No. S251709

IN THE SUPREME COURT OF CALIFORNIA

PROTECTING OUR WATER & ENVIRONMENTAL RESOURCES, et al.,

Plaintiffs and Appellants,

v.

STANISLAUS COUNTY, et al.,

Defendants and Respondents.

After a Decision by the Court of Appeal, Fifth Appellate District
Case No. F073634

Appeal from the Stanislaus County Superior Court
Case No. 2006153
The Honorable Roger M. Beauchesne, Judge, Presiding

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

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I. INTRODUCTION

As a general rule, a public agency's discretionary approval must comply with CEQA. But, in the CEQA context, not all discretion is the same. This distinction compels a public agency, and subsequently the courts, to perform an intermediate step between the premise – that an approval involves the exercise of discretion - and the conclusion – that CEQA compliance is required. This intermediate step is essential to ascertain the type of discretion being exercised by a public agency, and determines whether the discretion's type makes CEQA compliance necessary. For a public agency approval to trigger CEQA compliance, the discretion exercised must be of "a certain kind" to be of a type that provides an agency with the authority and ability to mitigate or lessen the environmental effects asserted by a project opponent. In this matter, the Fifth District erred by bypassing this vital intermediate step.[1]

Dispensing with a review of the kind of discretion embedded in a regulatory scheme, the Fifth District's opinion ("**Opinion**"), converts many government actions presently understood to be ministerial into discretionary actions, thereby burdening otherwise exempt ministerial permits with time-consuming and expensive CEQA processes. Such additional burdens are wasteful and meaningless, and violate the legislative public policy rationale for making a permit ministerial in the first place.

The Opinion, which arises from a facial challenge, erroneously concludes that whenever a regulatory ordinance includes any provision

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[1] Appellants freely concede the Appellate Court dispensed with conducting the intermediate step, thereby collapsing a three-part syllogism into just two parts: "The Opinion holds that this standard triggers the application of CEQA because judging the distance to be 'adequate' for the purpose of protecting groundwater quality, regardless of any predetermined minimum standards, requires the exercise of discretion." Appellants' ANSWER BRIEF ON THE MERITS (Ans.Br.) at 10.

authorizing the exercise of some judgment in addition to merely applying specified objective criteria, decisions under the ordinance will be discretionary and subject to CEQA, even when the ordinance establishes objective criteria for issuance of permits and the exercise of judgement relates to different matters. The error of this approach is illustrated by a companion as-applied challenge to the same County ordinance. *Coston v. County of Stanislaus* 2018 Cal.App. Unpub. LEXIS 5796 (Cal.App. 5th Dist., August 24, 2018). In *Coston,* the unique circumstances requiring Stanislaus County to exercise nominal "discretion" over well location were not present; in *Coston*, the well permit was issued after applying *only* objective standards, a classic exercise of ministerial power. To put a finer point on it, in *Coston*, Stanislaus County did not exercise discretionary power when processing, evaluating and approving the permit. The Fifth District, however, wrongly concluded this well permit, approved under the exercise of ministerial power, was actually discretionary in nature because an unrelated element of the enabling ordinance supplied the County with nominal discretion *that it did not need to exercise in order to approve the permit.* This court should reject the Fifth District's conclusion that an approval is fully discretionary if the enabling ordinance contains any element of discretion, even if that element of discretion is not invoked or considered when a permit is evaluated and approved.

The petition for writ of mandate in this action asks a straightforward question: is the Stanislaus well permit ordinance entirely discretionary or entirely ministerial? The Petitioner's facial challenge is ill-suited to provide a meaningful answer because some element of discretion may be present in the narrow circumstance whenever a proposed well location is near a pollution source. In such instance a court must evaluate the *kind* of discretion involved to determine whether a CEQA burden exists. Petitioner did not provide the Court with the percentage of well permit applications requiring

the County to consider setbacks between well location and pollution sources, or the County's ultimate resolution of the setback questions in those instances. Indeed, the only actual permit presented to the Court is the *Coston* well permit, where the issue of a setback between the well location and a pollution source was not present, and the County exercised no discretion when evaluating and approving the permit.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Association of California Water Agencies (**ACWA**) and California Special Districts Association (**CSDA**) (collectively "**Amici**") joins and incorporates by this reference the Background Facts and Procedural History found at pages 18-26 of County of Stanislaus Appellant's Opening Brief dated January 14, 2019.

