Discretion - The Gateway To And Limitation On CEQA

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I. Introduction

An often repeated (albeit slightly modified) Shakespeare quote famously states that "discretion is the better part of valor."[1] As discussed herein, discretion is also a paramount consideration under the California Environmental Quality Act ("CEQA") because while a discretionary project approval is certainly a pre-requisite, or gateway, to CEQA's application, less than full discretion over a project by a lead agency can also act as a significant limitation on CEQA. This paper seeks to better explain and explore the nuances of what I refer to as the ministerial/discretionary dichotomy and how to apply it when conducting your own CEQA analysis.

With respect to the ministerial/discretionary dichotomy, the indisputable starting point is the fact that CEQA only applies to discretionary project approvals, not ministerial approvals. However, defining the line between a ministerial and a discretionary approval is not always easy, and just because a project approval affords the agency decision maker *some* discretion does not mean the lead agency has carte blanche authority to deny or condition a project approval to mitigate all issues and potential environmental impacts cognizable under CEQA. This is so because CEQA does not expand a lead agency's underlying discretion, but simply tracks it.

Specifically, this paper does the following three things: (1) provides a basic summary of the three possible components or tiers involved in an agency's CEQA compliance process; (2) explores the important ministerial/discretionary dichotomy associated with the second and third tiers in that process and explains why it is so important under CEQA; and (3) concludes with a case study that takes an inside look at the 8-unit, multi-family residential project and CEQA challenge underlying the First District Court of Appeal's recent published decision in *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80 ("*McCorkle*"), which addressed and applied these concepts in a remarkable way to find that the City's approval of that project was exempt from CEQA.

II. Overview of the Three-Step CEQA Compliance Process

"The foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' " (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390, citing *Friends of Mammoth v. Board of Supervisors* (1975) 8 Cal.3d 247, 259.) Through

[1] *See* William Shakespere, *Henry the Fourth*, Part 1, Act 5, scene 4, 115-121("Fallstaff: To die is to be a counterfeit, for he is but the counterfeit of a man who hath not the life of a man; but to counterfeit dying, when a man thereby liveth, is to be no counterfeit, but the true and perfect image of life indeed. **The better part of valor is discretion, in the which better part I have sav'd my life**.")

CEQA, the Legislature intended that "all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage . . .." (Pub. Res. Code § 21000(g).) CEQA's scope, however, is not unlimited. Under Public Resources Code Section 21080(a), CEQA only applies to "discretionary projects proposed to be carried out or approved by public agencies." As further discussed below, that seemingly simple provision declaring CEQA's scope is anything but simple in practice. Before delving into the ministerial/discretionary dichotomy, however, it is important to set the stage by presenting an overview of the three steps, or tiers, of the CEQA compliance process.

To guide agencies in their efforts to comply with CEQA and prevent environmental damage, CEQA Guidelines Section 15002(k) describes a three-step process to assist agencies in first determining whether a project is subject to CEQA and if so what type of environmental document – a Negative Declaration, Mitigated Negative Declaration or Environmental Impact Report – must be prepared and adopted/certified before a final project approval decision can be made.[2] To that end, CEQA Guidelines Section 15002(k) states as follows:

> Three Step Process. An agency will normally take up to three separate steps in deciding which document to prepare for a project subject to CEQA.
>
> (1) In the first step the lead agency examines the project to determine whether the project is subject to CEQA at all. If the project is exempt, the process does not need to proceed any farther. The agency may prepare a notice of exemption. See Sections 15061 and 15062.
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> (2) If the project is not exempt, the lead agency takes the second step and conducts an initial study (Section 15063) to determine whether the project may have a significant effect on the environment. If the initial study shows that there is no substantial evidence that the project may have a significant effect, the lead agency prepares a negative declaration. See Sections 15070 et seq.
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> (3) If the initial study shows that the project may have a significant effect, the lead agency takes the third step and prepares an EIR. See Sections 15080 et seq.

[2] *See also* Appendix A to the CEQA Guidelines, which provides a handy process flow chart with specific questions and actions pertaining to each of the three possible steps.

Interestingly, in its recent decision in *Union of Medical Marijuana Patients, Inc. v. City of San* Diego ("*UMMP*") (2019) 7 Cal.5th 1171,[3] the California Supreme Court explained this three-step process a bit differently than CEQA Guidelines Section 15002(k), essentially breaking Section 15002(k)'s first step into two distinct tiers and merging Section 15002(k)'s second and third steps into a single, final third tier.

