## *ARTICLE:*

# CALIFORNIA SUPREME COURT REJECTS ALL-OR-NOTHING CLASSIFICATION OF PERMIT DECISIONS, HOLDING THAT WHETHER CEQA-TRIGGERING DISCRETION EXISTS MUST BE DETERMINED ON A CASE-BY-CASE BASIS.

*By Travis Brooks* and Arthur F. Coon***

In an August 27, 2020 opinion, the California Supreme Court provided important guidance to local agencies regarding the classification of permit decisions based on ordinances that include both ministerial and discretionary components. *Protecting Our Water and Environmental Resources v. County of Stanislaus* ("*POWER*") centered around the County of Stanislaus' well permitting ordinance, which the county had classified as broadly ministerial so as to exempt the entire category of well-construction permits from review under the California Environmental Quality Act ("CEQA").[1] The county's well permitting ordinance actually contained both ministerial and discretionary elements and in some instances county staff had a level of subjective control over conditions and requirements for well permit approval whereby it could address certain environmental impacts. In other instances, the county ordinance merely required county staff to follow and determine compliance with objective, written standards without any subjective control when issuing well permits.[2]

The parties in the case took fairly extreme positions on opposite ends of the key question presented in the case. On one hand, the county argued that its discretionary decisionmaking authority under the well permitting ordinance was so significantly limited that it properly designated all such decisions as categorically ministerial. The county argued this approach was consistent with a CEQA guideline that encourages agencies to identify or classify permit approvals as ministerial or discretionary to assist in implementing CEQA, which applies only to discretionary approvals.[3] Conversely, plaintiffs in the action argued that because some permitting decisions under the county's well permitting ordinance were discretionary, *all* permitting decisions under the well permitting ordinance were necessarily discretionary.[4]

The California Supreme Court rejected both arguments and reached a rea-

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sonable middle position. First, the Court found that the county's blanket ministerial classification of certain well permit decisions was improper. However, the Court did not go so far as plaintiffs would have preferred and did not hold that *all* of the county's well permit decisions were discretionary. Instead, the Court held that each individual well permitting decision needed to be assessed on its own merits, based on the particular facts of the application presented, to determine whether that decision was ministerial or discretionary.[5] Going forward, *POWER* will provide important guidance to local agencies operating under permitting ordinances, for well construction permits and otherwise, that include both ministerial and discretionary approval provisions that apply in different circumstances.

## Legal Background

CEQA requires environmental review of projects, which are activities carried out, funded, or approved by the government, that may directly or indirectly cause a physical change in the environment.[6] Unless one of a variety of exemptions applies, such discretionary projects require some level of environmental review.[7]

CEQA defines what constitutes a ministerial or discretionary project. Ministerial projects are those governmental decisions:

> involving little or no personal judgment by the [local agency] as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out.[8]

Discretionary projects, by contrast, are those that require a local agency to exercise judgment or deliberation in deciding whether to approve an activity. The "key question is whether [subject to governing law] the public agency can use its subjective judgment to decide whether and how to carry out or approve a project."[9] CEQA encourages agencies to classify ministerial projects on a categorical or individual basis, and because of local authorship a local agency is often in the best position to interpret its own ordinances.[10] CEQA accordingly provides that local agencies "should, in [their] implementing regulations or ordinances, provide an identification or itemization of its projects and actions which are deemed ministerial under the applicable laws and ordinances."[11] Where a particular approval involves elements of both a ministerial action and a

 

discretionary action, that approval is discretionary and will be subject to the requirements of CEQA.[12]

In some instances, local agencies have tried to classify whole categories of permit decisions as ministerial, even though some permit decisions within those categories may involve the exercise of judgment or discretion. In *Sierra Club v. County of Sonoma*,[13] the First District Court of Appeal expressed skepticism about such "categorical" declarations. That case involved a Sonoma County ordinance that categorically declared the issuance of certain erosion-control permits to be ministerial, except when an applicant seeks exceptions from established standards.[14] Plaintiffs argued that the issuance of an erosion control permit was discretionary because many of the county's erosion control provisions were "broad and vague . . . and allow[ed] the [county's Agricultural commissioner] to exercise discretion."[15] The First District rejected this argument because most of the provisions conferring discretion on the county did not actually apply to the permit that was at issue in the case. According to the First District, the relevant question was:

> not whether the regulations granted the local agency some discretion in the abstract, but whether the regulations granted the agency discretion regarding the particular project . . . [A] regulation cited as conferring discretion must have been relevant to the project.[16]

In other words, permits issued under an ordinance that contains some discretionary approval authority are not necessarily discretionary in-and-of themselves; rather, this classification depends on the individual circumstances for each project.