III. ARGUMENT

A. INTEREST OF ASSOCIATION OF CALIFORNIA WATER AGENCIES

ACWA is a statewide organization comprised of 440 public agencies collectively responsible for more than 90 percent of the water delivered for beneficial uses in California. As such, ACWA knows the water issues facing public agencies. ACWA's legal committee is tasked with identifying issues of critical importance to ACWA members and informing the court of potential impacts to public agencies serving water throughout California, and the potential policy ramifications of those issues at a practical level.

CSDA is a statewide California non-profit corporation consisting of 900 special district members, many of which provide a variety of water delivery services to urban, suburban and rural communities. CSDA is advised by its Legal Advisory Working Group, comprised of attorneys from all regions of the state with an interest in legal issues related to special

districts. CSDA monitors litigation of concern to special districts and identifies those cases that are of statewide or nationwide significance. CSDA has identified this case as having statewide significance for special districts.

As explained further in this brief, Amici is concerned that if the Fifth District's conclusions are upheld, their members will be required to undertake costly and time-consuming CEQA compliance for ministerial approvals that CEQA was never intended to cover.

B. NOT ALL DISCRETION IN A PUBLIC AGENCY APPROVAL PROCESS TRIGGERS THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

1. As a General Rule not all discretionary power, but rather, discretionary power of a "certain kind," give rise to a public agency's obligation to comply with CEQA.

Generally speaking, a public agency's obligation to satisfy the California Environmental Quality Act, Public Resource Code sections 21000-21189.56 (CEQA), applies to discretionary projects proposed to be carried out or approved by public agencies that may have a significant effect on the physical environment. Pub.Res.C. §21080(a). Conversely, CEQA compliance is not required where a proposed project is subject to a ministerial approval. *Id.* at §21080(b)(1).

An activity is not subject to CEQA if: (1) the activity does not involve the exercise of discretionary powers by a public agency; (2) the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment; or (3) the activity is not a project as defined in Section 15378. (CEQA Guidelines, § 15060, subd. (c)(1)-(3).) *San Diegans for Open Gov't v. City of San Diego* (2016) 6 Cal. App. 5th 995, 1004(Ct. App. 2016), as modified (Dec. 16, 2016).

As a starting point, Appellants err twice by suggesting that performing the syllogism's intermediate step "contravenes well-settled CEQA case law

governing 'preliminary review' of projects." Ans.Br. at 12 and 45. The "CEQA PROCESS FLOW CHART", depicted at CEQA Guideline Appendix A, vividly illustrated this error. An overarching first step in the CEQA process asks whether an activity is a project.[2] According to the CEQA Process Flow Chart, if an activity is not a project then CEQA is irrelevant. But if an activity is a project as defined by CEQA, then an initial study is prepared to determine if CEQA compliance requires preparing either a negative declaration or an environmental impact report. Tit. 14 Calif. Code of Reg. §§15060(c) and 15063. This determination is the first step in the preliminary review. Following the syllogism does not contravene this CEQA process.

The analysis undertaken of the foregoing criteria to determine CEQA's applicability is not a simple mechanical chore to identify the exercise of *any* judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity. Indeed, neither the Legislature in enacting CEQA, nor the Office of Planning and Research when adopting the CEQA Guidelines, chose to define the word "discretionary". The CEQA Guidelines supply definitions for the term "discretionary project" (Title 14 Calif. Code of Reg. §15357) and the word "ministerial" (*Id.* at §15359).[3] Thus our Courts have, when necessary,

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[2] "Once an application is deemed complete, a lead agency must first determine whether an activity is subject to CEQA" Tit. 14 Calif. Code of Reg. §15060(c). (Section 15060 is entitled "Preliminary Review of Projects and Conduct of Initial Study")

[3] In its wisdom the Office of Planning and Research, when drafting the CEQA Guidelines, supplied a definition for the *term* "discretionary project" but not for the *word* "discretionary" while also providing a definition for the *word* "ministerial" while declining to define the *term* "ministerial project".

Meanwhile the statute opts to omit all these words and terms from the twenty-five words and terms listed in Chapter 2.5, entitled "Definitions".

evaluated the word "discretionary" in the context of specific legal disputes, and concluded that in certain instances the quality and scope of discretion exercised in a specific situation may not impose a duty on a public agency to comply with CEQA, even after a project opponent identifies a discretionary component in the enabling regulation process. Not all discretion is the same. Merely locating discretion somewhere in a public agency approval process, without more, does not necessarily trigger CEQA. That is, identifying a point in the approval process requiring the exercise of some amount of discretion is insufficient to compel an approving public agency to conduct a CEQA review. According to controlling legal authority, a party asserting that CEQA compliance is triggered by discretion in the approval process must demonstrate the discretion is "of a certain kind". *Sierra Club v. County of Sonoma* (2017) 11 Cal. App. 5th 11, 28. Here, any discretion found in the Stanislaus County well permit ordinance is not the "certain kind" that imposes CEQA obligations. The controlling legal authorities support this conclusion and Amici identifies the following illustrative trilogy of opinions.

