

Case No. S159690

SUPREME COURT COPY

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FILED

**In The Supreme Court
of the State of California**

FEB 04 2008

Frederick K. Ohlrich Clerk

Deputy

WAL-MART STORES, INC.,

Defendant and Petitioner,

v.

STOCKTON CITIZENS FOR SENSIBLE PLANNING,

Plaintiff and Respondent.

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 Sainers

REPLY IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

As does the majority opinion, Stockton Citizen's Opposition argues – on the merits – that the Stockton Community Development Director improperly approved the proposed Wal-Mart project as consistent with the Master Development Plan (MDP), and therefore the CEQA statute of limitations does not apply.

Whether the majority's opinion is correct on the merits of Stockton Citizen's claim is beside the point. The issue is whether the trial court should have considered and ruled upon the merits of Stockton Citizen's complaint, given its untimely filing. As to this critical issue, the real party's opposition offers neither legal authority nor rationale. This Court's review is essential to clarify that courts should not apply the statute of limitations in CEQA lawsuits by first examining the merits of the underlying claim. Absent review, the majority's opinion will result in serious confusion under CEQA and disruption in land use planning throughout California.

II. DISCUSSION

A. THE MAJORITY'S MERITS-BASED ANALYSIS NULLIFIES THE STATUTE OF LIMITATIONS

The crux of the Opposition is that the Director's approval of the Wal-Mart project was not simply improper, but rather was "void" and outside of his "jurisdiction." (Opp., p. 4.) Stockton Citizens claims the Director lacked "jurisdiction" because the MDP "does not authorize the Director to approve a project which is not within the MDP

or has environmental consequences." (Opp., p. 6.) The only legal authority the Opposition cites for this proposition, however, is the majority's decision itself. (*Id.*).

As the dissenting justice notes, the majority opinion holds the Director lacked jurisdiction because his decision was "mistaken." (See *Stockton Citizens for Sensible Planning v. City of Stockton* (2007) 157 Cal.App.4th 332, 349 ("That is, [the MDP] does not grant authority to the director to determine his own jurisdiction and hence mistakenly find the project is within the MDP").) The majority reasons that if a court finds the Director made the right decision, he acted within his authority under the MDP, the decision constitutes an approval by a "public agency," and the limitations period starts to run. On the other hand, if a court finds the Director made the wrong decision, he acted outside his authority under the MDP, there is no approval by a "public agency," and the limitations period never starts running.

The dissent correctly noted that the majority's approach is irrational, stating : "The majority opinion turns the statute of limitations on its head,": "No California court has conditioned the running of a statute of limitations upon the validity of the complainant's allegations, as the majority does here. Applying the statute of limitations as the majority opinion does obliterates the statute." (*Id.* at p. 353 (Nicholson, J., Dissenting).)

B. REGARDLESS OF THE MERITS, ANY CHALLENGE TO THE DIRECTOR'S AUTHORITY STILL HAD TO BE *TIMELY FILED*

The Opposition argues that an administrative agency has only such powers as have been conferred upon it by the Constitution or statute. (Opp., p. 4.) Accepting that premise as true, however, the Director was expressly authorized to rule on Wal-Mart's application. The CEQA Guidelines expressly authorize public agencies to delegate to staff specific functions, including, as occurred here, a determination that a proposed project is exempt from further CEQA review. (Guidelines, § 15025(a)(1) and (5).) In addition, Stockton's Municipal Code vests with the Director the authority to approve a project if he determines it to be consistent with the MDP. (SMC § 16-208(F)(2).) Moreover, the Municipal Code expressly authorizes the Director to interpret the MDP:

Interpretation. The Community Development 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.

(SMC § 16-208(C).) Contrary to the majority's holding, the Director was expressly authorized to rule on Wal-Mart's application.

A party may assert that the Director exceeded his authority by filing an action in court. Such a legal challenge is a valid process for voiding the approval, but only if that challenge is filed timely. As the dissent correctly stated: "[t]he 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 the statute commences to run upon the filing of the notice of exemption. (Pub. Resources Code, § 21167, subd. (d))." (*Stockton Citizens, supra*, 157 Cal.App.4th at p. 353 (emphasis in original).)

C. REVIEW IS NECESSARY TO CURB THE UNCERTAINTY AND CONFUSION UNDER CEQA CREATED BY THE MAJORITY'S DECISION

The majority's opinion introduces significant confusion and uncertainty into the rules governing the statute of limitations applicable to CEQA lawsuits. Unless this court grants review, public agencies will not know whether the statute of limitations for a CEQA challenge has expired. Under the majority's reasoning, any staff-level agency action intended to serve as an approval for purposes of CEQA will be vulnerable to legal challenge – possibly long after the statute of limitations has expired – if a court were to reach the merits of that challenge and determine that the approval was "mistaken."

While the majority's decision has serious implications if applied by courts in other legal contexts, its disruptive impact on trial courts' application of statutes of limitations in CEQA lawsuits is particularly troubling in light of well-settled law and public policy mandating the prompt resolution of CEQA challenges. (See *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 111.)

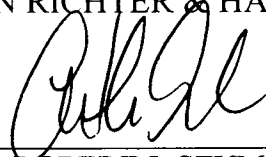
III. CONCLUSION

For these reasons, Wal-Mart respectfully urges the Court to grant review to resolve this important issue of law and provide guidance to public agencies charged with implementing CEQA's requirements, as well as much needed certainty in the land use planning and approval process.

DATED: February 4, 2008

SHEPPARD MULLIN RICHTER & HAMPTON LLP

By



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CERTIFICATE OF WORD COUNT

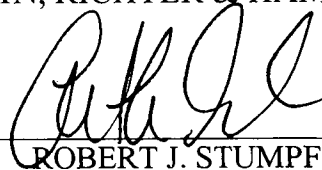
(Cal. Rules of Court, Rule 8.504 (1)(d))

The text of this petition consists of 973 words, including all footnotes, as counted by the computer program used to generate this petition.

DATED: February 4, 2008

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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PROOF OF SERVICE
CALIFORNIA SUPREME COURT

I am employed in the County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is Four Embarcadero Center, 17th Floor, San Francisco, California 94111-4109.

On **February 4, 2008**, I served the following document(s) described as

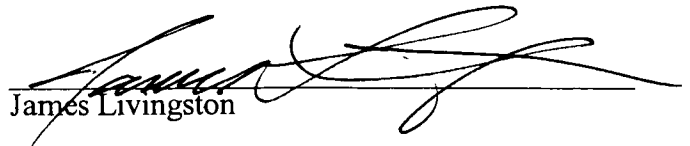
REPLY IN SUPPORT OF PETITION FOR REVIEW

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

See attached list.

- BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- BY OVERNIGHT DELIVERY:** I served such envelope or package to be delivered on the same day to an authorized courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier.
- BY FACSIMILE:** I served said document(s) to be transmitted by facsimile pursuant to Rule 2.306 of the California Rules of Court. The telephone number of the sending facsimile machine was 415-434-3947. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The sending facsimile machine (or the machine used to forward the facsimile) issued a transmission report confirming that the transmission was complete and without error. Pursuant to Rule 2.306(g)(4), a copy of that report is attached to this declaration.
- BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the office of the addressee(s).
- STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
- FEDERAL:** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on **February 4, 2008**, at San Francisco, California.


James Livingston

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