

Brett S. Jolley

bjolley@herumcrabtree.com

September 12, 2011

BY ELECTRONIC MAIL

Vice Mayor Ken Lane
Ceres City Council
c/o Planning Manager Tom Westbrook
Ceres, CA 95307
Tom.Westbrook@ci.ceres.ca.us



Re: Effect of 2-1 Vote on Walmart Mitchell Ranch Project

Dear Vice Mayor Lane and Councilmembers:

On behalf of appellant Citizens for Ceres this letter serves to object to any further proceedings on the Walmart Mitchell Ranch Project. Because the August 22, 2011 motion to approve the Project failed by a vote of 2-1, the Project was effectively denied and the Council lacks jurisdiction to hold any further proceedings on the Mitchell Ranch Project.

Vedanta Society of So. California v. California Quartet, Ltd. (2000) 84 Cal.App.4th 517 is instructive. There, opponents appealed the planning commission's approval certification of an EIR and approval of a development project. The board of supervisors deadlocked 2-2 and deemed the appeal denied and the project approved. The court reversed, holding that an EIR must be certified by the affirmative action of elected decision makers and the failure of a county board to reach a majority vote (in that case a tie vote and here a 2-1 vote) on an appeal of a planning commission's certification is a denial. As the court explains, Pub. Res. Code § 21151(c) provides when an unelected planning commission certifies an EIR, that certification may be appealed to the agency's elected decisionmaking body and therefore that decisionmaking body "must not only consider the EIR but make certain written findings if appropriate." *Vedanta* at 522. "The need for consideration, written findings and even a 'brief explanation' by the body to which the appeal is taken is simply incompatible with the approval by acquiescence. Consideration and written findings imply conscious, affirmative action, not default adoption of the status quo by inertness." *Id.*

In other words, "...CEQA requires not only de novo review by [the legislative body], but do novo fact finding as well." *Vedanta* at 529. Accordingly, it would take affirmative action (a majority vote) by the City Council to certify an EIR. Likewise, *REA Enterprises v. California Coastal Zone Commission* (1975) 52 Cal.App.3d 596 held that de novo appeals of coastal permit decisions to the California Coastal Commission Zone must be decided by a majority or else the permit is denied. Under the reasoning of *REA Enterprises* and *Vedanta*, the 2-1 vote on the motion to certify the Walmart EIR operates as a denial of the EIR and the Project.

Vice Mayor Ken Lane
Ceres City Council
c/o Planning Manager Tom Westbrook
September 12, 2011
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While outside the CEQA context, courts hold that the general rule is that a tie vote (or a lack of majority) constitutes "no action" (see *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1176) in the CEQA context a failure to reach majority vote must constitute a denial – rather than leaving the Project in limbo for what could be years.

Thus under the reasoning of *REA Enterprises*, a failure to reach a majority when affirmative action is required to approve should result in a denial. This is consistent with the idea that CEQA provides for quick decision-making in established time frames (Pub. Res. Code § 21151.5(a)(1)(A)-one year to complete and certify an EIR) and that the appeal to the decisionmaking body is designed to be a final act where elected officials decide whether a project goes forward. The idea that the City Council's failure to reach a majority results makes the appeal a "non-event" leaving the application in suspended animation is inconsistent with the statutory scheme.

And Walmart expressly acknowledged that it needed three affirmative votes to receive approval of its Project. Walmart could have but did not request a continuance to a date after the November election to allow four councilmembers to vote on the Project. In fact, Walmart advocated against continuing the matter and requested a decision that night. Vice Mayor Lane, you, too, attempted to continue the matter to a time in January but this proposal was rejected by the remainder of the Council. Based on these facts and the law as established in *REA*, *Vedanta*, and CEQA's statutory scheme, once Council closed the public hearing and voted on a motion to certify the EIR and approve the Project, the failure of that motion resulted in a denial of the EIR certification and, in turn, the Project itself. Thus, the City Council lacked jurisdiction to continue the public hearing to September 12, 2011 for further proceedings.

Accordingly, the Project is denied and the City Cannot act on the Project any further.

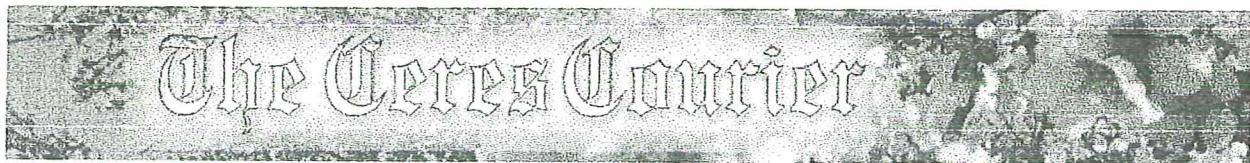
For these reasons, we respectfully request that the City remove tonight's continued item from the agenda.

