Case No. S159690

In the Supreme Court of the State of California

SUPREME COURT COPY

SUPREME COURT COPY

STOCKTON CITIZENS FOR SENSIBLE PLANNING, et al.,
Plaintiffs and Respondents,

v.

CITY OF STOCKTON, et al.,
Defendants and Respondents;

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

SUPREME COURT
FILED
CRC 8.25(b)
JUN 24 2008
Frederick K. Ohlrich Clerk
Deputy

After a Decision by the Court of Appeal
Third Appellate District Case No. C050885
San Joaquin Superior Court Case No. CV024375
Honorable K. Peter Saiers and Carter P. Holly Presiding

ANSWER BRIEF ON THE MERITS

Charity Kenyon, Cal. Bar No. 78823
J. William Yeates, Cal. Bar No. 84343
Kenyon Yeates LLP
3400 Cottage Way, Suite K
Sacramento, CA 95825
Telephone: (916) 609-5000
Facsimile: (916) 609-5001

William D. Kopper, Cal. Bar No. 95405
Attorney at Law
417 E Street
Davis, CA 95616
Telephone: (530) 758-0757
Facsimile: (530) 758-2844

Attorneys for Plaintiffs and Respondents, Stockton Citizens for Sensible Planning, Rosemary Atkinson, Paul Diaz, and Susan Rutherford Rich

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 STORES, INC.,
Real Parties in Interest and Appellants.

After a Decision by the Court of Appeal
Third Appellate District Case No. C050885
San Joaquin Superior Court Case No. CV024375
Honorable K. Peter Saiers and Carter P. Holly Presiding

ANSWER BRIEF ON THE MERITS

Charity Kenyon, Cal. Bar No. 78823
J. William Yeates, Cal. Bar No. 84343
Kenyon Yeates LLP
3400 Cottage Way, Suite K
Sacramento, CA 95825
Telephone: (916) 609-5000
Facsimile: (916) 609-5001

William D. Kopper, Cal. Bar No. 95405
Attorney at Law
417 E Street
Davis, CA 95616
Telephone: (530) 758-0757
Facsimile: (530) 758-2844

Attorneys for Plaintiffs and Respondents, Stockton Citizens for Sensible Planning, Rosemary Atkinson, Paul Diaz, and Susan Rutherford Rich

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 2

I. FACTUAL OVERVIEW 2

A. A.G. SPANOS SOUGHT APPROVAL OF A MIXED USE "BUSINESS PARK" GOVERNED BY A MASTER DEVELOPMENT PLAN, A DEVELOPMENT AGREEMENT, AND A DENSITY TRANSFER DEVELOPMENT AGREEMENT 2

B. THE CITY CONDUCTS ENVIRONMENTAL REVIEW OF THE MIXED USE BUSINESS PARK INCLUDING 935 HIGH DENSITY RESIDENTIAL UNITS 5

C. SPANOS CONVERTS THE BUSINESS PARK FROM OFFICE TO RETAIL 6

D. SPANOS PLANS A WAL-MART SUPERCENTER FOR PARCELS DESIGNATED HIGH DENSITY RESIDENTIAL HOUSING IN THE MDP 8

E. CITY FILES A NOTICE OF DETERMINATION OF EXEMPTION FROM CEQA 12

F. WAL-MART APPLIES FOR A CONDITIONAL USE PERMIT 13

II. PROCEDURAL HISTORY 14

A. TRIAL COURT ENTERS JUDGMENT FOR CONCERNED CITIZENS OF STOCKTON 14

B. THE COURT OF APPEAL AFFIRMS THE JUDGMENT 16

ARGUMENT 17

I. SUMMARY OF ARGUMENT 17

II. WHETHER CONDUCT CONSTITUTES A CEQA APPROVAL PRESENTS A QUESTION OF LAW INDEPENDENT OF THE MERITS 21

A. THE STATUTE OF LIMITATIONS AND GUIDELINES MAKE AN "APPROVAL" THE STATUTE-TRIGGERING EVENT 22

B. A CEQA STATUTE OF LIMITATIONS IS NOT TRIGGERED BY A MINISTERIAL DESIGN REVIEW PROCESS 25

C. A CEQA APPROVAL IS A DECISION BINDING ON THE LOCAL AGENCY ENTITLING A DEVELOPER TO COMMENCE A PROJECT 29

D. THE DECEMBER 2003 CORRESPONDENCE WAS NOT AN APPROVAL OF THE SUBSTITUTION OF RETAIL FOR RESIDENTIAL USES AS A MATTER OF LAW 32

1. IDENTIFYING A STATUTE-TRIGGERING EVENT PRESENTS A QUESTION OF LAW 32

2. THE LOWER COURTS CORRECTLY HELD THE STATUS REPORT DID NOT BIND THE CITY AND WAS NOT PROJECT APPROVAL 33

3. THE DECEMBER 15 STATUS REPORT DID NOT AMEND THE DENSITY AGREEMENT, AS REQUIRED TO BIND THE CITY TO PROJECT APPROVAL 36

4. THE FINDING OF NO TRIGGER EVENT IS CONSISTENT WITH *ENDANGERED HABITATS* AND THE OTHER CEQA "APPROVAL" DECISIONS 38

III. THE NOD WAS VOID BECAUSE IT DID NOT GIVE THE PUBLIC NOTICE OF THE PROJECT 40

A. AN NOD MUST INFORM THE PUBLIC ABOUT THE PROJECT 40

B. THE NOD DID NOT IDENTIFY THE PROJECT, OMITTED MATERIAL INFORMATION ABOUT THE PROJECT, AND INCLUDED MATERIALLY FALSE INFORMATION 43

C. SINCE THE NOD WAS INVALID, THE STATUTE OF LIMITATIONS WOULD NOT BEGIN TO RUN AT THE TIME THE DIRECTOR ISSUED THE DECEMBER 15 STATUS REPORT 45

IV. THE DIRECTOR WAS WITHOUT AUTHORITY TO APPROVE A PROJECT THAT REQUIRED CEQA REVIEW 45

CONCLUSION 47

TABLE OF AUTHORITIES

CASES

California Manufacturers Association v. Industrial Welfare Commission
(1980) 109 Cal.App.3d 95 28

Centinela Hospital Association v. City of Inglewood
(1990) 225 Cal.App.3d 1586 43

City of Chula Vista v. County of San Diego
(1994) 23 Cal.App.4th 1713 25,27,29

City of Vernon v. Board of Harbor Commissions
(1998) 63 Cal.App.4th 667 30

Committee for Green Foothills v. Santa Clara County Board of Supervisors
(2008) 161 Cal.App.4th 1204 39

Concerned Citizens of Costa Mesa v. 32nd District Agricultural Association
(1986) 42 Cal.3d 929 29,41,46

Concerned Citizens of McCloud v. McCloud Community Services District
(2007) 147 Cal.App.4th 181 30,31,35

County of Amador v. El Dorado Water Agency
(1999) 76 Cal.App.4th 931 1,16,24,30,42

Day v. City of Glendale
(1975) 51 Cal.App.3d 817 33

Endangered Habitats League, Inc. v. State Water Resources Control Board
(1997) 63 Cal.App.4th 227 19,29,38,39,46,47

Friends of Mammoth v. Board of Supervisors
(1972) 8 Cal.3d 247 22

Geneva Towers Partnership v. City & County of San Francisco
(2003) 29 Cal.4th 769 32

International Engine Parts v. Feddersen & Co.
(1995) 9 Cal.4th 606 21

International Longshoremen's and Warehousemen's Union v. Board of Supervisors
(1981) 116 Cal.App.3d 265 41

Iverson v. Berwald
(1999) 76 Cal.App.4th 990 32

Kleist v. City of Glendale
(1976) 56 Cal.App.3d 770 46

Laurel Heights Improvement Association v. Regents of the University of California
(1988) 47 Cal.3d 376 41

Laurel Heights Improvement Association v. Regents of University of California
(1993) 6 Cal.4th 1112 19,27

McQueen v. Board of Directors of the Mid-Peninsula Regional Open Space District
(1988) 202 Cal.App.3d 1136 42

Miller v. City of Hermosa Beach
(1993) 13 Cal.App.4th 1118 31,33,46

Mountain Lion Foundation v. Fish & Game Commission
(1997) 16 Cal.4th 105 21

Murrieta Valley Unified School District v. County of Riverside
(1991) 228 Cal.App.3d 1212 29

Muzzy Ranch Co. v. Solano County Airport Land Use Commission
(2007) 41 Cal.4th 372 21

No Oil, Inc. v. City of Los Angeles
(1974) 13 Cal.3d 68 22

Rare Coin Galleries, Inc. v. A-Mark Coin Co., Inc.
(1988) 202 Cal.App.3d 330 21

San Franciscans for Reasonable Growth v. City and County of San Francisco
(1989) 209 Cal.App.3d 1502 38

San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus
(1994) 27 Cal.App.4th 713 20

Santa Margarita Area Residents Together v. San Luis Obispo County
(2000) 84 Cal.App.4th 221 36

Stockton Citizens for Sensible Planning v. City of Stockton
(2007) 157 Cal.App.4th 332 1,3,12,16,34,35,46

Stavropoulos v. Superior Court
(2006) 141 Cal.App.4th 190 21

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova
(2007) 40 Cal.4th 412 22

Western States Petroleum Association v. Superior Court
(1995) 9 Cal.4th 559 42

STATUTES

Business and Professions Code §6148 32

Government Code §65867 4,36

Government Code §65867.5 36

Government Code §65868 4,9,35,36

Public Resources Code §21002 25

Public Resources Code §21065(b) 22

Public Resources Code §21065(c) 22

Public Resources Code §21080(a) 20

Public Resources Code §21080(b) 22,23

Public Resources Code §21080(b)(1) 19,20,25,26,27

Public Resources Code §21083 22

Public Resources Code §21083(a) 22

Public Resources Code §21083(d) 22

Public Resources Code §21108(a) 27

Public Resources Code §21108(b) 22,41

Public Resources Code §21152(a) 24

Public Resources Code §21152(b) 12,22,23

Public Resources Code §21157 3

Public Resources Code §21166 10,25,26,46

Public Resources Code §21167 1,18,22,24,29

Public Resources Code §21167(a) 2,18,22,32,45

Public Resources Code §21167(b) 28

Public Resources Code §21167(d) 2,22,18,24,26,32,41,45

Public Resources Code §21172 22

ADMINISTRATIVE REGULATIONS

CEQA Guidelines §15060 41

CEQA Guidelines §15061 41

CEQA Guidelines §15062 12,24

CEQA Guidelines §15062(a) 24

CEQA Guidelines §15062(a)(1) 43

CEQA Guidelines §15112(c)(2) 24

CEQA Guidelines §15132(b) 30

CEQA Guidelines §15162 10,25

CEQA Guidelines §15352 29

CEQA Guidelines §15352(a) 30

CEQA Guidelines §15357 20

CEQA Guidelines §15369 23

CEQA Guidelines §15374 12

CEQA Guidelines §15378(a) 44

CEQA Guidelines §15378(a)(1) 36

CEQA Guidelines §15378(c) 36,38

TREATISES

Guide to California Environmental Quality Act
(Solano Press 11th Ed., 2006) Remy and Thomas 31

Practice Under the California Environmental Quality Act
(Cont.Ed. Bar 2d ed. 2008) 2 Kostka & Zischke 10,19,26,27,29,46

INTRODUCTION

Petitioners ask this Court to reverse the lower courts' holdings because the lower courts made merit-based determinations to avoid the CEQA statute of limitations. Petitioners mischaracterize the lower courts' determinations as merit-based, since most rulings on the CEQA statute of limitations require some consideration of the facts. In actuality, the Petitioners contend the lower courts should not have reviewed the facts considered, but only the fact the City stated it approved the Supercenter and filed an NOD. [1] Petitioners' position is contrary to CEQA's statutory structure and the cases interpreting CEQA.

