No. S251709

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PROTECTING OUR WATER & ENVIRONMENTAL RESOURCES et al.
Plaintiffs and Appellants,

v.

STANISLAUS COUNTY et al.
Defendants and Respondents.

After a decision by the Court of Appeal, Fifth Appellate District
Case No. B283846

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

APPLICATION OF CALIFORNIA WATER IMPACT NETWORK, CALIFORNIA WILDLIFE FOUNDATION, AND LANDWATCH MONTEREY COUNTY FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS; AMICUS CURIAE BRIEF

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Pursuant to Rule 8.520(f) of the California Rules of Court, California Water Impact Network and LandWatch Monterey County (Amici) respectfully apply to the Chief Justice for permission to file the following amicus brief in support of Plaintiffs and Appellants Protecting Our Water & Environmental Resources, et al.

In accordance with Rule 8.520(f)(4), Amici affirm that no party or counsel for a party in the pending case authored the proposed amicus brief in whole or in part, or made any monetary contribution intended to fund its preparation.

Interests of Amici

California Water Impact Network (C-WIN) is a California non-profit public benefit organization headquartered in Santa Barbara. C-WIN's purpose is the protection and restoration of fish and wildlife resources, groundwater resources, water quality, recreational opportunities, and other beneficial uses of the rivers, streams, and groundwater aquifers of California. In support of this purpose, C-WIN advocates for the fair and environmentally responsible distribution of California's surface and groundwater resources through research, public education, media outreach and litigation, with the goal of promoting the equitable sharing of water among urban ratepayers, practitioners of sustainable agriculture, fisheries and wildlife. C-WIN is the petitioner and appellant in

California Water Impact Network v. County of San Luis Obispo (2018) 25 Cal.App.5th 666 (review granted and held, No. S251056).

California Wildlife Foundation (CWF) is a California non-profit public benefit corporation headquartered in Oakland. Established in 1990 by a group led by the then Resources Agency Secretary to support the work of the California Department of Fish and Wildlife (formerly California Department of Fish and Game), CWF partners with federal, state, regional and local agencies as well as land trusts and other non-profit organizations to implement wildlife and habitat projects on lands and easement-covered lands for the public benefit. CWF has a longstanding interest and expertise in California water policy and law, including application of the California Environmental Quality Act ("CEQA") to programs, plans, and projects that utilize our State's surface and groundwater resources.

LandWatch Monterey County (LandWatch) is a California non-profit public benefit corporation headquartered in Salinas. LandWatch's organizational purpose is to promote sound land use planning and legislation at the city, county, and regional levels, to combat urban sprawl, and to protect high agricultural productivity and environmental health in Monterey County. LandWatch's programmatic focus has shifted increasingly toward protecting groundwater resources in the Salinas Valley aquifer from overdraft and seawater intrusion as a result of excessive well drilling and pumping.

The current case is of specific concern to C-WIN, CWF, and LandWatch, as its outcome will substantially impact how local permitting agencies coordinate land use planning and water resource management decisions in the future. Amici's organizational interests are therefore directly affected.

Amici's brief will assist the Court in deciding the matter by presenting different and/or expanded legal arguments in support of Petitioners and Appellants than briefed by the Parties. The brief will also present a more thorough analysis of the cases giving rise to, and later implementing, the "functional test" for distinguishing discretionary and ministerial actions under the California Environmental Quality Act.

Amici therefore respectfully request that the Court **grant** permission to file the accompanying proposed amicus curiae brief.

Dated: May 9, 2019

Respectfully submitted,

M. R. WOLFE & ASSOCIATES, P.C.

Mark R. Wolfe
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AMICUS CURIAE BRIEF OF CALIFORNIA WATER IMPACT NETWORK, CALIFORNIA WILDLIFE FOUNDATION, AND LANDWATCH MONTEREY COUNTY IN SUPPORT OF PLAINTIFFS AND APPELLANTS

TABLE OF CONTENTS

I. Introduction 9

II. The Court should affirm the Fifth District's language-focused application of the *Friends of Westwood* functional test, which is consistent with decades of precedent 14

The 1975 cases 15

Friends of Westwood 17

Later cases applying the functional test 20

Sierra Club v County of Sonoma transmutes the functional test into a fact- and circumstance- based inquiry. 24

III. The Court should disapprove *Sierra Club* and decline to adopt the County's outlying, unworkable approach to the functional test 29

IV. Under the standard application of the functional test, well permits issued in accordance with the DWR Bulletins are discretionary. 32

V. The Court should reverse *California Water Impact Network v. County of San Luis Obispo.* 35

VI. Affirming the Fifth District will not create an undue burden on local well permitting agencies. 37

Conclusion 39

TABLE OF AUTHORITIES

Cases

California Water Impact Network v. County of San Luis Obispo
(2018) 25 Cal.App.5th 666 35,36

Communities for a Better Environment v. Calif. Resources Agency
(2002) 103 Cal.App.4th 98 29

Concerned Citizens of Costa Mesa v. 32nd Dist. Ag. Assn.
(1986) 42 Cal.3d 929..... 14

Cummins Inc. v. Superior Court
(2003) 36 Cal.4th 478 31

Day v. City of Glendale
(1975) 51 Cal.App.3d 817 16,17

Eisner v, Uveges
(2004) 34 Cal.4th 915 31

Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.
(2016) 1 Cal.5th 937 27,28

Friends of Mammoth v. Board of Supervisors
(1972) 8 Cal.3 246 18

Friends of the Juana Briones House v. City of Palo Alto
(2010) 190 Cal.App.4th 286 21

Friends of Westwood, Inc. v. City of Los Angeles
(1987) 191 Cal.App.3d 259..... *passim*

