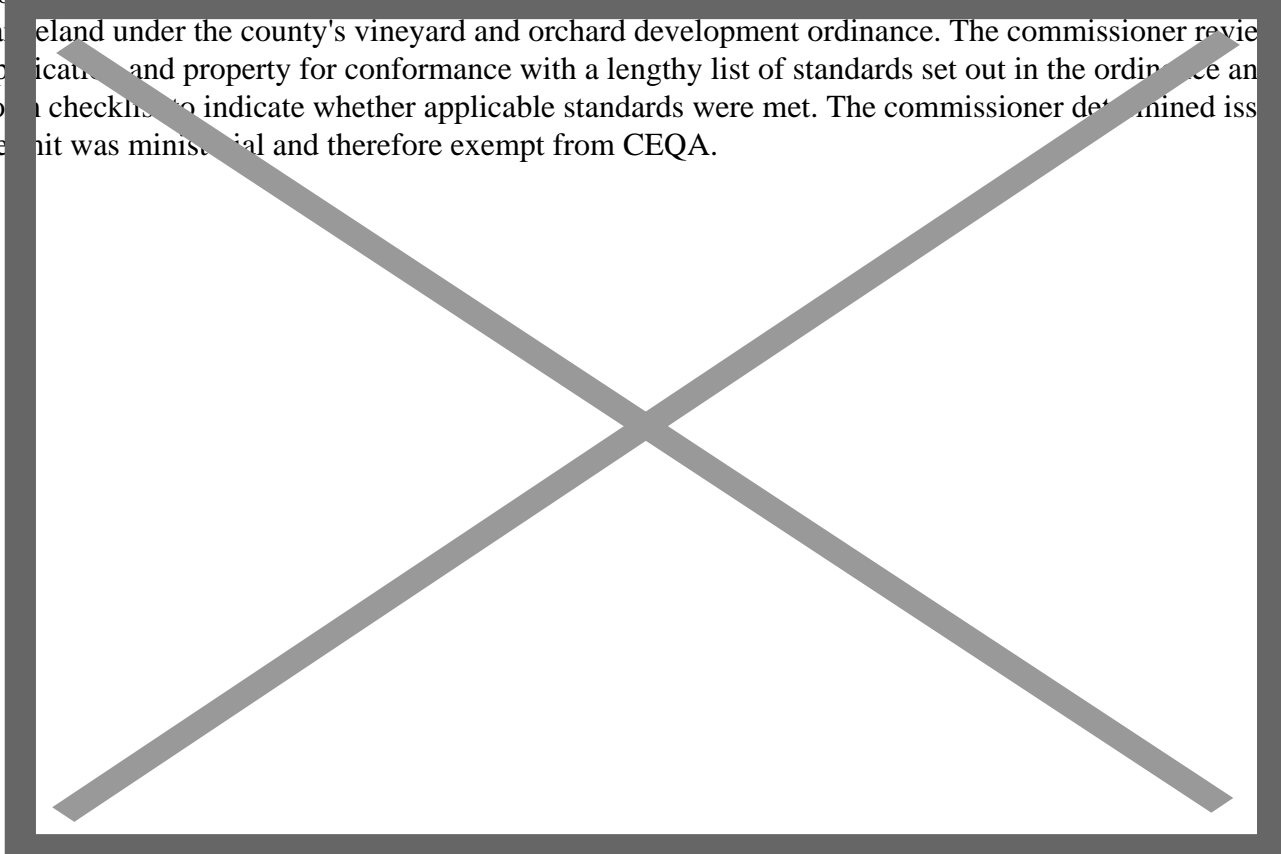


## A Project Is Not Discretionary If the Agency Lacks Authority to Require Mitigation

In *Sierra Club v. County of Sonoma*, (A147340, May 22, 2017) the First District Court of Appeal affirmed that a decision to issue a permit will trigger the duty to comply with CEQA only when the agency has the ability and authority to mitigate the project's environmental impacts to some degree. The Agricultural Commissioner of Sonoma County issued an erosion-control permit that allowed the applicants to establish a vineyard on former rangeland under the county's vineyard and orchard development ordinance. The commissioner reviewed the application and property for conformance with a lengthy list of standards set out in the ordinance and used a form checklist to indicate whether applicable standards were met. The commissioner determined issuance of the permit was ministerial and therefore exempt from CEQA.



CEQA

**Only Applies When the Agency Has Discretion to Mitigate a Project's Environmental Impacts to a Meaningful Degree** Environmental groups challenged the commissioner's determination, alleging the permit approval was discretionary because of the broad and vague substantive standards of the ordinance. Those standards provide guidance on proper grading, drainage improvements, and vineyard and orchard site development. The environmental groups argued the ordinance gave the commissioner broad discretion both to interpret and apply those standards and to require measures to mitigate environmental impacts that might occur. The trial court upheld the commissioner's decision and the court of appeal affirmed. The court's opinion focuses on the functional distinction between discretionary projects which are subject to CEQA, and ministerial activities which are exempt: whether applicable permitting standards give the agency the discretion to deny a permit or

impose mitigation measures based on the project's environmental impacts, or instead require the agency to approve the project if it is found to comply with permitting standards, whether or not it might adversely affect the environment. The court of appeal first acknowledged that some provisions of the ordinance required that the commissioner exercise discretion when applying them to a proposed project. It explained, however, that the discretion-conferring provisions of the ordinance would only be relevant to the analysis if they actually applied to the project. Here, the court held that only three provisions of the ordinance that could be interpreted as involving a discretionary determination applied to the project. But none of those provisions gave the commissioner the authority to exercise judgment or deliberation in deciding whether to approve the application or to mitigate environmental impacts in a meaningful way. The first provision required either a 50-foot setback from wetlands or a setback as recommended by a wetlands biologist. The court determined that this provision conferred no meaningful discretion ? either the project would have a 50-foot setback or a setback as recommended by a wetlands biologist, or it wouldn't. The second provision required diverting storm water to the nearest practicable disposal location and the third required the applicant to incorporate natural drainage features whenever possible. The court ruled that the environmental groups had failed to demonstrate that the commissioner had discretion under either provision, and also failed to show that the ordinance gave the commissioner authority "to mitigate potential environmental impacts to any meaningful degree." **Voluntary Mitigation Measures Do Not Make an Action Discretionary** The environmental groups also argued that issuance of the permit was discretionary because the commissioner requested additional mitigation measures and clarifications and corrections to the application before granting the permit. The court disagreed and explained that an action does not become discretionary simply because an agency makes such requests and an applicant voluntarily agrees to them. In this situation, the commissioner had no authority under the ordinance to require mitigation measures as a condition of approval and did not do so. Instead, the applicants voluntarily adopted further mitigation measures and made corrections and clarifications to their application. **The Takeaway Message** The court's decision reaffirms that an agency decision to approve a project will be treated as a discretionary action that is subject to CEQA only when the provisions of governing law that are claimed to provide discretionary authority over a proposed project directly apply to the project and give the decision-maker the authority to impose measures that will mitigate environmental impacts in a meaningful way.

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