2. Trilogy of Opinions.

a. *Sierra Club v. County of Sonoma* (2017) 11 Cal. App. 5th 11.

In *Sierra Club v. County of Sonoma* (2017) 11 Cal. App. 5th 11, the Sierra Club challenged an erosion control permit granted to plant a vineyard on land devoted to grazing cattle, asserting the permit process possessed elements of discretion; therefore, CEQA compliance was required before considering the plan. While planting a vineyard was a "matter of right" under the applicable land use regulatory framework (*Id.* at 16), the Sierra Club nevertheless maintained the ordinance contained some aspect of discretionary power, and therefore compelled CEQA compliance.

The appellate court upheld the trial court's dismissal of the petition, finding that an ordinance conferring some amount of discretion did not

automatically trigger CEQA requirements. Instead, the court held that a petitioner must prove a public agency has the right kind of discretion—the ability and authority to mitigate environmental damage identified by the petition. More specifically, the court held that simply identifying some discretion (an undefined term in both CEQA and the Guidelines) in the approval process does not mean the challenged action is a "discretionary project" (a defined term in the CEQA Guidelines) subject to CEQA review:

> Petitioners argue that the language of these provisions is general enough to confer discretion. But even assuming we could interpret these provisions to grant some discretion to the Commissioner, we reject petitioners' argument that this alone requires us to hold that the Commissioner's issuance of the Ohlsons' permit was a discretionary act. **The argument ignores the principle, arising out of the functional test, that "'CEQA does not apply to an agency decision simply because the agency may exercise some discretion in approving the project or undertaking. Instead[,] to trigger CEQA compliance, <u>the discretion must be of a certain kind</u>; it must provide the agency with the ability and authority to "mitigate ... environmental damage" to some degree.'"** (*San Diego Navy Broadway Complex Coalition v. City of San Diego, supra*, 185 Cal.App.4th at p. 934, italics omitted.) For the reasons discussed above, **the existence of discretion is irrelevant if it does not confer the ability to mitigate any potential environmental impacts in a meaningful way**.

Id. at 28 (boldface and underline added).

Appellants' description of *Sierra Club v. County of Sonoma* creates a serious internal inconsistency. On the one hand, Appellants argue the opinion supports a contention that a narrow exercise of discretion should be treated as broad and expansive unless the ordinance *expressly* announces that exercising discretion is limited to only setback standards. Ans.Br. at 32. On the other hand, one page earlier, Appellants refute this unsubstantiated assertion by advising us the appellate court limited Sonoma County's

discretion based on the "*purpose* of the [erosion control] ordinance" (*Id.* at 31 [italics added]) instead of relying on expressed language cutting off or limiting the scope of discretion.

This internal conflict between pages 31 and 32 of the Appellant's brief underscores the flaw in the Appellants' legal position. It argues, without authority, that a grant of narrow discretion attached to a discrete aspect of a regulatory ordinance expands discretion to all other aspects of the ordinance unless cleaved from the remainder of the ordinance by language expressly limiting or prohibiting the discretion's migration. But *Sierra Club v. County of Sonoma* contradicts this interpretation, finding that discretion was limited to specific erosion control features due to the "purpose" of the ordinance even though the ordinance did not by expressed language limit the scope of the granted discretion.[4]

b. *Sierra Club v. Napa County* (2012) 205 Cal. App. 4th 162.

The preceding reasoning and holding from *Sierra Club v County of Sonoma* conforms to the general conclusion presented in *Sierra Club v. Napa County* (2012) 205 Cal. App. 4th 162, that CEQA:

> requires assessment of environmental consequences where government has the power through its regulatory powers to eliminate or mitigate one or more adverse environmental consequences a study could reveal.

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[4] "Petitioners argue that the language of these provisions is general enough to confer discretion. But even assuming we could interpret these provisions to grant some discretion to the Commissioner, we reject petitioners' argument that this alone requires us to hold that the Commissioner's issuance of the Ohlsons' permit was a discretionary act.... For the reasons discussed above, the existence of discretion is irrelevant if it does not confer the ability to mitigate any potential environmental impacts in a meaningful way." *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 28.

