Filed 9/18/18 Coston v. Stanislaus County CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JAMIE COSTON et al.,

Plaintiffs and Appellants,

v.

STANISLAUS COUNTY et al.,

Defendants and Respondents;

RB RANCH DEVELOPMENT, LLC et al.,

Real Parties in Interest

F074209

(Stanislaus Super. Ct. No. 2016561)

ORDER MODIFYING OPINION AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on August 24, 2018, be modified in the following particulars:

1. At page 25, at the end of the last sentence of the paragraph immediately before the "**DISPOSITION**" heading, add the following footnote:

> [33] Because we reverse the judgment on the pleadings on other grounds, plaintiff's first amended petition is once again the operative pleading. That pleading is entirely intact on remand, including the procedural due process cause of action. Here, we merely conclude that appellants have failed to adequately brief the issue of entitlement to *appellate relief* based on procedural due process

rights. That conclusion does not invalidate or impair the procedural due process cause of action on remand. The parties may still litigate the issue of whether petitioners sufficiently alleged and/or actually suffered a "significant" or "substantial" deprivation of property so as to trigger procedural due process rights under *Horn* and its progeny.

There is no change in judgment. Appellant's petition for rehearing is denied.

POOCHIGIAN, Acting P.J.

WE CONCUR:

FRANSON, J.

PEÑA, J.

Filed 8/24/18 Coston v. Stanislaus County CA5 (unmodified opinion)

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(Stanislaus Super. Ct. No. 2016561)

OPINION

APPEAL from a judgment and order of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Law Office of Thomas N. Lippe and Thomas N. Lippe for Plaintiffs and Appellants.

Shute, Mihaly & Weinberger, Matthew D. Zinn, Sarah H. Sigman, Peter J. Broderick; John P. Doering, County Counsel, and Thomas E. Boze, Assistant County Counsel, for Defendants and Respondents.

Dennis Bunting, County Counsel (Solano), and Peter R. Miljanich, Deputy County Counsel, and Jennifer Henning for the California State Association of Counties as Amicus Curiae on behalf of Defendants and Respondents.

Herum Crabtree Brown and Steven A. Herum for Real Parties in Interest.

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FACTS

I. Litigation

In a first amended petition for writ of mandate (the petition), appellants challenged Stanislaus County's approval of a well construction permit (Permit No. 2014-539; "the well permit"). The well permit was issued to real party in interest RB Ranch Development, LLC ("RB Ranch"), which subsequently constructed the well on property on Orange Blossom road in Oakdale.[1]

Appellants are seven individuals who also own property on Orange Blossom Road in Oakdale. Five of the appellants alleged in the petition that since RB Ranch constructed its well, the "depth to water" at their well has increased.

In its first cause of action, the petition alleged that the County's[2] issuance of the well permit violated the California Environment Quality Act (CEQA). Specifically, the petition claimed that Chapter 9.36 of the Stanislaus County Code requires that the County exercise discretion in deciding whether to issue well construction permits. Because the decision was discretionary, CEQA requires environmental review, which the County did not perform.

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[1] The petition alleges that real party in interest Nick Bavaro has an interest in the Oakdale property on which RB Ranch's well was constructed. We will refer to Bavaro and RB Ranch collectively as "real parties in interest."

[2] Appellants named Stanislaus County; its Board of Supervisors; Jami Aggers, the Director of Environmental Resources at the Department of Environmental Resources (DER) and Janis Mein, the Manager of the DER as respondents. We will refer to them collectively as "the County."

In the second cause of action, the petition alleged the County violated appellants' procedural due process right to notice and an opportunity to be heard before a government's adjudicative decision deprives them of a significant property interest. Specifically, the petition alleged the County's issuance of the well permit "has caused and threatens to continue to cause a substantial interference with [appellants'] property interests including but not limited to loss of groundwater supply in [appellants'] wells; increased traffic congestion; increased risk of traffic accidents; increased air pollution by dust, pesticide drift, diesel pump generator exhaust, and increased noise pollution."[3]

The first amended petition sought a writ of mandate under section 21168.9; a permanent injunction prohibiting real parties in interest from operating the well constructed pursuant to the permit; attorney's fees under Code of Civil Procedure section 1021.5; costs; and other and further relief the court deemed proper.

More than a year before the present suit began, another lawsuit was filed in Stanislaus County Superior Court challenging the County's policy of treating standard well construction permits as discretionary. That case was decided by the same judge as the present case, and was titled *Protecting Our Water and Environmental Resources, et al. v. Stanislaus County, et al.*, Stanislaus County Case No. 2006153 (the "*POWER* case").[4] On February 16, 2016, the superior court entered judgment in the *POWER* case in favor of the County, after concluding that the issuance of standard well permits under Chapter 9.36 was a ministerial act. Shortly thereafter, the County moved for judgment on the pleadings in the present case. The County asked the superior court to take judicial

[3] While environmental considerations like traffic, air pollution, pesticides, exhaust and noise pollution are mentioned in the complaint, they are not expressed as bases for plaintiffs' arguments on appeal.

[4] The petitioners in *POWER* also filed an appeal currently pending in this court. We declined to consolidate the two cases, but have considered them simultaneously.

notice of its own decision in the *POWER* case, which it argued "disposes of this case as well."

