



DISCRETION The Gateway to and Limitation on CEQA

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Agenda



Summary of
the three-step
CEQA process



Evaluation of Statutory,
Regulatory and Judicial
treatment of the
Ministerial/Discretionary
Dichotomy



Case Study:
*McCorkle
Eastside
Neighborhood
Group v. City of
St. Helena*

3-Step CEQA Process: 1st Step

- Is the proposed activity subject to CEQA?
 - Preliminary review to determine whether proposed activity constitutes a “project”
 - PRC § 21065 (defining “project”) is king
 - *Muzzy Ranch* and *UMMP*: Purely abstract and theoretical threshold inquiry resolved apart from factual record, based on the general nature of the proposed activity asking whether it is capable of causing a direct or reasonably foreseeable indirect physical change in the environment.
 - Bottom line: simple test, easily satisfied. If not a “project,” end of CEQA process. If a “project,” proceed to 2nd step

3-Step CEQA Process: 2nd Step

- Is the project exempt from CEQA?
 - Numerous statutory exemptions found both in and outside of CEQA; includes exemption for “ministerial” projects in PRC § 21080(b)(1) (much more on that later!).
 - 33 classes of categorical exemptions found in CEQA Guidelines §§ 15301-15333; BUT inapplicable if any exceptions in Guidelines § 15300.2 apply.
 - Common sense exemption in Guidelines § 15061(b)(3).
 - Multiple exemptions OK; preparation of CEQA document does not waive exemption; generally subject to substantial evidence standard with several caveats.
- If exempt, end of CEQA process. File Notice of Exemption to trigger 35-day Statute of Limitations (“SOL”) period. If not exempt, proceed to 3rd step.

3-Step CEQA Process: 3rd Step

- Environmental Review: Initial Study (“IS”) via Guidelines’ Appendix G Checklist
 - IS will form the basis for a Negative Declaration (no significant impacts) or a Mitigated Negative Declaration (potentially significant impacts reduced to insignificance by mitigation measures agreed to by applicant), or lead to preparation of full Environmental Impact Report (“EIR”).
 - Draft/ Final EIR, CEQA Findings, MMRP
 - Notice of Determination, 30-day SOL period

4th Step? Supplemental CEQA

- PRC § 21166; Guidelines §§ 15162-15164.
 - Applies when EIR certified or ND/MND adopted for a project and a subsequent discretionary approval is required.
 - Subsequent/ Supplemental EIR or ND/MND required ONLY if changes in the project or its circumstances or new information disclose a new or more severe impact not previously addressed.
 - Addendum for minor changes/ additions and to explain why no conditions requiring supplemental review are met (use hybrid checklist geared to Guidelines § 15162(a) triggers, i.e., changes or new information disclosing new or more severe impact

Ministerial v. Discretionary

Statutory

PRC § 21080(a) –
CEQA only applies to
discretionary projects

PRC § 21080(b)(1) –
CEQA does NOT
apply to ministerial
projects



Ministerial v. Discretionary

Regulatory Definitions

- **Ministerial** – decision involving little or no personal judgment re wisdom/manner of carrying out project. Involves only use of fixed standards or objective measurements (Guidelines § 15369, common examples cited – auto registrations, dog/marriage licenses, building permits [depending on language of local ordinance])
- **Discretionary** – judgment/deliberation, key question is whether agency can use subjective judgment to decide whether and how to carry out/approve a project (Guidelines § 15357)



Recommendation

Practice Tip: Adopt local CEQA Guidelines* that expressly identify/ list all local approvals that are ministerial

*CEQA requires local agencies to adopt local implementing procedures including, inter alia, a list of projects or permits over which the agency has only ministerial authority (Guidelines § 15022(a)(1)(B)) and acknowledges ministerial determination most appropriately made by local agency (Guidelines § 15268).



Mixed Ministerial/Discretionary

“Where 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))



Mixed Ministerial/Discretionary

- CEQA provides no separate grant of authority to require project changes or allow project denials in the name of environmental protection beyond the authority and discretion other non-CEQA laws afford an agency.
- Resulting Concept: CEQA's reach is limited to the amount and type of the underlying agency discretion.
- (PRC § 21004; Guidelines § 15040.)