Public participation in the CEQA process is an important CEQA policy. The Court of Appeal's construction of Public Resources Code section 21167 is consistent with the statute's language and protects the public's privileged role in environmental decision-making. As Respondents show in this Brief, there are several lines of authority that support the lower courts' holdings that the Director's December 15, 2003, "Status Memo" was not a CEQA project "approval."

Cases construing CEQA hold that when an agency undertakes a discretionary project that was not within the scope of the first tier CEQA document for a general plan or other plan, the agency must complete additional CEQA review. If the agency does not conduct the required CEQA review with accompanying public notice, the statute of limitations is

---

[1] See, *Stockton Citizens for Sensible Planning v. City of Stockton* ("*Stockton Citizens*") (2007) 157 Cal.App.4th 332, 337, fn.3. where the court characterizes Petitioners' argument as: "[the court] should be bound by the Director's determination of the ultimate fact that his action constituted an approval of the Wal-Mart project." Appellant Spanos takes this argument to the extreme by suggesting that the Court should overrule *County of Amador v. El Dorado Water Agency* (1999) 76 Cal.App.4th 931. (See, Spanos OBM, pp. 15, 17.)

not triggered pursuant to Public Resources Code section 21167(a) or (d) until 180 days after commencement of the project. Since the City did not complete any environmental review for the Supercenter, a discretionary project, the CEQA statute of limitations did not start at the time of the "Status Memo." The late-filed notice of determination did not cure the City's failure to complete additional CEQA review, and was itself fatally defective.

STATEMENT OF THE CASE

I. FACTUAL OVERVIEW

A. A.G. SPANOS SOUGHT APPROVAL OF A MIXED USE "BUSINESS PARK" GOVERNED BY A MASTER DEVELOPMENT PLAN, A DEVELOPMENT AGREEMENT, AND A DENSITY TRANSFER DEVELOPMENT AGREEMENT

After a 1986 plebiscite by City of Stockton voters, the County of San Joaquin and the City of Stockton began review of land use changes within six new planning areas in north Stockton, which included Spanos Park East and Spanos Park West. (AR 533.) In December 1987, the County certified a staged EIR for the A.G. Spanos Park project to evaluate the potential impacts of canceling a Williamson Act contract on the project site. The EIR focused on the impacts of converting agricultural land to urban uses on the project's 1239 acres, 653 west of I-5 and 586 east of I-5. (AR 538.)

In August 1988, the City certified a Supplemental EIR (SEIR 3-87), which addressed the environmental impacts of development entitlements for the 1239 acre A.G. Spanos Park Project. SEIR 3-87 described a master planned community, including residential, commercial, recreational, open space, and institutional uses. After certifying the SEIR, the City approved

for the master plan area a total of 7,460 residential units, with 2,983 units to the west of I-5 and 4,476 units to the east of 1-5. (AR 533, 538.)

On March 21, 1989, the City Planning Commission recertified SEIR 3-87 and over the course of the year approved tentative maps authorizing 7,459 residential units, 78.8 acres of business park, 36.8 acres of commercial, 8.5 acres of commercial marina, and various ancillary and support uses. (AR 533)

After Spanos Park East was almost built-out and Spanos Park West was graded for residential development, Spanos returned to the City in 2001 seeking changes to the 1989 approvals for Spanos Park West to reflect current market conditions. (AR 536, 543.) Spanos' revised plan divided his 1989 entitlements into a residential component, known as The Villages at Spanos Park, and an M-X, or mixed-use, component, known as A.G. Spanos Business Park (the "Business Park"). (AR 533, 545-546, 2107).

The 2001 proposed changes required a General Plan Amendment and rezoning of 138 acres in The Villages portion of the project from high-density residential to single-family residential. (AR 533.) The City agreed The Villages area would be zoned low-medium residential zoning (R-1). (AR 2130-2143.)

To implement the Business Park portion zoned M-X, Spanos requested and the City prepared a Master Development Plan (MDP or Plan), as well as the Spanos Park West Development Agreement pursuant to Stockton City Ordinances.[2] (AR 562, 568, 1162-1189.) The Mixed Use designation was intended to "encourage the development of a mixture of

[2] The Court of Appeal described the MDP as governed by Public Resources Code § 21157. (*Stockton Citizens, supra,* 157 Cal.App.4th at 340.) The agreement itself does not rely on this statute but on Stockton City Ordinances. (AR 562.) This distinction makes no difference to analysis of the statute of limitations.

compatible land uses including high-density multiple family residential, administrative and professional offices, retail and service uses, light industrial and public and quasi-public facilities." (AR 562).

According to the MDP, the Project was "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." (AR 1072-1076, 1102.) The primary use for most parcels was office. (AR 1072-1076; 1967-1970.) Residential uses represented approximately 30 per cent of the proposed land use with four separate parcels identified for residential development: 17, 17a, 18, and 19.[3] (AR 565, 1072, 1075-1076.)

The City also required Spanos to enter into the Spanos Park West Density Transfer Development Agreement ("Density Agreement"). (AR 1910-1932; 2144-2167.) The Density Agreement "transferred" the high density residential from the rezoned R-1 acreage at the "Villages" portion to the Business Park portion of the Spanos Park West Project. (AR 1913, 1916.) This Density Agreement required Spanos "to construct a minimum of Nine Hundred Thirty Five multi-family units as part of the development of The Business Park." (AR 1913, 2150; see also AR 1916-1918, 2153-2155 -- §4.2 High Density Residential, §5.1 application of New City Laws, and §5.2 Future Growth Control Ordinances/Policies)

The Density Agreement requires any amendment to it to comply with Government Code §65868. (AR 1924, 2161.) This provision of the law requires a noticed public hearing and legislative action by the governing body of the City. (Gov. Code, §§ 65867, 65868.)

---

[3] The four parcels with primarily residential designation totaled 48.46 acres (AR 1075-1076) of the total 219.48 acres (AR 565); or 45.43 buildable acres of the total 151.81 buildable acres (after subtracting the roadways, landscape buffer and utility easement, etc. acreage). (*Id.*)

B. THE CITY CONDUCTS ENVIRONMENTAL REVIEW OF THE MIXED USE BUSINESS PARK INCLUDING 935 HIGH DENSITY RESIDENTIAL UNITS

In September of 2001, the City, acting as lead agency under CEQA,[4] circulated a draft Supplemental EIR (DSEIR) to address Spanos' proposed changes to the Spanos Park West Project, including creation of a Master Development Plan. (AR 505-1161.)

The notice of preparation for 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]." (AR 315.) The DSEIR 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." (AR 569.)

Based on the proposed General Plan Amendment and rezoning of the 138 acres to R-1, all of the Spanos Park Project high-density residential use would now be in the Business Park M-X zoned area. (AR 569.) The DSEIR recognized that development of high-density residential uses was necessary in the M-X area of Spanos Park West to comply with the requirements of the Housing Element of the City's General Plan. (AR 712.)

On January 29, 2002, after a duly noticed public hearing, the City certified the Final SEIR[5], made the required CEQA findings and approved: the General Plan amendment, the rezoning, the Development Agreement,

---

[4] "CEQA" is an acronym for the California Environmental Quality Act (Pub. Resources Code, § 21000, et seq.)

[5] All following references in this Brief to the "SEIR" are to the SEIR that was prepared for the Master Development Plan.

the Master Development Plan, zoning map amendments to implement the MDP, and the Density Agreement.[6] Each of these approvals acknowledged the City completed CEQA environmental review before the proposed discretionary actions. (See fn. 6.)

C. SPANOS CONVERTS THE BUSINESS PARK FROM OFFICE TO RETAIL

Sometime after the City's January 2002 approvals, Spanos began submitting detailed plans for development of the Business Park, which City staff administratively processed through the MDP design review process. (AR 1159-1161.)

The MDP authorized Spanos to appoint the Design Review Board, which includes: the developer (or his successor in interest), the Project Landscape Planner, and the Project Site Planner. (AR 1092.) This entity reviews all construction drawings and site plans for design quality and consistency with the MDP. (AR 1092, 1986.) The Design Review proceedings are not open to the public. (AR 1160.) If the Design Review Board approves plans, the Board shall submit a written finding of consistency with the MDP to the Director "prior to the review and approval of any building permit for a specific development project." (AR 1090.)

The certified Spanos Park West SEIR was intended to apply to all specific proposals for development within the Business Park.

> The Spanos Park West Supplemental Environmental Impact Report is the Project EIR (EIR) for the Plan Area and is intended to apply to a series of actions. As the EIR is a companion document to the [MDP] for a mixed use project

---

[6] See AR 2083-2084 (rezone parcels from R-1, R-2, R-3, C-2, C-R, & P-L to M-X); 2101-2103 (development agreement); 2130-2131 (rezone parcels from R-2, R-3, C-2, P-L to R-1); 2144-2146 (density transfer development agreement); 2168-2169 (certifying SEIR, findings, etc.); 2170-2172 (general plan amendment); and 2173-2175 (master development plan).

> with a comprehensive range of uses allocated for all portions of the Plan Area, any future development or use within the Plan Area is exempted from further environmental review provided the proposed development or use is consistent with the [MDP]. (AR 1063.)

The MDP does not contemplate further discretionary approvals, so long as the project is developed consistent with the A.G. Spanos Business Park Conceptual Site Plan (Fig. 3-1) and Land Use Summary (Table 3-1). (AR 1102; see AR 1072 (Conceptual Site Plan), 1073-1076 (Land Use Summary).)[7] As the MDP states,

> This Master Development Plan, and the companion Environmental Impact Report, establish the criteria for, consideration of, and action upon, all future specific proposals for development of the lands lying within A. G. Spanos Business Park . (AR 1046.)[8]

Therefore, approval of the MDP was the final discretionary approval for "all future specific proposals for development" in the Business Park portion of Spanos Park West that are consistent with the MDP.[9] (AR 1046, 1048.)