Citing and relying heavily on its prior decision in *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372 ("*Muzzy Ranch"*), the Court in *UMMP* began by explaining that "[a] putative lead agency's implementation of CEQA proceeds by way of a multistep decision tree, which has been characterized as having three tiers." The court expanded on that explanation by stating:

> First, the agency must determine whether the proposed activity is subject to CEQA at all. Second, assuming CEQA is found to apply, the agency must decide whether the activity qualifies for one of the many exemptions that excuse otherwise covered activities from CEQA's environmental review. Finally, assuming no applicable exemption, the agency must undertake environmental review of the activity, the third tier.

(*UMMP*, *supra*, 250 Cal.Rptr.3d at p. 826.) The Court in *UMMP* went on to name and expand on these tiers, as follows.

The Court summarized the first tier, which it defined as a preliminary review to determine "CEQA's applicability," as follows:

> When a public agency is asked to grant regulatory approval of a private activity or proposes to fund or undertake an activity on its own, the agency must first decide whether the proposed activity is subject to CEQA. In practice, this requires the agency to conduct a preliminary review to determine whether the proposed activity constitutes a "project" for purposes of CEQA. If the proposed activity is found not to be a project, the agency may proceed without further regard to CEQA.

(*UMMP*, *supra*, 250 Cal.Rptr.3d at p. 826 [citations omitted].)[4]

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[3] At the time this paper was prepared, pinpoint cites were only available for the Pacific and California Reporter decisions so all subsequent citations are to the California Reporter decision at 250 Cal.Rptr.3d 818.

[4] The *UMMP* decision focused solely on this first step and held: (1) that Public Resources Code Section 21080 does not declare every zoning amendment to be a CEQA project as a matter of law (*Id.* at pp. 830-834); and (2) the City of San Diego's medical marijuana dispensary ordinance

The second tier, which the Court in *UMMP* defined as a determination regarding whether the project qualifies for an "[e]xemption from environmental review," entails the following:

> If the lead agency concludes it is faced with a project, it must then decide "whether the project is exempt from the CEQA review process under either a statutory exemption or a categorical exemption set forth in the CEQA Guidelines." The statutory exemptions, created by the Legislature, are found in section 21080, subdivision (b). Among the most important exemptions is the first, for "[m]inisterial" projects, which are defined generally as projects whose approval does not require an agency to exercise discretion. The categorical exemptions, found in Guidelines sections 15300 through 15333, were promulgated by the Secretary for Natural Resources in response to the Legislature's directive to develop "a list of classes of projects which have been determined not to have a significant effect on the environment." If the lead agency concludes a project is exempt from review, it must issue a notice of exemption citing the evidence on which it relied in reaching that conclusion. The agency may thereafter proceed without further consideration of CEQA.

(*Id.*, at p. 827 [citations omitted].)

Finally, the Court defined the third tier as "[e]nvironmental review" and summarized it as follows:

> Environmental review is required under CEQA only if a public agency concludes that a proposed activity is a project and does not qualify for an exemption. In that case, the agency must first undertake an initial study to determine whether the project "may have a significant effect on the environment." If the initial study finds no substantial evidence that the project may have a significant environmental effect, the lead agency must prepare a negative

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at issue was a project subject to CEQA under this preliminary, first tier project decision analysis because under Section 21065 it was an activity undertaken by the City that, theoretically, may cause either a direct or reasonably foreseeable indirect physical change in the environment (*Id.* at pp. 834-839).

> declaration, and environmental review ends. If the initial study identifies potentially significant environmental effects but (1) those effects can be fully mitigated by changes in the project and (2) the project applicant agrees to incorporate those changes, the agency must prepare a mitigated negative declaration. This too ends CEQA review. Finally, if the initial study finds substantial evidence that the project may have a significant environmental impact and a mitigated negative declaration is inappropriate, the lead agency must prepare and certify an environmental impact report before approving or proceeding with the project.

(*Id.*, [citations omitted].)

With that three-step process in mind, we now focus in on the second step and explore the ministerial/discretionary dichotomy in more detail.