Mixed Ministerial/Discretionary

Evolution of Concept in Caselaw:

- Functional Test – Can private applicant legally compel approval without changes (*Friends of Westwood v. City of Los Angeles* (1987) 191 Cal.App.3d 259 [building permit])
- *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004 [design review]
- *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924 [design review]
- *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11 [erosion control permit]

Mixed Ministerial/Discretionary

CA Supreme Court:

- *Protecting Our Water & Env'tl Resources v Stanislaus County* [review granted Nov. 14, 2018, S251709]
- *California Water Impact Network v. County of San Luis Obispo* [review granted Nov. 14, 2018, S251056; superseded opinion at 25 Cal.App.5th 666, 679])

*Both involve well drilling permits





Case Study

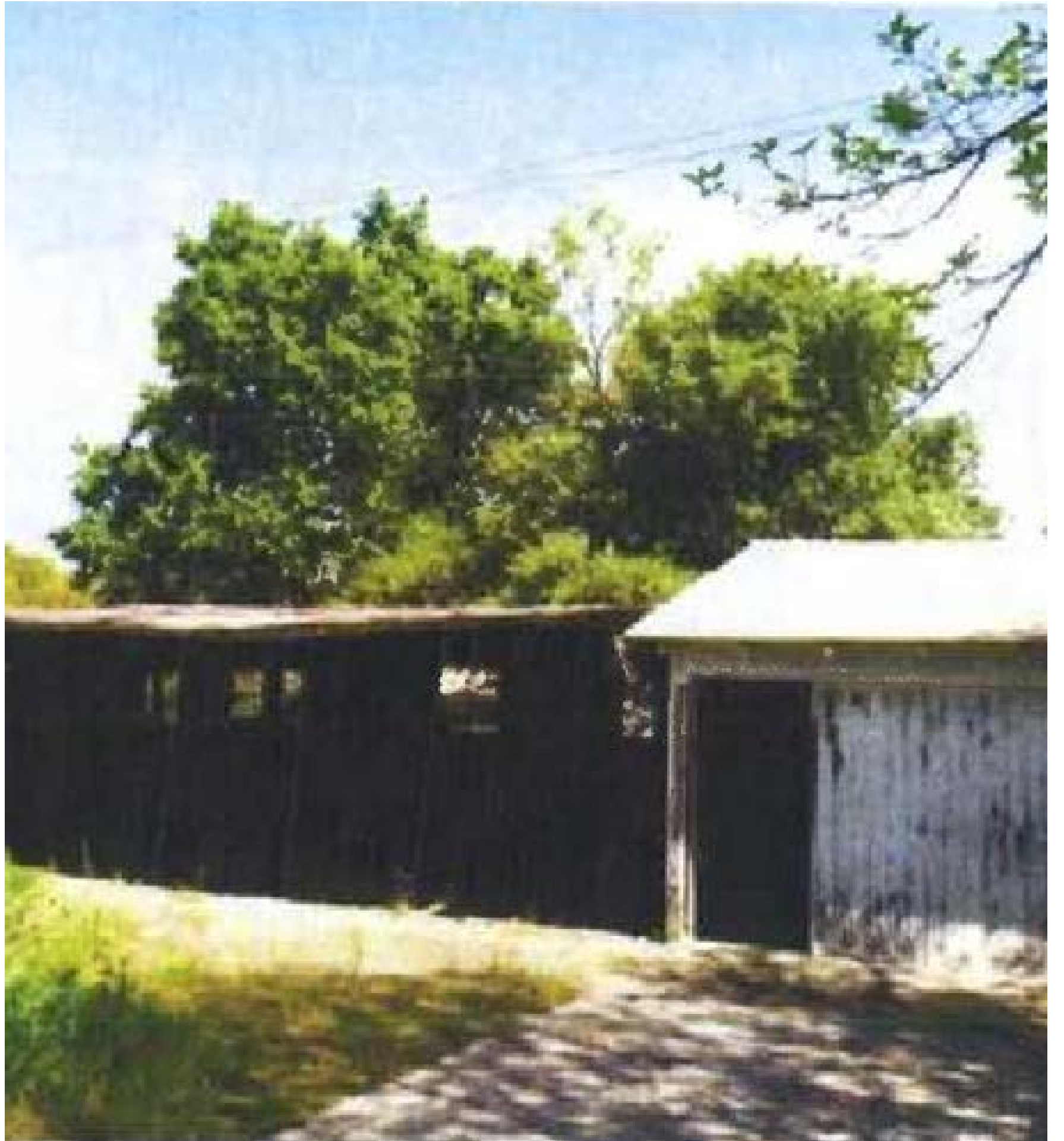
McCorkle Eastside Neighborhood Group

v. City of St. Helena

(2018) 31 Cal.App.5th 80



McCorkle Project Site





632 McCorkle Apartments Proposal





McCorkle Project and Litigation

○ Project site in High Density (HR) Residential Zone since at least 1993, but use permit required for projects with more than 4 units.