---

[7] Wal-Mart and Respondents concur with this understanding of the MDP's purpose. (Wal-Mart BOM at pp. 6-7.)

[8] "This Master Development Plan will supersede any provision in the City' s Planning and Zoning Code that is in conflict with this Master Development Plan as determined by the Community Development Director." (AR 1092.)

[9] "If a request is made for a project or use that is not consistent with and does not share the same or similar characteristics of an allowed use identified within the Master Development Plan, such project or use 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 proposed project or use; and (2) that the City of Stockton Planning Commission approves and issues a Conditional Use Permit for the proposed project or use, provided the following finding,

However, according to the MDP (section 8.3), major amendments, "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]," would be reviewed in public meetings and would require a Conditional Use Permit. (AR 1160.) Minor amendments, such as lot line adjustments, would be processed by the private A.G. Spanos Design Review Board and the City Community Development Director (Director). "Minor amendments shall not be subject to public hearings." (AR 1159-1160.)

D. SPANOS PLANS A WAL-MART SUPERCENTER FOR PARCELS DESIGNATED HIGH DENSITY RESIDENTIAL HOUSING IN THE MDP

The MDP Conceptual Site Plan (Fig. 3-1) and Land Use Summary (Table 3-1) designated the primary use for Parcels 17, 17a, 18 and 19 as high-density, multi-family residential. (AR 569, 1412-1413.) By the Fall of 2003, Parcels 17 and 17a were the only remaining undeveloped parcels with the primary land use designation for multi-family units. (AR 1075-1076.) The MDP designated Parcel 18 for 325 multi-family units and Spanos constructed 308 units on Parcel 18. (AR 1076, 2277; cf. 2413, 2419.) The MDP designated Parcel 19 for 475 multi-family units (AR 1076), but Spanos built an office building on Parcel 19. (AR 1072, 2521.)

On October 9, 2003, Spanos applied for an amendment to the Development Agreement to "[a]llow Spanos to further develop the Spanos Park West power center by transforming Spanos obligation to construct

---

based upon substantial evidence presented at a public hearing, can and is made by the Commission, or by the City Council if the decision of the Commission is appealed to the City Council: that the proposed project or use would not create internal inconsistencies within the Master Development Plan and is consistent with the goals and objectives of the A. G. Spanos Business Park." (AR 1047.)

high density residential units within Spanos Park West to other locations within the City." (AR 2268.) Spanos did not apply for an amendment to the Density Agreement. The Density Agreement committed Spanos "to construct a minimum of Nine Hundred Thirty Five multi-family units as part of the development of The Business Park" and could be amended only by noticed public hearing and legislative action in compliance with Government Code section 65868. (AR 1924, 2150.) The City never amended the Density Agreement to relieve Spanos of its obligation.

On October 29, 2003, Spanos' Design Review Board reviewed and approved a site plan, grading plan, landscape plan, and building elevations, each dated the same day, October 29, 2003, showing a Supercenter to be developed on Parcels 17 and 17a. (AR 1072, 2413, 2419; compare to AR 567.) This large scale retail use is not the primary use designated on the MDP's Conceptual Site Plan (Fig 3-1). (AR 1072-1076, 1102.) The 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. (AR 1075-1076.)

Despite the fact that the retail use was not the primary use designated on the Conceptual Site Plan and the retail space exceeded the retail space allocated on the Land Use Summary (Table 3-1), the Design Review Board's October 29, 2003, letter to the Director stated that it had reviewed and approved plans for a 207,160 sq. ft. "two-phased retail development" on 22.38 acres within the Business Park. It stated that the project submittal "is consistent and the design of the proposed retail development is in accordance with the standards and guidelines associated with the Master Development Plan, the Master Development Agreement, as well as, the City of Stockton's General Plan and Land use designations." (AR 2269-2270.)

The Board's letter concluded: "A written finding of consistency and compatibility of the terms of the Master Development Plan, Development Agreement and all applicable policies and regulations for the building permit process will follow with subsequent submissions." (AR 2270.) The Design Board never provided its formal findings to the City, as required by the MDP *before* the City's approval of any building permit for the specific project. (MDP 5.5, AR 1090.)

The City did not conduct an initial study, or any other analysis under CEQA to evaluate the significance of the environmental impacts of Spanos' proposed substitution of retail for the high-density housing required by the City's General Plan, the MDP, and the Density Agreement. (Cf. Public Resources Code, § 21166; Guidelines[10], § 15162; 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed. Bar 2d ed. 2008), §23.26, pp. 1163-1166.)

The sole City-generated document relating to the substitution of retail for high-density residential was a December 15, 2003 private letter from the Director to Doucet & Associates titled, "Status Report Regarding Site Plan, Landscape Plan, Elevation and Design Approval – Retail Store: Spanos Park West." It stated,"[i]nitial staff review of the above-noted plans ... has ... determined that the Site Plan, Pre- Expansion Building Elevations and Post Expansion Building Elevations are in substantial conformance with the [MDP]" subject to several corrections. (AR 2273-2274.) Although the letter recognized the project was a retail store, it did not mention the size of the store or the specific parcels upon which it would be built. The letter did not state the Director had made a final determination that the Project plans or proposed retail use is consistent with and shares the same or similar characteristics of an allowed use identified within the MDP.

---

[10] "Guidelines" refers to the CEQA Guidelines, 14 California Code of Regulations §§ 15000-15387.

(See AR 1160.) The Director's letter failed to acknowledge the Density Agreement. (AR 2273-2274.)

On December 16, 2003, in a letter referenced "Amendment to Density Transfer Development Agreement," Spanos wrote the Community Development Director acknowledging that Spanos had only developed 308 of the required 935 multi-family units and that Spanos "lacks the space within the M-X component of Spanos Park West necessary to accommodate the additional [627] Units." (AR 2277.) The letter acknowledged that Spanos had agreed to construct a minimum of 935 multi-family units to be located within the M-X component of Spanos Park West. Despite this obligation, Spanos sought approval to delay construction of the additional 627 units until after adoption by the City of its updated General Plan. (*Id.*)

The Director, without either the public notice or the legislative action by the City Council that the Density Agreement and Government Code section 65868 requires,[11] signed the letter: "Approved this 17th day of December, 2003." (AR 2278.) More than six weeks later, Spanos' lawyers sent a reply to the Director's December 15 letter, dated February 5, 2004, 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[12]

---

[11] (AR 1924, 2161.)

[12] Section 8.2 of the MDP states applications for development in the MDP "shall be subject to review and approval [by] (1) the Design Review Board and (2) the Community Development Director for consistency with the Land Use and Development Standards" of the MDP. (AR 1159.)

[and] that as a result the 10 day period for filing an appeal of that decision has expired."[13]

E. CITY FILES A NOTICE OF DETERMINATION OF EXEMPTION FROM CEQA

On February 17, 2004, two weeks after receiving Spanos' lawyers' reply to the December 15 Status Report, the City filed a Notice of Determination (NOD) with the County Clerk. (AR 2283.) The NOD states, "[The Director] has determined that the Site Plan, Grading Plan, Landscape Plan, Building Elevations and Design applicable to the Project conform to the standards set forth in the [MDP], which is a ministerial action not subject to CEQA review." (*Id.*)[14]

In describing the project and explaining that the decision to approve site plans was ministerial, the Director stated, among other things, "[T]he property's primary land use designation is commercial according to the Development Plan's Conceptual Site Plan." (*Id.*) In fact, the land use designation in the Conceptual Site Plan was high-density residential. (AR 1072, 1075-1076.) The NOD contained nothing from which a member of the public could discern that there was the substitution of retail for high-density residential as designated by the referenced site plan and the Master

---

[13] The Court of Appeal correctly found the City did not have an initialed copy of the letter in its files. (*Stockton Citizens*, *supra*, 157 Cal.App.4th at 343, fn. 16.) Only a Request for Judicial Notice included such a document. (AA 774.)

[14] The Guidelines characterize this notice as a "notice of exemption" ("NOE"), which, when posted, triggers a short 35-day statute of limitations to challenge the public agency's *approval* of a project. (Guidelines, §§15062, 15374; see Public Resources Code, § 21152 (b) "Whenever a local agency determines that a project is not subject to [CEQA] . . . and the local agency approves . . . the project, the local agency . . . may file a notice of the determination with the county clerk. . . .")

Development Plan, as well as the City of Stockton's General Plan and zoning regulations. (AR 2283.)

Only someone privy to the private, December 2003 correspondence between the Director and Doucet & Associates might have recognized that the February 17 NOD related not to ministerial approval of plans for land designated "commercial," but to a proposed big-box store to be located on parcels designated for high-density housing on the Conceptual Site Plan.

F. WAL-MART APPLIES FOR A CONDITIONAL USE PERMIT

Respondents did not learn of the Supercenter proposal until after February 24, 2004, when Wal-Mart applied for a conditional use permit for the sale of alcohol. (AR 2286.)

On March 16, 2004 Respondents, as yet unaware of the NOD and the private correspondence to which it related, asked to be placed on the City's Notice List for the Project. (AR 2314.) Respondents opposed the Supercenter as soon as they became aware the City was processing the Use Permit (UP15-04). (AR 2286.)[15]

Respondents appeared at the Planning Commission hearing on the Use Permit and urged the City to complete CEQA environmental review of the Supercenter before issuing building permits. (AR 2342-2347.)

---

15 Spanos incorrectly asserts "[c]ounsel for Respondents was aware during the 35 days following the [NOD] that the Project was to be a Wal-Mart Supercenter." (Spanos BOM, p.6.) Stockton could have mailed Respondents' counsel a copy of the NOD within the thirty-five day filing period because the City received counsel's letter asking to be placed on the Notice List on March 18, 2004. (AR 2314.) Instead of timely informing counsel of the NOD, the City waited until March 29, and then only sent counsel notice of the hearing on the Use Permit. The City's notes on the bottom of the March 16, 2004, letter make clear that the City mailed notice regarding UP15-04.

Respondents presented a traffic study to the Commission indicating the Supercenter was likely to have significant traffic impacts not considered in the certified SEIR for the MDP. (AR 2374-2380.) After the Planning Commission approved the Use Permit, Respondents appealed the Commission's approval to the Stockton City Council. (AR 2440.) On June 22, 2004, after the City Council hearing on Respondents' appeal, the Council voted 6-1 to deny the appeal and issued the use permit. (AR 2573-2575.)