The superior court granted the motion for judgment on the pleadings with leave to amend,[5] concluding that the issuance of the well construction permit was ministerial and that fact was fatal to appellants' CEQA and due process claims.

II. Background

Chapter 9.36 of the Stanislaus County Code

In 1973, the Stanislaus County Board of Supervisors enacted Ordinance No. 443 (the Ordinance).[6] The ordinance was eventually codified as Chapter 9.36 of the Stanislaus County Code.[7] The purpose of the Ordinance was "to protect the ground waters of the State for the enjoyment, health, safety and welfare of the people of the county by regulating the location, construction, maintenance, abandonment and destruction of all wells with may affect the quality and potability of underground waters." (Stan. Co. Code, § 9.36.010.)

Under Chapter 9.36, landowners must obtain a permit from the County Health Officer to construct, repair or destroy any well. (Stan. Co. Code, § 9.36.030.) The permit application must "contain such information as the health officer may require." (Stan. Co.

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[5] Appellants elected not to amend their petition.

[6] The County requests that we take judicial notice of several documents, including Ordinance No. 443; a memorandum of the Stanislaus County Health Officer; Stanislaus County Board of Supervisors Resolution No. 83-1750; Ordinance No. C.S. 1155; and excerpts of the 2016 California Building Code. Appellants object only to judicial notice of the Building Code excerpts. Appellants correctly note that only some building permits are ministerial. We agree. But appellants' contention goes to the persuasiveness of the argument the building code excerpts are intended to support, not the propriety of taking judicial notice. We grant the County's request for judicial notice in its entirety.

[7] Except for some very minor changes (capitalization, etc.), Chapter 9.36 reflects the text of the Ordinance. This opinion quotes from the current Stanislaus County Code.

Code, § 9.36.030.) Chapter 9.36 also sets forth various standards for well construction, including:

> "1.) All wells shall be so constructed as to prevent the entrance of surface water from any source into the well or into any aquifer." (Stan. Co. Code, § 9.36.060.)
>
> "2.) The construction of a well pit is prohibited; provided, however, a variance permit may be granted by the health officer." (Stan. Co. Code, § 9.36.060.)
>
> "3.) "All pumping equipment shall be installed with protective devices to effectively prevent the entrance of foreign matter into the well casing." (Stan. County Code, § 9.36.060.)
>
> "4.) "All wells shall have a sanitary seal. All wells shall also have an annular seal, except agricultural wells not used for domestic purposes and located more than three hundred feet from a domestic well." (Stan. Co. Code, § 9.36.070.)
>
> "5.) After the construction, installation, or repair of any well, or pumping equipment, and prior to its use, the well and all appurtenances thereto shall be disinfected." (Stan. County Code, § 9.36.080.)

The health officer must also inspect a well before it is used. (Stan. Co. Code, § 9.36.100.) Under section 9.36.110, the health officer may "authorize an exception to any provision of this Chapter, when, in his/her opinion, the application of such provision is unnecessary. Upon application therefore, the health officer may issue a variance permit and shall prescribe thereon such conditions as, in his judgment, are necessary to protect the waters of the state from pollution."

Applicants may appeal the denial or revocation of their permits, to be heard by the board of supervisors. (Stan. Co. Code, § 9.36.170.)

Bulletin No. 74

Section 9.36.150 of the County Code provides:

> "Except as may be otherwise provided by this chapter, standards for the construction, repair, reconstruction, or abandonment of wells shall be as set

> forth in Chapter II of the Department of Water Resources Bulletin No. 74, "Water Well Standards" (February 1968), or as subsequently revised or supplemented, which are incorporated in this chapter and made a part of this chapter."[8] (Stan. Co. Code, § 9.36.150.)

Bulletin No. 74-81 is a document published by the Department of Water Resources containing various specifications for water wells. (See *California Groundwater Assn. v. Semitropic Water Storage Dist.* (2009) 178 Cal.App.4th 1460, 1469.) Five years after its publication, the Legislature enacted Water Code section 13801 which, among other things, requires local authorities "to adopt an ordinance that 'meets or exceeds' the Bulletin 74-81 standards." (*Ibid*.; see also Water Code, § 13801, subd. (c).) Additional provisions were added in Bulletin 74-90. (*California Groundwater Assn. v. Semitropic Water Storage Dist.*, *supra*, 178 Cal.App.4th at p. 1469.)

Stanislaus County Practices in Issuing Well Construction Permits Under Ch. 9.36

Prior to November 25, 2014,[9] Stanislaus County did not engage in CEQA environmental review of well permits under Chapter 9.36, unless the permit was a "variance permit" under section 9.36.110.

Stanislaus County's Designation of Well Permit Approvals as "Ministerial"

CEQA provides that "[a]ll public agencies shall adopt by ordinance, resolution, rule, or regulation, objectives, criteria and procedures for the evaluation of projects and the preparation of environmental impact reports and negative declarations pursuant to this division." (Pub. Resources Code, § 21082.) The Guidelines for the Implementation of the California Environmental Quality Act[10] further directs that a public agency's

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[8] The original Ordinance worded the last phrase differently, but to the same effect of incorporating Bulletin No. 74 by reference.

[9] This is the date Ordinance No. C.S. 1155 (discussed below) was approved.

[10] California Code of Regulations, title 14, section 15000 et seq.; hereafter "Guidelines."

implementing procedures should contain "[a] list of projects or permits over which the public agency has only ministerial authority." (Guidelines, § 15022(a)(1)(B).)