○ Project site contaminated with lead and hydrocarbons from prior owner's hoarding and messy auto "repair" hobby; current owner/ applicant entered voluntary agreement with Napa County (CUPA) to remediate.



At HCD's Insistence, City Updated Housing Element (2015) and Zoning Ordinance (2016) to eliminate use permit requirement for multi-family residential projects in HR zone, retaining only design review authority. At that time, City Attorney cautioned that as a permitted or "by right" use, City's future discretion over multi-family housing applications would be limited to aesthetic issues only under Design Review Ordinance.

Original application to demolish house and build 10 multi-family workforce apartments submitted shortly before City amended Zoning Ordinance, City staff requested traffic and biological studies to inform Class 32 infill categorical exemption determination.



After City amended Zoning Code, application revised to downsize project to 8-units, staff determined project fell under infill exemption and demo permit and design review findings could be made and were supported by record.

Planning Commission approved 3-2 based on infill exemption, neighborhood groups appealed to City Council, arguing project not exempt and EIR required to address alleged contamination, traffic, safety and historic resource impacts. City Council denied appeal, also approved project based on infill exemption.

City Attorney advised both PC and CC that their discretion was limited to aesthetic impacts under Design Review Ordinance and that the multi-family residential land use was permitted by right.



Writ Petition in Napa County Superior Court

- ✓ Administrative Record case, Petitioners' motion to augment record and allow discovery/depositions denied
- ✓ Trial Court Denied CEQA claims:
 - City's "limited" review was not abdication of electeds' authority or violative of PRC § 21151
 - Project qualified for Infill Exemption

Appeal to First District Court of Appeal

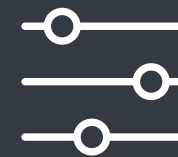
- ✓ Court focused on scope of City discretion
- ✓ Affirmed: publication requests granted - *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80
- ✓ Petitions for review and de-publication denied



McCorkle Court of Appeal's Analysis

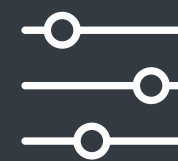


- CEQA applies to discretionary projects that may have a significant effect on environment
 - Mixed discretionary and ministerial = discretionary
- Touchstone: whether the agency could “meaningfully address any environmental concerns”
- Scope of CEQA authority is dependent upon powers granted by other laws
 - Guidelines § 15040(a); *Friends of Davis v. City of Davis*





McCorkle Court of Appeal's Analysis



- City's limited design review and CEQA authority
 - City properly found design review ordinance "prevented it from disapproving the project for non-design related matters"
 - City properly found CEQA review thus limited to design issues, such as "scale, orientation, bulk, mass, materials and colors"
- " 'Aesthetic issues ...are ordinarily the province of design review, not CEQA' " [quoting Bowman v. City of Berkeley]
- "Because of the lack of any discretion to address environmental effects, it is unnecessary to rely on Class 32 exemption"

Recommendation

Practice Tip: Take notice of any helpful unpublished court of appeal decisions in decision/findings so such decisions can be included in the Administrative Record and cited in merits briefing.

City did so here to get very analogous and helpful decision in the record and before the reviewing courts (*Venturansfor Responsible Growth v. City of San Buenaventura* (2013) 2013WL3093788

(See *People vMcDaniels* (1994) 21 Cal.App.4th 1560, 1566 fn. 2 [courts may properly consider analysis in un published opinion]; accord *Grist Creek Aggregates LLC v. Superior Court* (2017) 12 Cal.App.4th 979, 992 fn. 6.)

TakeAways:

- Agency's CEQA authority is dependent upon scope of its discretionary authority pursuant to underlying laws, regulations
- When substantive laws do not provide agency authority to alleviate adverse impacts (e.g., by denial or conditions to modify), no CEQA review
 - *McCorklev. City of St. Helena* (2018)
 - *Sierra Club v. County of Sonoma* (2017) [application of erosion control permit involved only ministerial decisions; ministerial exemption]
 - *San Diego Navy B'way Complex v. City of San Diego* (2010) [authority limited to design review following prior project approvals and EIR]
 - *Friends of Davis v. City of Davis* (2000) [authority limited to design review following prior approvals and EIR]

A piece of weathered, dark brown driftwood lies diagonally across a light blue wooden plank surface. A white, rectangular piece of paper or card is pinned to the wood, featuring the word 'Takeaway' written in a large, black, handwritten-style font. The background consists of vertical wooden planks in a light blue-grey tone.

Takeaway



ANY QUESTIONS?



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