Very truly yours,



BRETT S. JOLLEY
Attorney-at-Law

cc: Sherri Jacobson, Citizens for Ceres (sherri-jacobson@earthlink.net)
Michael Lyons, City Attorney (mike.lyons@ci.ceres.ca.us)



Wednesday, September 07, 2011

Sound Off! calls published Sept. 7, 2011

Wednesday, September 07, 2011

• Walmart wants to be top dog

I hope this is not the City Council that we have to rely on for the planning of our city. Take a look at downtown. If Walmart moves to its new location, who will ever even drive far enough to see a downtown. We can trade the weeds and dirt from that field to downtown Ceres. Why we can't have a Target? They could remodel the inside of the old Walmart to accommodate the groceries. Believe me, if they had to they would.

Ceres says we are losing money to Turlock? There is not a Supercenter there but there is a Target?

Come on, City Council, Turlock said no. We can too. Just because it fits the general plan doesn't make it the best plan. With the budget cuts, how will our Ceres PD deal with the added crime that comes with the Supercenter?

The one in Modesto is a joke.

Walmart does not stop until they are the only ones left. Just take a look at other cities and see this yourself. They are ghost towns. We don't have to be one. We can stop them before it's too late. I am sure Walmart is upset that there are still some retailers left so they need Supercenter to finish the job. Just say no.

- Debbie Swift, Ceres

September 8, 2011



Tom Westbrook and Ceres City Council
2720 2nd Street
Ceres, CA 95307

Dear City Council Members,

Please think twice before giving the supercenter project an automatic green light. Many eyes and ears are on you. Denying the project is the responsible thing to do.

Where is the timeline for the rest of the center? Who is going to meet the nearby residents halfway? The traffic calming measure are not enough, nor are the ~~and~~ new traffic lights.

Don't forget about the unavoidable impacts to our beautiful, growing town. Tell Wal-Mart, "N-O"!!

Sincerely,

A handwritten signature in black ink. The first name "Chella" is written in a cursive script, followed by a thin vertical line and the last name "Hopkins" in a similar script. The signature is fluid and personal.

City of Ceres



September 9, 2011

Subject: Wal-Mart Supercenter -- Reason to vote: "NO"!

Dear City Council,

Why doesn't Wal-Mart remodel their old store in Ceres, the way Wal-Mart is currently doing in Folsom, California? Read the letter from the Modesto Bee -- September 8th, 2011.

I think it would be prudent to ask Wal-Mart to remodel and rearrange their store to fit the grocery and deli departments, instead of building a dated concept at our Southern Gateway that has five traffic lights within approximate 2400 feet.

If Wal-Mart is able to remodel the store in Folsom, it seems they can do a remodel in Ceres. The remodel would minimize the many risks from both foreseen (and sometimes ignored) risks and unforeseen risks that could adversely affect our city for years to come.

Wouldn't a remodel be a better fit for our city since the 99/Mitchell freeway interchange is on an indefinite hold?

I don't like the idea that we are putting our city at a needless risk when the remodel can provide a Win-Win solution for both Wal-Mart and Ceres.

Say "NO" to the new store!

Yours truly,

A handwritten signature in black ink, appearing to read "Joshua L. C.", is written across a diagonal line.

ARTICLE FROM Modbee.com

Thursday, Sep. 08, 2011

Wal-Mart today begins Folsom store revamp

By Mark Glover - mglover@sacbee.com

Wal-Mart said expansion and remodeling of its store at 1018 Riley St., in Folsom will create about 85 new jobs upon completion.

Groundbreaking ceremonies for the nearly 27,000-square-foot expansion will be at 10 a.m. today. Wal-Mart expects the project to be completed in fall 2012.

The upgraded store will offer a full line of groceries. A bakery and deli also are planned. The store will be open during construction.

Call The Bee's Mark Glover, (916) 321-1184.

Read more: <http://www.modbee.com/2011/09/08/1849778/wal-mart-today-begins-folsom-store.html#0 undefined,0 #ixzz1XU96ZHsk>

Tom Westbrook - Supercenter Hearing -- September 12, 2011

From: James Vinyard <vinybros@att.net>
To: <klane@ci.ceres.ca.us>
Date: 9/10/2011 1:07 PM
Subject: Supercenter Hearing -- September 12, 2011
CC: <Tom.Westbrook@ci.ceres.ca.us>



September 10, 2011

A Supercenter in Sheep's Clothing...