Stanislaus County's CEQA Guidelines and Procedures, initially adopted in December 1983 and amended most recently in May 2008, reads, in pertinent part:

> "(B) In the absence of any discretionary provision contained in the relevant ordinance, it shall be presumed that the following actions are ministerial: [¶] … [¶]
>
> (5) Issuance of sanitary well permits and septic tank permits."

Sustainable Groundwater Management Act

The California Legislature passed the Sustainable Groundwater Management Act ("SGMA"; Water Code, §§ 10720 et seq.), which became effective January 1, 2015. (*Center for Biological Diversity v. County of San Bernardino* (2016) 247 Cal.App.4th 326, 335, fn. 3.) Among other things, SGMA provides "that certain newly created "groundwater sustainability agencies" may impose groundwater pumping charges to fund the costs of groundwater management…." (*City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191, 1209, fn. 6.)

Chapter 9.37 of the Stanislaus County Code

On November 25, 2014, the County approved Ordinance No. C.S. 1155 (i.e., "the groundwater ordinance"), which amended Chapter 9.37 (not Chapter 9.36) of the Stanislaus County Code.[11]

Chapter 9.37 now prohibits (1) the unsustainable extraction of groundwater; and (2) the export of water from the county. (Stan. Co. Code, § 9.37.040.) Section 9.37.050 exempts certain "water management practices" from these requirements, including "de

[11] Appellants request that this court take judicial notice of Chapter 9.37 of the Stanislaus County Code and excerpts from the record in the *POWER* appeal. We grant these unopposed requests.

minimis" extractions of water (defined as two acre-feet or less per year). (Stan. Co. Code, §§ 9.37.030(10), 9.37.050(A)(2).)

Stanislaus County Practices in Issuing Well Construction Permits After the Groundwater Ordinance

All applications for well construction permits filed under Chapter 9.36, after November 25, 2014, must put forth substantial evidence "that either: (1) one or more of the exemptions set forth in Section 9.370.50 apply; or (2) that extraction of groundwater from the proposed well will not constitute unsustainable extraction of groundwater." (Stan. Co. Code, § 9.37.045(A).)

Section 9.37.060 provides that the Stanislaus County Department of Environmental Resources (DER) "shall establish a system of permits to authorize water management practices otherwise prohibited by this chapter." The same section also allows for appeal of DER decisions to an appeal review committee.

After the adoption of the groundwater ordinance, the County's review of well permit applications involves two steps. First, the DER reviews the permit application to determine whether Chapter 9.37 applies. Second, the DER reviews the permit application for compliance with Chapter 9.36.

If a permit application is exempt from Chapter 9.37 pursuant to section 9.37.050(A), then the County does not engage in CEQA review (unless the application is for a variance permit under section 9.36.110.) The County acknowledges that if a permit application is *not* exempt from Chapter 9.37, then CEQA environmental review procedures apply.

After November 25, 2014, the County issued over 400 well permits, all of which were exempt from Chapter 9.37 and not subjected to CEQA environmental review.[12]

[12] None of the permits sought a "variance."

The County identified six well permit applications that do require CEQA environmental review, but none of those applications had yet been approved.

DISCUSSION

I. The Decision Stanislaus County's DER Makes in Approving Well Permit Applications Contains Discretionary and Ministerial Aspects[13]

A. Law of Ministerial and Discretionary Decisions

CEQA applies to discretionary projects (Pub. Resources Code, § 21080, subd. (a)), but not to "[m]inisterial projects." (Pub. Resources Code, § 21080, subd. (b)(1).)

" 'Discretionary project' means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations." (Guidelines, § 15357.)

" 'Ministerial' describes a governmental decision involving little or no personal judgment by the public official 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 objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out. Common examples of ministerial permits include automobile registrations, dog licenses, and marriage licenses. A building permit is ministerial if the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength

[13] The parties raise virtually identical arguments concerning the CEQA issue in this case as they do in *POWER*. Consequently, much of our analysis in that opinion is repeated here.

requirements in the Uniform Building Code, and the applicant has paid his fee."[14] (Guidelines, § 15369; see also *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 117–118.)

B. Standard of Review

"[T]he legal determination of whether an approval is "exempt from CEQA review as a ministerial action" is subject to … de novo review." (*Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 303 (*Friends of Juana Briones House*).) However, appellate courts afford considerable weight to a local agency's classification of its own ordinance as ministerial. (See *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 23–24; *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1015; see also Guidelines, § 15268.) When there are doubts as to whether a decision is ministerial or discretionary, the doubt should be resolved in favor of finding the decision to be discretionary. (*Friends of Juana Briones House*, *supra*, 190 Cal.App.4th at pp. 301–302.)

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14 The County argues its well permits are closely similar to common building permits, "which CEQA recognizes as presumptively ministerial." But building permits are ministerial "*if* the ordinance requiring the permit *limits* the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his fee." (Guidelines, § 15369, italics added.) Thus, building permits are presumptively ministerial "*[i]n the absence of any discretionary provision* contained in the local ordinance or other law establishing the requirements for the permit…." (Guidelines, § 15268(b) & (b)(1), italics added.) As we explain below, through its incorporation of the well spacing standard in Bulletin No. 74, the Stanislaus County Code does contain a significant, discretionary provision.

