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., WAL-MART PROJECTS, INC.,

Real Parties in Interest and Appellants.

After a Decision by The Court Of Appeal
Third Appellate District (San Joaquin)
Civil No. C050885

REPLY BRIEF ON THE MERITS OF APPELLANT WAL-MART PROJECTS, INC.

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I. INTRODUCTION

In their answer brief ("AB"), plaintiffs note that Wal-Mart does not address whether plaintiffs' CEQA claims have merit. That is true, and for good reason. The issue on review is not the merits of plaintiffs' claims, but whether a trial court is free to use its assessment of the merits to avoid ruling that the plaintiffs' claims are barred by the statute of limitations. In particular, may a trial court find an approval under CEQA was invalid on the merits, and on that basis, incapable of triggering the start of the limitations period? The answer, both in general and under the plain meaning of the CEQA limitations provisions, is no.

Plaintiffs attempt to avoid this conclusion in three ways. First, they make the anomalous argument, not raised below, that the Director's December 15, 2003 letter (AA 771-772) was a ministerial determination that could not trigger *any* statute of limitations because "the prior approved MDP was not changed or modified; nor was a new project approved." (AB at p. 27.) At best, this argument is a non sequitur. The Wal-Mart Project was, in fact, a new "ministerial project," based on the Director's determination that it was consistent with the MDP, and thus encompassed within the scope of uses contemplated and analyzed under CEQA when the City adopted the MDP. (See AA 92.) Plaintiffs' lawsuit attacking this determination as "improper" was thus subject to the

limitations periods in Public Resources Code section 21167, subdivision (d).[1]

Second, plaintiffs argue that the Director's approval was not really an approval, i.e., a decision which "commits the agency to a definite course of action," because it was "invalid" in several respects, and hence could not start the statute of limitations running. This argument is wrong on the law and mostly consists of a potpourri of merits-based arguments, some old and others raised for the first time in this Court. None has merit and all miss the critical point: merits arguments have no bearing on the statute of limitations.

Third, plaintiffs attack the form of the Director's letter and, for the first time, the technical sufficiency of the Notice of Determination ("NOD"). These arguments, too, miss the mark. On their face and consistent with well-established authority, both the Director's approval and the later-filed NOD triggered the commencement of the applicable statutes of limitation. The NOD also removes any doubt that the City intended the Director's letter as an "approval" of the Wal-Mart Project.

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[1] All statutory references are to the Public Resources Code, unless otherwise noted.

In the end, nothing in plaintiffs' brief changes the fact that regardless of the merits of their claims, plaintiffs were required to bring their CEQA lawsuit within 35 days after the City filed the NOD or, at the latest, within 180 days after the City approved the Project. Plaintiffs did not meet either deadline, and their claims are time-barred under section 21167, subdivision (d). Any other conclusion would disregard the straightforward meaning of the statute and seriously disrupt well-established procedures and land use practices.

II. DISCUSSION

A. Plaintiffs' Argument that a "Ministerial Design Review Process Cannot Trigger the Statute of Limitations" Is Plainly Wrong

Plaintiffs' lead argument is that because the Director made a "ministerial determination" that the Wal-Mart Project was consistent with the MDP, no CEQA statute of limitations applies, as a matter of law. (AB at pp. 25-29.) If plaintiffs are arguing that no ministerial determination can ever start a CEQA limitations period running, they are obviously mistaken. The statute of limitations in section 21167, subdivision (d), applies to actions "alleging that a public agency has improperly determined that a project is not

subject to [CEQA] pursuant to subdivision (b) of Section 21080 . . ."[2] Subdivision (b) of section 21080 is the exemption from CEQA for, among other things, "[m]inisterial projects proposed to be carried out or approved by public agencies."

Plaintiffs' complaint alleging that the City of Stockton improperly determined that the Wal-Mart Project was consistent with the MDP, and hence "not subject to CEQA review" (AA 92), fits squarely within this statutory language. Stated another way, plaintiffs' complaint is unquestionably an action "alleging that a public agency has improperly determined that [the Wal-Mart] project is not subject to [further CEQA review]." As such, it is subject to the limitations periods in section 21167, subdivision (d).