III. Understanding and Applying the Ministerial/Discretionary Dichotomy

Under the preliminary review conducted pursuant to CEQA's first step, an activity is a "project" and thus subject to CEQA if it has two essential elements – it involves an activity that may cause a direct (or reasonably foreseeable indirect) physical change in the environment and is an activity that will either be directly undertaken by a public agency, supported in whole or in part by a public agency, or involves the issuance by a public agency of some form of entitlement, permit, or other authorization (*e.g.*, contracts, grants, subsidies, loans, etc.) (Pub. Res. Code § 21065; CEQA Guidelines § 15378(a); see also *UMMP* and *Muzzy Ranch*, *supra.*)

Once it is determined that a proposed activity is a project subject to CEQA, one must move on to the second step and to assess and determine whether the project is exempt from CEQA. This entails assessing whether the project is subject to any of the numerous statutory and/or categorical exemptions,[5] including determining whether the

[5] Because this paper is focused on the ministerial exemption only, all of the other potential statutory and categorical exemptions are not specifically addressed here. Indeed, while all 33 classes of categorical exemptions are contained within CEQA Guidelines Sections 15301-15333, and most of the statutory CEQA exemptions are contained within CEQA Guidelines Sections 15260-15285, other statutory CEQA exemptions are not specifically referenced in the CEQA Guidelines but are found elsewhere in the CEQA statute itself or in other provisions of the Public Resources, Business and Professions, Education, Fish and Game, Government, Health and Safety, Water, and the Military and Veterans Codes. There are even some uncodified CEQA exemptions for specific projects. For a good discussion of and tables listing both these codified and uncodified statutory CEQA exemptions, *see* Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. 2019) Statutory Exemptions, §§ 5.5-5.67.

project entails/requires a discretionary agency approval.[6] If no discretionary approval is involved because the agency decision in question is ministerial the project is statutorily exempt as CEQA makes clear that it "does not apply to . . . [m]inisterial projects proposed to be carried out or approved by public agencies." (Pub. Res. Code § 21080(b)(1); *see also* CEQA Guidelines § 15268 (a) ["Ministerial projects are exempt from the requirements of CEQA."].)

A. Definitions Of Ministerial vs. Discretionary

Accordingly, our discussion turns next to the definitions of ministerial and discretionary. CEQA Guidelines Section 15369 defines ministerial as:

> A governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out.

Guidelines Section 15369 continues by noting that:

> Common examples of ministerial permits include automobile registrations, dog licenses, and marriage licenses. A building permit is ministerial **if the ordinance requiring the permit limits the public official** to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the

[6] In addition to the ministerial/discretionary dichotomy, CEQA and the CEQA caselaw spend considerable effort defining when an agency's discretionary "support" of/for a project amounts to an "approval." While not addressed in detail here, this area of the law is equally important as CEQA compliance is only required to be completed before a public agency proposes to "approve" a project (Pub. Res. Code § 21080(a); CEQA Guidelines § 15004), which is generally defined as a decision "commit[ing] the agency to a definite course of action in regard to a project (CEQA Guidelines § 15352(a)). For a good discussion of the types of decisions that *have* and *have not* amounted to such an approval, see *Save Tara v. City of W. Holly wood* (2008) 45 Cal.4th 116 and *Cedar Fair LP v. City of Santa Clara* (2011) 194 Cal.App.4th, respectively.

> Uniform Building Code, and the applicant has paid the fee. (Emphasis added.)[7]

In contrast, CEQA Guidelines Section 15357 defines a discretionary project as:

> A project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statues, ordinances, regulations, or other fixed standards. The key question is whether the public agency can use its subjective judgment to decide whether and how to carry out or approve a project.

B. Projects Involving Both Ministerial And Discretionary Actions

In addition to the above-referenced definitions, the CEQA Guidelines provide additional guidance for approvals including elements of both ministerial and discretionary actions. Specifically, after outlining the exemption for ministerial projects, CEQA Guidelines Section 15268(d) ends by declaring that "[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**." (Emphasis added.)

This statement has led untold numbers of CEQA practitioners to fatally conclude that *any* amount of discretion is enough to trigger CEQA's full application and provides authority to address any/all of the resource issues/impacts cognizable under CEQA. As discussed and demonstrated below, that simply is not the case. The reason is because CEQA is the "cart behind the horse" in that it does not expand a lead agency's discretion, but simply tracks it. This concept is firmly set in both the CEQA statute and the CEQA Guidelines. Specifically, Public Resources Code Section 21004, entitled "[l]egislative intent; public agency authority," unequivocally states:

> In mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than this division. However, a public agency may use discretionary powers provided by such other law for the purpose of mitigating or avoiding a significant effect on the environment

[7] I emphasized the bolded language in CEQA Guidelines Section 15369 above because as further discussed below, the language of the applicable local law is truly the key to the ministerial/discretionary dichotomy.