C. The Determination as to whether a Proposed Well is Adequately Separated from a Contamination Source Involves Subjective Judgment Concerning how the Project Should be Carried Out and is Therefore not Ministerial Under CEQA Guidelines Section 15369

Appellants cite provisions from Bulletin No. 74-90 governing standards for keeping wells untainted by potential pollution or contamination sources.[15] Respondents concede that the contamination source spacing standard is indeed a "standard[] for well construction."[16] Because such standards are incorporated into the County Code by

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[15] Appellants also point to provisions in section 8(B), 8(C), and 9. Section 8(B) provides that, "*[w]here possible*, a well shall be located up the ground water gradient from potential sources of pollution or contamination." (Italics added.) Section 8(C) states that, "*[i]f possible*, a well should be located outside areas of flooding." (Italics added.)

"Possible" is a more objective standard than "adequate." While determining whether something is "possible" may require scientific expertise, the ultimate question being asked is objective (i.e., can this be done?) rather than subjective (i.e., should it be done this way?).

Next, in section 9, the Bulletin provides for the minimum depths to which a well's annular seal must extend below ground surface. (An annular seal is "a watertight seal placed between the well casing and the side wall of a drilled hole." (Stan. Co. Code, § 9.36.020(G).) For example, the annular seals of individual domestic wells must extend at least 20 feet below ground surface. But the annular seal requirements do not have an overarching "adequacy" standard. Instead, the section lists actual "minimum" depths that apply for each type of well, without the qualifying "guidepost" language found in the contamination source spacing section. Limited exceptions to the annual seal depth minimums are allowed in cases of shallow water depth, freezing areas, etc. But even those exceptions have absolute minimum depths – e.g., 10-foot seal depth when water depth is less than 20 feet; 50-foot seal depth for wells near pollution source; four-foot seal depth for freezing areas; four-foot seal depth if subsurface vault or equivalent feature is used. These annular seal depth provisions are objective and simply do not involve the scope of discretion provided in the well/pollution source spacing standard.

[16] The parties disagree, however, as to whether other provisions in the Bulletin are incorporated by section 9.36.150. We need not resolve that issue because we conclude a provision the parties do agree was incorporated – i.e., the contamination source spacing standard – renders the issuance of well permits discretionary.

section 9.36.150, we will now determine whether the standard calls for a discretionary or ministerial decision by the DER.

Potential Pollution or Contamination Sources

Under the heading "**Separation**", section 8(A) of the Bulletin provides the following standard: "All water wells shall be located an adequate horizontal distance from known or potential sources of pollution and contamination."[17]

Later in section 8(A), the Bulletin displays a chart, listing horizontal separation distances between various contamination sources (e.g., 50 feet between a well and a sewer line, 100 feet between a well and an animal enclosure, etc.) Above the chart is the following text:

> "The following horizontal separation distances are generally considered adequate where a significant layer of unsaturated, unconsolidated sediment less permeable than sand is encountered between ground surface and ground water. These distances are based on present knowledge and past experience. Local conditions may require greater separation distances to ensure ground water quality protection."

After the chart, is the following text:

> "Many variables are involved in determining the "safe" separation distance between a well and a potential source of pollution or contamination. No set separation distance is adequate and reasonable for all conditions. Determination of the safe distance for individual wells requires detailed evaluation of existing and future site conditions.
>
> Where, in the opinion of the enforcing agency adverse conditions exist, the above separation distances shall be increased, or special means of protection, particularly in the construction of the well, shall be provided, such as increasing the length of the annular seal.
>
> Lesser distances than those listed above may be acceptable where physical conditions preclude compliance with the specified minimum

[17] It also provides that "[c]onsideration should also be given to adequate separation from sites or areas with known or suspected soil or water pollution contamination."

separation distances and where special means of protection are provided. Lesser separation distances must be approved by the enforcing agency on a case-by-case basis."

Analysis

We conclude the contamination source spacing standard calls for a discretionary decision by the DER.

"A ministerial decision involves *only* the use of *fixed* standards or *objective* measurements, and the public official *cannot* use personal, *subjective judgment* in deciding whether *or how* the project should be carried out." (Guidelines, § 15369, italics added.) This dividing line is illustrated well in the case of *People v. Department of Housing & Community Dev.* (1975) 45 Cal.App.3d 185 (*Department of Housing*). There, the question was whether issuing a mobile home park construction permit was ministerial or discretionary. The court noted that the Mobilehome Parks Act contained several "fixed design and construction specifications covering such matters as space occupancy, road access, toilets, showers and laundry facilities." (*Department of Housing*, *supra* 45 Cal.App.3d at p. 193.) Because these were "*fixed* design and construction specifications … the official decision of conformity or nonconformity leaves scant room for the play of personal judgment." (*Ibid.*, italics added.) The court held these provisions were ministerial.

However, the Mobilehome Parks Act had other, broader standards as well. "The applicant for a mobile home construction permit must submit a "description of the water supply, ground drainage, and method of sewage disposal." [Citation.] There must be a "sufficient" supply of artificial lighting. [Citation.] The water supply must be "adequate" and "potable." [Citations.] The site must be "well-drained and graded." [Citation.]" (*Department of Housing, supra,* 45 Cal.App.3d at p. 193.) These standards were "more generalized" and presented "relatively personal decisions addressed to the sound judgment and enlightened choice" of the agency. (*Id.* at p. 193.) As a result, the decisions were held to be discretionary.