Alternatively, if plaintiffs are only arguing that the ministerial determination in *this* case did not start the statute of limitations running, they are still wrong. Although far from clear, plaintiffs' argument seems to be that the Director's December 15, 2003 letter could not trigger the start of any CEQA limitations period because "the prior-approved MDP was not changed or modified; nor was any new project approved." (AB at p. 27.) Plaintiffs are half right. The Director's determination did not change or

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[2] At times, plaintiffs refer to the statute of limitations in section 21167, subdivision (a). Because plaintiffs did not argue below that subdivision applies, rather than subdivision (d), the Court should decline to consider it. (Cf. Cal. Rules of Court, rule 8.500(c)(1).)

modify the MDP, but his determination was, in fact, an approval for a "new project." Thus, it was a determination that started the statute of limitations running. Here is why:

One of the important objectives of the City's MX ordinance was to streamline the review of later site-specific projects (such as the Wal-Mart Project) once an MDP has undergone environmental review and been approved. (Stockton Mun. Code, § 16-200, subd. (A), at AA 785 and RJN, Ex. A.) The MDP Ordinance authorizes the Director to approve any site-specific project he determines to be consistent with the MDP. (Stockton Mun. Code, § 16-208, subds. (C), (F)(2), at AA 787.1 and RJN, Ex. A.) In October 2003, Wal-Mart submitted such a site-specific project application (AR 2269-2270), which was then subject to review by the City's Design Review Board and the Director for that purpose and that purpose only. These determinations constitute a separate "project" under section 21065 because they were activities which may cause "either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" that "involve[] the issuance to a person of. . . [an] entitlement for use by one or more public agencies."

Thereafter, the Director determined the Wal-Mart Project was consistent with the MDP, i.e., within the scope of uses contemplated and analyzed under CEQA in adopting the MDP. (AR 2273-2274.) Thus, in

accordance with section 21080, subsection (b)(1), and sections 15300, 15300.1 and 15369 of the CEQA Guidelines, the Project was a "ministerial project" exempt from further environmental review.[3] Contrary to the plaintiffs' argument (AB at p. 29), the Director did not "change" the MDP. He simply exercised his authority under the MDP and the applicable City ordinance (Stockton Mun. Code, § 16-208) to determine whether the Project was consistent with the MDP and thus exempt from further CEQA review. (AA 787-787.1 and RJN, Ex. A.)

The City's filing of the NOD thus triggered the 35-day statute of limitations in section 21167, subdivision (d), for actions alleging that a project is not subject to CEQA. That this was a "ministerial" determination makes no difference. Nor, for purposes of the statute of limitations, does it matter whether the Director's determination was right or wrong. Regardless of the merits, plaintiffs' lawsuit is time-barred under the plain meaning of CEQA.

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[3] These Guidelines state that ministerial projects are among the classes of projects "which have been determined not to have a significant effect on the environment and which shall, therefore, be exempt from the provisions of CEQA."

B. The Director's Letter Was An "Approval" that Started the Statutes of Limitation Running

Next, plaintiffs argue that the Director's December 15 letter was not an "approval" under CEQA because it was not a decision that, in the words of the CEQA Guidelines, "commits the agency to a definite course of action," nor was it a "legally binding action." (AB at pp. 29-35.) This argument is without merit.

1. An Agency "Approves" a Project When It *Intends* to Commit Itself to Proceeding With the Project

At the threshold, the authorities plaintiffs cite on this point demonstrate that for purposes of the statute of limitations, the relevant inquiry is not whether an approval is "binding" in the sense of being technically correct or free from legal challenge, but whether the agency in fact *intended* to commit itself to proceeding with the project. In making this determination, courts should defer to the agency's own characterization of its actions. (See *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497.) This principle is also consistent with section 15352(a) of the CEQA Guidelines, which provides that the exact date of an approval is a matter to be determined by each public agency, according to its own rules, regulations and ordinances.

