

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

PROTECTING OUR WATER &)	Supreme Court Case #
)	S251709
ENVIRONMENTAL RESOURCES et al.,)	
)	
Plaintiffs and Appellants)	Fifth Appellate District,
)	Case # F073634
)	
vs.)	Stanislaus County
)	Superior Court
)	Case # 2006 193
STANISLAUS COUNTY et al.)	
)	
Defendants and Respondents)	

SUPREME COURT
FILED
MAY 20 2019
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ON REVIEW AFTER A DECISION BY THE FIFTH APPELLATE DISTRICT

STANISLAUS COUNTY SUPERIOR COURT,
ROGER M. BEAUCHESNE, JUDGE, PRESIDING

**APPLICATION OF CALIFORNIA ASSOCIATION OF
REALTORS® FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*
IN SUPPORT OF DEFENDANTS AND RESPONDENTS AND
BRIEF OF CALIFORNIA ASSOCIATION OF REALTORS® IN
SUPPORT OF DEFENDANTS AND RESPONDENTS**

JUNE BABIRACKI BARLOW, Esq., Bar No. 093472
SENIOR VICE PRESIDENT AND GENERAL COUNSEL

JENNY LI, Esq., Bar No. 158801
ASSISTANT GENERAL COUNSEL

525 South Virgil Avenue
Los Angeles, California 90020
Telephone: (213) 739-8200
Email: juneb@car.org

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Attorneys for CALIFORNIA ASSOCIATION OF REALTORS®

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ASSISTANT GENERAL COUNSEL
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Los Angeles, California 90020
Telephone: (213) 739-8200
Email: juneb@car.org

Attorneys for CALIFORNIA ASSOCIATION OF REALTORS®

I. INTRODUCTION AND NATURE OF C.A.R.'S INTEREST

The California Association of REALTORS® (“C.A.R.”) respectfully files this application pursuant to Rule 8.520(f) of the California Rules of Court, to submit the attached *amicus curiae* brief in support of Defendants and Respondents.

C.A.R. is a voluntary trade association whose membership consists of approximately two hundred thousand (200,000) persons licensed by the State of California as real estate brokers and salespersons and the local Associations of REALTORS® to which those members belong. Members of C.A.R. assist the public in buying, selling, leasing, financing and managing residential and commercial real estate. C.A.R. advocates for the real estate industry by bringing the perspective of the industry as a whole rather than the singular perspective of a particular constituent or litigant.

For years, C.A.R. has worked to address the housing affordability crisis within the State of California by actively promoting housing, homeownership, and the growth of housing opportunities statewide. In addition to providing down payment and closing cost assistance to homebuyers through its Housing Affordability Fund, C.A.R. has supported various legislative initiatives aimed at increasing the housing supply in this State. Examples of this include C.A.R.’s publicized support for a recent bill that would provide “density bonuses” to developers (i.e., authority to build additional units in exchange for the developer’s building below-market units) to boost housing and apartment developments in and around major transit hubs and employers, in addition to a bill to support more construction of accessory dwelling units (“ADUs”).¹ Within the past year,

¹ “California Realtors® Support Bold 2019 Legislative Solutions to Address State’s Housing Crisis” at <https://www.prnewswire.com/news->

C.A.R. has established an affiliated charity called Californians for Homeownership to exert pressure on cities to approve new housing construction in compliance with the Housing Accountability Act.

C.A.R. is interested in participating as *amicus* in this case because the Court of Appeal's expansion of the scope of permits considered to require "discretionary" approval by the local government, thereby triggering California Environmental Quality Act ("CEQA") review, would create enormous legal and financial obstacles for property owners and developers and impair the increase of housing that is so needed in this State. C.A.R. is concerned that such an expansion of CEQA's reach would bring the prolonged CEQA review process and litigation exposure to a larger set of cities' and counties' decisions relating to new construction and improvements to existing properties. If left uncorrected, the Court of Appeal's broad definition of "discretionary" will prevent much-needed housing from ever being built, and undermine the positive steps being taken to address California's affordable housing crisis. In addition, if upheld, the Court of Appeal's decision will introduce a significant amount of uncertainty into thousands of everyday real estate transactions when the parties are contemplating possible construction or other activities on real property, resulting in delayed transactions, increased costs, and greater litigation risks.