It is in this legal context that *POWER* reached the California Supreme Court.

## Factual Background

*POWER* concerned the Stanislaus County's well permitting and construction ordinance, which incorporates by reference the well construction standard in the state Department of Water Resources Bulletin No. 74 ("Bulletin 74").[17] Bulletin 74 focuses on protecting groundwater quality (i.e., to protect against contamination of potable water and pollution of aquifers) and provides technical specifications for the proper construction and siting of water wells. Under state law, counties are legally required to meet or exceed Bulletin 74's standards in their local well construction ordinances.[18]

Stanislaus County Code Chapter 9.36 requires a permit from a county health

 

officer to construct, repair, or destroy a water well in the county.[19] *POWER* concerned four specific standards from Bulletin 74 that were adopted by the county: Section 8.A (requiring all wells to "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.)[20]

Section 8.A was key to the parties' contentions in the case. Section 8.A lists well separation distances that are generally considered adequate in specific situations. For example, a well should be located at least 50 feet from any sewer line, 100 feet from any watertight septic tank or animal enclosure, and 150 feet from any cesspool or seepage pit. However, Section 8.A also made clear that the above distances were not intended to be rigidly applied, noting that "many variables" would be involved in determining a "safe separation distance" for each proposed well. Section 8.A further provided that no "set separation distance is adequate for all conditions" and that "[d]etermination of safe separation distance for individual wells requires detailed evaluation of existing and future site conditions." In other words, Section 8.A allowed county staff to increase or decrease suggested well distances depending on the circumstances involved in each well permit application.[21]

The Section 8.A provisions operated within a larger well permitting framework. For example, the county's Chapter 9.36 also authorized variance permits where the county health officer authorized exceptions to any provision of the county's well permitting ordinance when in his or her opinion strict compliance with that provision was unnecessary. A related chapter, Chapter 9.37, focused on preventing the unsustainable extraction and export of groundwater in the county. Chapter 9.37 required well permit applications to satisfy both Chapter 9.36 and Chapter 9.37 of the well permitting ordinance, unless the application was exempt from Chapter 9.37.[22]

The county adopted a process to determine whether well permit decisions were discretionary or ministerial by category. First, the county determined whether a particular well application was exempt from Chapter 9.37. If a permit application was not exempt from Chapter 9.37, the county classified approval or denial of that application as discretionary. Second, if the county determined that a well permit application was exempt from Chapter 9.37, the county then

 

determined whether the application sought a variance under Chapter 9.36. Third, if the application was exempt from Chapter 9.37 and did not seek a variance, the county classified approvals and denials in that category as ministerial for CEQA purposes.[23] It was this third category of permitting decisions that was the basis of the lawsuit underlying the POWER decision.

## Procedural Background

In January 2014, plaintiffs filed suit alleging a "pattern and practice" by the county of approving "misclassified" well construction permits without review for projects falling into the third category above. Plaintiffs alleged that *all* well permit issuance decisions in the county were discretionary projects subject to CEQA review because for at least some projects, the county could deny a permit or require changes to a project based on concerns related to its potential environmental impacts.[24]

The trial court disagreed and held that all of the county's non-variance well permit decisions were ministerial, consistent with the county's interpretation of its ordinance. The Fifth District Court of Appeal reversed. In so doing, the court acknowledged that many permit decisions under Chapter 9.36 may be ministerial. However, the Court of Appeal noted that because the county's compliance determination under Section 8.A involved discretionary decision-making authority in some instances, the issuance of *all* permits under Chapter 9.36 was discretionary.[25] It is interesting to note that the positions advanced by the parties, and adopted by the trial court and court of appeal were "all-or-nothing" on opposite ends of the spectrum—either all decisions under 9.36 were discretionary *or* they were ministerial. With the plaintiffs' chief interest being to establish a basis to challenge a broad category of well permits on environmental grounds, unrelated to Chapter 9.36's aims, and the county's chief interest being to avoid this and maintain a streamlined permit process, neither the courts nor the parties appeared to focus to any degree on finding a middle position.

