQA, and that the "record of project approval" is available to the public. (CITY2283-2284; *see Cumming v. City of San Bernardino Redevelopment Agency* (2002) 101 Cal.App.4th 1229, 1235 ("public record gave notice sufficient to start the statute of limitations running"), distinguishing *Concerned Citizens of Costa Mesa v. 32nd Dist. Agric. Ass'n* (1986) 42 Cal.3d 929.)[4]

In any case, Respondents cannot claim any prejudice from the project description, because counsel for Respondents understood exactly what it referred to. (*See Santa Monica* at 926 fn.7.) While the 35-day clock was still ticking, he wrote the City and referred to the "Wal-Mart Supercenter" at the correct location. (SpanosOB at 6.)[5]

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[4] Respondents cite *Costa Mesa* for the proposition that "the public had a right to presume...the project to be the same as the [MDP]." (RB at 29.) But in *Costa Mesa* the city never provided any notice of the project in its final form, whereas here the Notice clearly identified the project in its final form.

[5] Respondents assert that this statement is incorrect. (RB at 13 fn.15.) But the letter from Respondents' counsel, which is dated within 35 days of the Notice, refers to a "Wal-Mart Supercenter" at the correct location. (CITY2314.)

Otherwise, Respondents try to make their disagreement with the substance of the City's decision into a procedural defect. They argue that the Notice "misled the public by representing [that the project was in conformity with the master development plan]" when (according to Respondents) it was not. (RB at 44.) But the Legislature plainly did not intend the notice to be a guarantee of the correctness of the agency's decision, just an announcement that the determination had been made. Here the Notice accurately announced the City's determination.

Respondents argue that "[t]he principal aspect of the Project consisted of re-designating high-density housing for retail use." (*Id.*) No, it did not. The MDP specifically included retail use as an optional use for the parcels. (See section II, above.)

Respondents argue that the Notice was defective because it did not inform the public that "If the City did not amend the Density Agreement, the Supercenter could not be built". (RB at 44, citing no authority for the proposition.) But the City could not have believed this assertion to be true. The MDP does not refer to the density agreement, and the Director approved the project without reference to the density agreement. (See section II.C, above.) The City had no obligation to make statements it believed were false.

The cases cited by Respondents are readily distinguishable. (*See* RB at 41-42.) In *International Longshoremen* the notice was found defective because it did not include a statement explaining why the project was exempt. (*International Longshoremen's and Warehousemen's Union v. Board of Supervisors* (1981) 116 Cal.App.3d 265, 273.) Here the Notice clearly explained the Director's determination. *McQueen* is not a statute-of-limitations case, but rather an exhaustion-of-administrative-remedies case, and the language quoted by Respondents concerns whether plaintiff had sufficient notice of the hazardous substances to be required to exhaust. (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1150-1151.) Here the Notice

sufficiently described the approval of a very large retail store, which Respondents knew to be a Wal-Mart Supercenter.

The Notice was required only to announce the City's determination that the project was not subject to CEQA. It did that well.

VI. THE DIRECTOR HAD AUTHORITY TO APPROVE THE PROJECT

As the majority below recognized, the MDP "authorizes the Director to approve a project which substantially conforms to the MDP". (*Stockton Citizens* at 348.) The Director also obtains his authority from the Stockton ordinance authorizing master development plants, which gave him "authority to interpret" the MDP, "to determine if the proposed use, while not specifically listed as an allowable use, would be consistent with" the MDP, and to "approve an implementing site plan review that is consistent" with the MDP. (AA119, §16-208(C), §16-208(F)(2).) Nothing in CEQA prohibits the delegation of ministerial determinations, and the Guidelines specifically allow them. (Guidelines §15022(A)(12), §15025(A).) The Director therefore had authority to approve the project.

The majority nevertheless asserts that 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* at 349.) But this assertion confuses authority with jurisdiction. Superior courts also do not have *authority* to make a wrong decision, but they have *jurisdiction* to decide a broad range of legal and factual issues. "Lack of jurisdiction...means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." (*Kristine H. v. Lisa R.* (2005) 37 Cal.4th 156, 166.) Here the Director had power to determine whether the project was consistent with the MDP. He therefore had jurisdiction. If his decision was incorrect, and therefore beyond his authority, it had to be challenged within the statute of limitations.

VII. CONCLUSION

The court of appeal should be reversed.

Dated: July 14, 2008

BRISCOE IVESTER & BAZEL LLP

By: 

Lawrence S. Bazel
Attorneys for Real Party In Interest and Appellant
A.G. SPANOS CONSTRUCTION, INC.

CERTIFICATE OF WORD COUNT

The text of this brief consists of 4,084 words as counted by Microsoft Word 2003.

Dated: July 14, 2008

BRISCOE IVESTER & BAZEL LLP

By: _____
Lawrence S. Bazel

PROOF OF SERVICE

CALIFORNIA SUPREME COURT

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

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

REPLY BRIEF ON THE MERITS OF REAL PARTY IN INTEREST AND APPELLANT A.G. SPANOS CONSTRUCTION, INC.

on the following parties:

Robert J. Stump, Jr.
Judy V. Davidoff
Arthur J. Friedman
Sheppard, Mullin, Richter & Hampton LLP
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111
Telephone: 415-434-9100
Attorneys for Real Party in Interest and Appellant Wal-Mart Stores, Inc.

Karin Dougan Vogel
Sheppard, Mullin, Richter & Hampton LLP
501 West Broadway, 19th Floor
San Diego, CA 92101
Telephone: 619-338-6500
Attorneys for Real Party in Interest and Appellant Wal-Mart Stores, Inc.

William D. Kopper, Esq.
Law Offices of William D. Kopper
417 E Street
Davis, CA 95616
Telephone: 530-758-0757
Facsimile: 530-758-2844
Attorney for Respondent Stockton Citizens For Sensible Planning, Rosemary Atkinson, Paul Diaz and Susan Rutherford Rich

Office of the City Attorney
City of Stockton
Richard E. Nosky, Jr.
Guy D. Petzold
425 North El Dorado Street
Stockton, CA 95202
Telephone: 209-937-8333
Attorneys for Defendant City of Stockton

Maxwell M. Freeman
Thomas H. Keeling
Michael L. Gurev
Chad R. Vanisko
Freeman, D'Aiuto, Pierce, etc.
1818 Grand Canal Blvd., Suite 4
Stockton, CA 95207
Telephone: 209-474-1818
Facsimile: 209-474-1245
Attorney for Respondent Stockton Citizens For Sensible Planning, Rosemary Atkinson, Paul Diaz and Susan Rutherford Rich

Charity Kenyon
J. William Yeates
Keith R. Flanders
KENYON YEATES LLP
3400 Cottage Way, Suite K
Sacramento, CA 95825
Phone: 916-609-5000
Fax: 916-609-5001
Attorney for Respondent Stockton Citizens For Sensible Planning, Rosemary Atkinson, Paul Diaz and Susan Rutherford Rich

X **BY OVERNIGHT DELIVERY:** On the date written above, I delivered the Federal Express package to a location authorized by Federal Express to receive documents for pickup. The package was placed in a sealed envelope or package designated by Federal Express with delivery fees paid or provided for, addressed to the persons on whom it is to be served at the addresses shown above.

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

Margaret Howlett