The standard for spacing wells from contamination sources imported into the County Code from Bulletin No. 74 are akin to the discretionary standards in *Department of Housing*. The ultimate standard for contamination source spacing is that "[a]ll water wells shall be located an *adequate* horizontal distance from known or potential sources of pollution and contamination." (Italics added.)[18] Determining whether a particular spacing is "adequate" inherently involves subjective judgment. (See *Department of Housing*, *supra*, 45 Cal.App.3d at pp. 193–194.)

The County's Well Permitting Scheme Does Allow the DER to Address Impacts That Would be Considered in Environmental Analysis

The County argues the Bulletin's spacing standard does not allow the DER to address impacts revealed by environmental analysis. (See *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 267 ["the touchstone is whether the approval process involved allows the government to shape the project in any way which could respond to any of the concerns which might be identified in an environmental impact report."].) We disagree.

Suppose an applicant seeks approval for construction of a well near a contamination source. The applicant says the proposed spacing between the well and the contamination source is "adequate," even though it is closer than the "generally

[18] As noted above, the Bulletin does contain a chart enumerating horizontal separation distances that are "generally considered adequate where a significant layer of unsaturated, unconsolidated sediment less permeable than sand is encountered between ground surface and ground water." However, the Bulletin's language makes clear those distances are essentially guidelines, not fixed standards. The Bulletin provides that "[l]ocal conditions may require greater separation distances to ensure ground water quality protection"; that "[n]o set separation distance is adequate and reasonable for all conditions; and that "[d]etermination of the safe separation distance for individual wells requires detailed evaluation of existing and future sight conditions." In sum, while the horizontal separation distances enumerated in the Bulletin provide some objective guideposts, the surrounding provisions confirm that the ultimate standard is that well/pollution separations distances must be "adequate."

accepted" distances enumerated in the chart in section 8(A). Environmental analysis of such an application could reveal relevant information, including whether the lesser distance proposed by the applicant was "adequate" under the spacing standard (or whether it was "acceptable" with respect to risk of contamination under the "lesser distances" provision). Depending on what the environmental analysis revealed, the County could deny the permit as failing to satisfy the spacing standard.[19]

The County's Discretionary Role is not Insubstantial

The County argues that its ability to require, for example, that a well be located 120 feet from a pollution source rather than 100 feet[20] "hardly constitutes the kind of substantial control required to make well construction permits discretionary." The County cites *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11 (*Sierra Club*), a case which involved a permit allowing an applicant to establish a vineyard on his land. Among other things, the applicable ordinance required that a 50-foot setback from wetlands be established "unless a wetlands biologist recommends a different setback." The county accepted a wetlands biologist's conclusion that a 35-foot setback would be sufficient for the applicant's vineyard. (*Id.* at pp. 29–30.)

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[19] With respect to this issue, the parties engage in a tangential debate about the relevance of the County's police powers to regulate groundwater depletion. We need not determine what the County could do to address environmental concerns through its police powers – and whether that issue is even relevant (see Guidelines, § 15002, subd. (i)(2)) – because Chapter 9.36 itself empowers DER to deny a permit for failure to comply with the contamination spacing standard. (See Stan. Co. Code, §§ 9.36.030 & 9.36.150.) In other words, because the County has the ability to affect the project (e.g., by denying the well permit) in response to at least one environmental concern that would be analyzed during CEQA review, it is not material that the County may or may not have other police powers.

[20] We appreciate that many would consider a distance measured in feet to be "minor." But if, for example, 20 feet is the difference between a well being adequately spaced from a pollution source versus groundwater becoming contaminated, then such a modification would not be "minor" even though it involves a short distance.

In arguing the County's control over well/pollution source spacing is insubstantial, respondents cite *Sierra Club* for the proposition that no discretion was involved in that case, even though the agency could make adjustments to setback distances based on the biologist's report. We conclude *Sierra Club* is distinguishable on this issue.

> "As the trial court put it, "[a]lthough the details for the size of any setback for undesignated wetlands are left open, the qualification is itself ministerial because the Ordinance provides that the setback will be *whatever a wetlands biologist recommends*. The actual size of the setback is not set, *but the requirement to accept a biologist recommendation is set.*" (*Sierra Club, supra*, 11 Cal.App.5th at p. 30, italics added.)

In this case, however, the County (through its DER) is the arbiter of "adequacy" – not a third party whose recommendation the County is essentially required to accept. In other words, Stanislaus County's determination of "adequacy" involves "subjective judgment in deciding … how the project should be carried out." (Guidelines, § 15369.)

In a similar vein, the County argues that its authority to modify the spacing between a well and a contamination source is a "minor adjustment." But such a modification is not minor if it is the difference between safe versus contaminated groundwater.