Id. at 179.[5] There, the court cited a general principle that the mere existence of discretion is insufficient to compel CEQA compliance. Instead, the discretion must empower an agency to mitigate the environmental consequences of the discretionary aspect of the approval:

> Following *Friends of Westwood*, the court in *Leach v. City of San Diego* [citation omitted] held that a municipality was not required to prepare an environmental impact report before being permitted to draft water from a reservoir; despite environmental consequences, the municipality had little or no ability to minimize in any significant way the environmental damages that might be identified in the report. As one reviewing court recently put it, quoting from a major treatise: " 'CEQA does not apply to an agency decision simply because the agency may exercise some discretion in approving the project or undertaking. Instead to trigger CEQA compliance, the discretion must be of a certain kind; it must provide the agency with the ability and authority to "mitigate ... environmental damage" to some degree. [Citations.]' " (*San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) [citation omitted] italics omitted).

Id. at 179 (underlining added). This necessarily means that to present valid CEQA objections, the alleged environmental harm must flow from the discretionary rather than ministerial aspect of an approval. Simply stated, a project is a "discretionary project" only if a public agency has sufficient power to mitigate environmental harms flowing from the discretionary aspects of an approval. Accordingly, a public agency does not have sufficient governmental power to mitigate environmental harms flowing from a ministerial approval in a "meaningful way". *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80, 89 and

[5] Of course, as we know, CEQA "a public agency may exercise only those express or implied powers provided by law *other than* CEQA." *Sierra Club v. California Coastal Com.* (2005) 35 Cal.4th 839, 859 (italics in original). Pub.Res.Code §21004. CEQA Guideline §15040(b).

90 ["The 'touchstone' for determining whether an agency is required to prepare an EIR is whether the agency could meaningfully address any environmental concerns that might be identified in the EIR.... However, the discretionary component of the action must give the agency the authority to consider a project's environmental consequences to trigger CEQA."]

Appellants mention *Sierra Club v. County of Napa* only in connection with the deference owed to local government decisions. Ans.Br. at 23. Yet the opinion offers substantial guidance fully consistent with the common understanding that discretion must be of a certain type before requiring CEQA compliance. Appellants' fifty-seven-page brief leaves *Sierra Club v. County of Napa*'s emphasis on the importance of conducting the intermediate step in the syllogism—ascertaining the "the kind" of discretion at issue—and the line of cases supporting this approach undisturbed.

c. *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal. App. 4th 924.

San Diego Navy Broadway Complex Coalition v. City of San Diego (2010) 185 Cal. App. 4th 924 (*San Diego Navy*), "summarized the case law" as follows:

> ... CEQA does not apply to an agency decision simply because the agency may exercise *some* discretion in approving the project or undertaking. Instead to trigger CEQA compliance, the discretion must be of a certain kind; it must provide the agency with the ability and authority to 'mitigate ... environmental damage' to some degree.

Id. at 934 (underlining added; italics in original).

In sum, the methodology endorsed and followed by the trilogy of opinions summarized above involves, first, identifying whether there is actual discretion in the regulatory approval process enacted by the relevant legislative body, and then ascertaining whether that discretion is the

"certain kind" requiring a public agency to impose conditions to avoid or reduce significant adverse environmental effects.

Appellants dismiss *San Diego Navy* as "highly attenuated and easily distinguishable", Ans.Br. at 38, characterizing it as reflecting "policy concerns ...for protecting the finality of previously certified EIRs." *Id.* at 41. This is a half-truth but the wrong half. Appellants offer the full story when noting that the project opponents in *San Diego Navy* argued the discretionary "authority to review the project plans' consistency with the development agreement's *aesthetic guidelines* also gave the CCDC the authority and duty under CEQA to assess the project's impact on *global climate change*." *Id.* at 41 (italics in original). After performing the intermediate step of the syllogism, the city concluded the discretion to evaluate the new design's consistency with existing aesthetic standards did not sufficiently enlarge the scope of the discretion to justify studying other impacts caused by the new design, including climate change. The reviewing courts agreed.

C. THE OPINION IS FLAWED

1. The Court Missed a Vital Step.

The Opinion got on the wrong train going in the wrong direction.[6] The Court cites the definitions for the term "discretionary project" and word "ministerial" at pages *10 and *11 of the Opinion; thereafter, at page *14 it concludes the Stanislaus County ordinance "calls for a discretionary

[6] According to Lutheran theologian and martyr Dietrich Bonhoeffer "If you board the wrong train it is no use running along the corridor in the opposite direction." Quoted in Metaxas, Bonhoeffer: Pastor, Martyr, Prophet, Spy at 176.

decision." This is, however, a flawed syllogism yielding the wrong conclusion. The flaw flows from collapsing the syllogism by omitting the critical middle step.

