Case No. F073634
(Related Case No. F074209)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

PROTECTING OUR WATER AND ENVIRONMENTAL RESOURCES et al.
Plaintiffs and Appellants

vs.

STANISLAUS COUNTY et al.
Defendants and Respondents.

Appeal From a Judgment Entered in Favor of Respondents
Stanislaus County Superior Court Case No. 2006153
Honorable Roger M. Beauchesne, Judge

[PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND RESPONDENTS COUNTY OF STANISLAUS ET AL. BY THE CALIFORNIA STATE ASSOCIATION OF COUNTIES

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

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APPELLANT/ PETITIONER: Protecting our Water and Environmental Resources, et al RESPONDENT/ REAL PARTY IN INTEREST: Stanislaus County, et al	

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Date: June 26, 2017

Peter R. Miljanich
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(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION

For more than 30 years, Stanislaus County has treated groundwater well construction permits as ministerial approvals exempt from review under the California Environmental Quality Act, Pub. Res. Code § 21000 et seq. ("CEQA"). The trial court affirmed this long-standing practice because the County's well construction ordinance ("Ordinance") does not allow its Department of Environmental Resources ("DER") to condition or deny well permit approvals to meaningfully mitigate or avoid the environmental impacts that CEQA review could reveal. This "functional" test for whether a local agency approval is discretionary—and therefore subject to CEQA—is well-established law.

To determine whether DER's issuance of well construction permits is discretionary, this Court must focus on the scope of DER's authority under the existing 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. 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 state Department of Water Resources Bulletin No. 74, 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, Cal. Code Regs., tit. 14 § 15000 et seq., also recognize: local public agencies are best positioned to determine what is ministerial based upon an analysis of their own laws. This Court should give considerable deference to Stanislaus 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. Many counties do so under local legislation that closely resembles the Stanislaus County ordinance at issue here, and a decision for Plaintiffs could have significant practical consequences for these local agencies. The California State Association of Counties therefore urges this Court to affirm the trial court's ruling and uphold Stanislaus County's practice of treating well construction permits as ministerial approvals.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

CSAC joins in and incorporates by reference the Statement of Facts and Statement of the Case found at pages 13-26 of Respondents' Brief.

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ARGUMENT

I. A decision for Plaintiffs could have significant practical consequences for public agencies throughout California.

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

Counties throughout the State administer well permitting programs under local ordinances that closely resemble the Stanislaus County ordinance at issue here.[1] These ordinances limit the authority of local permitting departments to ensuring compliance with detailed technical standards. As in Stanislaus, many well ordinances incorporate the standards for design, construction, destruction, and location of wells "set forth" in the relevant state Department of Water Resources Bulletins. *See, e.g.*, Solano County Code § 13.10-14; *see also* Kings County Code § 14A-31(a).

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)(13). 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).

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[1] These include the counties of Alpine, *see* Alpine County Code § 8.36.010 et seq., Kern, *see* Kern County Code § 14.08.010 et seq., Kings, Santa Barbara, Solano, Trinity, *see* Trinity County Code § 15.20.010 et seq., and Yolo.

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 rules for Plaintiffs in this case, there would 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.

B. A decision for Plaintiffs could require wasteful environmental review or represent a fundamental reorientation of land use regulation in California.

Many county well ordinances apply to permits for the construction of both agricultural and domestic wells as ministerial approvals. *See, e.g.*, Solano County Code § 13.10-11 ("Water well means any artificial excavation constructed by any method for the purpose of extracting water from, or injecting water into, the underground."); *see also* Yolo County Code § 6-8.422 ("Well shall include the following: . . . [¶] (5) Irrigation wells which supply water for agricultural and landscape uses.")

The CEQA review that Plaintiffs ask this Court to require of Stanislaus County involves evaluating the direct impacts and all reasonably foreseeable indirect impacts of a proposed activity. *See* CEQA Guidelines § 15064(d). Environmental review of the indirect impacts of a new well, either agricultural or domestic, would need to include all of the foreseeable impacts of the land use that the well would serve, such as air quality impacts, greenhouse gas emissions, biological resources impacts, traffic impacts, and any cumulative environmental impacts. *See id.* §§ 15064(d), (h); 15355. In performing this environmental review, Stanislaus County and similarly situated local agencies would be required to obtain and analyze

substantial amounts of information, at considerable cost both to the local agencies and to the new well applicants.

But these extensive investigations would serve no purpose where local agencies have granted their local 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).

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* Appellants' Reply Brief ("ARB") at 32–33. 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. *See* Respondents' Brief at I.A. 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.

II. 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, rather than its broad police power, 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. *See Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 272. CSAC joins, without duplicating, Defendants' argument that Stanislaus County's well construction ordinance does not give the County Department of Environmental Resources 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. *See* 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), § 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. *See* 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 contemplate this sort of variation across local public agencies. *See* CEQA Guidelines § 15002(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.

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

In arguing that Stanislaus 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. *See* Appellants' Reply Brief ("ARB") at 13–18. 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 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(a); *see also Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1015 ("*Friends of Davis*"); *Napa County Board*, 205 Cal.App.4th at 178; *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 23–24 (*County of Sonoma*"). Plaintiffs themselves acknowledge the Supreme Court's holding that "courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." *See* Appellants' Opening Brief ("AOB") at 18, fn. 5 (citing *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 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*, 83 Cal.App.4th at 1015. Contrary to Plaintiff's argument, *see* Appellants' Reply Brief at 13–18, this case largely turns on the County's interpretation of its own local ordinance. The proper interpretation of the standards contained in the state Bulletin is certainly

also relevant, and Defendants have ably demonstrated why those standards do not confer meaningful discretion. *See* Respondents' Brief at 47–59.

But key questions in this case—Which portion of the state Bulletin does the Ordinance incorporate? Does any part of the Ordinance allow the County Department of Environmental Resources to condition or deny well construction permits to avoid environmental impacts?—center on how Stanislaus County interprets the legislative direction of its own Board of Supervisors. Indeed, Plaintiffs' own briefs argue these points. *See, e.g.*, AOB at 28–31; *see also* ARB at 43–44. Stanislaus 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* ("Gray") (2008) 167 Cal.App.4th 1099, 1129–30.

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 Stanislaus 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 id.* at 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 13; *see also* Appellants' Appendix 3:676–88. And the County has historically and consistently maintained its interpretation since enacting the Ordinance. *Id.*

Deference to the County's longstanding, consistent interpretation and application of the Ordinance also promotes certainty and predictability in CEQA litigation, which are important public policy concerns. The Supreme Court has noted the potential hardships and disruption imposed by CEQA litigation, and the Legislature's corresponding concern for certainty. *See Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1107–08. By giving great weight 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 minor permit approvals.

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.

WORD COUNT CERTIFICATION

I certify that this brief and accompanying application contain a total of 3,055 words as indicated by the word count feature of the Microsoft Word computer program used to prepare them.

Dated: June 26, 2017

Respectfully submitted,

By: /s/

PETER R. MILJANICH
Attorney on Behalf of Amicus Curiae
California State Association of Counties

PROOF OF SERVICE

Protecting Our Water and Environmental Resources, et al. v. Stanislaus County et al. California Fifth District Court of Appeal Case No. F073634

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the City and County of Solano, State of California. My business address is at the Office of the Solano County Counsel, Government Center, 675 Texas Street, Suite 6600, Fairfield, California 94533. On June 26, 2017, I served true copies of the following document(s) described as:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

and

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

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Executed on June 26, 2017

BY: 

Tammy Lawson

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