## The California Supreme Court's Decision

Out of the gate, the state Supreme Court made clear that it was rejecting the divergent all-or-nothing approaches proposed by both parties and adopted by the lower courts:

> [w]hether County's issuance of the challenged permits is discretionary or ministerial depends on the circumstances [of the particular permit application or

> approval]. As a result, County may not *categorically* classify all of these projects as ministerial. For the same reason, plaintiffs have not demonstrated that *all* issuance decisions are properly designated as discretionary.[26]

## The Court Finds the "Functional Test" Instructive Although Not Controlling

The Court then distinguished the key characteristics that define a ministerial from a discretionary action as discussed above. In determining that the all-or-nothing approaches proposed by both parties were inconsistent with CEQA, the Court found the "functional test" enunciated by several lower courts instructive.[27] As the Court noted, this functional test focuses on the scope of an agency's discretion when considering a permit application:

> [t]he "touchstone" is whether the relevant approval process . . . allows the government to shape the project in any way [by requiring modifications] which could respond to any of the concerns which might be identified by environmental review.[28]

Under the functional test, if an agency has no discretionary authority to deny or shape a project when denying or approving an application, that decision is ministerial. Moreover, even if a statute grants an agency some discretionary authority, the project is ministerial for CEQA purposes if the agency lacks authority to address *environmental* impacts.[29] On the other hand, if an agency has authority to approve, disapprove, or condition approval of a project based on environmental concerns, then that approval process is discretionary and subject to at least some level of CEQA review if another exemption does not apply.[30]

To highlight the individualized determination required to classify a project approval as discretionary or ministerial, the Court looked to two court of appeal decisions where courts found that the issuance of building permits, very often considered to be classic ministerial actions, were discretionary. In the 1987 case *Friends of Westwood Inc. v. City of Los Angeles,* the Second District Court of Appeal found a building permit decision discretionary where the City of Los Angeles had authority to require project modifications to allow adequate ingress or egress.[31] In the 1993 decision *Miller v. City of Hermosa Beach*[32] the Second District Court of Appeal held that the City of Hermosa Beach's issuance of a hotel building permit was a discretionary project. In that case, the city required the applicant to obtain analyses of traffic impacts, soil settlement, and the effects on a downstream sewer line. The court reasoned that because the project applicant could not legally compel approval of its building permit without

 

making changes to alleviate adverse environmental consequences, this meant the project was discretionary.[33]

In *POWER*, the functional test was instructive to the Court, but could not be directly applied because the case did not involve consideration of an individual permit. Instead, the question before the Court was whether, at least in some circumstances, the county's well permit decisions under Chapter 9.36 required the county to exercise discretion. If that was the case, the county's categorical classification of all such permits as ministerial was erroneous and an abuse of discretion.[34]

## The Court Rejects the County's Arguments that All Well Permitting Decisions in Question Were Ministerial

The Court found that Section 8.A's plain language authorized the county to exercise judgment or deliberation when it decides to approve or disapprove a permit, meaning that many decisions under Section 8.A were discretionary in nature. Although Section 8.A set out well separation distances generally considered adequate, it also provided that individualized judgment may be required for certain permits, and that no well separation distance was adequate and reasonable in all circumstances. Accordingly, Section 8.A. conferred "significant discretion to the county health officer to deviate from the general standards, allowing either relaxed or heightened requirements depending on the circumstances." The Court concluded that "[a] permit issuance in which [the] [c]ounty is required to exercise independent judgment under Section 8.A cannot be classified as ministerial."[35]

In striking down the county's ministerial categorization of all non-variance well permits, the Court rejected the contrary arguments raised by the county. First, the Court rejected the county's argument that its well permit decisions were ministerial under Section 8.A because the county had limited options under the ordinance to mitigate environmental damages. To the contrary, the county had authority in some circumstances to require a different well location from that proposed, or to deny the permit altogether. As the Court noted, "just because [an] agency is not empowered to do everything does not mean it lacks discretion to do anything" to avoid environmental consequences.

