Supreme Court of California Weighs In on Blanket Categorization of Well Construction Permit Approvals as Ministerial

by Niran S. Somasundaram

Key Points

- A permitting agency's blanket designation of an entire category of permit decisions as ministerial for purposes of the California Environmental Quality Act (CEQA) may be held to be improper if the agency has the ability to modify or deny the permit based on any concern that may be examined under CEQA review.
- Courts will afford a larger degree of deference to an agency's designation of a single permit decision as ministerial on a case-by-case basis.

Under CEQA, perhaps the earliest key determination a governmental entity can make is whether its role in a project is ministerial or discretionary. This distinction is crucial to government entities and project developers alike; if there is no discretionary approval on the part of the governmental entity, then the entity's decision is ministerial, and the project itself is statutorily exempt from the demands of CEQA. (*see* Pub. Res. Code § 21080(b)(1);*see also* CEQA Guidelines § 15268(a).) In *Protecting Our Water and Environmental Resources, et al.. v. County of Stanislaus, et al.,* filed on Aug. 27, 2020, the Supreme Court of California addressed the permissibility of a County blanket designating an entire subset of permit approvals as ministerial, even though the text of the governing ordinance left at least a portion of the approval decision up to the judgment of County officials.

The case examined the distinction between discretionary and ministerial approvals in the context of Stanislaus County's ordinance governing the issuance of well construction permits, and more specifically, Stanislaus County Code Chapter 9.36, which incorporates well standards set forth in a State Department of Water Resources bulletin.[1] A particular provision of Chapter 9.36, incorporating Standard 8.A of State Department of Water Resources Bulletin No. 74, provides specific standard set-off distances for proposed wells located near resources with the potential for contamination, such as groundwater. However, the provision also makes clear that the standard distances are not intended to be rigidly applied, and that the County has the ability to increase or decrease set-off distances based on the many variables that determine safe set-off distance, including "detailed

evaluation of existing and future site conditions."

Since 2014, the County had categorized all permits issued under Chapter 9.36 (and not requiring a variance) as ministerial projects. However, plaintiff groups challenged this categorization as improper, arguing that the text of Chapter 9.36 demonstrated that permit issuances under Chapter 9.36 should instead be categorized as discretionary.

The Court examined the County's permitting power under Chapter 9.36, focusing on what it determined to be the crux of agency discretion: whether "the agency is empowered to disapprove or condition approval of a project based on environmental concerns that might be uncovered by a CEQA review […]."

The Court found that the ability of the County to determine on a case-by-case basis whether a prescribed statutory standard set-off distance was appropriate conferred significant discretion on the County in some cases, rendering its blanket categorization of permit approvals as ministerial improper. In particular, the Court noted that Standard 8.A specifically states that an adequate set-off distance may depend on several variables, and explicitly allows for set-off distances to be increased or decreased based on the "the opinion of the enforcing agency […]" regarding the level of protection needed, which "allows County to shape a well construction project in response to concerns that could be identified by an environmental review." The Court found that the County's ability to require a different well location, or deny a permit, was sufficient authority to render a permit discretionary when the County is elected to alter a project under Standard 8.A. The Court also found that the County's lack of ability to impose mitigation measures under Chapter 9.36 did not affect its determination that permits issued under the Chapter could be discretionary.

However, the Court rejected plaintiffs' contention that all permit approvals should be blanket classified as discretionary, as there are some circumstances under which the ordinance does not allow the County any discretion. Instead, the Court was careful to hold that County may find permit approvals to be a ministerial action on a case-by-case basis when the record supports such a classification.

In rejecting the County's argument that the interpretation of County ordinances should be left to the County, as it is the party best situated to determine intent and meaning, the Court reasoned that the portions of the County ordinance relevant to the case were those that merely incorporated State standards by reference. Since the agency that promulgated the standards was not a County agency, the Court held that the CEQA guidelines and precedent supporting deference to an agency's determination of what is ministerial or discretionary were not relevant. Furthermore, the Court suggested that its position on discretion may be different if it were reviewing a particular permit issuance decision, but the County's claim here was that the ministerial exemption applied to an entire category of permits as a matter of law.

The *Protecting Our Water and Environmental Resources* decision is instructive to governmental entities or project proponents attempting to determine whether project permits are discretionary. While the Court notes that the blanket categorization of a category of permits is technically permissible, its holding demonstrates that such categorizations will be scrutinized and will be found to be improper if the permitting agency has any ability to deny or modify a project based on any concerns that could properly be the focus of CEQA analysis. It appears that Courts will be far more lenient and deferential to permitting agencies if ministerial categorizations are made for particular permits on a case-by-case basis.

For more information about this decision or any other land use issue you are facing, please contact the author or the Hanson Bridgett Land Use Group. You can also follow @Cal_LandUseLaw on Twitter.

[1] The standards particularly addressed by the Court are state standards taken from Sections 8.A, 8.B, 8.C,

and 9 of State Department of Water Resources Bulletin No. 74.

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