Health First v. March Joint Powers Authority
(2009) 174 Cal.App.4th 1135 23

Kings County Farm Bureau v. City of Hanford
(1990) 221 Cal.App.3d 692..... 30

Lakin v. Watkins Associated Industries
(1993) 6 Cal.4th 644 31

Laurel Heights Improvement Assn. v. Regents of the Univ. of Calif.
(1988) 47 Cal.3d 376 14

Leach v. City of San Diego
(1990) 220 Cal.App.3d 389 20,21

Madera Oversight Coalition
(2011) 199 Cal.App.4th 48 26

Madrigal v. City of Huntington Beach
(2007) 147 Cal.App.4th 1375 23

McCorkle Eastside Neighborhood Gr. v. City of St. Helena
(2018) 31 Cal.App.5th 80 23

Mountain Lion Foundation v. Fish & Game Comm'n
(1997) 16 Cal.4th 105 9,11,20

People v. Department of Housing and Community Dev.
(1975) 45 Cal.App.3d 185 15,16

Plan for Arcadia, Inc. v. City Council of Arcadia
(1974) 42 Cal.App.3d 712 23

Preserve Wild Santee v. City of Santee
(2012) 210 Cal.App.4th 260 26

San Diego Navy Broadway Complex Coalition v. City of San Diego
(2010) 185 Cal.App.4th 924 22,23

Schoen v. Cal. Dept. of Forestry & Fire Prot.
(1997) 58 Cal.App.4th 556 14

Sequoyah Hills Homeowners Assn. v. City of Oakland
(1993) 23 Cal.App.4th 704 37

Sierra Club v. County of Sonoma
(2018) 11 Cal.App.5th 11 ..... *passim*

Sierra Club v. Napa County Bd. of Supervisors
(2012) 205 Cal.App.4th 162 23

Statutes

Public Resources Code
§ 21000 ..... *passim*
§ 21080 16

Water Code
§ 13801 14

Regulations

Title 14, California Code of Regulations
§ 15002 14
§ 15061 38
§ 15201 14
§ 15268 11

Amici curiae California Water Impact Network, California Wildlife Foundation, and LandWatch Monterey County (Amici) respectfully submit this proposed brief in support of Plaintiffs and Respondents Protect Our Water & Environmental Resources, et al.

I.
Introduction

The Court granted review to address this question: Is the issuance of a well permit pursuant to state groundwater well-drilling standards a discretionary decision subject to review under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) or a ministerial action not subject to review?

The Court last addressed the distinction between ministerial and discretionary decisions under CEQA over two decades ago, in *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105. That case involved a relatively rare decision by a state agency to remove an animal from the state endangered species list. The current case, by contrast, involves local permitting decisions made routinely (approximately 150 per year in Stanislaus County alone). The Court's ruling will impact well drillers, neighboring landowners, natural resources, environmental values, and others who share groundwater resources statewide. The case accordingly presents an opportunity for the Court to clarify an increasingly convoluted area of CEQA jurisprudence, and to provide much-needed guidance to local agency officials

issuing a variety of land use, resource extraction, waste discharge, and other development-related permits pursuant to local ordinances.

The parties, the Fifth District, and Amici agree that the analytic touchstone for determining whether a given permit approval is ministerial or discretionary under CEQA is the "functional test" laid down in *Friends of Westwood, Inc. v. City of Los Angeles* (1986) 191 Cal.App.3d 259. Under that test, a permitting decision is discretionary and subject to CEQA if it "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." *Friends of Westwood* at p. 266-267. On the other hand, the decision is ministerial and exempt from CEQA if the government "lack[s] the power (that is, the discretion) to stop or modify it in any relevant way," such that the permit applicant "would be able to legally compel issuance of the permit without change." *Id.* at 272.

Virtually every case preceding and following *Friends of Westwood* applies the functional test to permitting ordinances in the same manner. Approaching the question whether an approval is discretionary or ministerial as one of statutory interpretation, courts have looked to the plain language of the permitting ordinance or regulation, viewing it in the context of the permitting scheme as a whole. If the language gives the permitting official the power to deny or modify a permit based on environmental concerns, then it is discretionary and subject to CEQA. If instead the language compels the official

to issue the permit if quantitative, objective, or numeric standards are met, such that there is no room whatsoever for subjective judgment in any material sense, then the permit is ministerial and exempt from CEQA. And if the plain language contains both discretionary and ministerial elements, then the permitting schemes is discretionary "even where an agency's role is largely ministerial." *Mountain Lion, supra,* 16 Cal.4th at p. 117, citing *Friends of Westwood,* 191 Cal.App.3d at 271; CEQA Guidelines, 14 C.C.R. § 15268. Thus, the functional test seeks to determine statutory or regulatory intent: did the legislative or regulatory body that enacted the permitting ordinance or regulation intend for officials to use subjective judgment in deciding whether to deny or modify projects of a given type on environmental grounds. The functional test does not determine whether a particular project, a particular approval, or a particular set of facts actually triggered the use of subjective judgment. In other words, the functional test is a question of law, not fact.

Applying the functional test in this manner, the Fifth District found one provision in the plain language of the Department of Water Resources (DWR)'s well permitting bulletins incorporated by reference into the County's well permitting ordinance that require permitting officials to use subjective judgment to determine the "safe" distance between wells and sources of groundwater contamination. Although the DWR bulletins contain several discretionary provisions beyond this one, as Amici will discuss *infra*, the Fifth

District's straightforward, language-focused manner of applying of the functional test was absolutely correct.

The County urges this Court to reject this long-standing, statutory language-based application of the functional test in favor of an ad hoc, "case-by-case," "approval-by-approval" approach. Citing the recent outlying case of *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11 ("*Sierra Club*"), the County argues that its permitting officials should be able to gauge for themselves whether the discretion afforded them by ordinance is "minimal" or whether the environmental concerns raised by a project are "minor." Officials are likewise free, in the County's view, to consider such oblique factors as the number of discretionary provisions contained in the ordinance and the relative size of the project.