II. PROCEDURAL HISTORY

A. TRIAL COURT ENTERS JUDGMENT FOR CONCERNED CITIZENS OF STOCKTON

On July 22, 2004, Respondents filed a Petition for Writ of Mandate and Complaint for Injunction (Petition) to enjoin construction of the Wal-Mart Supercenter in the Spanos Park West Business Park, and to require the City to prepare an environmental impact report before any construction would be undertaken. (AA[16] 1-26.). The City, Spanos, and Wal-Mart asserted that the petition was barred by the statute of limitations, whether the 35-day limit from the posting of the NOD, or the 180-day limit from the December 15 Director's Status Report. In the trial court the City and real parties primarily relied on the statute of limitations defense, first in demurrers and later in briefing on the merits. (AA 44-46, 157.1-157.3, 174-179, 1355-1357, 1387, 1415-1420.)

The trial court ruled that the December 15 Director's letter was not a project approval, and, therefore, did not trigger CEQA's statute of limitations. The court stated, "First, the letter is entitled 'Status Report.'"

---

[16] "AA" refers to Appellants' Appendix filed with the Court of Appeal on March 22, 2006.

(AA 1544.) "The second paragraph starts off with [the words] 'initial staff review.'" (AA 1277.9.) "Second, it is a letter not a formal order of approval. Third, it contains five conditions that require further action by the applicant before it is approved." (AA 1544.)

A fourth reason was mentioned in the "Decision re: Writ of Mandate," but more completely explained in the Order After Hearing on Motion for Preliminary Injunction. The court stated: "[The letter] does not find the change to retail use is consistent with the land uses and Development Standards of this Master Development Plan." (AA 1277.9) Before the land use could be changed from residential to retail, the MDP required both the Design Review Board and Director to review and approve the proposed change "for consistency with the Land Uses and Development Standards of this Master Development Plan." (AA 1277.10; AR 1159.) "The December 15, 2003, letter had no such finding or approval and, therefore, was not an approval of [Parcels] 17 and 17a to be changed to retail, its optional use." (AA 1277.10.)

The trial court found that the MDP limited the total retail within the Plan area to 875,000 square feet, and construction of the Supercenter would cause the MDP to exceed that level. (AA 1544, 1545, 1277.9.) Further, "approving the retail complex on Lot 17 and 17a ... not only exceeds the retail limit, but it also prevents the construction of the [935] residential units [required by the MDP]." (AA 1545.)

Accordingly, the trial court found, an Amendment of the Density Agreement to transfer 627 housing units out of the MDP area was a discretionary act necessitating CEQA review. (AA 1545-46.) Additionally, the transfer of the 627 high-density housing units offsite was a major amendment of the MDP requiring CEQA review. (AA 1277.10.)

In ruling for Respondents and mandating the City to prepare an EIR for the Supercenter, the trial court found that the Supercenter would

generate substantially more traffic than the residential units it was replacing. (AA 1545.)

Finally, the trial court found the NOD did not start the 35-day statute of limitations to challenge government action because the December 15 status report was not a project approval, and that only a project approval triggers the opportunity to file an NOD, citing *County of Amador v. El Dorado County Water Agency* ("*County of Amador*") (1999) 76 Cal.App.4th 931, 963.

After entry of judgment, the City, Wal-Mart and Spanos appealed. (AA 1549-1557.) The City later dismissed its appeal.

B. THE COURT OF APPEAL AFFIRMS THE JUDGMENT

The Court of Appeal found the Supercenter was not authorized by the MDP, the Development Agreement, the Density Agreement, and related planning and zoning amendments. "Since the Wal-Mart ... was not authorized by these documents, it was not subject to environmental review in the SEIR." (*Stockton Citizens*, *supra*, 157 Cal.App.4th at 341.)

In addressing the December 15 Director's letter, the Court agreed with the trial court that the letter was not an "approval" of the Project within the meaning of CEQA. (*Id.* at 343-344.) Expanding on the trial court's reasoning, the Court noted that a project approval is defined in part by the agency's rules, regulations, and ordinances. (*Id.* at 344.) The MDP provides a member of the public 10 days to appeal to the planning commission a decision of the Director approving a proposal for compliance with the MDP. (*Id.* at 344.) "Since the rule provides for appeals by members of the public, it contemplates that ... an approval must be capable of being known to the public, either because the approval is posted or published or otherwise distributed to the public." (*Id.*) The Court stated the

Director's letter was not a project approval because the letter was titled "Status Report" and did not inform the public it was a final project approval, and the letter was also not in any manner made public. (*Id.*) It followed that the February NOD was of no effect because there was no "determination."

The Court held "the date of the public agency's decision to carry out ... 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. (*Id.* at 345.)

The Court found a second and separate ground for finding there was no project approval–lack of authority in the Director to approve a project with environmental consequences. The Court concluded that when an agency's administrative officer acts without jurisdiction, the actions are void for purposes of CEQA.

This Court granted review to address the issue whether Stockton Citizens for Sensible Planning challenged the Wal-Mart Supercenter within the applicable statute of limitations, on the theory that the statute of limitations was not triggered because there was no valid approval.

ARGUMENT

I. SUMMARY OF ARGUMENT

Where the facts are undisputed, the question whether an event triggering the statute of limitations has occurred presents a question of law requiring construction of the applicable statutes and regulations. The Court of Appeal, based on undisputed facts, properly found that Citizens for Sensible Planning timely filed this action challenging the Petitioners' substitution of retail for high-density residential within the Business Park on July 22, 2004 (AA 1), 30 days after the City issued its first potentially binding approval, a Conditional Use Permit (CUP) on June 22, 2004 (AR 2518).

It is undisputed that the proposed Supercenter is not specified on the Conceptual Site Plan (Fig. 3-1) and Land Use Summary (Table 3-1) of the MDP. It is also undisputed that the Density Agreement required Spanos to "construct a minimum of Nine Hundred Thirty Five multi-family units as part of the development of The Business Park" on Parcels 17, 17a, 18 & 19. (AR 569, 1412-1413.) Nor is it disputed that substituting a major retail use on Parcels 17 and 17a, prevented Spanos from constructing the remaining 627 multi-family dwelling units due to lack of remaining undeveloped land in the Business Park, thus necessitating a request to amend the Density Agreement. (AR 2277.) It also is undisputed the City did not give public notice or hold a public hearing to approve an amendment to the Density Agreement forgiving Spanos his obligation to develop 935 multi-family dwelling units in the Business Park to offset the low density housing allowed at The Villages. (AR 1924, 2161.)

Finally, it is undisputed that Spanos and Wal-Mart stake their claim to an entitlement reviewed and authorized by private correspondence between the master developer and the City's Community Development Director unknown and unavailable to the public. Wal-Mart asserts in its Brief on the Merits, the Director "merely performed the ministerial task of determining that because the Supercenter is consistent with the previously approved MDP, which had been the subject of an EIR, it was exempt from further CEQA review." (Wal-Mart BOM at p.33.)

The parties agree that the statutes of limitation potentially applicable to Citizens for Sensible Planning's challenge the project are contained in the six subdivisions of Public Resources Code section 21167. Petitioners argue that either subdivision (a) or (d) bars Citizens for Sensible Planning's challenge to Spanos' proposal to substitute a Supercenter for the high density housing designated by the Conceptual Site Plan (Fig. 3-1) and Land

Use Summary (Table 3-1) within the MDP, and required by the Density Agreement.

Citizens for Sensible Planning assert that the statute-triggering event never occurred until approval of the CUP or, alternatively, would not have occurred before "commencement" of the project. The City did not make a CEQA "approval" necessary to trigger either subdivision (a) or (d) of Section 21167.[17] As Wal-Mart acknowledges, the ministerial private review process authorized by the MDP could not trigger a new statute of limitations because uses consistent with the MDP had already been evaluated under the MDP's already certified EIR. (Wal-Mart BOM at p. 33.) (AR 1046.) (See Pub. Resources Code, § 21080. subd. (b)(1).)[18]

Respondents are not challenging the previously approved MDP, nor are they challenging the certified and unchallenged SEIR for the MDP. Rather Respondents are challenging the implementation of the MDP. (See *Endangered Habitats League, Inc. v. State Water Resources Control Board* (1997) 63 Cal.App.4th 227, 234-238.) Major amendments to the MDP for uses not consistent with the MDP's Conceptual Site Plan (Fig. 3-1) and Land Use Summary (Table 3-1), and any amendment to the Density Agreement are discretionary projects that require public notice prior to any public hearing before either the City's planning commission or elected

---

[17] All further references to the statute are to the Public Resources Code, unless otherwise specified.

[18] "The prior EIR ... is conclusively presumed to be legally adequate if it is not challenged within the statutory period after certification or approval." (2 Kostka, Practice Under the California Environmental Quality Act, *supra*, §23.26, pp. 1163-1164, citing *Laurel Heights Improvement Ass'n v. Regents of University of California* (1993) 6 Cal.4th 1112, 1130.)

legislative body–the City Council.[19] (AR 1159-1160.) In implementing the MDP the City failed to follow this alternative public review and approval process for discretionary developments that are not consistent with and do not share the same or similar characteristics of the primary use designated on the Conceptual Site Plan (Fig. 3-1) and Land Use Summary (Table 3-1) of the MDP. (AR 1159-1160.) The City filed an NOD after the Director's private review and determination that substituting a big box retail store for the designated high density housing was consistent with the MDP. This notice was materially defective because it provided no information about the change in the primary land use necessary for the Project to large-scale retail use, and completely omitted any information about any purported change to the Density Agreement, which would excuse the master developer from providing the required high density housing within the Business Park. (AR 2283-2284.)

The lower courts resolved the question of law whether Respondents' challenge to the implementation of the MDP was time-barred in favor of Citizens. Their decisions are consistent with the CEQA statutes, Guidelines and established case law. "CEQA applies to 'discretionary projects proposed to be carried out or approved by public agencies.'" (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 730, quoting Public Resources Code, § 21080(a).)

As Wal-Mart acknowledges, CEQA does not apply to "[m]inisterial projects proposed to be carried out or approved by public agencies." (Public Resources Code, § 21080, (b)(1).) Since the City failed to notify

---

[19] "Discretionary project" is defined by the Guidelines to mean "a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations." (Guidelines, § 15357.)

the public that it was going to approve, or had approved, a discretionary project subject to CEQA, when the Director purportedly approved the Supercenter, there was no triggering event implicating CEQA's statute of limitations. Contrary to Petitioners' argument, the courts' construction of the applicable statutes and controlling environmental documents involved no determination of the merits of the cause of action, rather the lower courts' decisions recognized that there was no triggering event that triggered CEQA's statute of limitations.

