Case No. S251709

IN THE SUPREME COURT OF CALIFORNIA

PROTECTING OUR WATER & ENVIRONMENTAL RESOURCES et al.,

Plaintiffs and Appellants,

vs.

STANISLAUS COUNTY et al.,

Defendants and Respondents.

[PROPOSED] AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF DEFENDANT AND RESPONDENT COUNTY OF STANISLAUS

Court of Appeal, Fifth Appellate District
Case No. F073634

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

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I. INTRODUCTION

For decades, the majority of California's counties have treated groundwater well construction permits as ministerial approvals exempt from review under the California Environmental Quality Act (CEQA) (Pub. Res. Code, § 21000 et seq.). The Second District Court of Appeal affirmed this long-standing practice when it recognized that an ordinance similar to the one before the Court in this case authorizing well permits, also based on the Department of Water Resources (DWR) guidelines, does not allow the issuing authority to condition or deny well permit approvals to meaningfully mitigate or avoid the environmental impacts that CEQA review could reveal. (*California Water Impact Network v. County of San Luis Obispo* (2018) 25 Cal.App.5th 666 (*CalWIN*).) This "functional" test for whether a local agency's approval is discretionary, and therefore subject to CEQA, is well-established law.

In employing the functional test, this Court must focus on the scope of the County's Department of Environmental Resources (DER) authority under Stanislaus County Code § 9.36.110 (the Ordinance). The California Constitution vests California cities and counties with the authority to implement an array of options for regulating the construction of groundwater wells, or even the extraction or use of groundwater. (Cal. Const., art. XI, § 7.) Local agencies may adopt legislation creating a discretionary well permitting scheme, but they are not required to do so. And local permitting departments cannot circumvent the statutory limitations on their authority established by local well ordinances.

In this case, the Ordinance limits DER to ensuring that well construction complies with detailed technical standards, mostly adopted from the DWR guidelines, and therefore does not satisfy CEQA's functional test for discretion. Environmental review of these permit

approvals would require the County to obtain and analyze substantial amounts of information at considerable cost both to the County and to new well applicants. But these investigations would serve no purpose where DER lacks the authority to meaningfully mitigate or avoid the environmental impacts that CEQA review could reveal.

Courts have repeatedly confirmed what the state CEQA Guidelines also recognize: local public agencies are best positioned to determine what is ministerial based upon an analysis of their own laws. (Cal. Code Regs., tit. 14 § 15000 et seq.) This Court should give considerable deference to the County's interpretation of its own Ordinance, an approach that provides certainty and predictability to local agencies.

All California counties, and many cities, administer well-permitting programs. The majority of the state's counties do so under local legislation that closely resembles the County ordinance at issue here. A decision for Plaintiffs could have significant practical consequences for these local agencies.

The California State Association of Counties therefore urges this Court to reverse the Fifth District's ruling and uphold Stanislaus County's practice of treating well construction permits as ministerial approvals.

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II. ARGUMENT

A. Concluding that discretion was exercised under the Ordinance here could have significant practical consequences for public agencies throughout California.

1. Stanislaus County's Ordinance closely resembles many other county well permitting ordinances.

The vast majority of California's counties[1] administer well permitting programs under local ordinances that closely resemble the County ordinance at issue here. These ordinances limit the authority of

[1] Alameda County Code, § 6.88.060; Alpine County Code, § 8.36.030; Amador County Code, § 14.06.170; Butte County Code, § 23B-5; Calaveras County Code, § 8.20.020; Colusa County Code, § 35-10; Del Norte County Code, § 7.32.70; El Dorado County Code of Ordinances, § 8.39.120; Glenn County Code, § 20.080.060; Humboldt County Code, § 631-10; Imperial County Code of Ordinances, § 92103.02; Inyo County Code § 14.28.100; Kern County Code of Ordinances, § 14.08.210; Kings County Code of Ordinances, § 14A-31; Lake County Code of Ordinances, § 9-66; Lassen County Code, § 7.28.100; Madera County Code of Ordinances, § 13.52.050; Mariposa County Code § 13.16.030; Merced County Code, § 9.28.060; Modoc County Code of Ordinances, § 13.12.030; Mono County Code of Ordinances, § 7.36.070; Monterey County Code of Ordinances, § 15.08.110; Nevada County Code, § L-X 2.12; Orange County Code of Ordinances, § 4-5-30; Placer County Code, § 13.08.100; Plumas County Code of Ordinances, § 6-8.05; Riverside County Code of Ordinances, § 13.20.100; Sacramento County Code, § 6.28.040; San Benito County Code of Ordinances, § 15.05.095; San Bernardino County Code of Ordinances, § 33.0633; San Diego County Code of Regulatory Ordinances, § 67.421; San Francisco Health Code, § 806; San Luis Obispo County Code, § 8.40.060; Santa Barbara County Code of Ordinances, § 34A-12; Santa Cruz County Code, § 7.70.090; Shasta County Code of Ordinances, § 8.56.070; Sierra County Code, § 12.04.080; Siskiyou County Code of Ordinances, § 5-8.21; Solano County Code, § 13.10-14; Sonoma County Code of Ordinances, § 25B-6; Sutter County Code of Ordinances, § 765-040; Trinity County Code of Ordinances, § 15.20.080; Tulare County Code, § 4-13-100; Tuolumne County Ordinance Code, § 13.16.160; Ventura County Code of Ordinances, § 4814; and Yuba County Code of Ordinances, § 7.03.040.