The County's proffered modification of the functional test based on *Sierra Club* is unworkable. According to the County, a permitting official could conclude that the same ordinance provisions are discretionary with respect to one project and ministerial with respect another, based on her own subjective assessment of the projects' size, the extent of potential (though not actually investigated) environmental impacts, whether her ability to impose conditions to address environmental concerns is "significant" or "minor," or whether objecting members of the public have presented sufficient evidence that specific features of the project or its environmental setting require the application of discretionary provisions in the ordinance.

If the Court were to ratify such an ad hoc approach to the *Friends of Westwood* functional test, it would inject substantial confusion into local permitting schemes, incentivize project applicants to try to persuade permitting officials to deem their permits ministerial, and, inevitably, generate more litigation. It would also result in further degradation of the State's environment and natural resources, as more resource extraction or development permits evade environmental review. While the County's view does find some support in *Sierra Club,* that case is a clear outlier whose reasoning was incorrect and should not be ratified, as discussed later in this brief. This present case therefore presents an important opportunity to cure the uncertainty that led the Second and Fifth District Courts of Appeal to interpret the exact same text in directly opposing ways.

The case also presents an opportunity to clarify an issue of great statewide importance with which courts and litigants continue to struggle. The characterization of an agency approval as either discretionary or ministerial can be profoundly consequential, since it dictates whether a project will receive any environmental scrutiny at all. If a project is deemed ministerial, the agency has no duty to evaluate or mitigate environmental impacts, and the public will have no meaningful opportunity to participate in the agency's decision. By contrast, when a project approval is discretionary and subject to CEQA, the agency not only has a mandatory duty to evaluate and mitigate impacts, it also must directly involve the affected public in its decision-

making. Public participation is, after all, "an essential part of the CEQA process." Guidelines, §§ 15002(j), 15201; *Concerned Citizens of Costa Mesa v. 32nd Dist. Ag. Assn.* (1986) 42 Cal.3d 929, 935-936; *Schoen v. Cal. Dept. of Forestry & Fire Prot.* (1997) 58 Cal.App.4th 556, 574 ("[p]ublic review provides the dual purpose of bolstering the public's confidence in the agency's decision and providing the agency with information from a variety of experts and sources"). "The EIR process protects not only the environment but also informed self-government." *Laurel Heights Improvement Assn. v. Regents of the Univ. of Calif.* (1988) 47 Cal.3d 376, 392.

In sum, the Supreme Court should affirm the Fifth District's ruling and make clear that application of the functional test should focus on the plain language of the permitting ordinance in question, reading it in the context of the permitting scheme as a whole.[1]

II.
The Court should affirm the Fifth District's language-focused application of the *Friends of Westwood* functional test, which is consistent with decades of precedent.

Friends of Westwood did not create the functional test from whole cloth. The opinion followed earlier cases addressing the ministerial vs. discretionary distinction dating back to the mid-1970s, shortly after CEQA was first enacted. Below is a synopsis.

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[1] That context is provided by Water Code section 13801, which required the Department of Water Resources to promulgate the Bulletin provisions in the first instance in order to protect groundwater resources.

The 1975 cases

The earliest case on point is *People v. Department of Housing & Community Dev. ("Ramey")* (1975) 45 Cal.App.3d 185. The issue was whether a state agency's issuance of a trailer park construction permit under the State Mobilehome Parks Act ("Act") was discretionary and subject to CEQA, even though most of the decision-guiding elements of the statute were ministerial. The Third District approached the question as one of statutory interpretation, explaining that "[t]he law administered by a public agency supplies the litmus for differentiating between its discretionary and ministerial functions." *Id.* at 192. The court found the Act contained "fixed design and construction specifications" for toilets, showers, space occupancy, and laundry facilities, which were plainly ministerial, but also contained standards that required officials to determine whether there was a "*sufficient*" supply of artificial lighting; an "*adequate*" water supply; a "*well-drained*" and "*well-graded*" site; and "*satisfactory*" sewage disposal. *Id.* at 193, italics added.

The court held that the presence of these qualitative terms in the language of the Act necessarily required officials to exercise personal judgment in permitting decisions, and that their "inevitably" discretionary nature "compelled [the agency] to inquire and make a finding touching its environmental impact." *Id.* at 194.

Notably relevant here, *Ramey* observed that such judgment-based decisions "may have great environmental significance relative to one physical site, negligible

significance in another." *Id.* at 193. The court did not hold that judgment-based decisions are discretionary and subject to CEQA only on certain physical sites and not others depending on site-specific factors, which is the approach the County is now urging the Court to ratify. Instead, the court explained

> Statutory policy, not semantics, forms the standard for segregating discretionary from ministerial functions. [Citation.] CEQA is to be interpreted to "afford the fullest possible protection to the environment within the reasonable scope of the statutory language." [Citation.] So construed, section 21080 extends CEQA's scope to hybrid projects of a mixed ministerial-discretionary character; doubt whether a project is ministerial or discretionary should be re-solved in favor of the latter characterization.

Id. at 194.

The Second District that same year reached a similar result interpreting a municipal grading ordinance in *Day v. City of Glendale* (1975) 51 Cal.App.3d 817. The court held that the City of Glendale's issuance of a nominally ministerial grading permit was nevertheless discretionary based on the presence of several judgment-based factors in the permitting ordinance. As in *Ramey,* the court focused on the plain language of the ordinance within the context of the overall permitting scheme, finding provisions that allowed the permitting official to impose regulations "as he shall determine are required in the interest of safety precautions involving pedestrian or vehicular traffic," and to attach conditions "as may be necessary to prevent creation of hazard to public or private property." *Id.* at 822-823. The court held

that these provisions "patently, are discretionary items without fixed standards or objective measurements and require the exercise of judgment, deliberation, and decision by the city engineer." *Id.* at 823.