The Court also rejected the argument that the county was entitled to dispositive deference in its interpretation of its ordinance, applying the 1998 California Supreme Court decision *Yamaha Corp. of America v. State Board of*

 

*Equalization*.[36] As the Court in *Yamaha* noted, the level of deference afforded to a local agency is *situational* and depends on an agency's interpretative advantage over courts. Here, less *Yamaha* deference was appropriate because the county well permitting ordinance incorporated *state* standards by reference (i.e., the key provisions were not actually drafted by the county's legislative body).[37] Moreover, the case did not rely on the county's factual interpretations (which would be afforded more deference) because the county was arguing that its categorical ministerial exemption applied to an entire category of permits as a matter of law.[38]

Finally, the Court also rejected the county's argument that a determination that the well permit decisions in question were not ministerial would result in "increased costs and delays" in the well permitting process. As the Court noted, "CEQA cannot be read to authorize the categorical mischaracterization of well construction permits simply for the sake of alacrity and economy." Regarding practical concerns that the county raised, the court noted that "an individual permit may still be properly classified as ministerial." Moreover, even if some well permit decisions were discretionary, that did not mean that full CEQA review would be required. In many circumstances, a categorical CEQA exemption or a negative declaration might be appropriate, thus reducing the level of environmental review required.[39]

## The Court Also Rejected Plaintiffs' Position that All of the Well-Permitting Decisions in Question Were Discretionary

While the Court found that the county's "blanket classification" of well permits violated CEQA, the Court also rejected plaintiffs' and the court of appeal's position that "the issuance of a well permit under Chapter 9.36 is always a discretionary project." To the contrary, although the ordinance may contain some provisions allowing a permitting agency to exercise discretion in some instances, that does not mean that all permits issued under that ordinance are discretionary. As stated in the *County of Sonoma* decision, the key question is not whether regulations grant a local agency discretion in the abstract, but whether regulations relevant to a specific permit at issue conferred meaningful discretion.[40] In other words, permits issued under an ordinance are not necessarily discretionary merely because that ordinance contains some discretionary provisions, as those provisions may have no application to the particular permit at issue.

Turning to the county's well permit decisions under Chapter 9.36, the Court

 

noted that the chapter incorporates a number of discretionary standards that may never come into play for a particular permit. For example, Section 8.A's discretionary provisions only apply "when there is a contamination source near a proposed well." Where there is no contamination source near a proposed well, Section 8.A's discretionary provisions will not be implicated, and county approval may be purely ministerial. Accordingly, the Court found that it would be inappropriate to deem all well permitting decisions under Chapter 9.36 discretionary.

## Conclusion and Implications

For local agencies issuing well permits subject to state standards, the *POWER* case effectively ends the practice of categorically treating all such permits as ministerial and therefore exempt from CEQA. This is despite the possibility that many, if not most well permit decisions will still be ministerial based on their individual characteristics, or otherwise categorically exempt from CEQA review.

For those individual well permits and similar decisions that are discretionary, an interesting and open question is the scope of CEQA review required for such decisions. Such review would arguably be limited to analysis of those environmental impacts that a local agency has discretion to address during the approval process, but the Supreme Court had no occasion to address this question, which will undoubtedly be presented by like-minded plaintiffs in a future case.