II. WHETHER CONDUCT CONSTITUTES A CEQA APPROVAL PRESENTS A QUESTION OF LAW INDEPENDENT OF THE MERITS.

"[W]here the facts are agreed or ascertained, it is a question of law whether a case is barred by the statute of limitations ...." (*Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, 193 (quoting *Rare Coin Galleries, Inc. v. A-Mark Coin Co., Inc.* (1988) 202 Cal.App.3d 330, 334); see also, *Int'l Engine Parts v. Feddersen & Co.* (1995) 9 Cal.4th 606, 611.) (Cf. Spanos BOM p.7).[20]

It is well established that the provisions of CEQA are to be broadly interpreted in order to afford full protection of the environment. (See *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 381 (court must "bear in mind that '[t]he foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language' [citations omitted])"; *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112; *No Oil,*

---

[20] Spanos takes the inconsistent position later in his brief that the standard of review is substantial evidence. (Spanos BOM at p.13.)

Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 83; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 263.)

A. THE STATUTE OF LIMITATIONS AND GUIDELINES MAKE AN "APPROVAL" THE STATUTE-TRIGGERING EVENT

Public Resources Code § 21167 sets out the statute of limitations for challenges to public agency approvals of projects subject to CEQA. Corresponding CEQA Guidelines[21] have been promulgated by the Resources Agency as authorized by Public Resources Code § 21083. Both subdivisions (a) and (d) make a public agency "approval" the statute-triggering event.

Public Resources Code § 21167 subdivision (a) allows challenges to discretionary projects to be filed 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."

Where a Notice of Determination (NOD) or Notice of Exemption (NOE) is filed after the agency's approval of a project, Public Resources §21167(d) shortens the statute of limitations. Subdivision (d) of § 21167[22]

---

[21] In interpreting CEQA, the courts accord the Guidelines "great weight except where they are clearly unauthorized or erroneous. [Citations.]" (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428, fn. 5.)

[22] Section 21167(d) provides:

> "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

requires that challenges to a local agency's "determination" that a project is exempt from CEQA because it is a "ministerial"[23] (as opposed to "discretionary") decision shall be filed within 35 days of the agency's filing the notice authorized by subdivision (b) of § 21152. The NOE is discretionary and subdivision (b) of § 21152 does not specify a time limit

---

> 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."

Section 21080 subd. (b) provides:

> (b) This division does not apply to any of the following activities:
>
> > (1) Ministerial projects proposed to be carried out or approved by public agencies.

[23] Guidelines section 15369 defines "ministerial":

> "Ministerial" describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out. . . . A building permit is ministerial if the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his fee.

for its being filed.[24] If the agency or the applicant does not file this notice, the 180-day limit from approval or commencement of the project applies.

Under Guidelines section 15112, subdivision (c) (2), the 35-day period runs from the filing of a notice of exemption "in compliance with Section 15062." Section 15062 subdivision (a), governing notices of exemption, applies "[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... . The notice shall be filed, if at all, after *approval* of the project."[25]

If there is no "approval" of the project, the notice of exemption is of no effect, and the 35-day statute of limitations set out in section 21167 subdivision (d) does not begin to run. (*Id.*, *County of Amador, supra*, 76 Cal.App.4th at 963.) Because the City did not approve the Supercenter the NOD filed on February 17, 2004 was void. (AR 2283.)

---

[24] In contrast, a notice of determination that a project *is* subject to CEQA is mandatory and shall be filed within 5 working days after the approval becomes final. (Pub. Resources Code, § 21152, subd. (a).)

[25] Section 15062 specifies the contents of the notice and requires it to be available for public inspection and posted in the County Clerk's office for a period of thirty days. Such a notice shall include:

> (1) A brief description of the project,
>
> (2) The location of the project (either by street address and cross street for a project in an urbanized area or by attaching a specific map, preferably a copy of a U.S.G.S. 15' or 7-1/2' topographical map identified by quadrangle name).
>
> (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.

B. A CEQA STATUTE OF LIMITATIONS IS NOT TRIGGERED BY A MINISTERIAL DESIGN REVIEW PROCESS

As a matter of law, the MDP's ministerial design review process did not trigger the CEQA statute of limitations. By approving the MDP the City agreed to allow uses within the Spanos West Business Park that are consistent with the MDP's Conceptual Site Plan (Fig. 3-1) and Land Use Summary (Table 3-1). To implement the approved Business Park component of the Spanos Park West project, the MDP sets forth a ministerial design review process to review uses deemed to be consistent with the primary uses authorized by the MDP. (AR 1159-1160.)

Approval of uses, developments, or projects the Director determines to be consistent with the MDP does not change the prior approved MDP, and, therefore, does not require subsequent environmental review, because there is no discretionary decision approving a new or modified project pursuant to the ministerial design review process. (Public Resources Code, §§ 21080(b)(1), 21166; Guidelines, § 15162; *City of Chula Vista* v. *County of San Diego* (1994) 23 Cal.App.4th 1713, 1720-1721.)

The MDP's ministerial review process is consistent with section 21166 of the Public Resources Code, as described in a leading treatise on CEQA.

> Under CEQA and the CEQA Guidelines, the legal hook for environmental review of a project is the need for discretionary approvals by public agencies. See, *e.g.*, Pub Res C §21002. Ministerial actions are exempt from CEQA requirements []. Thus, the review process, including subsequent environmental review under Pub Res C §21166, terminates once all discretionary approvals necessary for a project to proceed have been granted. Agency action to implement a project that has been previously approved does not trigger a need for further environmental review (citation omitted).

(2 Kostka, Practice Under the California Environmental Quality Act, *supra*, §19.31, p. 901.)

As further explained by this treatise, section 21166 of the Public Resources Code allows for "reopen[ing] the need for further CEQA review ... because substantial changes to a project will often require further discretionary approvals to authorize the changes." (*Id*., at §19.32, p. 902.) The treatise goes on to warn public agencies that "[i]f an agency authorizes major modifications to a project without determining whether further CEQA review is required, its decision to approve the changes to the project may be set aside." (*Id.*)

The City recognized this legal requirement by providing in the MDP for a separate discretionary review process when the City determines that a proposed use, development, or project is not consistent with and does not share the same or similar characteristics of an allowed use identified within the Master Development Plan. (MDP § 8.3, AR 1160.)

Petitioners identify the Director's December 15, 2003 "Status Report Regarding Site Plan, Landscape Plan, Elevation and Design Approval-- Retail Store: Spanos Park West" as the statute-triggering "approval" required to trigger section 21167 subdivisions (a) and (d). (Wal-Mart BOM at p. 9; Spanos BOM at p. 19.) Despite their desire to make more of this "Status Report," the Director's action could not have changed the MDP, because as Wal-Mart argues and the MDP process expressly states, no ministerial decision proclaiming a use is consistent with the MDP changes the prior approved MDP. (Public Resources Code, §§ 21080 (b)(1); 21166.)

The Court has framed the issue in this case as follows:

> Was plaintiff's challenge to the approval of a Wal-Mart Supercenter project filed within the applicable statute of limitations on the theory that the approval was invalid and thus did not trigger the running of the limitations period?

Respondents believe an additional dispositive issue is whether within the context of the ministerial design review of proposed uses, developments, or projects consistent with the prior approved MDP, a ministerial decision approving a use purported to be consistent with the MDP can trigger a new statute of limitations. Respondents do not believe the Director's purported ministerial action can trigger the running of the limitations period, because the prior-approved MDP was not changed or modified; nor was a new project approved.

Ministerial decisions are not subject to CEQA. (Public Resources Code, § 21080(b)(1).) Even the filing of a NOD or an NOE cannot re-open the statute of limitations for challenging the prior approved MDP. (*City of Chula Vista*, *supra*, 23 Cal.App.4th at 1720-1721; 2 Kostka, Practice Under the California Environmental Quality Act, *supra*, §23.26, p. 1164; see also *Laurel Heights II*, *supra*, 6 Cal.4th at p. 1130, "After certification, the interests of finality are favored over the policy of encouraging public comment.") Therefore, as will be explained below, the Director's purported ministerial decision could not be an "approval" that triggers a new statute of limitations period for challenging a new discretionary project or a substantially modified MDP.

Petitioners rely on *California Manufacturers Ass'n v. Industrial Welfare Commission* (1980) 109 Cal.App.3d 95. Unlike the factual situation in this proceeding, in *California Manufacturers* the lead agency, Industrial Welfare Commission ("IWC"), issued discretionary orders regulating the wages, hours, and conditions of employment in the manufacturing industry among others. (*Id.* at p. 102-103.) The IWC's approval of these discretionary rules regulating wages, hours, and conditions of employment, and the adoption of a negative declaration triggered IWC's obligation to file an NOD pursuant to section 21108(a) of

the Public Resources Code. The filing of the NOD in turn started CEQA's short 30-day statute of limitation for challenging the IWC's discretionary action. (Public Resources Code, § 21167(b).)

After the 30-day statutory period had run petitioner association challenged the IWC's adoption of a negative declaration rather than preparing an EIR to address the environmental impacts of adopting the wages, hours, and conditions of employment rules. (*California Manufacturers*, *supra*, 109 Cal.App.3d at 123-124.) The association also challenged the timing of the IWC's filing of the NOD. (*Id.* at 124.) The Court of Appeal ruled that the association was time-barred from bringing its substantive claims against the IWC's environmental review and filing of the NOD. (*Id.* at 124-125.)

Although superficially similar to the situation at hand, the IWC's actions were substantially dissimilar from the Director's action. The adoption of the IWC rules was completed within a publicly noticed, public review process. (*Id.* at 108.) The filing of the NOD by the IWC started a 30-day clock for challenging the IWC's discretionary decision adopting new rules. (*Id.* at 125.)

In this case, the Director's ministerial decision was completed in private. The NOD that was filed with the County Clerk did not inform the public that the "project" had been modified. Instead, this notice simply stated that the retail use "meets the intent and standards of the [MDP]." (AR 2283.) The NOD also stated the " Site Plan, Grading Plan, Landscape Plan, Building Elevations and Design applicable to the Project conform to the standards set forth in the Spanos Park West Master Development Plan, which determination is a ministerial action not subject to CEQA review." (*Id.*) This is exactly what Wal-Mart asserts in its opening brief – the Director's determination of conformity was ministerial and not subject to CEQA review. (Wal-Mart BOM at p.33.)

The NOD simply informed the public that the project had not been changed, and the public had a right to presume, based on the NOD's explanation of what occurred in private, the project to be the same as the originally approved project. (*Concerned Citizens of Costa Mesa v. 32nd District Agricultural Ass'n* (1986) 42 Cal.3d 929, 938.)[26] If the proclaimed public agency action implementing a prior discretionary approval does not change the prior approved project then the ministerial action as described in an NOE cannot reopen the statute of limitations. (*City of Chula Vista*, *supra*, 23 Cal.App.4th at 1720-1721; 2 Kostka, Practice Under the California Environmental Quality Act, *supra*, §23.26, p. 1164; see *Endangered Habitats League, Inc. v. State Water Resources Control Board* (1997) 63 Cal.App.4th 227, 240-243.) In this case the Director changed the MDP, and the purported ministerial action and accompanying NOD did not trigger the statute of limitations.