In this manner, *Ramey* and *Day* laid the foundation for the "functional test." Both cases affirmed that subjective standards in the language of local permitting schemes can render permits issued under those schemes discretionary, especially if the permitting authority may impose permit conditions of its own devising.

Friends of Westwood

The modern jurisprudence on the ministerial vs. discretionary question starts with *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259. The case involved a citizen group's challenge to the City of Los Angeles' issuance of a nominally ministerial building permit for a mixed-use high-rise building without conducting CEQA review. The petitioner contended that notwithstanding CEQA's provision that building permits are presumed ministerial, the permit was discretionary because the City's Municipal Code authorized officials to impose additional conditions that addressed matters beyond mere compliance with objective building standards. The court framed the question as

> whether the city had the power to deny or condition this building permit or otherwise modify this project in ways which would have mitigated environmental problems an EIR might conceivably have identified. If not, the building permit process indeed is "ministerial" within

> the meaning of CEQA. If it could, the process is "discretionary."

Id. at 273.

As in *Ramey* and *Day*, the court approached the question as one of statutory interpretation, albeit in the context of this Court's admonition that "CEQA must 'be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' " *Id.* at p. 271, citing *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3 246, 259. It looked to the plain language of L.A.'s building permit ordinance to determine whether the cited provisions were discretionary within the context of the broader permitting scheme. The court found several ordinance provisions that extended beyond simple adherence with fixed, quantitative building standards, and that were therefore discretionary. The court explained:

> In the instant case, city employees set-or had the opportunity to set-standards and conditions as to many aspects of the proposed building. For example, the city engineer was empowered to determine what dedications and modifications would be sufficient to provide "**adequate**" ingress from and egress to the public streets. [Citation.] The building and safety department was authorized to require modifications in access driveways it **deemed necessary** in its judgment to **minimize interference** with the flow of traffic. [Citation.] The department of transportation may even set standards for internal parking circulation **if necessary** to ensure what happens *within* the building is **not 'detrimental** to the flow of traffic' *outside* the building. [Citation.]

Friends of Westwood at 274, emphasis in original. The court reasoned that even though building permits are presumed to be ministerial by the CEQA Guideline, this is the case

> only where the agency has *no* power to exercise its personal judgment as to the manner *any* phase of a project is carried out but instead *only* has the power to determine whether zoning allows the structure to be built and whether it satisfies strength requirements, and nothing more, and then only when those decisions involve application of *fixed* standards and *objective* measurements.

Id. at 271, italics in original. Thus, the litmus test once again was the language of the enabling local ordinance, and the test's outcome was determined by the presence in the ordinance of subjective standards such as "adequate," "if necessary," and "not detrimental."

Note that *Friends of Westwood* did not turn on whether city officials *actually exercised* the discretion given to them under the ordinance. The touchstone was whether city officials "*had the opportunity* to set standards and conditions" to address environmental concerns. *Id.* at 274, emphasis added. In other words, if local officials "have the power" under a permitting ordinance to impose or modify conditions on a project that go beyond mere compliance with objective, quantitative standards, the project is discretionary regardless of whether the officials actually exercise that power with respect to a given project or permit. The court also held that even if the city lacked discretion to deny a permit outright in the event it found environmental problems, that did not make the permit ministerial: "[i]t is enough the city retains

discretion substantial changes in building design." *Friends of Westwood*, p. 269.

In sum, *Friends of Westwood* solidified the proposition that it is the discretion contained in the ordinance's *language* that is dispositive; *not* the permitting official's determination whether a given project requires the use of that discretion.

Later cases applying the functional test

Ten years after *Friends of Westwood*, this Court ratified the statutory language-focused application of the functional test in *Mountain Lion Foundation v. Fish & Game Comm'n* (1997) 16 Cal.4th 105. There, petitioners challenged the State Fish and Game Commission's removal of the Mojave ground squirrel from the state list of threatened species, claiming the action was discretionary. Affirming and adopting the rationale of *Friends of Westwood, id.* at 112, 117, the Court looked to the language of the Fish & Game Code and implementing regulations, concluding that the delisting decision was a discretionary action subject to CEQA:

> The numerous **statutory provisions** and administrative regulations governing the listing and delisting process leave no doubt as to the discretionary nature of the Commission's delisting decision. (*See*, e.g., *Fish & G. Code*, §§ 2074.2, 2075 [Commission shall consider petition]; Cal.Code Regs., tit. 14, § 670.1, subd. (i)(1)(B) [species may be delisted if Commission determines its existence no longer threatened by enumerated factors].)

Id. at 118, boldface added.

Other cases applying the *Friends of Westwood* functional test have found permits to be ministerial and exempt from CEQA. In *Leach v. City of San Diego* (1990) 220

Cal.App.3d 389, the court held that a municipality was not required to prepare an EIR before draining water from a reservoir. The court reasoned that despite environmental consequences, the municipality had little or no ability to minimize in any significant way the environmental damages that might be identified in a CEQA document. *Id.* at 394-395. The court explained:

> [T]he City's operation of its reservoir system is a ministerial activity. These reservoirs were constructed for the sole purpose of ensuring a portion of San Diego's population a constant water supply. They were intended to be drafted for such use. The decision to draft water from one particular reservoir to another within this system does not involve personal judgment as to the wisdom or manner of carrying it out.

Id. at 393.