[releases/california-realtors-support-bold-2019-legislative-solutions-to-address-states-housing-crisis-300809567.html](https://www.cra.org/press-releases/california-realtors-support-bold-2019-legislative-solutions-to-address-states-housing-crisis-300809567.html)

**II. IDENTIFICATION OF AUTHORS AND MONETARY
CONTRIBUTORS**

No party or counsel for a party in the pending appeal authored the proposed *amicus* brief in whole or part, and no party or counsel for a party in the pending appeal made a monetary contribution intended to fund the preparation or submission of the brief. C.A.R. has entirely funded the preparation and submission of this proposed *amicus* brief without any monetary contribution from any other person or entity.

III. REQUEST FOR PERMISSION TO FILE

C.A.R. has read Plaintiffs' and Defendants' briefs and believes that, as a representative body of the real estate brokerage community and a leading proponent of homeownership, it can highlight important policy concerns and provide an additional perspective to this Court. Therefore, C.A.R. respectfully requests that this Court accept for filing the accompanying *amicus curiae* brief in support of Defendants.

Respectfully submitted,

CALIFORNIA ASSOCIATION OF REALTORS®
JUNE BABIRACKI BARLOW, SENIOR VICE PRESIDENT AND
GENERAL COUNSEL, SBN 093472
JENNY LI, ASSISTANT GENERAL COUNSEL, SBN 158801

By: _____

Jenny Li

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525 South Virgil Avenue
Los Angeles, California 90020
Telephone: (213) 739-8200
Email: juneb@car.org

Attorneys for CALIFORNIA ASSOCIATION OF REALTORS®

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I. INTRODUCTION AND FACTUAL SUMMARY

The parties have described the relevant facts of this case in their briefs, and this declaratory relief action was tried on stipulated facts. Therefore, only a brief summary of the core facts follows.

Stanislaus County Code Section 9.36.030 requires landowners in the County to obtain a permit to “construct, install, repair or destroy” any well. The County has approved hundreds of well construction permits without applying the California Environmental Quality Act (“CEQA”) environmental review procedures because approval for these types of permits is “ministerial” and therefore excluded from CEQA. Under Public Resources Code Sections 21080, subd. (a) and 21080, subd. (b)(1), CEQA applies to “discretionary” projects but does not apply to “ministerial” projects.

Plaintiffs allege that the County has violated CEQA law because approving well construction permits requires an exercise of judgment by the Stanislaus County Department of Environmental Resources (“DER”) and therefore is “discretionary.” Plaintiffs request declaratory judgment, a permanent injunction against well construction permit approvals until the County begins applying CEQA review for such permits, along with attorneys’ fees and costs.

The trial court issued judgment in favor of the County, ruling that the County’s approval of exempt, non-variance well construction permits was “ministerial.” However, the Court of Appeal has reversed that judgment, and its decision relies heavily on particular language contained in the Department of Water Resources *Bulletin No. 74: Water Well Standards, State of California* (“Bulletin”) that provides model design and

construction standards, and which was adopted by the County. (Opinion, pp. 10-13). The Court of Appeal closely examined the Bulletin's well separation standard concerning the proper distance of a well from potential sources of groundwater contamination. In particular, Section 8(A) of the Bulletin states: "All water wells shall be located an adequate horizontal distance from known or potential sources of pollution and contamination."¹ Based on its reading of this well spacing standard and particularly the standard's use of the word "adequate," the Court of Appeal concluded the County's decisions on well construction approvals involve subjective judgment and are "discretionary" for CEQA purposes. (Opinion, p. 13).

An expansion of CEQA's scope would result in severe, negative consequences-- preventing the construction of much-needed affordable housing in this State and adding greater costs and legal exposure in thousands of real estate transactions. C.A.R. agrees with the arguments set forth in Defendants' opening and reply briefs and urges this Court to reverse the Court of Appeal's decision.