Aesop's Fable: "A wolf found great difficulty in getting at the sheep owing to the vigilance of the shepherd and his dogs. But one day it found the skin of a sheep that had been flayed and thrown aside, so it put it on its own pelt and strolled down among the sheep. The Lamb that belonged to the sheep, whose skin the Wolf was wearing, began to follow the Wolf in the Sheep's clothing; so, leading the Lamb a little apart, he soon made a meal of her, and for some time he succeeded in deceiving the sheep, and enjoying hearty meals."

Dear Vice Mayor Lane and Councilmembers,

The moral of *Aesop's fable*, "Appearances are deceptive," is related to Walmart's attempting to enjoy a hearty meal at Ceres' expense. The EIR is not complete and in no way needs to be complete in order for all of you to turn down Walmart's proposal once and for all.

I applaud Vice Mayor Lane for wanting the Reuse Strategic Plan to have teeth, but the teeth you request may not provide enough protection to prevent Walmart from delivering a crippling bite to Ceres. Unless, of course, the Reuse Strategic Plan is included in the EIR as a mitigation measure.

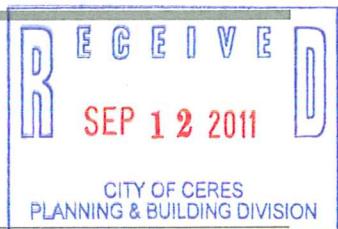
Thank you very much,

James R. Vinyard

1339 Grandview Ave.
Ceres, Ca. 95307

Tom Westbrook - Thank You to Vice Mayor Lane, Re: Walmart Supercenter

From: <socles85844@mypacks.net>
To: <klane@ci.ceres.ca.us>, <Tom.Westbrook@ci.ceres.ca.us>
Date: 9/10/2011 3:13 PM
Subject: Thank You to Vice Mayor Lane, Re: Walmart Supercenter



September 10, 2011

Dear Vice Mayor Lane,

It was a pleasure to see you hold Wal-Mart accountable to the City of Ceres regarding the reuse plan for Wal-Mart's old store. If members of the City Council think it is OK for Wal-Mart to abandon that old store, without signing a proper reuse plan as part of the EIR or as part of a development agreement, those members will be derelict in their duty to provide reasonable protection for Ceres' economic welfare.

You showed me and many in attendance at the August 22 Council meeting that the leadership of our city is led by example. Thank you for being the example.

Lastly, it is my sincere hope that you can convince your fellow Council Members, Mr. Ochoa and Mr. Durossette, to finally vote down the Supercenter proposal during the Monday, September 12th hearing, or have the hearings continued until January when a full City Council will be representing our community.

Respectfully,

Rick Rushton

City of Ceres
c/o Tom Westbrook
Fax: 209.538.5759



Subject: Walmart Supercenter -- Vote, "no".

To: Vice Mayor Ken Lane

September 10, 2011

I am concerned about Ceres losing its local mom and pop stores that have been here for years and "are" Ceres. It does not seem right that any company can come in and squash local Ceres businesses like bugs, as suggested in the EIR.

Ceres is at risk of losing Richland Markets, a special mom and pop store, and SaveMart. Think about the job loss, and loss of other businesses within those shopping centers.

I appreciate the way that you have taken the "bull by the horns" on this matter. Hold tight, and remain strong. Voting "no" on September 12 is the right choice for our City.

Sincerely,

Angela Amant

Tom Westbrook - VOTE NO - Walmart Super Center

From: Rosalinda Puentes <rosalindapuentes@att.net>
To: <tom.westbrook@ci.ceres.ca.us>
Date: 9/11/2011 2:19 PM
Subject: VOTE NO - Walmart Super Center



Dear Ceres Council members and Vice Mayor,

I hope the City Council understands that you run Ceres. Not the Planning Commission, and not Tom Westbrook (although he is one fine employee in Ceres' City Planning Department), and not Walmart.

The City Council is responsible for making sure the Walmart Supercenter proposal conforms with good common sense, rather than approving the project simply because it is zoned accordingly.

You still have time to make sure the reuse plan for the building Walmart wants to abandon is part of the EIR.

Or, there is the obvious choice -- vote 'no'!

Sincerely,

Rosalinda Puentes

City of Ceres
Council Members
09/11/11



Re: Wal-Mart Super Center

Dear Council Member,

In one last ditch effort we would like to persuade you in saving our neighborhood. We understand the Super Center is inevitable. We would like you to re-consider the truck entrance from Don Pedro. Instead we would like the solid wall.

My children play in our neighborhood and after the Wal Mart is in place I feel like the safety of my children will be at risk without the buffer of the solid wall.