As the preceding trilogy of decisional law explains, the middle step of the syllogism involves determining if the scope of discretion is of "a certain kind." In this case, the appellate court neglected to conduct the intermediate or middle step in the syllogism. It dispensed with the intermediate step because it wrongly presumed all discretion is the same and indistinguishable, contrary to the approach followed by better reasoned opinions.

2. The Essential Nature of the Second Step Can Be Illustrated.

An analogy illustrates the importance of the CEQA principle that the discretion must be "of a certain kind". Assume a local agency ordinance allows construction of a multi-story office tower after obtaining a building permit. The ordinance does not regulate building height, as long as the building does not exceed ten floors. It does, however, give the building department some discretion regarding the design of landscaping surrounding the building. A builder seeks a permit for a ten-floor building, a use permitted as a matter of right. The agency reviews and changes the proposed landscaping plan, and then grants the permit without CEQA review. The neighbors sue, arguing the building height will significantly obstruct local views, but they do not complain about the landscaping plan.

Applying the controlling legal authorities, these neighbors established that the permit has an element of discretion with respect to landscape design, but that discretion is not the "certain kind...provid(ing) the agency with the ability and authority" to mitigate the alleged environmental damage. *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal. App. 4th 924, 934. That is, the public agency had some degree of discretionary regulatory authority over the landscaping plan, but

no discretionary regulatory authority over the building height, as long as the building did not exceed ten floors.

3. Application to this Case.

We face the same situation here. While Petitioners argue over well impacts to groundwater conditions, the County's well ordinance was designed to give discretionary regulatory authority only over the distance of the well from contamination sites, and not over whether installing and operating the well is prudent with respect to any other groundwater conditions.

The companion case, *Coston v. County of Stanislaus* 2018 Cal.App. Unpub. LEXIS 5796 (Cal.App. 5th Dist., August 24, 2018), which analyzed the same ordinance, further illustrates the meaningful error produced by the Opinion's flawed syllogism. In *Coston*[7], the petitioners alleged that "[s]ince real party in interest constructed the well subject to well construction permit No. 2014-639, the depth of water in said Plaintiff's well has increased." Petition at ¶¶ 4-8. They complained only about operation of the well on the water table, while never alleging the well location is near a contamination source, the setback between the well location and a contamination source constituted a health and safety question, or the County erred by approving the well location near an identified contamination source.

The Real Party in Interest's well met the ordinance's objective standards for contamination-source spacing and set-back (because there was no identified nearby contamination source) and did not require the County to exercise any discretion when determining whether to approve the

[7] The Petition in *Coston* can be found in the record of proceedings which are a part of the request for review before the Supreme Court (for the convenience of the Court a true and correct copy of the petition attached hereto as Exhibit A). The undersigned serves as counsel to the real parties in interest in that matter.

well permit application. Thus, the challenged water well permit application squarely satisfied all applicable objective standards enacted by the local agency's legislative body for issuing the permit, was not designed to require the County to exercise any discretion concerning contamination source spacing standards, and was approved exclusively by applying only objective standards. It represented a textbook example of a ministerial approval.

The environmental concern articulated by the Petitioners involved perceived reductions in ground water levels. The discretion that Stanislaus County could exercise over a well location decision in relationship to contamination sources did not vest the County with power to mitigate the amount or use of water from an approve water well permit, because Stanislaus County's Board of Supervisors – its legislative body – has elected not to regulate such use. The discretion, assuming any is found in the contamination source standard set back requirements, is not the "certain kind...provid(ing) the agency with the ability and authority" to impose conditions to avoid or reduce adverse environmental effects from groundwater production. The underlining facts of the as applied challenge underscore the legal infirmity created by dispensing with the intermediate step of the syllogism.

Requiring CEQA review for the *Coston* water well permit violates separate-of-powers principles by disregarding the legislative decision to condition the issuance of well permits solely on certain limited objective standards that exclude discretion "to mitigate any potential environmental impacts in a meaningful way." *Sierra Club v. County of Sonom*a (2017) 11 Cal. App. 5th 11, 28. That is, regulate the rate or amount of water pumped.

In this regard, *Coston* and Stanislaus County's implementation of the Ordinance cohere to *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80. There a neighborhood group opposed an

eight-unit apartment complex on environmental grounds, including parking, traffic, safety and soil remediation. *Id.* at 86. However, the apartment complex was a permitted use in the zoning district, and needed only a design review permit. *Id.* Undeterred by this limitation, the neighborhood group latched on to the design review permit process, arguing it was discretionary in nature and therefore allowed the city to evaluate environmental issues unrelated to design standards. *Id.* at 87.