> subject to the express or implied constraints or limitations that may be provided by law.

And CEQA Guidelines section 15040, entitled "[a]uthority [p]rovided by CEQA," similarly echoes this critical limitation by stating:

> (a) CEQA is intended to be used in conjunction with discretionary powers granted to public agencies by other laws.
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> (b) CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws.
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> (c) Where another law grants an agency discretionary powers, CEQA supplements those discretionary powers by authorizing the agency to use the discretionary powers to mitigate or avoid significant effects on the environment when it is feasible to do so with respect to projects subject to the powers of the agency. Prior to January 1, 1983, CEQA provided implied authority for an agency to use its discretionary powers to mitigate or avoid significant effects on the environment. Effective January 1, 1983, CEQA provides express authority to do so.
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> (d) The exercise of the discretionary powers may take forms that had not been expected before the enactment of CEQA, but the exercise must be within the scope of the power.
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> (e) The exercise of discretionary powers for environmental protection shall be consistent with express or implied limitations provided by other laws.

Thus, in sum, 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. Those other laws generally flow from the general police power or from overarching state laws (e.g., zoning, planning and/or subdivision laws) and are typically codified in the various Municipal/County Codes and Charters that exist across the state. Interestingly, these concepts and provisions have formed the basis for numerous CEQA decisions highlighting the importance of those other, non-CEQA laws and requiring a unique focus on the type/scope of authority and discretion they afford.

C. CEQA's Reach May Be Curtailed By An Agency's Limited Discretion

The concept that CEQA's reach is limited to the amount and type of the underlying agency discretion afforded by the applicable local law is typically linked to the decision in *Friends of Westwood v. City of Los Angeles* ("*Friends of Westwood*") (1987) 191 Cal.App.3d 259, a case requiring the court to assess whether the building permit required by the City of Los Angeles for the 26-floor office tower in question there was discretionary and thus subject to CEQA, or ministerial and exempt therefrom. In analyzing the ministerial/discretionary dichotomy, the *Friends of Westwood* Court emphasized that:

> The purpose of CEQA is to minimize the adverse effects of new construction on the environment. To serve this goal the act 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. Thus 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 when is government foreclosed from influencing the shape of the project? Only when a private party can ***legally compel*** approval without any changes in the design of its project which might alleviate adverse environmental consequences.

(*Friends of Westwood, supra,* at pp. 266-267 [emphasis in original].)

And while the *Friends of Westwood* Court deemed the building permit process pursuant to the local ordinance at issue there to be discretionary and thus subject to CEQA, the decision is better known and cited more for the "functional test" the Court set out to help clarify the line between discretionary and ministerial project approvals. The *Friends of Westwood* Court explained its functional test as follows:

> The functional distinction between "ministerial" and "discretionary" projects under CEQA. . . . To properly draw the line between "discretionary" and "ministerial" decisions in this context, we must ask why it makes sense to exempt the ministerial ones from the EIR requirement. The answer is that for truly ministerial permits an EIR is irrelevant. No matter what the EIR might reveal about the terrible environmental consequences of going ahead with a given project the government agency would lack the power (that is,

> the discretion) to stop or modify it in any relevant way. The agency could not lawfully deny the permit nor condition it in any way which would mitigate the environmental damage in any significant way. The applicant would be able to legally compel issuance of the permit without change. Thus, to require the preparation of an EIR would constitute a useless – and indeed wasteful – gesture.
>
> Conversely, where the agency possesses enough authority (that is, discretion) to deny or modify the proposed project on the basis of environment consequences the EIR might conceivably uncover, the permit process is discretionary within the meaning of CEQA.

(*Id.* at p. 272.)

Citing *Friends of Westwood*, the California Supreme Court embraced this concept in noting that "[t]he statutory distinction between discretionary and purely ministerial projects implicitly recognizes that unless a public agency can shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent, environmental review would be a meaningless exercise." (*Mountain Lion Foundation v. Fish and Game Com.* (1997) 16 Cal.4th 105, 117.)