In *Friends of the Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, the petitioners alleged the City of Palo Alto's issuance of a demolition permit under its municipal code was discretionary and subject to CEQA. Petitioners argued that an ordinance provision barring any action on a permit application for 60 days pending referral to an architectural and/or historical resources review board rendered the permitting scheme discretionary, since it "implied" authority to condition or deny the permit--even though the plain language of the ordinance provided no such authority. The court applied the *Friends of Westwood* test in the same language-focused manner, and "as a matter of judicial restraint," declined to imply discretionary provisions that did not facially appear in the ordinance. *Id.* at 307.

In *San Diego Navy Broadway Complex Coalition v. City San Diego* (2010) 185 Cal.App.4th 924, the Fourth District in *San Diego Navy* applied the *Friends of Westwood* functional test to a design review approval required for a project for which an EIR had already been certified. The court found that because the design review body's authority to "shape" the project was limited to concerns of design and aesthetics only, it was not required to prepare an EIR to examine other issues, such as the project's global climate change impacts. 185 Cal.App.4th at 938. The court found that although the design review body may have exercised *some* discretion with respect to various *aesthetic* issues relating the previously approved project, there had been no showing that its discretion extended beyond such issues to encompass impacts on global climate change. *Id.* at 938.

As with its forebears, the *San Diego Navy* court looked to the plain language of the legal source of the design review body's review authority, namely a development agreement between the project developer and the City that specified certain design guidelines. *Id.* at 937-938. The court noted that the development agreement's plain language sharply limited the design review body ("CCDC")'s authority to require any changes whatsoever to the submitted plans:

> The fact that the CCDC could arguably exercise discretionary authority to alter the aesthetics of the Project so as to make the Project consistent with the development agreement does not demonstrate that the CCDC had the authority to modify the Project in accordance with a proposed updated EIR so as to

> reduce the impact of the Project on global climate change.

Id. at 939. *San Diego Navy* is thus one of several Court of Appeal decisions holding that "design review" for aesthetic compatibility with governing land use plans that occurs after CEQA review of the entire project has been completed is a ministerial approval that does not trigger a subsequent round of environmental review under CEQA section 21166. *See e.g., Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1144; citing *Madrigal v. City of Huntington Beach* (2007) 147 Cal.App.4th 1375 and *Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 724.[2]

In *Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, the First District rejected the petitioner's challenge to a County ordinance declaring all lot line adjustment approvals to be ministerial actions and exempt from CEQA. Applying the *Friends of Westwood* functional test, the court found that the plain language of the ordinance mandated approval of any lot line adjustment application that complied with "12 specified standards." *Id.* at 177. The 12 standards, which the court quoted in toto (*id.*, footnote 11), were all plainly objective, quantitative criteria, as

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[2] This line of cases is inapposite here because the County's ordinance does not provide "design review" for aesthetic impacts and the County's permit approvals do not follow any previous environmental review under CEQA. In any event, *San Diego Navy*'s ultimate outcome is the product of its unique facts, and it by no means serves to contradict the Fifth District's holding in the current case. *See also McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80.

the court noted. In so holding, however, the court was careful to note that "the Ordinance does not enable any development beyond what already is possible through existing land use policies and zoning laws," and thus would not lead to any physical changes in the environment that would trigger CEQA. *Id.* at 180.[3]

In sum, the foregoing synopsis shows that courts across several Appellate Districts have for decades consistently adopted a language-focused approach to determining whether permit approvals are discretionary or ministerial for purposes of CEQA. If upon examination of the plain language of the permitting statute or ordinance, within the context of the broader permitting scheme and the principle that CEQA must be interpreted "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language," the court finds provisions that require officials to use subjective judgment, or authorize them to condition, modify, or deny projects on environmental grounds, the approval is discretionary.

Sierra Club v County of Sonoma transmutes the functional test into a fact- and circumstance-based inquiry.

More recently, the First District published its opinion in *Sierra Club v. County of Sonoma* (2017) ("*Sierra Club*") 11 Cal.App.5th 11. That case declared, for the first time, that "a determination whether issuing a permit is ministerial or

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[3] Unlike the current case, where well drilling permits plainly authorize physical environmental changes and resource extraction.

discretionary generally must be made *on the basis of the project's particular circumstances.*" *Id.* at 24, italics added. The opinion, which strains to distinguish several of the cases discussed above (*id.* at 28-29), stands as a complicating and starkly revisionist approach to the *Friends of Westwood* functional test, one that this Court should repudiate.

In *Sierra Club*, the petitioners argued that a vineyard development permit issued under a Sonoma County permitting ordinance was discretionary based on the presence of several "subjective standards that require County personnel to use deliberation and personal judgment to determine whether and how vineyard developments should be carried out." *Id.* at 25. For example, petitioners cited ordinance provisions requiring cuts and fills to be "limited to the amount necessary for the intended use;" requiring storm water to be diverted to "the nearest practicable disposal location;" requiring "suitable stabilization measures" to protect against a loss of topsoil during grading activities; and requiring minimum setbacks from wetlands and stream channels "unless a wetlands biologist recommends a different setback." *Id.* at 25-27.

The First District found that even though some of these provisions were "arguably" discretionary, they did not trigger CEQA because the permitting officials had found they did not apply as a factual matter to the project in question. 11 Cal.App.5th at 27. With respect to other discretionary provisions in the ordinance, including the one allowing County officials to reduce minimum wetland setback

requirements based on an outside wetland biologist's recommendations, the court's reasoning in finding this provision ministerial is, frankly, startling:

> In a report submitted with the Ohlsons' application, a wetlands biologist stated that a 35–foot setback was sufficient because the slopes would be covered with vegetation and because cattle grazing, which had damaged the wetlands, would be eliminated. The provision required the Commissioner to allow the 35-foot setback in the absence of some reason to reject the biologist's report. 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." Petitioners point to nothing demonstrating that the Commissioner had discretion under this provision or, even assuming there was some discretion, could mitigate potential environmental impacts to any meaningful degree.