McCorkle noted that if a project involves both discretionary and ministerial actions it is considered discretionary; "[h]owever the discretionary component of the action must give the agency the authority to consider a project's environmental consequences to trigger CEQA." *Id.* at 90. Thus, "the City Council found the design review ordinances prevented it from disapproving the project for non-design-related matters. This was correct." *Id.* at 92.

Appellants find no time or space available within a fifty-seven-page brief to address *McCorkle Eastside Neighborhood Group*. The Opinion's conclusion that "the discretionary component of the action must give the agency the authority to consider the project's environmental consequences to trigger CEQA" conflicts with Appellants' assertion that CEQA gives an agency power to address environmental impacts (Ans.Br. at 11), and also clashes with its obvious misreading that section 21004 requires a public agency to comply with CEQA even if it lacks authority to mitigate environmental effects (*Id.* at 15). Appellants' arguments cannot be reconciled with *McCorkle's* conclusion that: "The 'touchstone' for determining whether an agency is required to prepare an EIR is whether the agency could meaningfully address any environmental concerns that might be identified in the EIR.... However, the discretionary component of the action must give the agency the authority to consider a project's environmental consequences to trigger CEQA." The Stanislaus ordinance grants power to regulate the

distance between a proposed well's location and a known pollution source, but does not give the County regulatory power to control the amount or rate of water pumped from the proposed well.

The method of analysis endorsed by *McCorkle* applies to the Stanislaus County ordinance. A water well permit, such as the permit at issue in *Coston*, meeting the contamination source standard's set-back requirement does not allow discretion by the County to deny the permit on grounds unrelated to the contamination-source standard's set-back requirement and, therefore, does not trigger CEQA review to assess environmental effect from the amount or rate of water that may be pumped. The discretion, if any, contained in the County Ordinance is not that "certain kind" triggering CEQA compliance. By dispensing with the intermediate step in its syllogism the Opinion fails to analyze the scope and type of discretion actually presented in the challenged Ordinance and, therefore, reaches the wrong conclusion about whether the Ordinance in general, or the *Coston* water well permit in particular, triggers CEQA.

D. ALTERNATIVELY, CEQA APPLIES ONLY IF THERE IS A CONTAMINATION SOURCE SET BACK ISSUE.

Because the *Coston* water well permit did not implicate the topic of the distance between a proposed well location and a contamination source the County never reached the point of exercising discretion when processing the permit. The permit was granted according to objective criteria and standards, classic qualities of a ministerial permit in which CEQA is not triggered. 14 Cal. Code of Reg. Section 15368. ["'Ministerial' describes a governmental decision involving little or no personal judgment by the public official".]

In the alternative, if the Ordinance does create a regulatory framework triggering CEQA, compliance should be triggered only in instances where

the location of a proposed water well permit actually requires the County to consider contamination source standard setback rules. Thus, CEQA may or may not apply to that narrow category of water well permits, depending upon whether discretion is actually exercised due to the physical proximity between a contamination source and the proposed location of the well. Because this appeal is a facial attack to the Ordinance, and the subject matter of the companion as applied matter challenge involves a water well permit that did not require the exercise of judgment about the contamination source standard, then a challenge to the Ordinance should await an instance where a proposed water well permit location actually triggers application of the contamination source standard.

E. PUBLIC POLICY STRONGLY SUPPORTS THE COUNTY

1. A decision determining the Ordinance requires CEQA compliance will have a chilling effect on local environmental and land use regulations.

The Fifth District acknowledged that implementing its Opinion could be "unnecessary", "troublesome", "costly" and "time consuming" while satisfying its requirements could "cause harm, loss or hardship". *Protect Our Water & Environmental Residents v. Stanislaus County* (2018) 2018 Cal.App. Unpub. LEXIS 5791 at *2-*3.

The Opinion should be reversed to avoid a chilling effect on local government adopting beneficial environmental and land-use regulations. The unnecessary, troublesome, costly and time consuming consequences that flow from adopting a flawed syllogism dispensing with the middle step would bleed into unrelated regulatory programs so that the mere hint of minor and unrelated discretion in a regulatory program would trigger full CEQA burdens when that is not what the local legislative body intended at

all. Local agencies will be mindful of, and perhaps guided by, the Supreme Court's admonition that:

> [I]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail.

Johnson v. State of California (1968) 69 Cal.2d 782, 788.