For example, in *City of Vernon v. Board of Harbor Commissioners* (1998) 63 Cal.App.4th 677, the trial court held that the

agency's certification of an EIR following its execution of a "Statement of Intent" in support of the project violated CEQA's requirement that environmental review be performed before the agency's approval of the project. (*Id.* at pp. 686-687.) The court of appeal reversed, stating that the trial court "apparently used the word 'approval' in the broad sense of esteem, rather than in the sense of an official act granting a permit or recognizing a right." (*Id.* at p. 688.) It described the relevant legal standard as follows: "[t]he agency commits to a definite course of action not simply by being a proponent or advocate of the project, but by agreeing to be legally bound to take that course of action." (*Id.*) Thus, the relevant inquiry concerns the intent of the agency (i.e., did the agency intend to commit itself to the project). The evidence in *City of Vernon* revealed that the agency had not intended to commit itself to the project. (*Id.* at p. 690.)

The two additional cases plaintiffs cite also illustrate this point. In *Concerned McCloud Citizens v. McCloud Community Services District* (2007) 147 Cal.App.4th 181, the court held that the evidence did not demonstrate that the agency intended to commit itself to the project. And the agreement at issue expressly provided that the parties would not be bound until the process of complying with CEQA was completed. (*Id.* at 193.) Similarly, in *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th

1118, 1143, the court concluded, as an evidentiary matter, that the evidence "did not reflect an intention by the agency to commit itself to the project."

In the present case, by contrast, the record emphatically demonstrates the Director's December 15, 2003 letter did not merely reflect the City's "esteem" for the Wal-Mart Project, but its unequivocal intent to commit itself to the Project.[4] Indeed, plaintiffs do not refute this fact, they embrace it, arguing that the Court should not conclude "that it is bound by the City's adamant, but mistaken, view of the import of the December 15, 2003 Status Report." (AB at p. 32.) In other words, both sides agree that the City intended the Director's letter to be an approval — and that is the point. The fact that the Director later filed and posted the NOD giving public notice of the City's approval removes any doubt this is so.

Likewise, the CEQA treatise plaintiffs cite lends no support to plaintiffs' position. (See AB at p. 31.) It concludes that the analysis of whether an agency's action constitutes an "approval" should focus on two questions: (1) in taking the challenged action, did the agency indicate whether it would perform environmental review before it makes any commitment to the project; and (2) as a practical matter, has the agency foreclosed any meaningful options to going forward with the project?

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[4] For additional supporting evidence, see pages 24-26 of Wal-Mart's opening brief.

(Thomas, et al., *Guide to Cal. Environmental Quality Act* (11th ed. 2006) p. 71.)

In the present case, both these factors demonstrate that the City "approved" the Wal-Mart Project on December 15, 2003: (1) the City specifically determined that the Wal-Mart Project was *not* subject to CEQA review (AA 0092); and, (2) under the MDP, the findings of consistency with the MDP by the Design Review Board and later by the Director were the only determinations needed for the Project's approval. (AR 1159.) As a practical matter, therefore, the City had foreclosed any meaningful options to going forward with the Project.

2. Right or Wrong, an Agency "Approval" Starts the CEQA Statute of Limitations Running

In any event, plaintiffs' "invalid approvals" argument is for the most part simply a litany of merits-based arguments, some old, some raised here for the first time.[5] All of them amount to asserting that a "valid" approval is necessary to start the statutes of limitation. In other words, plaintiffs argue that an agency's determination cannot be an approval under CEQA unless it is correct on the merits.

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[5] To the extent the arguments are raised for the first time here, the Court need not consider them. (See, e.g., *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 481.)

Such is not the case. CEQA statutes of limitation apply to how an action "to attack, review, set aside, void, or annul" acts or decisions of a public agency "shall be commenced." (Pub. Resources Code § 21167.) The commencement of the applicable limitations periods does not depend on the merits of the underlying action, or on facts or legal matters decided after the action is commenced. Even if an agency's determination that a project is exempt from CEQA is incorrect, "such error by an agency does not generally preclude or delay the running of the [] limitations period." (*City of Chula Vista v. County of San Diego* (1994) 23 Cal.App.4th 1713, 1720, fn. 4.)