local permitting departments to ensuring compliance with detailed technical standards. As in Stanislaus County, many well ordinances incorporate the standards for design, construction, destruction, and location of wells "set forth" in DWR Bulletin 74-81.

Many counties explicitly classify well construction approvals as ministerial in the local implementing procedures that CEQA and the state CEQA Guidelines require local public agencies to adopt. (See, e.g., Placer County Code, § 18.36.010(A)(l3).) And some County well ordinances explicitly require their permitting departments to issue ordinary well construction permits if applicants meet the relevant technical standards and submit all required information. (See, e.g., Santa Barbara County Code, § 34A-6(a) ["If the administrative authority finds the application for a permit requested pursuant to this chapter to contain all the required information and the proposed work is in compliance with all applicable standards as specified in this chapter, the administrative authority *shall* issue a well permit." (emphasis added)].)[2]

These well ordinances are designed to protect the quality of groundwater from pollution or contamination and authorize ordinary well construction as long as the proposed construction meets statewide standards established by DWR or substitute standards developed by the local agencies themselves. If the Court of Appeal's opinion is upheld, there will be no principled basis for distinguishing between Stanislaus County's duty to perform environmental review for ordinary well construction permits and the obligations of all other California local agencies with similar well permitting ordinances. Such a decision could have far reaching impacts to local jurisdictions if this re-interpretation of the functional test is adopted

[2] Alpine County Code, § 8.36.010 et seq.; Kern County Code,§ 14.08.010; Kings County Code, § 14A-22; Solano County Code, § 13.10-13 (a)(6); Trinity County Code§ 15.20.010 et seq.; and Yolo County Code, § 6-8.802.

by this Court as it determines the discretionary or ministerial characteristics of various local operations.

B. The Court of Appeal's decision requires wasteful environmental review and represents a fundamental reorientation of land use regulation in California.

Amicus agrees with the County that CEQA only applies where the legal standards applicable to that action give the agency authority to meaningfully alter its environmental consequences. (Opening Br., pp. 26-30.) Therefore, at the most basic level, the Court of Appeal's conclusion that when an agency lacks authority to impose mitigation measures CEQA still applies, is a fundamental misstatement of the law.[3] Extensive CEQA investigations would serve no purpose where local agencies have granted their permitting departments only limited control over the construction of groundwater wells and have not granted the authority to impose conditions on how water is extracted or used. (See *Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 178 (*Napa County Board*) ["[U]nless a public agency can shape the project in a way that would respond to concerns raised in an environmental impact report, or its functional equivalent, environmental review would be a meaningless exercise."] (quoting *Mountain Lion Found. v. Fish & Game Comm'n* (1997) 16 Cal.4th 105, 117).)

[3] The opinion's error is illustrated by the following statement, which incorrectly concludes that CEQA applies at all when an agency lacks authority to impose mitigation measures: "When a lead agency identifies mitigation measures that it lacks legal authority to impose, it may simply make a finding in the environmental document that the measures are legally infeasible." (*Protecting Our Water & Environmental Resources v. Stanislaus County* (Aug. 24, 2018) F073634 [nonpub. op., p. 26].)

1. Counties engage in environmental review at various stages of discretionary decision-making, including general plan amendments, zoning changes, and conditional use permits.

While there is no meaningful environmental review can occur in the context of a ministerial permit when the agency lacks authority to impose conditions to address environmental harms, the broader framework of CEQA ensures that environmental impacts of projects are assessed at a point in time when the local agency has authority to adopt mitigation measures.