Nonetheless, the *POWER* decision has broad application beyond the well permitting context and will impact any CEQA lead agency operating under a permitting ordinance that it believes to be ministerial but may contain discretionary elements in certain circumstances. As the Supreme Court concluded:

> 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 . . . and develop a record supporting that conclusion.[41]

**ENDNOTES:**

[1] *Protecting Our Water and Environmental Resources v. County of Stanislaus*, 10 Cal. 5th 479, 2020 WL 5049384 (Cal. 2020) ("POWER"); CEQA is codified at Pub. Resources Code, §§ 21000 et seq., and its implementing Guidelines

 

are found at Cal. Code Regs., tit. 14, §§ 15000 et seq.

[2]*POWER*, 2020 WL 5049384, * 490-91 (discussing Chapter 9.36, and Chapter 9.37 of the Stanislaus County Code.)

[3]*Id.* at 496. See Cal. Code Regs., tit. 14, § 15268, subd. (c).

[4]*Id.* at 492.

[5]*Id.* at 493.

[6]Pub. Resources Code, § 21065, subd. (c).

[7]Pub. Resources Code, § 21080 (a), (b)(1).

[8]Cal. Code Regs., tit. 14, § 15369.

[9]Cal. Code Regs., tit. 14, § 15357.

[10]Cal. Code Regs., tit. 14, § 15268 (a), (c).

[11]Cal. Code Regs., tit. 14, § 15268 (c).

[12]Cal. Code Regs., tit. 14, § 15268 (d).

[13]*Sierra Club v. County of Sonoma*, 11 Cal. App. 5th 11, 24, 217 Cal. Rptr. 3d 327 (1st Dist. 2017).

[14]*Id.* at 24.

[15]*Id.* at 18.

[16]*Id.* at 25.

[17]*POWER*, 2020 WL 5049384, * 487.

[18]*Id.* See California Department of Water Resources Bulletin No. 74, Well Water Standards.

[19]*POWER*, 2020 WL 5049384, * 490.

[20]*Id.* at 490-91.

[21]*Id.*

[22]*Id.* at 490-92.

[23]*Id.*

[24]*Id.* at 492.

[25]*Id.*

[26]*Id.* at 493.

[27]*Id.* See *Friends of Juana Briones House v. City of Palo Alto*, 190 Cal. App. 4th 286, 302, 118 Cal. Rptr. 3d 324 (6th Dist. 2010).

[28]*Id.* (internal quotations omitted).

[29]*Id.* at 493-94 (referencing *McCorkle Eastside Neighborhood Group v. City of St. Helena*, 31 Cal. App. 5th 80, 242 Cal. Rptr. 3d 379 (1st Dist. 2018), as modified, (Jan. 25, 2019), where a local agency's power to conduct design review did not make a project discretionary because the agency lacked any discretion to address environmental effects during that review, and *Friends of Juana Briones*

 

*House v. City of Palo Alto*, 190 Cal. App. 4th 286, 308, 118 Cal. Rptr. 3d 324 (6th Dist. 2010), where the local agency's authority to delay a project did not render its approval discretionary).

[30]*Id.* at 494.

[31]*Id.* at 494-95. (discussing *Friends of Westwood, Inc. v. City of Los Angeles*, 191 Cal. App. 3d 259, 267, 235 Cal. Rptr. 788 (2d Dist. 1987)).

[32]*Miller v. City of Hermosa Beach*, 13 Cal. App. 4th 1118, 1136, 17 Cal. Rptr. 2d 408 (2d Dist. 1993), as modified, (Mar. 24, 1993).

[33]*POWER*, 2020 WL 5049384, * 495.

[34]*Id.* at 496.

[35]*Id.* at 496-97.

[36]*Id.* at 498-99; *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 7, 78 Cal. Rptr. 2d 1, 960 P.2d 1031 (1998).

[37]This was an interesting wrinkle in the Court's decision, which suggests that in other contexts where the lead agency drafts and enacts the particular permitting scheme in question, the Court will show greater deference to its ministerial/discretionary interpretation. See, e.g. *Sierra Club v. County of Napa*, 121 Cal. App. 4th 1490, 1497, 1510, 19 Cal. Rptr. 3d 1 (1st Dist. 2004).

[38]*POWER*, 2020 WL 5049384, * 498-500.

[39]*Id.* at 501.

[40]*Id.* at 500-01.

[41]*Id.* at 501.

 