Local agencies, concerned that the mere "driving of a nail" may involve discretion triggering CEQA, may be reticent to adopt regulations intended to protect the environment, improving the housing stock or support the quality of life, fearing that new regulations may be subsequently challenged as discretionary and require CEQA compliance, even in instances where a court concludes CEQA compliance may be unnecessary, troublesome, costly and time consuming. This threat is more than just the product of zealous advocacy in an amicus brief but is derived from a recent judicial observation about the adverse and "perverse effect" of refusing to analyze the scope and kind of discretion before concluding a public agency has a CEQA burden:

> **It is worth pointing out that adopting petitioners' argument would have the perverse effect of discouraging agencies from enacting ordinances, such as the ordinance here, specifically designed to mitigate environmental impacts through a permitting process.** Under petitioners' view of the law, if an agency has *any* discretion under the language of such an ordinance it cannot determine that issuing a permit is ministerial, even if there is nothing to suggest that the discretion allows the agency to further mitigate potential environmental impacts to any meaningful degree. **If this were the law, agencies would be motivated to avoid CEQA burdens by simply not enacting such ordinances in the first place.**

Sierra Club v. County of Sonoma (2017) 11 Cal. App. 5th 11, 28 fn. 17 (bolding added; italics in original).

Dispensing with the middle step in the syllogism creates gaps and discrepancies in the analysis and wrongly implies all discretion is the same and all types of discretion triggers CEQA compliance. This casuistry would have the unintended consequence of chilling local government efforts to create clean, affordable, healthy and safe communities. The infirmity embedded in the Fifth District's method of analysis is straightforward: it omitted any reasoned analysis of whether the discretion it located in the County ordinance was of sufficient scope and of the certain kind giving rise to require compliance with CEQA.

2. Existing ministerial regulatory schemes may be challenged as having a CEQA burden.

While issuing building permits are regarded as ministerial for CEQA purposes, the Uniform Building Code, which is generally adopted by most California cities and counties with some local variation, undoubtedly allows discretion by the local building official when deciding whether to and how to issue a building permit.[8] The discretion contained in the Uniform Code is greater than "driving of a nail," but substantially less than the scope and "certain kind" to give rise to a CEQA obligation. But if the Fifth District's methodology of dispensing with the middle step—the analysis of the scope and kind of discretion at issue—is approved of, then commonly understood

[8] The Opinion impliedly conflicts with the CEQA Guideline definition of "ministerial". The definition allows a ministerial action to have an aspect of discretion but not "of a kind" imposing a CEQA burden. According to the definition a ministerial decision involves "**little** or no **personal judgement by the public official**". 14 Cal. Code of Reg §15369 (bolding added). A definition recognizing some discretion may appear in ministerial actions inherently requires a public agency and reviewing court to evaluate whether exercising discretion within a regulatory scheme is "of a kind" requiring CEQA compliance. Yet the Opinion conflates any discretion into a CEQA burden thereby treating this evaluation as irrelevant for CEQA purposes. The opinion and definition are incompatible and irreconcilable.

ministerial acts such as building permits are vulnerable to attack for non-compliance with CEQA.

Such unintended consequences could force cities and counties to provide comprehensive notice and hearing procedures, comply with CEQA and make formal findings after a noticed public hearing before issuing each and every building permit. This result would be true even if the building permit was part of a larger development project where a comprehensive environmental impact report was prepared for the General Plan, Zoning Reclassification, Specific Plan and Tentative Subdivision map. It would be easy to describe this situation as being unnecessary, troublesome, costly and time consuming.

The public policy problems associated with a lack of housing in California is observed regularly and reported almost daily.[9] Adding CEQA burdens to the building permit process not only contributes to the impact of this enormous socio-economic tragedy, but would also unravel decades of CEQA case authority. Yet upholding the Opinion's analysis and reasoning places this threat directly into the laps of policy and decision makers attempting to resolve California's housing shortage.[10]

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[9] "[H]omeless people are three to four times more likely to die than the general population (O'Connell, 2005). This increased risk is especially significant in people between the ages of 18 and 54. Although women normally have higher life expectancies than men, even in impoverished areas, homeless men and women have similar risks of premature mortality. In fact, young homeless women are four to 31 times as likely to die early as housed young women (O'Connell, 2005). The average life expectancy in the homeless population is estimated between 42 and 52 years, compared to 78 years in the general population." Health Care and Homelessness, National Coalition for the Homeless (July 2009). https://www.nationalhomeless.org/factsheets/health.html

[10] "Some of the housing challenges facing California include: • Production averaged less than 80,000 new homes annually over the last 10 years, and ongoing production continues to fall far below the projected need of 180,000

3. Further Ramifications.

The potential adverse policy considerations discussed above regarding building permits illustrate the grave and real concerns facing Amici members.