Plaintiffs respond by arguing for what would amount to a fundamental reorientation of land use regulation in California: that local public agencies should be required to either deny a well construction permit or require mitigation of the environmental impacts of any activities supported by that well construction. (See Plaintiffs' Answer Brief, pp.54-55.) Yet many of the activities supported by groundwater wells, such as irrigated agriculture, are normally undertaken by right under local general plans and zoning ordinances throughout California. As Defendants have clearly established, CEQA itself does not provide agencies any authority to approve, deny, or mitigate the impacts of a project. (Opening Brief, p. 29.) Any such authority must come from other laws that govern a local agency's decision on the project. (See Pub. Res. Code,§ 21004.) In the case of activities such as irrigated agriculture, there may simply be no such source of authority for what Plaintiffs envision.

2. CEQA is not the only tool available for addressing concerns about groundwater quality or quantity.

The State Legislature recently elected to comprehensively regulate groundwater extractions through the Sustainable Groundwater Management Act (SGMA) for the protection of the state's water resources. (Wat. Code,

§§ 10720 - 10737.8.) In enacting SGMA, the Legislature chose to broadly regulate and protect groundwater resources, including interconnected surface waters. The Legislature expressly delegated "local and regional agencies the authority to sustainably manage groundwater" under SGMA, finding that "[g]roundwater resources are most effectively managed at the **local and regional level**." [emphasis added] (SGMA Legislative Findings, § 1(a)(6), (b)(1).) SGMA acknowledges the preexisting "authority of [] counties to manage groundwater pursuant to *police power*" within their own jurisdictional boundaries. (SGMA Legislative Findings, §1(b)(5).)

SGMA is a robust regulatory framework that authorizes specific local agencies to manage groundwater sustainably, while providing for direct oversight and authority of specific state agencies to intervene where a basin is not being sustainably managed in compliance with SGMA's requirements. And yet the Legislature preserved the authority of counties issuing those permits without contemplating their ministerial nature; "This section does not authorize a groundwater sustainability agency to issue permits for the construction, modification, or abandonment of groundwater wells, except as authorized by a county with authority to issue those permits." (Wat. Code, § 10726.4 (b).) As the *CalWIN* court noted, "[C]oncerns about groundwater sustainability do not empower the courts to rewrite [county well construction permit ordinances] to hasten [] legislative goals." (*CalWIN, supra,* 25 Cal.App.5th 666 at p. 679.) This is particularly so where local agencies are currently actively engaged in the SGMA process.

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C. The "functional test" is the well-established, workable legal standard for determining whether a local agency's approval is discretionary, and the County's existing Ordinance must be the basis of this inquiry.

The functional test described in *Friends of Westwood* and other case law is a workable standard that, properly applied, provides certainty and predictability to local public agencies. (*Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 272.) CSAC joins, without duplicating, Defendants' argument that the County's well construction ordinance does not give the DER discretion to deny or modify ordinary well construction permits to avoid environmental impacts. The Court's inquiry must focus on the County's authority to exercise discretion when issuing well construction permits under the existing Ordinance.

CSAC acknowledges that California cities and counties are vested with the authority to implement an array of options for regulating construction of water wells and pumping of groundwater. Pursuant to the police power, a city or county may adopt a discretionary well permitting scheme authorizing the agency to approve or deny a well permit based on the results of environmental review. (Cal. Const., art. XI, § 7; *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 173-174.)

Accordingly, some counties have adopted ordinances regulating groundwater use, and CEQA review is appropriate where local agencies have established these discretionary well permitting programs. For example, some counties have instituted ordinances requiring permits for extraction of groundwater for use outside of county boundaries. (See, e.g., Shasta County Code, § 18.08.030 [requiring permit to export groundwater for use outside county], and § 18.08.050 [contemplating CEQA review for such groundwater export permits].) Others, such as the City and County of San Francisco, explicitly authorize county departments to issue well

permits that restrict or condition the use of groundwater. (San Francisco Health Code, § 805 [requiring CEQA review for new water well permits and requiring applicants to comply with conditions or restrictions on well use imposed as mitigation measures].)

But a county's exercise of its police power in regulating groundwater is entirely voluntary, as in the case of any exercise of the police power. In fact, the CEQA Guidelines envision this sort of variation across local public agencies. (CEQA Guidelines, § 15002, subd. (i)(2).) ["Similar projects may be subject to discretionary controls in one city or county and only ministerial controls in another."].) But the California Constitution does not grant local permitting departments any authority to exercise discretion and control over well construction beyond what is given by their Boards of Supervisors in their well permitting ordinances.