Numerous recent cases have arguably expanded on this concept to add heightened focus on not only the question of whether the agency possesses any authority/discretion, but on evaluating the type/kind of discretion afforded by local laws to ensure that the discretion afforded coincides with and gives the local agency the authority to remedy the environmental concerns at issue. Indeed, in determining that the County of Sonoma's erosion control ordinance afforded some discretion but didn't confer the right type of discretion and thus holding that the issuance of the erosion control permit at issue was a ministerial act exempt from CEQA, the First District Court of Appeal recently stated "[f]ollowing *Friends of Westwood*, courts recognize 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." (*Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 23.)

Similarly, in *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 934, the Fourth District Court of Appeal held that no subsequent or supplemental EIR was required for the large waterfront redevelopment project at issue because the only remaining project approval - design review - did not provide the City with the discretion or authority to address the project's alleged water-supply, public-services, groundwater contamination, air pollution and greenhouse

gas/climate change-related impacts advanced by project objectors. (See also, *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1144 [same].)

Additional cases fall under this same rule and reason that an activity is ministerial and exempt from CEQA if the local law governing the permit/approval decision does not give the agency the relevant authority to address the environmental concerns implicated by the project or being raised by objectors. Thus, if the agency lacks the authority to refuse to approve the proposed activity, or to condition/modify it to mitigate the potential environmental impacts of concern, the action is ministerial and exempt from CEQA. (See, e.g., *Friends of the Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 308 [demolition permit ministerial under Palo Alto Municipal Code][8]; *Central Basin Mun. Water Dist. v. Water Replenishment Dist. of S. Cal* (2012) 211 Cal.App.4th 943, 949 [water district declaration of water emergency ministerial because no discretion to address potential impacts of carryover water rights and/or delayed water replacement]; *Leach v. City of San Diego* (1990) 220 Cal.App.3d 389, 394 [City's operation of water reservoir system ministerial such that CEQA does not apply to City's transfer of water from one reservoir to another]; *Tower Lane Props. v. City of Los Angeles* (2014) 224 Cal.App.4th 262 [no CEQA review required for grading permit whose approval was ministerial under local ordinance]; *Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 178 [approval of lot line adjustment is ministerial under Subdivision Map Act]; *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1014-1015 ["CEQA does not enlarge an agency's authority beyond the scope of a particular [design review] ordinance"]; *Prentiss v. City of S. Pasadena* (1993) 15 Cal.App.4th 85 [building permit to expand historic residence ministerial].)[9]

There are two final notes before moving on to take an inside "case study" look at the recent published decision in *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80 ("*McCorkle*"), which addressed and applied these concepts in a remarkable way to find that the City's approval of an 8-unit multi-family apartment project was exempt from CEQA.

First, some advice for City Attorneys: CEQA requires local agencies to adopt local implementing procedures including, *inter alia*, "a list of projects or permits over which the public agency has only ministerial authority." (CEQA Guidelines §

[8] But see *San Diego Trust & Sav. Bank v. Friends of Gill* (2981) 121 Cal.App.3d 203, holding permit to demolish historical structure discretionary because the agency retained authority to deny the permit by making a discretionary determination that an alternative be implemented.

[9] Of course, there are also numerous cases that have held, based on the specific language of the applicable local laws, that the local agency permit/approval at issue was discretionary and thus subject to CEQA. (See, e.g., *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118 [building permit]; *Friends of Westwood, supra* [building permit]*; People v. Department of Hous. & Community Dev.* (1975) 45 Cal.App.3d 185, 193 [building permit]; *Day v. City of Glendale* (1975) 51 Cal.App.3d 817, 823 [grading permit].)

15022(a)(1)(B).) To help avoid controversy and minimize litigation over which local permit approvals are ministerial and which are discretionary (and thus which are exempt from and subject to CEQA), local agencies should take advantage of this opportunity by adopting such CEQA procedures and ministerial project lists. Indeed, CEQA acknowledges that "the determination of what is 'ministerial' can most appropriately be made by the particular public agency involved based upon its analysis of its own laws. (CEQA Guidelines § 15268(a).)[10]

Second, a note of caution: The California Supreme Court is poised to weigh in on these issues once again, this time in the context of two cases involving permits for well drilling projects. Specifically, the Court granted review of an unpublished opinion holding that such permits in Stanislaus County are discretionary (*Protecting Our Water & Env'tl Resources v. Stanislaus County* [review granted Nov. 14, 2018, S251709]) and issued a "grant and hold" order regarding a similar, but opposite decision holding that well permits issued under the County of San Luis Obispo's well ordinance are ministerial (*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]). Briefing is complete in *Protecting Our Water* and the parties in both cases are waiting for oral argument to be scheduled.

