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Ms. Rachel Van Mullem
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Santa Barbara County
105 E. Anapamu St., Rm. 201
Santa Barbara, California 93101

Re: Application of CEQA to ministerial aspects of proposals

Dear Ms. Van Mullem:

Thank you for taking the time to discuss the pending appeal with me. In response to the request for any applicable legal authorities, I offer to you the following analysis.

In *Sierra Club v. County of Sonoma* (2017) 11 Cal. App. 5th 11, the Sierra Club challenged an erosion control permit to establish a vineyard on land devoted to grazing cattle. It asserted the permit possessed discretionary aspects; therefore, CEQA compliance was a condition precedent before considering the plan. While planting a vineyard was a "matter of right" (*Id.* at 16) the Sierra Club nevertheless maintained the enabling ordinance contained some aspect of discretionary power.

The appellate court upheld the trial court's dismissal of the petition, finding the fact the challenged ordinance conferred some discretion did not automatically trigger CEQA requirements. Instead a petitioner must prove the public agency has the ability and authority to mitigate environmental damage identified by the petitioner. More specifically, the Appellate Court wrote:

> Petitioners argue that the language of these provisions is general enough to confer discretion. But even assuming we could interpret these provisions to grant some discretion to the Commissioner, we reject petitioners' argument that this alone requires us to hold that the Commissioner's issuance of the Ohlsons' permit was a discretionary act. **The argument ignores the principle, arising out of the functional test, that "'CEQA does not apply to an agency decision simply because the agency may exercise some discretion in approving the project or undertaking. Instead[,] to trigger CEQA compliance, the discretion must be of a certain kind; it must provide the agency with the ability and authority to "mitigate ... environmental damage" to some degree.'"** (*San Diego Navy Broadway*

> *Complex Coalition v. City of San Diego, supra,* 185 Cal.App.4th at p. 934, italics omitted.) For the reasons discussed above, **the existence of discretion is irrelevant if it does not confer the ability to mitigate any potential environmental impacts in a meaningful way.** (See also *Johnson v. State of California* (1968) 69 Cal.2d 782, 788 [73 Cal. Rptr. 240, 447 P.2d 352] ["'[I]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail'"].)

*Id.* at 28 (bolding added).[1]

This conclusion conforms to the general conclusion, presented in *Sierra Club v. Napa County* (2012) 205 Cal. App. 4th 162, that CEQA:

> requires assessment of environmental consequences where government has the power through its regulatory powers to eliminate or mitigate one or more adverse environmental consequences a study could reveal.

*Id.* at 179.[2] There the Appellate Court cited with authority the general principle that the mere existence of discretion is insufficient to compel CEQA compliance. Instead the discretion must empower the agency to mitigate the environmental consequences of the approval:

> Following *Friends of Westwood*, the court in *Leach v. City of San Diego* [citation omitted] held that a municipality was not required to prepare an environmental impact report before being permitted to draft water from a reservoir; despite environmental consequences, the municipality had little or no ability to minimize in any significant way the environmental damages that might be identified in the report. As one reviewing court recently put it, quoting from a major treatise: "'CEQA does not apply to an agency decision simply because the agency may exercise some discretion in approving the project or undertaking. Instead to trigger CEQA compliance, the discretion must be of a certain kind; it must provide the agency with the ability and authority to "mitigate ...

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[1] The Appellate Court also offered a practical public policy reason for rejecting the petitioner's extreme CEQA interpretation: "It is worth pointing out that adopting petitioners' argument would have the perverse effect of discouraging agencies from enacting ordinances, such as the ordinance here, specifically designed to mitigate environmental impacts through a permitting process. Under petitioners' view of the law, if an agency has *any* discretion under the language of such an ordinance it cannot determine that issuing a permit is ministerial, even if there is nothing to suggest that the discretion allows the agency to further mitigate potential environmental impacts to any meaningful degree. If this were the law, agencies would be motivated to avoid CEQA burdens by simply not enacting such ordinances in the first place." Id. at 28 fn. 17.

[2] Of course, as we know, CEQA "does not grant an agency new power independent of the powers granted to the agency by other laws." CEQA Guideline §15040(b). Pub.Res.Code §21004.

> environmental damage" to some degree. [Citations.]' " (*San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) [citation omitted] italics omitted).

*Id.* at 179. This necessarily means that in order to present valid CEQA objections the alleged environmental harm must flow from the discretionary rather than ministerial aspect of the approval. Simply stated, a public agency has sufficient power to mitigate environmental harms flowing from the discretionary aspects of an approval but insufficient power to mitigate environmental harms flowing from the ministerial aspects of the project. A public agency does not have sufficient governmental power to mitigate an environmental harm flowing from a ministerial approval in a "meaningful way".

*San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal. App. 4th 924, "summarized the case law" as follows:

> Under the reasoning set forth in *Leach*, CEQA does not apply to an agency decision simply because the agency may exercise *some* discretion in approving the project or undertaking. Instead to trigger CEQA compliance, the discretion must be of a certain kind; it must provide the agency with the ability and authority to 'mitigate ... environmental damage' to some degree.

Id. at 934.[3]

We can first apply these general CEQA principles through an analogy. Assume an ordinance allows construction of a multi-story office tower after obtaining a building permit. The ordinance does not regulate the building height, as long as the building does not exceed ten floors. It does, however, give the building department some discretion regarding the type and density of landscaping surrounding the building. A builder seeks a permit for a ten floor building. The jurisdiction reviews and changes the builder's proposed landscaping plan and then grants the permit without CEQA review. The neighbors sue, arguing the building height will produce significant environmental damage, including traffic congestion. It does not complain about the landscaping plan, either as proposed or ultimately approved.

Apply the controlling legal authorities these hypothetical opponents have established the permit has an element of discretion but has failed to establish that the identified discretion is of a "certain kind...provid(ing) the agency with the ability and authority" to mitigate the alleged environmental damage. That is, the public agency had some degree of discretionary regulatory authority over the landscaping plan but no discretionary regulatory authority over the building height, as long as the building

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[3] To the extent the reasoning is helpful and illuminating, while the actual decision does not constitute binding legal precedent, we refer the reader to *Watertrough Children's Alliance v. County of Sonoma* (2017) Cal. App. Unpub. LEXIS 5319.

did not exceed ten floors. This conclusion is fully consistent with the authorities cited in this letter.

The same situation exists with the North Fork application opposition. While some discretion may be embedded in the approval, opponents have failed to correlate the environmental damage they alleged to the discretionary aspect of the application. Akin to our hypothetical project opponents they identify a discretionary aspect of the approval but raise alleged environmental damage stemming from the ministerial aspect of the project. Indeed, the project's representatives emphasized at the Planning Commission hearing that the environmental harms alleged related to the "approved as a matter of right" aspect of the project. The alleged environmental damage, according to the opponents, derives from ministerial but not discretionary aspects of the approval; accordingly, the public agency lacks "power through its regulatory powers to eliminate or mitigate one or more adverse environmental consequences a study could reveal".

Thank you for this opportunity to comment. We respectfully ask this letter be made a part of the record of proceedings.

Very truly yours,

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cc: Client Group