C. A CEQA APPROVAL IS A DECISION BINDING ON THE LOCAL AGENCY ENTITLING A DEVELOPER TO COMMENCE A PROJECT

Beyond the section 21167 references to "a decision to carry out or approve" and "a formal decision," CEQA itself does not define the term "approval." Section 15352 of the CEQA Guidelines and judicial decisions interpreting when a public agency's action has "approved" a project define a CEQA "approval" in terms of a decision or commitment binding on the local agency, in this case the City, and entitling the applicant to proceed.

The Guidelines define "approvals" separately for public and private projects in order to guide local agencies in identifying the decisions

---

[26] See *Murrieta Valley Unified School District v. County of Riverside* (1991) 228 Cal.App.3d 1212, 1227-1228 ("It is unfair and unwise to penalize the public for proceeding on the expectation that the law will be obeyed.")

triggering the need to analyze potential environmental impacts. An "approval" for a public project is, according to the Guidelines, "the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." (Guidelines, § 15352(a).) "The exact date of approval of any project is a matter determined by each public agency according to its rules, regulations, and ordinances. Legislative action in regard to a project often constitutes approval." (*Id.*)

An "approval" for a private project "occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project." (Guidelines, § 15132(b).)

Within the context of public contracts, several cases have addressed the meaning of the words "commit[ing] [an] agency to a definite course of action." In *City of Vernon v. Board of Harbor Commissions* (1998) 63 Cal.App.4th 667, 688, the Court stated "the 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.* at 688; *County of Amador, supra,*76 Cal.App.4th at 965 followed the *City of Vernon* holding that an agency must agree "to be legally bound to take the course of action" before the action is deemed to be project approval.)

Concerned Citizens of McCloud v. McCloud Community Services District (2007) 147 Cal.App.4th 181 addressed whether a community services district's approval of an agreement with a company for the purchase of spring water was invalid for failure to complete CEQA review. The Court ruled there was no project approval for CEQA purposes because the District reserved CEQA review, and "the terms of the agreement

demonstrate the District retains the right to participate in and approve or disapprove or modify major aspects of the prospective project." (*Id.* at 193.)

Miller v. City of Hermosa Beach ("*Miller*") (1993) 13 Cal.App.4th 1118, one of the few cases to discuss when "approval" occurs for a private project, is discussed more fully below. It found that issuance of a building permit was the "formal, legally enforceable event" of sufficiently "public nature" to be a CEQA approval, and that an earlier private "Approval in Concept" did not trigger the statute. (*Id.* at 1143.)

In one of the two widely respected and often cited treatises on CEQA, the authors set forth a standard for project approval consistent with these court decisions:

> [T]he analysis should focus on two factors to determine whether the challenged agency's action constitutes "approval" of a project. First, the analysis should consider whether, in taking the challenged action, the agency indicated that it would perform environmental review before it makes any further commitment to the project and, if so, whether the agency has nevertheless effectively circumscribed or limited its discretion with respect to that environmental review. Second, the analysis should consider the extent to which the record shows that the agency or its staff have committed significant resources to shaping the project. If, as a practical matter, the agency has foreclosed any meaningful options to going forward with the project, then for purposes of CEQA, the agency has "approved" the project.

(Remy, et al., Guide to CEQA (Solano Press 11th ed. 2006) p. 71.)

The above-cited cases and treatise, consistent with the statutory references to "a decision to carry out or approve" and "a formal decision," establish that a CEQA "approval" triggering a new statute of limitations must be a legally binding agency action. If the agency has taken no legally binding action to change the previously approved project, the agency has not approved a new or significantly modified project for CEQA purposes.

D. THE DECEMBER 2003 CORRESPONDENCE WAS NOT AN APPROVAL OF THE SUBSTITUTION OF RETAIL FOR RESIDENTIAL USES AS A MATTER OF LAW

The Director's December 15, 2003 "Status Report Regarding Site Plan, Landscape Plan, Elevation and Design Approval--Retail Store: Spanos Park West" was not a statute-triggering "approval" required to trigger section 21167 subdivisions (a) and (d). The December 15 memo, did not bind the City to allow Spanos to construct a Wal-Mart Supercenter instead of the high-density residential units that were the subject of CEQA review. The Court should reject Petitioners' argument relying on the Director's Status Report as an approval. Nor should the Court conclude, that it is bound by the City's adamant, but mistaken, view of the import of the December 15, 2003 Status Report.

1. IDENTIFYING A STATUTE-TRIGGERING EVENT PRESENTS A QUESTION OF LAW

First, identifying the statute-triggering event requires construction of CEQA and is a question of law independent of the merits.

For example, construing a statutory scheme defining the trigger as denial of a tax refund, *Geneva Towers Partnership v. City & County of San Francisco* (2003) 29 Cal.4th 769 rejected San Francisco's contention that the statute of limitations began to run six months after the taxpayer filed its tax refund claim. This Court reviewed the statutory language and concluded that there had been no "denial" within the meaning of the statute.

Similarly, *Iverson v. Berwald* (1999) 76 Cal.App.4th 990 determined that the promissory notes attached to the complaint did not, as a matter of law, constitute a "valid enforceable written contract" under Business and Professions Code § 6148. The Court reviewed the documents allegedly constituting the statute-extending written agreement between attorney and

client in light of the governing statutes. The Court determined that there was no "valid contract" and therefore the fee dispute was barred by the shorter, two-year quantum meruit statute of limitations.

The courts have taken the same approach in CEQA cases. Thus, for example, *Miller v. City of Hermosa Beach*, *supra*, 13 Cal.App.4th at 1118 rejected a statute of limitations defense similar to Petitioners' argument. *Miller* held that "approval" of a private project for purposes of the 180-day statute of limitations was issuance of a building permit, not an earlier "Approval in Concept," which (1) had numerous substantive conditions attached that, if not met, would have barred the issuance of a building permit, and (2) was not of "such a public nature that it would be subject to a writ of mandate proceeding by a concerned citizen." (*Id.* at 1143.) "[I]ssuance of the building permit ... [was] the formal, legally enforceable event." (*Id.*) The Court relied in part on *Day v. City of Glendale* (1975) 51 Cal.App.3d 817, which concluded, "the applicability of [CEQA] cannot be made to depend upon the unfettered discretion of local agencies that a project is ministerial and thus exempt from the requirements of the CEQA." (*Id.* at 822.)

2. THE LOWER COURTS CORRECTLY HELD THE STATUS REPORT DID NOT BIND THE CITY AND WAS NOT PROJECT APPROVAL

The trial court and the Court of Appeal stated the City was required to process a discretionary major amendment to the MDP with CEQA review, and provide a public hearing prior to approval of the Supercenter. [27]

---

[27] The trial court held the Supercenter was not within the scope of the MDP because: 1) it would cause the MDP to exceed the maximum 875,000 square feet retail space allowed by the Plan, and 2) it would prevent the construction of the 935 residential units required by the MDP. (AA 1544, 1545, 1227.9) This finding was not contested in the Court of Appeal.

(AA 1544-1546; *Stockton Citizens*, *supra*, 157 Cal.App.4th at 349-350.) The December 15 Status Report did not provide these required discretionary approvals.

The Director's purported approval could not have bound the City to the alternative project, because the MDP gave him no role in making discretionary, but only ministerial, decisions, as set forth in sections 5.5, 8.2 and 8.3 of the MDP. (AR 1090, 1159, 1160.) Approval of major amendments (section 8.3) including alternative projects to those approved in the MDP required noticed public hearings and legislative body decisions capable of review. (AR 1160.) Because these steps were not taken, the City provided no approval.

Even if the actions of the City are viewed under the ministerial provisions of the MDP as Petitioners propose, the December 15 letter did not meet the requirements of the MDP. As the trial court stated, the letter is titled "Status Report" and states that it is an "initial staff review." It is not a formal order of approval and includes five conditions that require further action of the applicant. (AA 1277.9, 1544.) The letter does not make the required finding that land use change from multi-density housing to retail use is consistent with the "Land Uses and Development Standards of this Master Development Plan." (AA 1544, 1277.9-1277.10; AR 1159.)

The Court of Appeal endorsed the trial court findings and additionally found that the MDP provided the public a right to appeal a ministerial approval by the Director. For the public to appeal, the public would have to be informed of the project. The court held that the letter was not a project approval because it was titled a "Status Report" and did not

---

Because the Supercenter was not within the scope of the MDP, the MDP required a major amendment under section 8.3, which is discretionary.

inform the public it was a final project approval, and was not made public. (*Stockton Citizens*, *supra*, 157 Cal.App.4th at 344.)

There are other reasons not cited by the lower courts that the Status Report was not an approval pursuant to the MDP. As in *Concerned Citizens of McCloud*, *supra*, 147 Cal.App.4th at 193, the project was subject to change. After the Director issued the Status Report, the Supercenter site plan was significantly changed. When Spanos applied for the CUP for sale of alcohol, the Conceptual Site Plan labeled P-6 (AR 2271) was presented to the City Planning Commission and City Council as the approved site plan. (See AR 2320-2322, 2450.) This site plan did not exist on December 15, 2003 because it was a December 30, 2003 revision of the original drawing dated October 29, 2003.[28]

Additionally, on October 9, 2003, Spanos submitted the following written application to amend the Development Agreement: "Allow Spanos to further develop the Spanos Park West power center by transforming [sic] Spanos obligation to construct high density residential units within Spanos Park West to other locations within the City." (AR 2268.) The record discloses no approval of the requested amendment, which would have required a public hearing in conformity with Government Code section 65868 and the Stockton City Code. (AR 1924.)

---

[28] See upper right hand corner of Conceptual Site Plan P-6, indicating a revision 12/30/03. (AR 2271.) Spanos' first Request for Judicial Notice in Support of Demurrer identified Exhibit E as the December 15, 2003 Status Report. (AA 48.) Spanos' Exhibit E, in contrast to the Status Report in the record, included as an attachment a Conceptual Site Plan labeled P-5. (AA 88-90.) This P-5 Site Plan included one legible date in the upper left hand corner, November 18, 2003. The P-5 Site Plan was substantially different from the site plan presented to the City Council as the approved site plan. (AR 2450.)

Finally, the Design Review Board's October 29, 2003 letter transmitting the Wal-Mart plans to the Director committed the Board to making "[a] written finding of consistency and compatibility of the terms of the Master Development Plan, Development Agreement and all applicable policies and regulations for the building permit process." (AR 2270.) According to MDP section 5.5, the Board's written finding was required *before* the Director could review and approve or issue any permit for a specific development project. (AR 1090.) Despite this requirement, the Board never provided its formal findings to the Director, as required by the MDP *before* the Director's purported approval of the Supercenter plans. (Compare MDP, §5.5 at AR 1090.)