I hope you take our neighborhoods concerns into consideration before you make a final decision.

Regards,

Billy & Shasi Parmer
3512 Archcliffe Drive
Ceres, Ca
95307

City of Ceres
Tom Westbrook
2720 Second Street
Ceres, CA, 95307



September 11, 2011

Re: Wal-Mart Supercenter Shopping Center Proposal

Dear Ceres Councilmembers and Vice Mayor,

As the lyrics state in the Counting Crows' rendition of Joni Mitchell's classic song, Big Yellow Taxi: "Don't it always seem to go. That you don't know what you've got 'til it's gone. They paved paradise and put up a parking lot." That's exactly what Ceres will get, a 26-acre blacktopped parking lot and a generic-looking supercenter not the full shopping center that's shown on Wal-Mart's website. As others have said, Wal-Mart only wants the supercenter to be built; otherwise, why not construct the full shopping center in one phase?

Sincerely,

Heather Bud



*Tom Westbrook
City of Ceres, Planning Division
Subject: Wal-Mart supercenter*

Please distribute to the Council for September 12, 2011...

Printed online at Modbee.com on Saturday, September 03, 2011.

Wal-Mart is like a casino

As a former resident of Las Vegas, I am struck by some rather obvious similarities between Wal-Mart supercenters and the massive casinos which now dominate that desert city's skyline. To wit, both essentially lack windows and clocks, have a minimum of exit doors, are staffed by largely disinterested and underpaid employees, and are filled with gadgets and gimmicks to separate the unwary from their money.

In addition, both entities represent a "crap shoot" of sorts, in that one (Wal-Mart) offers tons of absolutely shoddy merchandise for sale, while in Vegas the odds are decidedly stacked against the foolhardy no matter what game they play.

In both cases, the sheer size of the buildings can be intimidating. As an example, I was once lost in a Bunyan-esque Wal-Mart for nearly 48 hours; dehydrated and delusional, I finally managed to drag myself out the front door, a mere shell of a man.

I heartily commend the Ceres residents for fighting to keep this monstrosity out of their community. The proposed supercenter is about as necessary as more fleas on my hound dog.

BUDDY DAVIS
Modesto

Read more: [#ixzz1XTiDioXf](http://www.modbee.com/2011/09/03/1844419/wal-mart-is-like-a-casino.html#1_undefined.0)



September 12, 2011
City of Ceres, Planning Division
Tom Westbrook

Dear City Council,

The benefits of the supercenter proposal do not outweigh the risks, and the adverse terrain-changing effects on Ceres' roadways. It has been noted that Supercenters bring more traffic than reported in EIR traffic trip generator studies. Couple that with the fact that more traffic accidents will occur as a result of the 99 interchange not being completed by the time the shopping center is constructed.

Councilmembers do what's in the best interest for Ceres and vote "NO"!

With thanks,



City of Ceres
c/o Tom Westbrook
FAX: 209.538.5759

Mitchell Ranch Center: Walmart Supercenter Vote on 9-12-11

Dear City Council,

Please do not make the mistake that the decision needs to be reached on September 12, 2011. If you feel yourself wanting to vote "yes" merely because you want to get the vote over with, that's unfortunate. It is never good to seal a deal, just to end the matter.

There is a lot at stake. The empty Walmart is the red flag.
Cast your Vote: "No"!

Cordially,

September 11, 2011

To: Ceres City Council & Tom Westbrook

FAX: (209) 538-5759

Subject: Walmart Supercenter Vote on September 12.

Dear Ceres City Council,

You must reconsider your decision to not have the Conditions of Approval added to the EIR.

I still feel that Walmart is not acting in good faith regarding their Sales Strategy/Reuse Plan. Please require that the EIR includes a mitigation measure for that tombstoned building that they will leave vacant on purpose. Or, just turn down their request for a new store.

Please read my letter below that was printed in The Modesto Bee.

Sincerely,



Carlos Vizcaino, Jr.



Printed: Monday, Aug. 08, 2011

Wal-Mart stall tactic

Wal-Mart's request for a continuance to finish a reuse plan for the Ceres store they will likely leave as an eyesore is ridiculous. Wal-Mart complained that opponents unfairly delayed the project's approval by presenting information to the City Council in May, so I thought they would be ready to take their lumps and have the supercenter vote on July 11.

Give us a break, Wal-Mart. Are you trying to say that a big outfit like Wal-Mart does not have a template for a sales strategy Wal-Mart has repeated time and again? If not, why not? As one commercial broker told the Wall Street Journal in 2004, "Wal-Mart clearly says up front, 'We don't want anyone in the buildings with a competing use' ... Sometimes they would rather sit with a vacant building than budge on letting a competitor in."