Nor is it minor merely because it involves only one of several decision points in the permitting process. Depending on the project, exercising discretion as to even a single standard can have a profound effect on the project and its environmental impacts. The number of discretionary standards the local agency must consider is not the rubric for determining whether a permitting scheme is ministerial. Rather, the question is whether the public official is *only* applying fixed standards and objective measurements or, instead, is exercising subjective judgment in deciding whether or how the project should be carried out. (Guidelines, § 15369.) Consequently, if a single standard has the public

official exercising subjective judgment as to how the project will be carried out, the scheme is discretionary and subject to CEQA.[21]

The Fact that Chapter 9.36 and Incorporated Standards are Designed to Address Groundwater Contamination Does not Dispense with CEQA

The County also argues that its permitting standards are designed to address the issue of groundwater contamination. As a result, an environmental impact report (EIR) "would not "uncover" or "reveal" groundwater contamination caused by a proposed well because discovery and avoidance of such contaminants is what the County's permitting program already does."[22] This argument essentially boils down to the County claiming it should be excused from CEQA review of potential groundwater contamination because it performs comparable environmental review of potential groundwater contamination

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[21] The reach of this rule is cabined by the functional test established by case law:

> "[T]he pertinent judicial decisions have developed a 'functional' test for distinguishing ministerial from discretionary decisions. [Citation.] That test examines whether the agency has the power to shape the project in ways that are responsive to environmental concerns. [Citations.] … 'Conversely, where the agency possesses enough authority (that is, discretion) to deny or *modify* the proposed project on the basis of environment consequences the EIR might conceivably uncover, the permit process is 'discretionary' within the meaning of CEQA. [Citation.]" (*Friends of Juana Briones House, supra,* 190 Cal.App.4th at p. 302.)

Under this test, one or more otherwise discretionary standards can be deemed ministerial if they do not bestow upon the agency "the power to shape the project in ways that are responsive to environmental concerns." (*Friends of Juana Briones House, supra,* 190 Cal.App.4th at p. 302.)

For example, appellants note that pumping groundwater can cause environmental harm. However, Chapter 9.36 does not grant the DER the authority to do anything about groundwater depletion through standard well construction permits. That is, groundwater consumption is not a permissible basis for denying a Chapter 9.36 well permit.

[22] This argument essentially inverts the rationale of *San Diego Navy Broadway Complex v. City of San Diego* (2010) 185 Cal.App.4th 924 (*San Diego Navy*), which held CEQA review of an environmental issue was not required because the relevant discretion did *not* concern the relevant environmental issue.

under its own statutory permitting scheme. But CEQA does not provide for such an equivalency exception.

This Case is Distinguishable from the San Diego Navy *Case*

This case is also distinguishable from *San Diego Navy*. That case involved a hotel/retail/office space development in downtown San Diego. The development agreement between the government and the developer created "a development plan and a series of urban design guidelines related to the aesthetic design of the Project." (*San Diego Navy*, *supra*, 185 Cal.App.4th at p. 929.) The development agreement required the developer submit its construction documents to the Centre City Development Corporation (CCDC) so it could determine whether the documents were consistent with the aesthetic criteria established in the development plan and urban design guidelines.

One of the questions the Court of Appeal faced was whether the CCDC's determination regarding the aesthetic criteria was "discretionary" or "ministerial."[23] (*San Diego Navy*, *supra*, 185 Cal.App.4th at p. 937.) The design standards CCDC was applying included: "Towers shall be designed as slender structures to minimize view obstructions" and "[a] palette of colors and building materials shall be developed for the Broadway complex to ensure harmonious treatment." (*Id.* at p. 938.) The CEQA petitioners argued the standards were "subjective" and involved "the exercise of judgment and deliberation." (*San Diego Navy*, *supra*, at p. 938.) As a result, petitioners argued, the City of San Diego should have prepared an updated EIR addressing the Project's impact on climate change. The Court of Appeal rejected that contention, holding as follows:

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[23] This issue arose in an unusual circumstance. The City of San Diego prepared an EIR for the project when it entered into the development agreement. The question was whether *additional* environmental review was required under section 21166 when the CDCC subsequently evaluated construction documents for compliance with aesthetic criteria. To resolve that issue, the Court of Appeal needed to determine whether the CDCC's approval was discretionary.

> "Assuming for purposes of this opinion that in performing the consistency reviews, the CCDC was required to exercise discretionary authority (Guidelines, § 15163(c)) with respect to various *aesthetic* issues on the Project, the [CEQA petitioners have] made no showing the scope of the CCDC's discretion extended to the Project's potential impacts on *global climate change*. We conclude that the failure to make such a showing is fatal to the … claim." (*San Diego Navy, supra*, 185 Cal.App.4th at p. 938.)

Whatever the merits of that holding, it does not apply here because the discretion the County exercises *does* concern an environmental issue: groundwater contamination.[24] Because Stanislaus County's discretionary authority covers an issue that *would* be a subject of environmental review, the rationale of *San Diego Navy* does not apply.

That the County Regulates Groundwater Depletion in Chapter 9.37 Does not Preclude the Conclusion that Chapter 9.36 Regulates Groundwater Contamination in a Discretionary Fashion

The County also argues that it regulates groundwater depletion separately, in Chapter 9.37. As a result, the County argues well construction permits under Chapter 9.36 "are not the tools to address … depletion." That may well be. (Cf. *California Water Impact Network v. County of San Luis Obispo* (June 28, 2018, B283846) ___ Cal.App.5th ___ 2018 Cal.App. Lexis 662].)[25] But the fact that the County makes a separate

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[24] As respondents acknowledge, DER can require greater distance between a well and a pollution source in order "to prevent the well from contaminating groundwater."