¹ The Court of Appeal also considered a chart contained in Section 8(A) that lists horizontal separation distances between various contamination sources (e.g., 50 feet between a well and a sewer line, 100 feet between a well and an animal enclosure), in addition to quoting text above and below the chart. (Opinion, p. 11)

**II. AN UNWARRANTED EXPANSION OF THE
“DISCRETIONARY” STANDARD IN APPROVING WELLS WILL
STYMIE CONSTRUCTION OF HOUSING AT A TIME WHEN
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HOUSING CRISIS**

Plaintiffs contend the County overstates concerns about the practical effects of expanding the scope of “discretionary approvals” (Answer Brief, p. 56-57). The very opposite is true. Moving routine well construction permits into the realm of “discretionary” approvals triggering the CEQA review process will spawn similar CEQA lawsuits that will exacerbate the housing shortage with costly delays and mounting fees. There are terrible consequences if the door is now opened wider to invite more claims like the Plaintiffs’. CEQA lawsuits and Not in My Backyard (“NIMBY”) policies have significantly aggravated California’s current housing crisis.

For several decades, California has experienced a significant housing access and affordability crisis. “California housing has become the most expensive in the nation,” and “[t]he lack of housing . . . is a critical problem that threatens the economic, environmental, and social quality of life in California.”² In some areas of the state, median home prices top \$1 million and median one-bedroom rents exceed \$3,500 per month.³ As a

² Gov. Code § 65589.5(a).

³ See *2019 County Sales & Price Statistic*, <https://www.car.org/-/media/CAR/Documents/Industry-360/PDF/Market-Data/201901-SFH-Sales--Price.pdf>; and Crystal Chen, *Zumper National Rent Report: May 2019*, <https://www.zumper.com/blog/2019/04/zumper-national-rent-report-may-2019/>.

result of the housing affordability crisis, younger Californians are being denied the opportunities for housing security and homeownership that were afforded to previous generations. Families across economic strata are being forced to rent rather than experience the wealth-building benefits of homeownership.⁴ Many middle and lower income families devote more than half of their take-home pay to rent, leaving little money to pay for transportation, food, healthcare and for other necessities.⁵ Unable to set aside money for savings, these families are also at risk of losing their housing in the event of a medical issue, car trouble, or other personal emergency. Indeed, housing insecurity in California has led to a mounting homelessness crisis.⁶ The Legislature recently observed: “The consequences of failing to effectively and aggressively confront this crisis are hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives.”⁷

At the core of California’s affordable housing crisis is a failure to build enough housing to meet demand. The California Legislative Analyst’s Office estimates that the state should have been building approximately 210,000 units a year in major metropolitan areas to meet housing demand. Instead, it has built approximately 120,000 units per

⁴ California’s Housing Future: Challenges and Opportunities, Final Statewide Housing Assessment 2025, (2018) at pp. 18–19, *available at* http://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA_Final_Combined.pdf.

⁵ Id. at p. 27.

⁶ Id. at pp. 3, 48-50.

⁷ Gov. Code § 65589.5(a)(2)(A).

year.⁸ In the five-year period from 2013 to 2017, despite a perceived “boom” in housing construction, California issued building permits for less than half as many units as it did from 1985-1989.⁹ Today, California ranks 49th out of the 50 states in existing housing units per capita.¹⁰ “The excessive cost of the state’s housing supply is partially caused by activities and policies of many local governments that limit the approval of housing . . . Among the consequences of those actions are discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration.”¹¹ Although it may seem counterintuitive to some, a shortage of housing is bad for the environment, as more people must commute long distances to their jobs, requiring consumption of more fuel or other energy resources, and contributing to poor air quality.¹²

The term “NIMBY” describes policies used across California to delay, reject, and downsize housing development projects, especially

⁸ Chas Alamo, Brian Uhler & Marianne O’Malley, *California’s High Housing Costs: Causes And Consequences* (2015) at p. 21, available at <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf>.

⁹ United States Census Bureau, *New Privately-Owned Housing Units Authorized by Building Permits in Permit-Issuing Places in the State of California*, <https://www.census.gov/construction/bps/pdf/annualhistorybystate.pdf>.

