



Supreme Court Holds Stanislaus County Well Permit Decisions Under State Standards Are Neither Categorically Ministerial Nor Categorically Discretionary In Nature; Rather, Whether CEQA-Triggering Discretion Exists Must Be Determined On Case-By-Case Basis

By [Arthur F. Coon](#) on August 28, 2020

On August 27, 2020, the California Supreme Court filed its unanimous opinion, authored by Justice Corrigan, in *Protecting Our Water and Environmental Resources v. County of Stanislaus* (2020) ___ Cal.5th ___ (“POWER”). The *POWER* decision is a “mixed bag” for the parties to the litigation themselves: the Court rejected *both* (a) the County’s position that *all* its well permits are ministerial approvals exempt from CEQA, *and* (b) the environmental plaintiffs’ converse position that *all* such permits are discretionary approvals subject to CEQA. For non-parties, the case’s significance lies in its elucidation of the legal rules and principles governing the key distinction between discretionary and ministerial projects – a fundamental distinction that determines CEQA’s threshold applicability to agency approvals and actions. In following appellate precedent focusing not on permitting ordinances and regulations as a whole and in the abstract, but more granularly on the specific regulatory controls applicable to a particular permit application, the high Court in *POWER* eschews the “all or nothing” approach urged by the parties and endorses a more nuanced and contextual analysis that is both reasonable and fully consonant with CEQA and its objectives.

Factual and Procedural Background

County issues well permits under an ordinance (Stanislaus County Code Chapter 9.36) incorporating by reference state well construction standards. The state standards are contained in Department of Water Resources bulletins containing technical specifications for water wells that counties are legally required to meet or exceed in their local well construction ordinances. The CEQA Guidelines encourage agencies to classify ministerial projects on either a categorical or individual basis. (CEQA Guidelines, § 15268(a)(c).) Since County’s 1983 adoption of its local CEQA regulations, it has classified all well construction permits

under its ordinance as ministerial projects, on a categorical basis, except where a variance is granted. Chapter 9.36, first enacted in 1973, requires a permit from County's health officer to construct, repair, or destroy a water well, sets standards for each activity, and conditions permit approval on compliance.

Plaintiffs sued challenging County's alleged "pattern and practice" of approving "misclassified" well construction permits without CEQA review. Plaintiffs asserted all well permit issuance decisions are discretionary projects, and thus subject to CEQA, because County can deny or condition a permit on project changes to address environmental impacts. To support their assertion, Plaintiffs pointed primarily to four (4) state standards incorporated in County's ordinance as conferring such discretion. These were Standards 8.A (requiring all wells "be located an adequate horizontal distance" from potential contamination sources); 8.B (providing that "[w]here possible, a well shall be located up the ground water gradient" from such sources); 8.C. (providing that "[i]f possible, a well should be located outside areas of flooding"; and 9 (requiring a well's "annular space" be "effectively sealed" and establishing minimum subsurface seal depths). Pursuant to variances granted by County's health officer (which County acknowledged were discretionary), exceptions to Chapter 9.36 could be allowed subject to conditions prescribed by the health officer which "in his or her judgment, are necessary to protect the waters of the state."

The trial court ruled all County's non-variance well permits were ministerial. The Court of Appeal reversed, holding County's issuances of all well construction permits were discretionary decisions based on Standard 8.A's horizontal separation requirement alone.

The Supreme Court's Decision

Rejecting the lower courts' "all or nothing" approach to the issue, the Supreme Court held:

"Whether County's issuance of the challenged permits is discretionary or ministerial depends on the circumstances. As a result, County may not *categorically* classify all these projects as ministerial. For the same reason, plaintiffs have not demonstrated that *all* issuance decisions are properly designated as discretionary."

The Court reached this conclusion applying basic CEQA rules as refined by the so-called "functional test" for distinguishing discretionary projects (which require use of the agency's subjective judgment in deciding whether or how to carry out or approve a project) from ministerial projects (under which an agency exercises little or no personal judgment and merely determines a project's conformity with applicable statutes, ordinances, regulations, or other fixed standards). The "touchstone" of the functional test for a discretionary project is whether the approval process allows the agency to deny or shape the project in a way that could respond to environmental concerns which CEQA review might identify. Conversely, with a ministerial project, a private party can *legally compel* approval without design changes that might alleviate adverse environmental impacts. (CEQA Guidelines, §§ 15002(i), 15357, 15369; *Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 302; *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 267; *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 117; *Leach v. City of San Diego* (1990) 220 Cal.App.3d 389, 393; *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1144-1145.)

The Supreme Court helpfully explained that the ministerial/discretionary distinction essentially boils down to how the legislative policy makers have chosen to structure the agency's project approval process:

"[I]f the [permitting] agency is empowered to disapprove or condition approval of a project based on environmental concerns that might be uncovered by CEQA review, the project

is discretionary. In a ministerial decision, the laws, regulations, and other standards are policy decisions made by the enactors. The agency's role is to apply those standards as adopted. If an agency refuses to approve a ministerial project, an affected party may seek a writ of mandate, ordering that approval be granted because the enacted standards have been satisfied. For discretionary decisions, on the other hand, the policy makers have empowered the agency to make individualized judgments in light of the particular circumstances involved."