As Wal-Mart noted in its opening brief and plaintiffs do not dispute in their brief, statutes of limitation, whether under CEQA or otherwise, represent legislative policy decisions to provide repose to the parties and the judicial system. They are not concerned with the merits of the underlying dispute, but the process by which it was brought to court. The Court has made clear that a statute of limitations "operates conclusively across the board, and not flexibly on a case-by-case basis." (*Norgart v. The Upjohn Company* (1999) 21 Cal.4th 383, 395.) Plaintiffs' lengthy recitation of merits-based arguments ignores this settled teaching. Wal-Mart, of course, disagrees with plaintiffs' view of the merits. But its view, like plaintiffs,' is not relevant to the only question at issue here: may

a court use its view of the merits of a claim to excuse the plaintiff from not filing its lawsuit within the applicable limitations period? The well-established answer to that question is no.

The two authorities plaintiffs cite in support of their position do not change the analysis. (See AB at pp. 38-40, citing to *Endangered Habitats League, Inc. v. State Water Resources Control Board* (1997) 63 Cal.App.4th 227 ["*Endangered Habitats*"] and *Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2008) 161 Cal.App.4th 1204 [petition for review pending].) In *Endangered Habitats,* Riverside County argued the statute of limitations for challenges to certain drainage channels approved in 1995 was triggered by the County's negative declaration for a water drainage plan filed nine years earlier, in 1986. (See *id.* at pp. 240-241.) The court of appeal disagreed, finding that although the 1986 filing of the notice of determination regarding the negative declaration *did* start a clock running as to challenges to the negative declaration, plaintiffs were not challenging that determination. (*Id.* at p. 241.) The court found that because no decision was ever made regarding whether the drainage channels complied with the water drainage plan, the statute of limitations for challenges to the drainage channels began to run when the construction on the channels commenced. (*Id.*)

The present case is different. Significantly, Wal-Mart does not argue the limitations period applicable to plaintiffs' claims runs from the approval of the MDP. Instead, the City made a site-specific decision regarding the Wal-Mart Project and filed an NOD reflecting that decision. Therefore, consistent with the language of section 21167, subdivision (d), the CEQA statute of limitations was triggered by both of these events specific to the Wal-Mart Project — the Director's approval in December 2003 and the NOD filed in February 2004.

Committee for Green Foothills v. Santa Clara County Board of Supervisors, supra, is not applicable because the issue there was whether the 180-day statute in subdivision (a) or the 30-day limitations period in subdivision (e) of section 21167 applied to the petitioner's claims. (See *id.* at pp. 1235-1236.) The parties specifically recognized that subdivision (d), which is the focus in the present case, did not apply. (*Id.* at p. 1226.)

The court noted, however, the legislative history of subdivision (d) shows that the principal purpose of the bill enacting the subdivision "was to shorten the time for challenging a determination that a project is not subject to CEQA." (*Id.* at pp. 1234-1235.) It also observed that a statute of limitation operates "regardless of merit." (*Id.* at pp. 1234, 1237.) That, of course, is the dispositive point here.

C. Plaintiffs Cannot Avoid the Limitations Bar by Attacking the Form of the Director's Approval or the NOD

Finally, plaintiffs challenge the form of the Director's December 2003 letter and the February 2004 NOD. They argue the former could not be an approval because, among other things, it was titled a "Status Report" and contained five conditions. (AB at pp. 34-35.) And they claim the NOD was "void" because it "did not identify the project, omitted material information about the project, and included materially false information." (AB at pp. 40-45.) Wal-Mart has already discussed plaintiffs' arguments regarding the form of the Director's letter at pages 24-28 of its opening brief. As to plaintiffs' arguments attacking the form of the NOD, plaintiffs once again make such arguments for the first time in this Court.

In any event, the NOD complied with the requirements of the law and was effective to start the statute of limitations running on plaintiffs' claims. The CEQA Guidelines specify that a notice of determination must include: (1) a brief description of the project; (2) the location of the project, which can be by street address and cross street; (3) a finding that the project is exempt from CEQA, including a citation to the State Guidelines section or statute under which it is found to be exempt; and (4) a brief statement of reasons to support the finding. (See Cal. Code. Regs., tit. 14,

§ 15062(a).) The NOD filed by the City regarding the Wal-Mart Project satisfied all of these requirements. (AA 776.)[6]