¹⁰ McKinsey Global Institute, *A Tool Kit to Close California’s Housing Gap: 3.5 Million Homes by 2025*, (2016) at p. 3, <https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Urbanization/Closing%20Californias%20housing%20gap/Closing-Californias-housing-gap-Full-report.ashx>.

¹¹ Gov. Code § 65589.5(a)(1)(C).

¹² See Sierra Club California, *Sierra Club California Housing Policy: Meeting Our Housing Needs and Protecting the Environment*, (2018) at pp. 5-6, https://www.sierraclub.org/sites/www.sierraclub.org/files/sce/sierra-club-california/PDFs/SCC_Housing_Policy_Report.pdf.

projects that might increase access to housing for low-income families and historically disadvantaged communities.¹³ The Legislature has been working to reduce the impact of local NIMBY policies in California for the better part of four decades. In the 1980s, it passed the Housing Accountability Act (“HAA”), which limits the right of localities to reject proposed housing development projects, with particularly limited authority to disapprove housing projects with designated affordable components. The HAA generally requires localities to apply objective rather than subjective criteria when they consider zoning-compliant housing developments.¹⁴ For housing projects with a designated affordable housing component, there are stricter limits tied to a locality’s level of affordable housing production.¹⁵ The law gave both project applicants and potential residents of a housing development standing to sue to overturn its rejection.¹⁶

In recent years, the Legislature and Governor have taken additional decisive action, passing a broad package of housing-related legislation. In 2017, recognizing the gravity of the crisis, the Legislature embarked on an effort to reform state housing law to increase penalties for localities that

¹³ See, e.g., Brock Keeling, *Marin County’s Anti-Growth Mindset Keeps Minorities and Low-Income Residents Out*, Curbed San Francisco, January 8, 2018, <https://sf.curbed.com/2018/1/8/16863362/marin-county-housing-segregation-affordable-homes>; also Carson Bruno, *NIMBY-ism, and the California Housing Shortage*, RealClearMarkets, March 24, 2016, https://www.realclearmarkets.com/articles/2016/03/24/nimby-ism_and_the_california_housing_shortage_102078.html; and Disability Rights California, *Everyone’s Neighborhood: Addressing “Not in My Backyard” Opposition to Supportive Housing for People with Mental Health Disabilities*, (2014) <https://www.disabilityrightsca.org/system/files?file=file-attachments/CM5301.pdf>

¹⁴ Gov. Code § 65589.5(j).

¹⁵ Gov. Code § 65589.5(d).

¹⁶ Gov. Code § 65589.5(k)(1)(A).

engage in NIMBY policies. It strengthened the HAA by adding additional penalties for non-compliance, changing the burdens and standards of proof, and providing a statutory right of action for housing organizations to sue to enforce the law without the involvement of the project applicant.¹⁷ As another part of its recent housing package, the state enacted SB 35.¹⁸ SB 35 is punitive. At regular intervals, the California Department of Housing and Community Development determines the state's overall housing deficit on a region-by-region basis, at different levels of affordability. This Regional Housing Need Allocation ("RHNA") is then meted out to individual localities by a regional council of governments. Cities are tasked with developing an action plan (called a "housing element") to enact land use policies that will produce enough housing to meet their RHNA goals.¹⁹ SB 35 punishes cities that have failed to meet their RHNA goals by limiting their review of new affordable housing projects.²⁰ Applications eligible for streamlining under SB 35 are required to be approved ministerially, and therefore without review under the California Environmental Quality Act ("CEQA").²¹

Together, today's periodic RHNA and housing element process, the Housing Accountability Act, and SB 35 form a coherent system for addressing the role of local governments in California's housing crisis. The RHNA rules require cities to periodically adjust their land use rules to accommodate necessary additional housing, including designated affordable housing. The HAA ensures that they live up to those adjusted

¹⁷ Stats. 2016 c. 420 (A.B. 2584) § 1; Stats. 2017 c. 378 (A.B. 1515) § 1.5.

¹⁸ Stats. 2017 c. 366 (S.B. 35)

¹⁹ *See generally* Gov. Code §§ 65583, 65584.

²⁰ *See* Gov. Code § 65913.4(a)(4)(A).