3. THE DECEMBER 15 STATUS REPORT DID NOT AMEND THE DENSITY AGREEMENT, AS REQUIRED TO BIND THE CITY TO PROJECT APPROVAL

The December 15th Status Report could not have been an approval of an alternate use because it did not and could not amend the Density Agreement. The Density Agreement could be amended "only in the manner provided for in Government Code section 65868 and Code Section 16-193 [except that] any amendment which does not relate to the Term, permitted uses, density or intensity of use ... shall not require a noticed public hearing before parties may make such amendment." (AR 1180.)

The Density Agreement, as a development agreement, can only be amended after noticed public hearings. (Government Code § 65868.) Amendment of a development agreement is a legislative act and must be approved by the governing body of a local agency with accompanying CEQA environmental review. (Government Code §§ 65867, 65867.5; *Santa Margarita Area Residents Together v. San Luis Obispo County* (2000) 84 Cal.App.4th 221, 227; Guidelines §15378 (a) (1) & (c).)

The Density Agreement committed the City to conduct further environmental analysis and approval of any substantial change to the Agreement by its legislative body through a public process (reviewable by mandate). Until such review occurred, there could be no approval by the City of the alternative project.

Spanos' December 16, 2003, letter styled "Amendment to Density Transfer Development Agreement," (AR 2277) acknowledged Spanos had agreed to construct a minimum of 935 multi-family units to be located within the M-X component of Spanos Park West. It stated "Spanos presently lacks the space within the M-X component … to accommodate the additional [627] Units." The Letter seeks approval to delay their construction until after adoption by the City of its updated General Plan.

The Director's December 17th sign-off on the requested delay did not include the environmental analysis to which the City committed in the Density Agreement nor the public process required by section 8.3 of the MDP and thus could not have bound the City to release Spanos from his obligations under the MDP, the Density Agreement, and the General Plan. Spanos' counsel recognized that limit on the Director's role and could not expand the scope of his authority by writing the February 5, 2004 letter (AA 774) that triggered the (void) Notice of Determination.

Amendment of the Density Transfer Agreement was necessary to the Project. The Density Transfer Agreement, as well as the SEIR, required 935 high-density residential units in the Spanos Business Park. (AR 2153, 571, 588, 712, 1725.) At the time the City processed the Supercenter, Parcels 17 and 17a were the only undeveloped Parcels with the primary land use designated for multi-family units. (AR 1075-1076).[29]

---

[29] The trial court found, "By approving this retail complex on Lot 17 and 17A it not only exceeds the retail limit but it also prevents the construction of the residential units. This necessitated the 12-16-03

Petitioners cite no reference in the MDP to provide the Director with authority to amend the Density Agreement. (Cf., *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1989) 209 Cal.App.3d 1502, 1525 (powers of a subordinate agency or official to the governing board of an agency are strictly circumscribed by law).)

4. THE FINDING OF NO TRIGGER EVENT IS CONSISTENT WITH *ENDANGERED HABITATS* AND THE OTHER CEQA "APPROVAL" DECISIONS

Endangered Habitats League, Inc. v. State Water Resources Control Board ("*Endangered Habitats*") (1997) 63 Cal.App.4th 227, is helpful in addressing the case before the Court. *Endangered Habitats* reviewed the effect of Riverside County's negative declaration adopted in 1986 for a Master Drainage Plan for a portion of the county. In 1993, the County sought approval from the State Water Resources Control Board to line with concrete two of the channels identified in the Master Drainage Plan. Like the approval of the "staged EIR" for the conversion of the agricultural land to urban uses at the outset of the Spanos Park East and Spanos Park West master planning process (AR 538), the negative declaration prepared for the Master Drainage Plan was the first tier environmental document.[30]

Habitat did not object to the Master Plan or the first tier environmental document, but when Riverside decided how it would implement the Plan, Habitat pointed out significant adverse environmental impacts associated with lining the natural drainage canals that had never

---

Amendment to the Density Transfer Development Agreement." (AA 1545.)

[30] "Tiering" refers to the coverage of general matters in broader EIRs (such as on general plans or policy statements) with subsequent narrower EIRs or ultimately site-specific EIRs incorporating by reference the general discussions and concentrating solely on the issues specific to the EIR subsequently prepared. (Guidelines, § 15385.)

received environmental review. (*Id.* at 237.) Despite Habitat's efforts to get the county's attention, Riverside gave no notice and provided no opportunity to be heard on the "second tier" review because of its "adamant" but "mistaken" view that no further review was necessary. (*Id.* at 238.)

The county argued it could rely on the 1986 negative declaration that was adopted when the Master Drain Plan was approved for the CEQA review for the two lined drainage line proposals, F and F-1 lines. Therefore, when Habitat challenged the county's decision to proceed to line the two drainages, the county argued Habitat's petition was filed after the statute of limitations expired for review of the negative declaration. (*Id.* 240-241.)

The Court of Appeal disagreed with the county's legal position and affirmed the trial court, holding "that since no formal *site-specific* decision on the F and F-1 Lines was ever taken by Riverside, the statute of limitations did not begin to run until commencement of the project, which occurred after the filing of the lawsuit."[31] (*Id.* at 241, emphasis in the original.) The "only trigger event was when construction began on the second-tier part of the project."[32] (*Id.*)

---

[31] *Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2008) 161 Cal.App.4th 1204, 1236-1237 took the Endangered Habitat League holding one step further. The court held CEQA does not permit the filing of an NOD encompassing a second tier project approval unless the agency previously completed environmental review for the specific project. If Committee for Green Foothills stands, then it would appear that appellants' challenge to the court of appeal decision should fail. *Committee for Green Foothills* is not yet a final decision.

[32] *Endangered Habitats League* includes no reference to a procedure in the Master Drainage Plan to approve specific projects within the scope of the Plan. In this respect the Master Drainage Plan may differ from the MDP. However, as in *Endangered Habitats League*, the City's Design

Similarly, in this case, the governing documents anticipated and committed the City to further, public, environmental review before the City would approve an alternative to the uses specified in the MDP and the Density Agreement. No such review occurred and the City gave no notice or opportunity to be heard in connection with substitution of a Supercenter for high-density residential housing. Petitioners are mistaken in claiming the Director had a ministerial duty to approve the Supercenter, which is not consistent with and does not share the same or similar characteristics of the allowed primary multi-family residential use identified on the MDP's Conceptual Site Plan (Fig. 3-1) and Land Use Summary (Table 3-1). (See AR 1072-1076, 1102, 1159-1160.)

III. THE NOD WAS VOID BECAUSE IT DID NOT GIVE THE PUBLIC NOTICE OF THE PROJECT

Not only did the NOD/NOE fail to follow a CEQA approval, it also failed to conform to the substance of the statutory requirements, thereby failing to accomplish the public notice for which CEQA provides. For this additional reason it did not trigger the statute of limitations.

A. AN NOD MUST INFORM THE PUBLIC ABOUT THE PROJECT

An agency's filing of a NOD for an exempt project may be the only means for members of the public to obtain information about the project, or even learn of the project's existence, before the CEQA statute of limitations

---

Review process also "provided no forum in which such objections could be lodged" (*Id.* at 239) concerning erroneous implementation of the MDP without subsequent CEQA review. "[T]he action taken, proceeding to complete second-tier construction without second tier CEQA review, was taken without providing any 'device,' meaning no notice or public participation, to rectify the error." (*Id.* at 240.)

expires. To satisfy the requirements of CEQA, the NOD must inform the public of the nature and scope of the project.

Public participation is an essential part of the CEQA process. Members of the public hold a "privileged position" in the CEQA process. This status reflects both "a belief that citizens can make important contributions to environmental protection and ... notions of democratic decision-making ..." (*Concerned Citizens of Costa Mesa*, *supra*, 42 Cal.3d at 936.) This Court has stated that CEQA procedures should be "scrupulously followed," so that "the public will know the basis on which its responsible officials either approve or reject environmentally significant action." (*Laurel Heights Improvement Association v. Regents of the University of California* ("*Laurel Heights I*") (1988) 47 Cal.3d 376, 392.)

An agency determination that a project is exempt from CEQA is unique under the statutory scheme because, unlike with projects subject to CEQA, the agency need not provide the public or other agencies with an opportunity to review, or hold a public hearing on, its exemption determination. (Guidelines, §§ 15060, 15061.) The filing of a Notice of Exemption (NOE) from CEQA is optional. (Public Resources Code, § 21108(b).) However, only by filing an NOE will an agency trigger the short, 35-day statute of limitations. (Public Resources Code, § 21167(d).)

Appellate courts have been unwilling to allow materially defective NOE's to trigger the 35-day statute of limitations. In *International Longshoremen's and Warehousemen's Union v. Board of Supervisors* (1981) 116 Cal.App.3d 265, 273-274, the Board adopted air pollution control district rules and then adopted a notice of determination intended to serve as a notice of exemption. Although the NOD included an accurate project description, it did not state the project was exempt from CEQA, did not cite a Guideline section authorizing the exemption, and did not state reasons for the exemption. The court rejected the argument of "substantial

compliance," and held that "[d]eficiencies in the notice were not mere matters of technical imperfections; they were matters of substance." (*Id.* at p. 273.)

If a notice of exemption is "defective in a material manner," the limitations period is extended. (*Amador, supra*, 76 Cal.App.4th at 963.) In *McQueen*, infra, the Board of Directors of the Mid-Peninsula Regional Open Space District ("District") filed a CEQA Notice of Exemption that simply described a project "as the acquisition of named surplus federal property for public open space." (*McQueen v. Board of Directors of the Mid-Peninsula Regional Open Space District* (1988) 202 Cal.App.3d 1136, 1144.)[33] At the time the Notice of Exemption was filed, the District had approved not only acquisition of the property, but also approved the plan for interim use and management. The District also knew that the property contained toxic and hazardous substances.

The Court stated: "We consider petitioners' situation tantamount to a lack of notice due to the incomplete and misleading project description employed by the District. While there is evidence the District gave notice of the proposed property acquisition, there is no evidence that the notice mentioned the acquisition of toxic, hazardous substances." (*Id.* at 1150.)