First, the NOD describes the Project in a discussion comprising two full paragraphs that begin by noting that the Project is located on 22.38 acres of land in the A.G. Spanos Business Park. It describes the MDP governing Spanos Park, and indicates the Project is a retail use that will be completed in two phases, of 138,272 square feet and 68,888 square feet, respectively. Obviously, a very large project was involved. Although the NOD did not specifically state the retail project was a Wal-Mart Project, CEQA does not require an NOD to state the name of the retailer. (See *Maintain Our Desert Environment v. Apple Valley* (2004) 124 Cal.App.4th 430, 441-442, 446.)[7]

Second, the NOD identifies the Project location at the "Northwest corner of Trinity Parkway and Consumnes Drive, City of

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[6] Because the NOD satisfied all of the requirements of the Guidelines, the case plaintiffs rely upon, *International Longshoremen's and Warehousemen's Union v. Board of Supervisors* (1981) 116 Cal.App.3d 265, 273-274, is inapposite.

[7] As the court noted, "[t]he crux of the issue is that the project itself, and therefore its environmental impact, is identical regardless of who will operate it. The only possible reasons for the public to object to accepting Wal-Mart but not a competitor under these circumstances have nothing whatsoever to do with the aims and purposes of CEQA." (*Id.* at p. 446.)

Stockton; San Joaquin County, Assessor's Parcel Number: APN: 071-600-030."

Third, it states the Project is exempt from CEQA as a ministerial action "under Public Resources Code Section 21080(b)(1) and CEQA Guidelines Section 15369."

Fourth, as a brief statement of reasons for the exemption, the NOD states, "[t]he Project is consistent with the Development Standards set forth in the Development Plan and the proposed retail use and size layout meets the intent and standards of the Master Development Plan, as well as the City of Stockton's General Plan and zoning regulations." (AA 776.)

There is no dispute that the NOD was filed and posted as required by law. It therefore gave constructive notice of the Wal-Mart Project — actual notice is not required. (See, e.g., *Citizens of Lake Murray Area Assn. v. City Council* (1982) 129 Cal.App.3d 436, 441 [notice of determination provides constructive notice]; *Lee v. Lost Hills Water Dist.* (1978) 78 Cal.App.3d 630, 634 [lack of personal knowledge does not render the limitations period inapplicable].) Thus, the NOD was effective to trigger the 35-day statute of limitations in section 21167, subdivision (d).

Finally, even if the NOD had not been filed, the 180-day statute of limitations in section 21167, subdivision (d), that begins with the approval of the Project would still bar plaintiffs' claims. In *City of Chula*

Vista, supra, the court held that even assuming the NOD was materially defective and insufficient to start the running of the 35-day limitation period of section 21167, subdivision (d), the 180-day limitations period still applied to bar the petition. (23 Cal.App.4th at p. 1720.)

III. CONCLUSION

Although citizens have broad rights to challenge land development decisions under CEQA, their rights are not without limits. The Legislature has restricted these broad rights by enacting "unusually short statutes of limitation on filing court challenges to the approval of projects under [CEQA]." (Cal. Code Regs., tit. 14, § 15112, subd. (a).) The CEQA statutes of limitations advance legislative intent "that the public interest is not served unless CEQA challenges are promptly filed and diligently prosecuted." (See *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 111.) The result is a carefully-defined balance: environmental concerns are addressed and protected, but land development is not unduly stymied.

In the end, the applicable statutes are unambiguous. Plaintiffs, however, successfully urged the courts below to disregard the applicable statutes of limitation by interposing their views of the merits of the underlying dispute. Particularly in the context of CEQA, a court may not condition the commencement of the limitations period on its

determination of the merits of the plaintiff's claim. The Court should reinforce this important principle and reverse the decision of the court of appeal with instructions to dismiss plaintiffs' petition as untimely.

Dated: July 21, 2008

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c), I certify that the foregoing Brief is proportionately spaced, has a typeface of 13 points, and contains 3,803 words, according to the word processing program with which it was prepared.

Dated: July 21, 2008

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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 **July 21, 2008**, I served the following document(s) described as

REPLY BRIEF ON THE MERITS

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

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

Executed on **July 21, 2008**, at San Francisco, California.

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