The Supreme Court found instructive, but had no occasion to directly apply the functional test to the case before it, which did not involve the status of any individual permit; rather, the issue was whether, at least in some circumstances, Standard 8.A required County to exercise discretion in issuing well permits and therefore its *categorical* classification of *all* such permits as ministerial was erroneous and an abuse of discretion under CEQA. In holding the County's categorical classification violated CEQA, the Court concluded Standard 8.A's plain language authorizes County to exercise "judgment or deliberation when [it] decides to approve or disapprove" a permit. The Court observed that – despite setting out separation distances *generally* considered adequate – the standard "makes clear that individualized judgment may be required" by noting, inter alia, that "an adequate horizontal distance" may depend on "[m]any variables" and "[n]o set separation distance is adequate and reasonable for all occasions." Because Standard 8.A's "language confers significant discretion on the county health officer to deviate from the general standards, allowing either relaxed or heightened requirements depending on the circumstances[,] a permit issuance in which County is required to exercise such judgment cannot properly be classified as "ministerial."

In rejecting County's argument that its "limited options" under its ordinance "to mitigate environmental damage" nonetheless rendered all its well permits ministerial, the Court noted that County conceded it had authority, under some circumstances, to require a different well location or to deny the permit. Per the Court: "Just because the agency is not empowered to do everything does not mean it lacks discretion to do anything." Accordingly, CEQA could apply to a well permit issuance by County despite its limited mitigation options, but, significantly, the Court noted the issue before it was "narrow" and it expressed no view on "the scope of County's authority once an environmental review process begins."

In rejecting arguments that it was required to defer to County's "ministerial" classification, the Court made clear that while it was not simply ignoring County's classification, the degree of deference due to it is "*situational*." (Citing *Yamaha Corp of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 12.) Here, County was not interpreting an ordinance that it had drafted, but, rather, state standards incorporated by reference. Nor did its determination rely on factual determinations that would be reviewed with deference for substantial evidence, but instead constituted a claim that "the [ministerial] exemption applies to an entire category of permits, as a matter of law." At bottom, County failed show the *Yamaha* factors warranted adoption of its interpretation.

But while holding "County's blanket classification [of well permits as ministerial] violates CEQA," the Court by the same token rejected plaintiff's and the Court of Appeal's position "that the issuance of a [well] permit under Chapter 9.36 is *always* a discretionary project." Per the Court: "The fact that an ordinance contains provisions that allow the permitting agency to exercise independent judgment in some instances does not mean that all permits issued under that ordinance are discretionary." (Citing *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, *passim* [relevant question is not whether regulations grant discretion in abstract, but whether regulations relevant to specific permit at issue conferred meaningful discretion].) Thus, the Supreme Court explained that "Chapter 9.36 incorporates a number of standards that may never come into play in the issuance of a particular permit," such as "Standard 8.A [, which] only applies when there is a contamination source near a proposed well. If no contamination source is

identified during the permit approval process, the discretion conferred by Standard 8.A will not be included in that individual issuance decision. As a result, all well construction permits are not necessarily discretionary projects.”

In rejecting County’s argument that its decision would “result in increased costs and delays” in the well permitting process, the Court stated: “But CEQA cannot be read to authorize the categorical mischaracterization of well construction permits simply for the sake of alacrity and economy.” Downplaying the dire consequences predicted by County, the Court again noted “that an individual permit may still be properly classified as ministerial” (thus requiring no CEQA review) and that even if other individual permits were discretionary that would not mean full environmental review, including an EIR, would always be required. Rather, the discretionary permits could potentially qualify for another CEQA exemption or a negative declaration of some type thus reducing the burden of any required CEQA review.

Conclusion and Implications

For the County of Stanislaus, and other counties issuing well permits subject to the state standards, the *POWER* decision appears to end any practice of categorically treating *all* such permits as ministerial approvals exempt from CEQA – while leaving open the realistic possibility that most, or even the great majority, of individual well permit decisions may nevertheless properly be treated as ministerial and exempt from CEQA review.

But the Court’s holding and guidance applies more broadly, beyond the well permitting context, to any CEQA lead agency operating under a permitting ordinance or regulations that it believes are ministerial, but may contain elements of discretion under specific circumstances. The Court’s own words put it best: “In summary, when an ordinance contains standards which, if applicable, give an agency the required degree of independent judgment, the agency may not *categorically* classify the issuance of permits as ministerial. It may classify a particular permit as ministerial (CEQA Guidelines, § 15268, subd. (a)), and develop a record supporting that conclusion.”

Questions? Please contact [Arthur F. Coon](#) of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written Miller & Starr, California Real Estate 4th, a 12-volume treatise on California real estate law. “The Book” is the most widely used and judicially recognized real estate treatise in California and is cited by practicing attorneys and courts throughout the state. The firm has expertise in all real property matters, including full-service litigation and dispute resolution services, transactions, acquisitions, dispositions, leasing, financing, common interest development, construction, management, eminent domain and inverse condemnation, title insurance, environmental law and land use. For more information, visit www.mslegal.com.