²¹ *See* Gov. Code § 65913.4(a). The legislature notably relied on the distinction between ministerial and discretionary review that the Court of Appeal's ruling here could dismantle.

land use rules in the years that follow. And SB 35 penalizes them if their planning efforts turn out to be inadequate in practice.

Changing existing practices that are ministerial with sufficient specificity to allow streamlined approvals of wells necessary for housing would effectively undermine the significant progress made thus far to improve housing opportunities in California. If more types of permits will now require CEQA review, it is possible that zoning-compliant housing projects that might otherwise avoid the CEQA process because they are being developed “by right” could nevertheless trigger CEQA as the result of certain permits related to construction (such as the well construction permit disputed here). By expanding CEQA’s reach, the Court of Appeal is creating additional obstacles to housing construction and the law does not require such an expansion. As millions of Californians struggle to find a place to live in the state and the Legislature works to implement positive solutions, the Court of Appeal’s timing could not be worse and is a step in the wrong direction.

III. UNWARRANTED DILUTION OF MINISTERIAL ACTS THAT PROTECT HEALTH, SAFETY AND THE ENVIRONMENT WILL INCREASE UNCERTAINTIES, DELAYS, AND COSTS IN THOUSANDS OF REAL ESTATE TRANSACTIONS

If the Court of Appeal’s decision is left to stand, it will generate a large amount of confusion as to when a permit for proposed work on real property will require “discretionary” approval, making CEQA review necessary. This uncertainty would likely cause delays and cost increases to potentially hundreds of thousands of real estate transactions. There has been an average of approximately 400,000 annual home sales in California

in recent years.²² Most of those 400,000 residential real estate transactions include an inspection contingency period. For example, the “California Residential Purchase Agreement and Joint Escrow Instructions,” a standard purchase contract that is published by C.A.R., includes a default time period of seventeen days for the buyer to retain inspectors and other experts and to evaluate how their findings might affect the buyer’s decision to proceed. During the inspection contingency period, buyers often seek recommendations and guidance from their real estate agents, in order to determine the appropriate number and types of inspections. Depending on the property’s location and features, various contractors, engineers, architects or others may inspect the electrical and plumbing systems, assess any geological issues, and conduct research regarding the city’s or applicable agency’s permit requirements. Buyers generally want to know if there are any significant defects or safety issues related to the property, and if they should request any repair items from the seller. Often, buyers have future dreams and plans related to the property, as they might envision adding a second floor to a single-story home, installing a swimming pool in the backyard, or converting a garage into an accessory dwelling unit (“ADU”) for a family member or another person. During the inspection contingency period, the buyer and seller review incoming reports and information that often lead to further negotiations between them on repairs to be completed prior to close of escrow, or possible price concessions. These types of discussions and negotiations occurring during the inspection contingency period normally involve the principals and their real estate agents because in California most residential real estate transactions are

²² California Association of REALTORS®, *March Home Sales and Price Report*, April 2019
<https://www.car.org/aboutus/mediacenter/newsreleases/2019releases/march2019sales>

completed with the help of real estate licensees and the title and escrow companies, with no attorney involvement.

Based on this normal sequence of events applicable to most residential real estate transactions, it is critical all parties have a high degree of certainty that they can rely upon the local government's determination regarding permit requirements for potential activities on the property. If the Court of Appeal's decision is upheld, many more ambiguities and uncertainties relating to construction and other types of permits will arise. It is easy to imagine that, like the County's well construction ordinance here, a local ordinance adopting state construction and safety standards might include the adjective "adequate," or a synonym such as "sufficient," or "requisite." Under the Court of Appeal's reasoning, a word or term that might be inconspicuous or seem unremarkable to most persons, and which word may have been chosen by the drafter with no intention of giving room for personal or subjective discretion, could nevertheless trigger an unexpected, expensive CEQA review process lasting several years. These uncertainties could increase the risk of lawsuits being brought against home sellers and real estate professionals. These uncertainties also may make it more difficult to appraise a given property's value when the parties cannot readily determine whether the property can be utilized in a certain manner and cannot estimate the costs that would be associated with a planned use. The unwarranted expansion of "discretionary" acts, due to risk management concerns, may compel participants in real estate transactions to regularly retain legal counsel in order to determine whether activities on the property will necessitate CEQA review. In addition to the increases in time and money spent on real estate transactions, another negative consequence of expanding CEQA's reach would be the likelihood of commensurate

increases in the cost of liability insurance intended to cover incorrect or incomplete disclosures in real property transactions.