[25] The Second District recently published its decision in *California Water Impact Network v. County of San Luis Obispo, supra,* ___Cal.App.5th ___ [2018 Cal.App. Lexis 662.]. That case involved whether San Luis Obispo County's well permit approvals are ministerial or discretionary decisions. The Court of Appeal observed that Chapter 8.40 of the Bulletin is concerned with groundwater contamination, not subsidence or groundwater depletion. We agree. But we must next determine whether the ordinance – which admittedly is concerned with groundwater contamination – affords the County " ' "the ability and authority to 'mitigate [that] … environmental damage' to some degree." ' [Citation.]" (*California Water Impact Network v. County of San Luis Obispo supra,* ___Cal.App.5th ___ [2018 Cal.App. Lexis 662, *13].) Here, it is clear that the ordinance, through its incorporation of the Bulletin's "adequate" well-spacing standard, *does* afford Stanislaus County with "the ability and authority to mitigate … environmental damage" (i.e., groundwater contamination) "to some degree." As a result, well permit approvals are discretionary.

discretionary decision concerning groundwater *depletion* under Chapter 9.37, does not impact our conclusion that the County also makes a discretionary decision concerning groundwater *contamination* under Chapter 9.36.

D. Other Provisions in Chapter 9.36 Identified by Appellants are not Discretionary

Appellants point to other provisions in Chapter 9.36 of the County Code and argues they are discretionary. We disagree.

Appellants first cite a portion of section 9.36.030 reading: "The application for a permit shall be in the form prescribed by the health officer and contain such information as the health officer may require." (Stan. Co. Code, § 9.36.030.) But appellants do not appear to argue that this provision independently renders the permitting scheme discretionary. Rather, they note it "support[s]" the County's authority to "carry out its discretionary functions under the state standards and to assess whether the permit may have significant environmental effects under CEQA." To the extent appellants intended to suggest this provision itself is discretionary, they failed to support that argument with reasoned legal analysis.

Appellants next cite to the following portion of section 9.36.060: "All pumping equipment shall be installed with protective devices to effectively prevent the entrance of foreign matter into the well casing." Appellants argue the inclusion of the word "effectively" requires the County to make a "judgment call." We disagree. The entire phrase "to effectively prevent the entrance of foreign matter into the well casing" is simply another way to say the protective devices used must actually function. That is an objective standard; the protective device either functions properly to prevent foreign matter from entering the well casing or it does not.

Appellants also point to the provision in Chapter 9.36, which empowers the health officer to grant variance permits. (Stan. Co. Code, § 9.36.110.)

> "The health officer may authorize an exception to any provision of this chapter when, in his/her opinion, the application of such provision is unnecessary. Upon application therefor, the health officer may issue a variance permit and shall prescribe thereon such conditions as, in his or her judgment, are necessary to protect the waters of the state from pollution." (Stan. Co. Code, § 9.36.110.)

The County acknowledges that its consideration of applications for variance permits is subject to CEQA. But appellants contend that the County must exercise judgment and discretion even on nonvariance permits in order to determine whether the normal standards are adequate or must be altered via a variance permit. The County responds that whether it will consider altering a standard is not discretionary because it "may issue variance permits only '[u]pon application therefor,' and not on its own initiative." Thus, CEQA would apply once an application for a variance permit is submitted, but not before that point.

We agree with the County that the phrase "[u]pon application therefor" requires that an applicant request a variance permit before the health officer may alter an applicable standard.[26] The language clearly conveys an absolute condition on the health

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[26] For this reason, the ordinance could run afoul of Water Code section 13801's requirement that a county's well ordinance must "meet[] or exceed[] the standard contained in Bulletin 74-81." (Water Code, § 13801, subd. (c).) When an applicable standard is going to be modified to *accommodate the applicant*, it seems appropriate to condition the variance on the applicant's request. But, what about when the relevant standard needs to be modified to be *more stringent* due to site conditions? As Bulletin 74-81 acknowledges, "under certain circumstances, adequate protection of groundwater quality may require *more stringent* standards than those presented here." (Italics added.) Arguably, since the Bulletin has no analogous precondition, DER's authority to require *more stringent* standards should not be conditioned on a request from an applicant who presumably would never make such a request. (See Water Code, § 13801, subd. (c).)

However, resolution of this question must await the proper case. Appellants' complaint for declaratory relief seeks only a judgment concerning the County's failure to perform CEQA review of well permit decisions. It does not seek invalidation of the well permit ordinance, or any other relief related to the possibility the ordinance violates Water Code section 13801.

officer's ability to grant variance permits. As a result, the decision to even consider altering a construction standard is ministerial – it arises with an application for a variance permit and without the exercising of discretion by the County. However, once the application is made, the decision of whether to issue the variance permit and on what conditions is clearly discretionary.

E. Practical Considerations

CEQA litigation often involves substantial commercial, industrial and governmental projects for which environmental review can be a costly and time-consuming undertaking. Yet, CEQA is not limited to projects of a specific magnitude or purpose.[27]

Stanislaus County issues hundreds of well permits annually for residential and agricultural wells. In a long-standing ordinance, the County has considered the issuance of these permits to be "ministerial." We understand that requiring CEQA review for these relatively small, routine projects may seem unnecessarily burdensome and of little benefit. Yet, we are constrained by what the law says about ministerial versus discretionary government approvals. Given the discretion accorded to the County, that standard leads us to conclude that CEQA applies here.