Id. at 30. Why is this startling? Because it delegates the County's discretion to a private party, which is flatly inconsistent with CEQA's requirement that government agencies retain control over mitigation. *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 280-82 [mitigation measure violated CEQA when specific details of implementing activities were subject to discretion of preserve manager based on environmental conditions]; *Madera Oversight Coalition* (2011) 199 Cal.App.4th 48, 81-82 [CEQA prohibits "environmental decision[s] to be made outside an arena where public officials are accountable"].)

Also startling, *Sierra Club* sought to distinguish *Ramey* and *Day*, based on the large number of pages of "substantive provisions" contained in the County's ordinance:

> First, and most importantly, in contrast to the significant discretion granted to the agencies in [*Ramey, Day,* and *Friends of* Westwood], the Commissioner's consideration of the Ohlsons' application was confined by a series of finely detailed and very specific regulations. The substantive provisions in article 16 of the ordinance run to 17 pages in the administrative record and the best management practices add a further 36 pages, covering a wide range of circumstances and prescribing specific measures to address them. While these provisions may grant some discretion, the scope of any such discretion is drastically narrower than that which was conferred by the broad language of the regulations in *Department of Housing* [*Ramey*], *Day*, and *Friends of Westwood.*
>
> 11 Cal.5th at 29.[4]

The *Sierra Club* court failed, however, to offer any metric whatsoever to determine when the scope of an agency's discretion is so much "narrower" than the scope of discretion conferred in *Ramey*, *Day*, and *Friends of Westwood* that CEQA would not be triggered. This Court has previously rejected approaches to difficult CEQA issues that invite arbitrary results. For example, in *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.*

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[4] The court's reliance on the volume of provisions in the ordinance is surprising given *Friends of Westwood*'s statement that "it is not the *number* of decision points on this flow chart which alone makes the 'plan check; a discretionary approval process. Rather it is the *amount* of discretion public employees exercise at many of these decision points. 191 Cal.App.3d at 274.

(2016) 1 Cal.5th 937, this court rejected the "new project" criterion for determining the standard of review for subsequent environmental review under CEQA, observing that:

> In the absence of any benchmark for measuring the newness of a given project, the new project test plaintiff urges would inevitably invite arbitrary results. As the Court of Appeal in *Mani Brothers* observed, to ask whether an agency proposal constitutes a "'new project'" in the abstract "does not provide an objective or useful framework."
>
> *Id* at 951.

Yet more startling still in Amici's view is *Sierra Club*'s assertion that the ministerial vs. discretionary question turns on whether the provision in question is "technical" in nature, and how the provision might be understood by a "lay person:"

> In addition, the provisions [in vineyard ordinance] are technical. A provision that appears to a lay person to grant discretion to an agency might, as understood by a person with technical knowledge, grant little or none in the context of a particular proposed project.

Ibid.

The court reasoned that the discretionary provisions in the ordinances addressed in *Ramey*, *Day*, and *Friends of Westwood* were "meaningful" from an environmental protection standpoint, while those in Sonoma County's vineyard ordinance were not, based on what the court believed was the relative size of the projects in question. *Id.* at 28 ("there was no question that the discretion involved in approving both of these large projects [in *Day* and *Friends of*

Westwood allowed for environmentally meaningful mitigation"). This logic stands in direct conflict with CEQA's long-standing principle that there is no "de minimis" exemption from CEQA, because small impacts from small projects may nevertheless be cumulatively considerable. *See, e.g., Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal.App.4th 98, 116-117.

III.
The Court should disapprove *Sierra Club* and decline to adopt the County's outlying, unworkable approach to the functional test.

The County here relies exhaustively on *Sierra Club* to support its argument for an ad hoc, "approval-by-approval" application of the functional test. The key problems with *Sierra Club*, and the reasons why this Court should decline to endorse or adopt the County's view of the functional test, are threefold.

First, *Sierra Club* places an unreasonable and unfair burden on members of the public who might be adversely impacted by a vineyard development, requiring them to prove, in the absence of any public administrative process, that the factual predicates for the exercise of discretion under a local permitting ordinance exist. The opinion acknowledges that the permitting ordinance in question contained discretionary provisions that *could* be triggered by *some* projects depending on the particular characteristics of the site, and/or the scale and specifications of the project proposal. Yet by faulting the petitioners for not having presented facts showing the proposed vineyard's site characteristics and engineering

specifications triggered the ordinance's discretionary provisions, the opinion shifts the burden of environmental fact-gathering away from the agency and onto the public – a near impossible task given the lack of any public notice, public hearing, or meaningful opportunity for public input for permits the local agency considers ministerial. And by also faulting petitioners for not having presented facts showing the agency could have exercised "environmentally meaningful" discretion to mitigate the project's specific impacts, *id.* at 339-340, the court places a new burden on the public to essentially perform a CEQA-esque initial study of a project's impacts itself, and then proffer the results to the agency--before it issues the permit--to persuade the agency that it should exercise its discretion.[5]

Further, by requiring the public to gather and present facts concerning precise physical details of a proposed project or site – a difficult if not impossible task given such projects will nearly always be on private property – *Sierra Club* violates CEQA's maxim that it is the agency, not the public, that bears the burden of information gathering and disclosure. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 724. Moreover, by calling for the parsing of permitting ordinances into separate, disconnected provisions, the County's view ignores the inherently discretionary nature of

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[5] The opinion imposes these burdens on the public even as it acknowledges that there likely will be no meaningful opportunity for public participation given the "informal" nature of this type of permitting process. *Id.* at 342, fn. 19.