IV. CONCLUSION

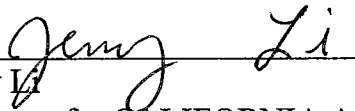
For all the reasons specified in this brief and those specified in Defendants' Opening and Reply briefs, C.A.R. urges this Court to reverse the decision of the Court of Appeal and reinstate that of the trial court.

Dated: May 10, 2019

Respectfully submitted,

CALIFORNIA ASSOCIATION OF REALTORS®
JUNE BABIRACKI BARLOW, SENIOR VICE PRESIDENT AND
GENERAL COUNSEL, SBN 093472
JENNY LI, ASSISTANT GENERAL COUNSEL, SBN 158801

By:



Jenny Li

Attorneys for CALIFORNIA ASSOCIATION OF REALTORS® as
Amicus Curiae

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court Rule 8.204(c)(1))

The text of this brief consists of 2654 words (including footnotes) as counted by the Microsoft Office Word 2016 word-processing program used to generate this brief.

Dated: May 10, 2019

Respectfully submitted,

CALIFORNIA ASSOCIATION OF REALTORS®
JUNE BABIRACKI BARLOW, SENIOR VICE PRESIDENT AND
GENERAL COUNSEL, SBN 093472
JENNY LI, ASSISTANT GENERAL COUNSEL, SBN 158801

By:



Jenny Li

Attorneys for CALIFORNIA ASSOCIATION OF REALTORS® as
Amicus Curiae

PROOF OF SERVICE BY MAIL

I, **Cheryl Strong**, am employed in the City and County of Los Angeles, and over the age of eighteen years. I am not a party to the within action. My business address is: 525 South Virgil Avenue, Los Angeles, California, 90020.

On May 10, 2019, I served the within *amicus curiae* brief, addressed to the California Supreme Court from the California Association of REALTORS® regarding:

Protecting Our Water & Environmental Resources et al. v. Stanislaus County et al.

Supreme Court Case No. S251709

Fifth Appellate District, Case No. F073634

Stanislaus County Superior Court Case No. 2006153

on interested parties in this action by placing one true copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Postal Service, addressed as follows:

Clerk of the Court
California Court of Appeal
Fifth Appellate District
2424 Ventura Street
Fresno, California 93721

Xavier Becerra
Office of the Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550

Honorable Roger M. Beauchesne
Dept. 24
Stanislaus County Superior Court
City Towers
801 10th Street, 4th Floor
Modesto, California 95354

John P. Doering
Thomas E. Boze
Office of the County Counsel
1010 10th Street, Suite 6400
Modesto, CA 95354-0074

Thomas N. Lippe
Law Offices of Thomas N. Lippe, APC
201 Mission Street, 12th Floor
San Francisco, CA 94105

Babak Naficy, Esq.
1504 Marsh Street, Suite 110
San Luis Obispo, California 93401

Matthew D. Zinn
Sarah H. Sigman
Lauren M. Tarpey
Shute Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102

Steven A. Herum
Herum Crabtree Dyer et al
5757 Pacific Avenue, Suite 222
Stockton, CA 95207

Jennifer B. Henning
California State Association of Counties
1100 "K" Street, Suite 101
Sacramento, CA 95814

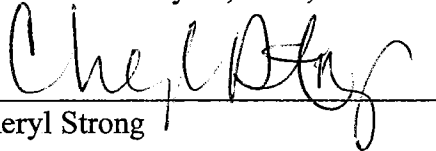
Arthur F. Coon
Miller Starr & Regalia
1331 N California Boulevard, 5th Floor
Walnut Creek, CA 94596

Mark Raymond Wolfe
M. R. Wolfe & Associates
1 Sutter Street, Suite 300
San Francisco, CA 94104

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

Executed on May 10, 2019, at Los Angeles, California.


Cheryl Strong