One way this issue could be relevant to the present case is its potential impact on the interpretation of section 9.36.110. Because there is a presumption official duties have been regularly performed (Evid. Code, § 664), one could argue that the ordinance should be interpreted in a way that brings it into compliance with Water Code section 13801. Specifically, that section 9.36.110 should be interpreted to permit DER to issue variance permits even without an application. Here, however, the language "[u]pon application therefor" so clearly conditions the health officer's authority, that no presumption or canon of construction can alter its meaning. (See *People v. Shiga* (2016) 6 Cal.App.5th 22, 40 [presumption that law has been followed in the course of performing an official duty can be overcome].)

[27] *Some* smaller projects are subject to categorical exemptions from CEQA, like building a single family residence or creating bicycle lanes on an existing right-of-way. (Cal. Code Regs., tit. 14, §§ 15303–15304.)

The County and Amicus Curiae argue that CEQA review would require the County to analyze a host of environmental impacts it is powerless to address. But that is not grounds for dispensing with CEQA review altogether. 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. (See *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 715–716; see also § 21081, subd.(a)(3) [referencing "legal … considerations" which "make infeasible the mitigation measures or alternatives identified in the environmental impact report"]; Guidelines, § 15364 [referencing the role of "legal … factors" in determining feasibility].) However, the fact that some mitigation measures are outside the lead agency's authority to impose does not dispense with CEQA altogether.

We are also sensitive to the concerns of Amicus Curiae that our conclusion will likely require the County to obtain and analyze substantial amounts of information, the costs of which will be borne by local agencies and/or applicants. Elsewhere, CEQA does address the reality that some projects are too small or inconsequential to justify the time and expense of an EIR.[28] But we may not shoehorn that concern into the ministerial exemption, which addresses a different issue.[29] Moreover, it may[30] be that many well

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[28] For example, CEQA and its implementing regulations provide for negative declarations and exemptions for small structures or minor alterations to land. (§ 21064, 21064.5; Guidelines, §§ 15303–15304.) Perhaps there should also be a categorical exemption for residential wells. But that issue must be raised with the Legislature, which has the power to create exemptions. (See *Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2009) 170 Cal.App.4th 956, 966, fn. 8.)

[29] The ministerial exemption addresses the distinct concern that an EIR would be wasteful not because the project is environmentally inconsequential, but because the government would be unable to exercise discretion in furthering the environmental interests that would be described in an EIR.

[30] We are not precluding or endorsing the use of negative declarations or notices of exemption for well permits in Stanislaus County. That issue is outside the scope of the present case.

permits in Stanislaus County will be appropriate candidates for negative declarations, mitigated negative declarations or perhaps even an exemption (other than the ministerial exemption).[31] We leave that determination to the County.

II. APPELLANTS HAVE FAILED TO DEMONSTRATE ERROR WITH RESPECT TO THEIR DUE PROCESS CLAIM

Appellants claim the County's approval of the well construction permit "is adjudicative in nature and thus required due process notice … and opportunity to be heard under the authority of *Horn v. County of Ventura* (1979) 24 Cal.3d 605 [(*Horn*)]."

Even assuming the County's approval of the well construction permit in this case was adjudicative, appellants have not established entitlement to procedural due process. The fact that a government action is discretionary and/or adjudicative may be necessary to invoke procedural due process, but it is not sufficient. The property interest

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[31] In the *POWER* case, petitioner's counsel made the following comments to the trial court:

> "CEQA has a range of…responses to a permit application once it's triggered. So the first level is preliminary review, and the question there is: Is there an exemption? So for lots of well permits there's going to be a categorical exemption because – or there could be a common sense exemption which is there's no reasonable possibility this could have a significant adverse impact on the environment. That's called the common sense exemption. So for lots of domestic wells, that's going to be the case. Replacement wells, there's a categorical exemption for that. For single-family dwellings there's a categorical exemption for that. So this first level of review is [g]oing to take out of the CEQA process a range of permits."

Shortly thereafter, petitioner's counsel said:

> "And moving on from there, if there's no exemption for the project it would go to the initial study. And at that point, if the initial study determines that the project may have a significant impact on the environment, then there would be an environmental impact report…[I]f it would not have a significant impact on the environment, then the negative declaration would be the result, and that would be the end of the process."

We agree that many well permit applications will not require the preparation of an EIR. We anticipate, without deciding, that the County will be able to satisfy CEQA through exemptions and/or negative declarations in many, if not most, instances.

deprivation must also be "significant." (*Horn, supra*, 24 Cal.3d at p. 616.) In *Horn*, the Supreme Court "emphasize[d] … that constitutional notice and hearing requirements are triggered only be governmental action which results in "significant" or "substantial" deprivations of property…." (*Ibid*.) Yet, appellants offer no legal argument as to why the property deprivation alleged here is "significant" enough to trigger procedural due process under *Horn*.[32] Appellants have failed to adequately explain and support their claim to appellate relief on this issue.

DISPOSITION

The judgment of dismissal is reversed. The trial court is directed to vacate its order granting respondents' motion for judgment on the pleadings and to enter an order denying the motion. The matter is remanded for further proceedings consistent with this opinion.

Appellants shall recover their costs on appeal.

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POOCHIGIAN, Acting P.J.

WE CONCUR:

_____
FRANSON, J.

_____
PEÑA, J.

[32] Indeed, with respect to their due process argument, appellants do little more than summarize *Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613.