the permitting scheme as a whole, contravening longstanding principles of statutory interpretation.[6]

Accordingly, both *Sierra Club* and the County's view of the functional test transform what the courts have long understood to be a question of law – whether a permitting scheme affords local officials environmentally meaningful discretion in deciding whether and how to approve projects – into a question of fact. According to their revisionist view, the determination whether a permit application is discretionary and subject to CEQA occurs only after a permit is applied for, at which time an official decides whether as a factual matter the project implicates discretionary provisions in a "meaningful" manner, based on factors such as the number of provisions in the ordinance, whether the provisions are "technical" in the eyes of a lay person, and the official's opinion of the project's size.[7]

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[6] A statute and the statutory scheme must be construed as a whole. "The meaning of a statute may not be determined from a single word or sentence." *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 659. "[T]he words of a statute [must be construed] in context, harmoniz[ing] the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole." *Cummins Inc. v. Superior Court* (2003) 36 Cal.4th 478, 487. The statute's various components should be read together to achieve the overriding purpose of the legislation. *Eisner v. Uveges* (2004) 34 Cal.4th 915, 933.

[7] Amici are unaware of any case that suggests, let alone affirms, that mitigation can only be "meaningful" if a project is relatively large. A small project on a minor parcel can have permanent, devastating environmental impacts depending on factors such as the presence of wetlands, endangered species,

For these reasons, this Court should decline to endorse *Sierra Club*'s transformation of the functional test away from a clear and practical statutory language-based analysis and into an unworkable fact-based, circumstance-specific analysis that will lead to arbitrary results.

IV.
Under the standard application of the functional test, well permits issued in accordance with the DWR Bulletins are plainly discretionary.

With due respect to the Fifth District's conclusion that one DWR Bulletin provision is discretionary for purposes of CEQA, Amici argue that the Bulletins actually contain several such discretionary provisions. Indeed, the entire regulatory framework established by the Bulletins is imbued with discretionary elements, most stemming from the Bulletins' own statements that the state standards are essentially baseline standards from which local officials may be called upon to deviate as local conditions prescribe.

For example, Chapter II of Bulletin No. 74-81, titled "Water Well Standards," provides in its introduction:

> The standards presented in this chapter are intended to apply to the construction (including major reconstruction) or destruction of water wells throughout the State of California. *However, under certain circumstances, adequate protection of groundwater quality may require more stringent standards than those presented here; under other circumstances, it may be*

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hazardous materials, sensitive receptors, and the like. It is up to an initial study prepared under CEQA to determine the significance of impacts and mitigation, not a pre-supposition based on generalized notions of project scale.

> *necessary to substitute other measures which will provide protection equal to that provided by these standards. Such situations arise from practicalities in applying any standards or, in this case, from anomalies in groundwater geology or hydrology.* ***Since it is impractical to prepare standards for every conceivable situation, provision has been made for deviation from the standards as well as for additional ones.***

AA129. Thus, the state standards contemplate that local authorities may often need to exercise judgment to ensure protection of groundwater when the DWR "baseline" standards are inadequate to a particular circumstance of location.

Accordingly, Bulletin No. 74-81 at Chapter II, Part I, Section 3, provides:

> Exemption Due to Unusual Conditions. If the enforcing agency finds that compliance with any of the requirements prescribed herein is impractical for a particular location because of unusual conditions or if compliance would result in construction of an unsatisfactory well, *the enforcing agency may waive compliance and prescribe alternative requirements which are "equal to" these standards in terms of protection obtained.*

Finally, Bulletin 74-81 provides additional discretionary authority in Chapter II, § 5 for agencies to prescribe "*special standards*" based on local conditions:

> Special Standards
>
> A. In locations where existing geologic or groundwater conditions require standards more restrictive than those described herein, or in addition to them, *such special standards may be prescribed by the enforcing agency.*

> B. Special standards are necessary for the construction of recharge or injection wells, horizontal wells and other unusual types of wells. *Design of these wells is subject to the approval of the enforcing agency.*

AA 151.

Following Bulletin 74-81, Bulletin 74-90 Section 8 goes on to provide for locating wells outside areas of flooding "if possible," based on a subjective determination of practicability and/or necessity:

> Flooding and Drainage. *If possible,* a well should be located outside of areas of flooding. The top of the well casing shall terminate above grade and above known levels of flooding caused by drainage or runoff from surrounding land. [¶] If compliance with the casing height requirement for community water supply wells and other water wells *is not practical, the enforcing agency shall require alternate means of protection.* [¶] Surface drainage from areas near the well shall be directed away from the well. *If necessary,* the area around the well shall be built up so that drainage moves away from the well.
>
> AA 184.

Furthermore, several of Bulletin 74-90's otherwise objective standards are accompanied by express notations that exceptions or alternative standards may be used "*at the approval of the enforcing agency on a case-by-case basis*" or where "*otherwise approved by the enforcing agency.*"

Amici submit the foregoing standards are patently discretionary under the traditional application of the functional test. Each one calls for the use of subjective judgment and/or opinion by the permitting authority to decide whether and if so how to deviate from the quantitative

standards otherwise provided in the Bulletins, and/or to impose additional, new, or different physical and/or regulatory requirements. Each of the foregoing provisions is specifically intended to address an environmental concern in a significant, meaningful manner that could be brought to light in an environmental review under CEQA – namely potential adverse impacts to groundwater.

The DWR bulletin standards incorporated into the County's ordinance vest the County with authority to "modify" all well construction permits to protect groundwater resources, neighboring users, and the environment generally. The standards are therefore the very epitome of discretionary authority under CEQA. *See Friends of Westwood, supra*, 191 Cal.App.3d 259 at 266-267 ("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"). And, again, "[w]here a project involves an approval that contains elements of both a ministerial action and a discretionary action, the project will be deemed to be discretionary and will be subject to the requirements of CEQA." Guidelines § 15268(d).