On September 16, 2014, the Sustainable Groundwater Management Act (SGMA) was signed into law, consisting of Senate Bills 1168 and 1319, and Assembly Bill 1739 collectively, codified at Water Code sections 10720 *et seq.* SGMA requires California groundwater basins and subbasins be managed by a Groundwater Sustainability Agency (GSA) or multiple GSAs, and implemented through an approved Groundwater Sustainability Plan (GSP) or multiple coordinated GSPs.

Many of Amici's member local water agencies formed GSAs, and are in the process of preparing the GSPs, many of which are required to be completed and adopted within eight months. These GSPs use intricate modeling of groundwater budgets and safe yields to determine how much groundwater can be utilized within the GSA to ensure that the basin maintains sustainability over the 20-year horizon. Preparing for, creating, and implementing these GSPs will cost local agencies millions of taxpayer dollars. Upon completion, each GSP must be submitted to, reviewed, and approved by the California Department of Water Resources. By the end of this process, the use of groundwater wells in all local agencies in California will have been studied and restudied, and future installation and use of these wells will be strictly controlled by local GSAs. This represents a huge undertaking, and one of the most significant changes in regulating water in decades.

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additional homes annually." California's Housing Future: Challenges and Opportunities (Feb. 2018) at 1 by Calif. Dept. of Housing and Community Development. http://www.hcd.ca.gov/policy-research/plans-reports/docs/sha_final_combined. pdf

The Opinion may operate to create mischief and chaos in the orderly regulation of groundwater as designed by the statute. Under the threat of potential CEQA litigation due to the Fifth District's oxymoronic holding on ministerial "discretion," these same local agencies, currently spending millions on SGMA compliance, may face the additional time consuming and financially costly obligations to prepare an initial study or environmental impact report, receive public comments, hold public hearings to comply with CEQA, and then deal with potential legal challenges that could prevent or impede for years the implementation of important water regulations. Requiring these local agencies to undertake further CEQA review of well installation, when they have previously made such a determination through the highly public SGMA process, a process that culminates in concluding that the installation and use of the well is consistent with groundwater sustainability, truly wastes public funds and unhinges the strong public policy benefits of the statute.

Here the public agency has discretion only over the set-back between the well and a contamination source, and that is the only environmental issue to be evaluated. Imposing a CEQA obligation where the legislature elected not to do so would materially interfere with California water agencies carrying out important public policies contained in SGMA, impede the realization of these benefits and add an unintended, new CEQA front to the battles GSAs will fight to implement SGMA in the face of disgruntled water users. The legislation provides sufficient public protection so that an added attack on an individualized case by case well permits operates to impede the public policy progress and benefits intended by SGMA.

IV. CONCLUSION

For good reason California Courts implement an important CEQA policy by analyzing the actual scope of discretion in agency decision making

and concluding that only certain kinds of discretion impose CEQA burdens. That vital rule respects the state legislature's decision to limit CEQA's application to truly discretionary decision making. It also protects local agencies' legislative decisions to enact ministerial permit programs that apply objective standards without triggering the requirements of CEQA review to implement programs that do not authorize the case-by-case development of approval conditions to avoid or reduce environmental effects:

> 'The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.' (*Bozung, supra*, 13 Cal.3d 263, 283.).

Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal. 3d 376, 393. See also Title 14 Calif. Code of Reg. §15003(g) [CEQA policies].

The trilogy of controlling decisional law teaches us that failing to ascertain the scope of discretion and determine whether it is the certain kind of discretion compelling compliance with CEQA results in "unnecessary", "troublesome", "costly" and "time consuming" yet ultimately meaningless paper work. Indeed, the Fifth District impliedly suggested this was the practical effect of its decision in this matter. In the final analysis an unfounded decision to collapse a three-part syllogism into a two-part syllogism should be rejected.

Dated: April 24, 2019

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(California Rules of Court, Rule 8.204(c)(1))

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Dated: April 24, 2019

Steven A. Herum

PROOF OF SERVICE

I, Laura Cummings, certify and declare as follows

I am over the age of 18 years and not a party to this action. My business address is: HERUM\CRABTREE\SUNTAG, 5757 Pacific Avenue, Suite 222, Stockton, California 95207. On the date set forth below, I served the following document(s):

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

Dated: April 25, 2019

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