In this case, due to the Director's incomplete and misleading project description, including its reference to the site's commercial land use instead of the residential designation in the MDP, the public could not have learned that the City was planning a big-box retail store on land it had designated in

---

33 Partially overruled on other grounds in *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 576, fn 6.

the MDP for high-density residential. In fact, the public could learn virtually nothing about the Project from the NOD. [34]

B. THE NOD DID NOT IDENTIFY THE PROJECT, OMITTED MATERIAL INFORMATION ABOUT THE PROJECT, AND INCLUDED MATERIALLY FALSE INFORMATION

Guidelines section 15062 subdivision (a)(1) requires a Notice of Exemption to include "[a] brief description of the project." The NOD describes the Project as "[t]he site plan, grading plan, landscape plan, building elevations and exterior design detail [for] a retail use consistent with the Development Plan that comprises two phases, the total parcel of which will measure roughly 22.38 acres." (AR 2283.) The NOD further states, "[t]he Project is located in a Mixed-Use ("MX") Zoning District and *the property's primary land use designation is commercial* according to the Development Plan's Conceptual Site Plan." (AR 2283, emphasis added.)

Anyone reading the Project description would have no clue the Project was a big-box retail store, which would replace 637 units of high-density housing. From the project description in the NOD it is even difficult to learn the City purportedly approved a new retail development. The only information provided by the NOD is that a site plan and designs

---

[34] In the trial court Wal-Mart and City characterized the City's errors in the NOD as a mere technical imperfection of form, citing *Centinela Hospital Association v. City of Inglewood* (1990) 225 Cal.App.3d 1586, 1600-1601 for this principle. In *Centinela* the notice of exemption described the facility as 2700 square feet, instead of 5400 square feet. The Court found the error made no difference since the 5400 square foot facility as well as a 2700 square foot facility was subject to a Class 3 Categorical Exemption under Guidelines section 15303. Here, the error was material because it did not inform the public of a decision requiring and amendment of the Density Agreement and MDP and misled the public as to the nature of the project, which had not been the subject of environmental review.

detailing a retail use on a commercially designated parcel were processed by the City. Even this limited information was materially false because the property's primary land use designation was for high-density housing.[35] The principal aspect of the Project consisted of re-designating high-density housing land for retail use. This information was not disclosed in the NOD.

The NOD failed to mention a critical component of the Project, amendment of the Density Agreement. CEQA defines "project" to mean "*the whole of an action,* which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Guidelines, § 15378(a), emphasis added.) If the City did not amend the Density Agreement, the Supercenter could not be built on Parcels 17 and 17a. Therefore, amendment of the Density Agreement was part of the Project, and was required to be disclosed in the NOD.

The NOD misled the public by representing "the proposed retail use [] meets the intent and standards of the Master Development Plan, as well as the City of Stockton's General Plan." (AR 2283.) The trial court found the opposite to be true. The court ruled that the MDP and General Plan specifically required that the high-density residential units be provided where the Supercenter was to be located. (AA 1543-1545.) Also, the SEIR stated that 935 high-density units must be located in the Business Park to provide consistency with the Housing Element of the City's General Plan. (AR 712.)

---

[35] Additionally, the NOD falsely stated that "The primary goal of the Development Plan is to create a mix of compatible commercial businesses and offices space that would be of the highest quality design and construction." (AR 2283.) The MDP's "Primary Goal" makes no mention of commercial retail uses. (AR 1070.)

This Court should rule the NOD is void for material failure to comply with the requirements of the statute and Guidelines. The NOD did not identify the Project as a big-box store, and it did not even make clear that the City was actually approving a new development. The NOD excluded essential information about the Project, included materially false information about the land use designation of the parcels, and did not inform the public that the City was substituting a large retail development for high-density housing.

C. SINCE THE NOD WAS INVALID, THE STATUTE OF LIMITATIONS WOULD NOT BEGIN TO RUN AT THE TIME THE DIRECTOR ISSUED THE DECEMBER 15 STATUS REPORT

Public Resources Code § 21167(d) states that if an agency does not file an NOD and a project "is undertaken without a formal decision by the agency," the statute of limitations commences within 180 days after the commencement of the project. As previously explained in this Brief, the December 15 Status Report was not an approval of new discretionary project or substantial modification of a prior approved project that could be considered "a formal decision by the agency". (See, this Brief, supra, at pp. 25-29, 33-37.) Therefore, CEQA's statute of limitations would not commence to run until 180 days after commencement of the Project. (Public Resources Code, § 21167(a).)

IV. THE DIRECTOR WAS WITHOUT AUTHORITY TO APPROVE A PROJECT THAT REQUIRED CEQA REVIEW

Finally, Petitioners assert that the Court of Appeal's analysis of the Director's authority was a resolution of the merits of Citizens' challenge to the new Supercenter. However, the court's review of the legal limits to the Director's authority was no different from the analysis that occurred in such

cases as *Endangered Habitats League, supra*, 63 Cal.App.4th 227, *Concerned Citizens of Costa Mesa*, *supra*, 42 Cal.3d 929, and *Miller*, *supra*, 13 Cal.App.4th 1118.

The court held that if a project is subject to CEQA, *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770, 778 precludes a local agency from delegating review to an administrative official other than the decision-making body. (*Stockton Citizens*, *supra*, 157 Cal.App.4th at 348.) The Court reasoned,

> 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 the project is within the MDP. (*Id* . at 349.)

The Court of Appeal appropriately applied *Kleist* to the facts before the Court. Since the MDP was approved in conjunction with the Density Agreement, and the Director had no authority under any applicable City ordinance or State law to amend the Density Agreement and issue a Notice of Exemption for such an amendment, the acts of the Director were void. (*Id.* at 349, fn. 22.)

The Court's holding is consistent with CEQA. As the Court stated, the Director could implement the MDP, but he could not approve a new project that was not within the scope of the previously approved SEIR without first completing CEQA review. (*Id.* at 349; Public Resources Code, § 21166; 2 Kostka, Practice Under the California Environmental Quality Act, *supra*, §19.32, p. 9021.) In *Endangered Habitats League*, the Court reached the same result, but approached it from a different perspective. The Court supported its holding by showing the concrete-lined channels were not within the project description of the previously approved

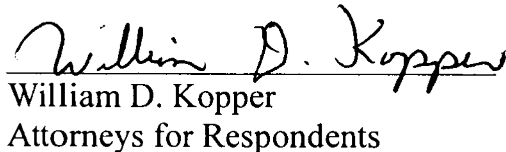
negative declaration, and the change in the project description triggered the requirement for noticed CEQA review. (*Endangered Habitats League, supra,* 63 Cal.App.4th at 242.) Similarly, the Supercenter was not within the project description of the SEIR.

CONCLUSION

For all of the reasons stated in this Brief, the Director's December 15, 2003 "Status Memo" was not a CEQA project approval. A CEQA project approval requires legally binding agency action. The Status Memo did not rise to this level. Furthermore, the purported ministerial approval did not trigger the statute of limitations, because it could not change the underlying project that was previously subject to CEQA review. When an agency undertakes a discretionary project that is not within the scope of the first tier CEQA document for a general plan or other plan, the agency must complete additional CEQA review. Because the City did not initiate CEQA review, its action did not trigger the statute. Additionally, the City could not rely on a materially defective NOD.

Dated: June 20, 2008 Kenyon Yeates LLP

Law Offices of William D. Kopper



William D. Kopper
Attorneys for Respondents

CERTIFICATION OF LENGTH OF BRIEF (RULE 8.204(c))

I, William D. Kopper, certify that the foregoing Answer Brief on the Merits is proportionately spaced, has a typeface of 13 points, and contains 13,871 words, as counted by the word count tool of Microsoft Word.

DATED: June 20, 2008

William D. Kopper
WILLIAM D. KOPPER
Attorney for Respondents

PROOF OF SERVICE

I am a citizen of the United States, employed in the City of Davis, County of Yolo. My business address is 417 E Street, Davis, California 95616. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with this company's practice whereby the mail, after being placed in a designated area, is given the appropriate postage and is deposited in a U.S. mailbox in the City of Davis, California, after the close of the day's business.

On June 23, 2008, I served the following:

ANSWER BRIEF ON THE MERITS

on the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as follows:

RICHARD ELLSWORTH NOSKY, ESQ.
GUY D. PETZOLD, ESQ.
OFFICE OF THE CITY ATTORNEY
CITY OF STOCKTON
425 North El Dorado Street, 2nd Floor
Stockton, CA 95202

(Attorneys for Defendants and Respondents City of Stockton and Stockton City Council)

MAXWELL M. FREEMAN, ESQ.
THOMAS H. KEELING, ESQ.
MICHAEL L. GUREV, ESQ.
FREEMAN, D'AIUTO, PIERCE, GUREV, KEELING & WOLF
1818 Grand Canal Boulevard, Suite 4
Stockton, CA 95207

(Attorneys for Defendants and Respondents City of Stockton and Stockton City Council)

JOHN BRISCOE, ESQ.
LAWRENCE S. BAZEL, ESQ.
CHRISTIAN L. MARSH, ESQ.
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104

(Attorneys for Real Party in Interest and Appellant, A.G. Spanos Construction, Inc.)

ROBERT J. STUMPF, JR., ESQ.
ARTHUR J. FRIEDMAN, ESQ.
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111

(Attorneys for Real Party in Interest and Appellant, Wal-Mart Stores, Inc.)

KARIN DOUGAN VOGEL, ESQ.
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
501 West Broadway, 19th Floor
San Diego, CA 92101-3505

(Attorneys for Real Party in Interest and Appellant, Wal-Mart Stores, Inc.)

MICHAEL D. EARLY, ESQ.
STEEFEL, LEVITT & WEISS
A Professional Corporation
One Embarcadero Center, 29th Floor
San Francisco, CA 94111-3719

(Co-Counsel for Petitioner/Appellant, Wal-Mart Stores, Inc.)

MICHAEL ZISCHKE, ESQ.
COX CASTLE NICHOLSON
555 California Street, 10th Floor
San Francisco, CA 94101

(Attorneys for Building Industry Association: Pub/Depublication Requester)

ANDREA ALESSANDRA MATARAZZO, ESQ.
DIEPENBROCK HARRISON
400 Capitol Mall, Suite 1800
Sacramento, CA 95814

(Diepenbrock Harrison: Pub/Depublication Requester)

WHITMAN F. MANLEY, ESQ.
REMY THOMAS & MOOSE LLP
455 Capitol Mall, Suite 210
Sacramento, CA 95814

(Remy Thomas Moose & Manley: Pub/Depublication)

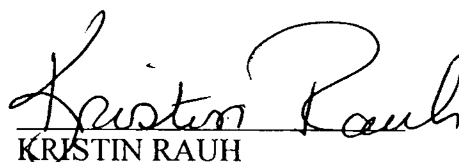
Superior Court of California
County of San Joaquin
Honorable K. Peter Saiers
Honorable Carter P. Holly
222 E. Weber Street
Stockton, CA 95202

(Trial Court)

Court of Appeal
Third Appellate District
Library and Courts Annex
900 N Street, Room 400
Sacramento, CA 95814-4869

(Appellate Court)

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 23, 2008, at Davis, California.



KRISTIN RAUH