V.
The Court should reverse *California Water Impact Network v. County of San Luis Obispo.*

This Court has granted "review and hold" as to Amicus California Water Impact Network (C-WIN) petition for review of the Second District's decision in *California Water Impact*

Network v. County of San Luis Obispo (2018) 25 Cal.App.5th 666 (Supreme Court No. S251056). While further briefing in that case may or may not eventuate, Amici respectfully submit that if the Court affirms the Fifth District's opinion in *POWER,* it should simultaneously reverse *California Water.* Since both the Stanislaus and San Luis Obispo County ordinances incorporate the same DWR Bulletins by reference, the issues raised in both appeals are functionally identical.

That said, *California Water* contains errors of law that go beyond application of the functional test for discretion under CEQA. The court held, for example, that because San Luis Obispo County's ordinance and the DWR Bulletins regulated groundwater *quality,* the County had no authority to impose conditions on well permits addressing other environmental concerns, and CEQA therefore could not apply:

> [o]nly an impermissible rewriting of the ordinance would allow us to infer a legislative intent to condition well permits on pump limits or subsidence monitoring, which have nothing to do with groundwater pollution. The County has no discretion to impose water usage conditions on permits issued under Chapter 8.40
>
> 25 Cal.App.5th at p. 678.

This reasoning improperly conflates the regulatory ambit of the permitting ordinance with the separate duty under CEQA to identify feasible measures to mitigate environmental impacts – even where the agency itself lacks jurisdiction to enforce those measures. As the Fifth District correctly observed in *POWER,*

> [w]hen 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."

POWER Op. at p.12, citing *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 715–716.

If a permitting ordinance grants an agency discretionary authority to protect or regulate *any* environmental resource, then CEQA applies; and once CEQA applies, the agency must evaluate all potential environmental impacts and mitigate them where feasible. It may not "dispense with CEQA altogether" simply because it would need to evaluate impacts it is powerless to mitigate. *POWER* at 22.

Left standing, *California Water* would nullify this central

VI.
Affirming the Fifth District will not create an undue burden on local well permitting agencies.

The Fifth District itself addressed concerns raised by other amici curiae below that its ruling would create an undue administrative burden on local well permitting agencies. *POWER* at p. 22 ("Elsewhere, CEQA does address the reality that some projects are too small or inconsequential to justify the time and expense of an EIR. [Footnote omitted]. But we may not shoehorn that concern into the ministerial exemption, which addresses a different issue"). The court added:

> 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.
>
> *POWER* at fn. 24.

Amici would simply add two observations. First, CEQA's "common sense" exemption exists precisely for purposes of avoiding unnecessary CEQA review of projects that could not possibly have significant adverse environmental impacts. CEQA Guidelines, § 15061(b)(3) (CEQA review not required '[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment"). Thus, the vast majority of well drilling permits for domestic or small-scale commercial water supply wells will be properly exempt from CEQA under this commons sense exemption, while wells for large-scale agricultural, commercial, or industrial uses will require some degree of environmental impact analysis.

Second, the court in *Friends of Westwood,* facing a similar protest from the City of Los Angeles, responded:

> Respondent predicts all manner of dire consequences should we hold issuance of the building permit in this case constitutes a "discretionary project" within the meaning of [CEQA]. They warn that if this one requires environmental review so would all the other 40,000 building permits issued each year in the city of Los Angeles. The entire building permit approval process would be thrown into chaos and new construction of all kinds would lurch to a halt.
>
> We have some doubts the building permit approval process would be tied in knots even were we to hold all building permits were discretionary. Both sides, for their own reasons, pointed out San Francisco has

> designated all building permits to be discretionary and thus subject to the environmental provisions of CEQA. No evidence was submitted suggesting this has led to a regulatory quagmire in that city."
>
> 191 Cal.App.3d at p. 279-280.

Thus, even if there were legitimate concerns that requiring CEQA compliance for well drilling permits would swamp local agencies – there are not – this is plainly not a factor for the Court to consider in addressing the question whether such permits are discretionary or ministerial. The Court should decline to consider these arguments here.

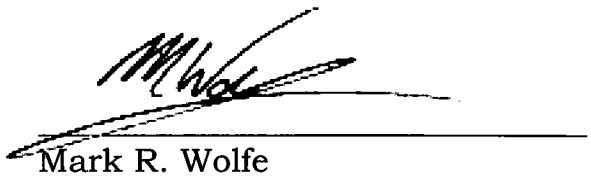
Conclusion

For the above reasons, the Court should affirm the Fifth District's opinion.

Dated: May 9, 2019

Respectfully submitted,

M. R. WOLFE & ASSOCIATES, P.C.



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CERTIFICATION OF LENGTH

I, Mark R. Wolfe, declare:

In accordance with Rule 8.504(d)(1) of the California Rules of Court, I hereby certify that the length of this brief, including footnotes but excluding tables, as calculated by the word processing software with which it was produced, is **7,400** words.

I affirm, under penalty of perjury, that the foregoing is true and correct.

Dated: May 9, 2019 By: _____
Mark R. Wolfe

PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of San Francisco and my business address is 555 Sutter Street, Suite 405, San Francisco, CA, 94102.

On May 9, 2019, I served the attached **APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF** as follows by U.S. Postal Service, first class delivery, postage fully prepaid, addressed as shown:

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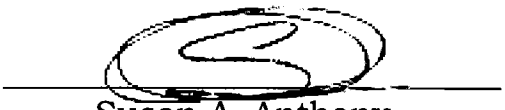
I declare, under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: May 9, 2019



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