Instead, many local well ordinances grant only limited authority to ensure that wells do not contaminate groundwater, to be judged based on compliance with a host of highly detailed and specific technical standards. Possibilities for adjustments are minimal. Groundwater permitting agencies with such narrow authority cannot effectively implement any lessons of environmental review and should not be required to undertake environmental review where that review could not make a meaningful difference in the agency's decision making.

D. Stanislaus County's determination that a well construction permit approval is ministerial is entitled to considerable deference.

In arguing that the County is required to undertake CEQA review for all new well construction permits, Plaintiffs also contend that this Court should give no weight to the County's longstanding position on this issue. (Answer Brief, pp. 24-25.) To the contrary, deference is clearly appropriate when a local agency, such as Stanislaus County, consistently applies a

reasoned determination of whether its own ordinance grants discretionary authority. The CEQA Guidelines and case law addressing this issue are consistent with the "fundamental rule that interpretation of the meaning and scope of a local ordinance is, in the first instance, committed to the local agency." (*Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004.) The County's interpretation that its ordinance does not grant the discretion to deny or modify ordinary well construction permits to avoid environmental impacts is therefore entitled to "considerable deference" from this Court. (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1129-30.)

The CEQA Guidelines and case law recognize that "[t]he determination of what is 'ministerial' can most appropriately be made by the particular public agency involved based upon its analysis of its own laws, and each public agency should make such determination either as a part of its implementing regulations or on a case-by-case basis." (CEQA Guidelines, § 15268, subd. (a); see also *Friends of Davis*, *supra*, 83 Cal.App.4th 1004 at p. 1015; *Napa County Board*, *supra*, 205 Cal.App.4th at p. 178; *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 23-24.) Plaintiffs' scant acknowledgment of this important legal principle does not dismiss the issue. This Court has held that "courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." (*Laurel Heights Improvement Ass 'n v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 391.) Neither CSAC nor Defendants argue that agencies have absolute power to determine which projects are ministerial, only that the County's determination is entitled to great weight.

The cases that Plaintiffs cite do not suggest otherwise. These cases merely describe a series of factors that a reviewing court may consider when weighing whether judicial deference to an agency's interpretation is

appropriate. (See *Yamaha Corp. of America v. State Bd. of Equalization* (*Yamaha*) (1998) 19 Cal.4th 1, 12-13.) The courts in *Friends of Davis*, *Napa County Board*, and *County of Sonoma* saw no need to look beyond the CEQA Guidelines for additional reasons to credit an agency's interpretation. But even if this Court were to engage in a *Yamaha*-style inquiry, the various factors described in that opinion clearly weigh in favor of deference to the County's long-standing interpretation. The County's permitting department is intimately familiar with the well permitting ordinance and possesses the expertise and technical knowledge necessary to understand the practical implications of its interpretation that ordinary well construction permits are subject to ministerial approvals. (See *Yamaha* at p. 12.) The text of the ordinance itself and the County's legislatively adopted CEQA Procedures are also clear indications that senior County officials have carefully considered this interpretation. (See *id*. at p. 13; see also Stanislaus County Code, § 9.36.110; Stanislaus County CEQA Guidelines and Procedures, § 3(B)(5).)[4] And the County has historically and consistently maintained its interpretation since enacting the Ordinance. (See *Yamaha* at p. 13.)

Deference to the County's longstanding, consistent interpretation and application of the Ordinance also promotes certainty and predictability in CEQA litigation, which is important to maintain stability statewide as evidenced by the large number of counties who have well construction permitting schemes substantially similar to Stanislaus'. This Court has noted the potential hardships and disruption imposed by CEQA litigation, and the Legislature's corresponding concern for certainty. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1107-08.)

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[4] Available online at: http://www.stancounty.com/planning/guidelines/CEQA-Guidelines-Procedures.pdf

By giving deference to the County's long-held position, this Court will encourage local agencies to continue to consistently apply reasoned interpretations of whether their own ordinances grant discretionary authority. A decision for Plaintiffs, on the other hand, could leave many local agencies vulnerable to uncertainty as to the scope of their obligations to undertake environmental review for permit approvals.

III. CONCLUSION

For the foregoing reasons, CSAC respectfully requests that this Court uphold the trials court's ruling that the County's practice of issuing well construction permits is consistent with CEQA.

Dated: _____, 2019

Respectfully submitted,

By:_____

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WORD COUNT CERTIFICATION

I certify that this brief and accompanying application contain a total of 4,668 words as indicated by the word count feature of the Microsoft Word computer program used to prepare them.

Dated: _____, 2019

Respectfully submitted,

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