It is logical to believe those ever-present, inescapable, tombstoned buildings across the United States, stand as reminders of Wal-Mart's strategy to prevent competitors from coming into the marketplace. You must save money by not bulldozing them to the ground. They remain a fine example of community rot, as you continue your half-baked environmental commitment.

Tom Westbrook - Fw: Thank you

From: florence cardenas <surungui@yahoo.com>
To: tom westbrook <tom.westbrook@ci.ceres.ca.us>
Date: 9/12/2011 10:53 AM
Subject: Fw: Thank you

----- Forwarded Message -----

From: florence cardenas <surungui@yahoo.com>
To: "klane@ci.ceres.ca.us" <klane@ci.ceres.ca.us>
Sent: Sunday, September 11, 2011 1:33 PM
Subject: Thank you



Dear Ken Lane, Vice Mayor:

I write to express my appreciation for your actions during the August 22, 2011 Ceres City Council meeting regarding Walmart's proposed expansion plans in Ceres. It is not easy to stand up to the pressure you endured from Walmart, while they disregard the consequences to our community. Thank you for looking out for the best interests of Ceres rather than the best interests of an Arkansas retailer.

Sincerely
Florence Cardenas

Tom Westbrook - Fw: Bravo

From: tony cardenas <bigtone48@yahoo.com>
To: "tom.westbrook@ci.ceres.ca.us" <tom.westbrook@ci.ceres.ca.us>
Date: 9/12/2011 10:59 AM
Subject: Fw: Bravo

----- Forwarded Message -----

From: tony cardenas <bigtone48@yahoo.com>
To: "klane@ci.ceres.ca.us" <klane@ci.ceres.ca.us>
Sent: Sunday, September 11, 2011 1:35 PM
Subject: Bravo



Dear Vice Mayor Lane,

Thank you for looking out for the best interests of Ceres in considering the Walmart project. I appreciate your realizing that the issues within this project require comprehensive scrutiny and that the decision to approve or not approve the project cannot be determined solely on whether the site has commercial zoning.

You stand out because you express a better understanding that Walmart must comply with the City's rules and mitigate its impacts before its project is approved. Ceres is well-served by your alertness to the fact that empty shells and closed anchor stores will not benefit Ceres. You are fulfilling your solemn responsibility when you are mindful that permitting this store will not bring the benefits Walmart would like us to assume, but will instead bring negative changes to Ceres.

Your courage in standing up to this large and powerful retailer is inspiring. I wish you luck in persuading your fellow Council Members to finally vote down the project on September 12, 2011.

Cordially,

Tony Cardenas

Tom Westbrook - Your Leadership & Walmart Hearings

From: Geri Ottersbach <geriottersbach@yahoo.com>
To: <klane@ci.ceres.ca.us>
Date: 9/12/2011 3:27 PM
Subject: Your Leadership & Walmart Hearings
CC: <tom.westbrook@ci.ceres.ca.us>

September 12, 2011

City of Ceres
2220 Magnolia Street
Ceres, CA 95307



Dear Vice Mayor Lane,

I cannot imagine myself in your shoes. You have taken a risk by being a leader and that leadership is a rare quality. Thanks for telling Walmart that their plans for leaving an empty store needs to be adjusted, so that Ceres does not risk being left with an eyesore, an untenantanted store, on a major intersection in town, that will surely go to seed (and Ceres along with it).

If you look at the letters I wrote that are a part of the record, you will see my concerns regarding Mitchell Ranch Center. I have other concerns as well. Walmart's long history of discarding their old worn out stores for newer ones within the same town, presents the worst kind of sprawl and is a waste of our limited land.

Vice Mayor, continue to do what you can to keep any developer from using their undue power to get what they want. Ceres has the potential to remain unique, and I hope you have the support to follow what I think is in your heart -- requiring Walmart to do right by the City of Ceres, and its leaders.

Sincerely,

Geri M. Ottersbach



September 12, 2011

City of Ceres, Planning Division
Attention: Tom Westbrook
2220 Magnolia Street
Ceres, CA 95307

Dear City Council:

I am writing to ask you to deny Walmart its Supercenter.

Council, please do not make your Supercenter decision based on fear, manipulation or the latest rumor being spread around Ceres, "What if Walmart sues Ceres?!" It's time for the City Council to take a deep breath, and exercise the authority that is afforded to you by statute.

You can DENY, DENY, DENY, and Walmart will still have the benefit of owning a store on Mitchell Road, and Ceres will still have a steady flow of tax revenue from the existing Walmart.

Sincerely,



Carol Dutra