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

In order to demonstrate the concept of marrying the discretion afforded by the local law with the environmental concerns at issue embodied in the above-referenced cases, I thought a deeper dive into the facts of the *McCorkle* case would be helpful.[11]

The original *McCorkle* project entailed a proposal to demolish an old, run down house within the City of St. Helena's High Density Residential Zoning District ("HR District") and replace it with a ten-unit multi-family residential project to provide the City with much-needed workforce housing. The project site had been zoned for such high density residential uses since at least 1993; however, the City's Zoning Ordinance had long-required a conditional use permit for any such projects containing more than 4 residential units. Thus, when the project application was originally submitted, it required a use permit application. The project site's soil was also contaminated with lead due to a prior owner's hoarding and messy auto repair hobby.

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[10] However, while a local agency's categorization of its ministerial permits as part of its adopted CEQA procedures is entitled to judicial deference, it is not dispositive. (See *Friends of Westwood, supra,* 191 Cal.App.3d at p. 270*; Day, supra,* 51 Cal.App.3d at p. 823.)

[11] Full disclosure - together with the City Attorney for the City of St. Helena and counsel for the Real Party in Interest, I successfully represented and defended Respondent City of St. Helena in the *McCorkle* litigation, both in the Napa County Superior Court and the First District Court of Appeal.

In an effort to address constraints on multi-family residential development, the California Department of Housing and Community Development ("HCD") encouraged the City to adopt Housing Element policies to address those constraints and conditioned its certification of the City's 2015-2023 Housing Element on an Implementing Action contained therein that committed the City to amend its Zoning Ordinance to eliminate the use permit requirement for multi-family residential projects in the City's HR District. After the City adopted its 2015-2023 Housing Element and HCD certified it, the City promptly followed through and amended its Zoning Ordinance to eliminate the use permit requirement for multi-family projects in the HR District. Notably, within the public reports and during the public meetings regarding that Zoning Ordinance amendment, City staff and the City Attorney discussed the legal significance of the proposed change, highlighting the fact that as a permitted or "by right" use, the City's future discretion over individual multi-family projects in the HR District would be limited to aesthetic issues only under the City's Design Review Ordinance, and that the City would not have discretion over broader land use-related issues such as project density, traffic, air quality, etc.

After the City amended its Zoning Ordinance to eliminate the use permit requirement for multi-family projects in the HR District, the project applicant revised his application to downsize the project to eight multi-family units and make a series of other voluntary changes to assuage concerns raised during a neighborhood meeting. The applicant also entered into a voluntary agreement with the County of Napa to remediate the site's lead-contaminated soil. As such, and pursuant to the City's amended Zoning Ordinance, the project's proposed multi-family residential land use was permitted by right and only required design review approval. However, because the original application was submitted before the Zoning Ordinance was amended to eliminate the use permit requirement, City staff had already made a preliminary determination that CEQA applied and requested biological and traffic studies from the applicant in an effort to determine whether CEQA's Class 32 categorical exemption for in-fill projects applied. After completing its review of the project, its design drawings and the applicant's consultants' biological and traffic reports, staff prepared a report demonstrating that the project did indeed fall under CEQA's in-fill exemption and that all required demolition permit and design review findings could be made and were supported by the record. Thus staff recommended that the Planning Commission find the project exempt from CEQA and issue design review approval for the project.

The Planning Commission approved the project over the objections of two local unincorporated associations named McCorkle Eastside Neighborhood Group and St. Helena Residents for an Equitable General Plan, which challenged the claimed CEQA exemption based on allegations of traffic, noise, public safety, and soil contamination-related impacts and on an alleged inconsistency with General Plan policies regarding historic resources (because there were several listed historical homes on the street).

Those same groups appealed the approval to the City Council, which denied the appeal and issued the design review approval based on similar findings that the project was categorically exempt from CEQA pursuant to the in-fill exemption and consistent with the General Plan and Design Review Ordinance. Notably, in addition to citing the opponents' lack of evidence in support of their alleged environmental impacts, both the Planning Commission and the City Council relied on statements and advice from the City Attorney noting that because only design review approval (and no use permit) was required, the City's discretion and thus the scope of its CEQA authority under the Design Review Ordinance was limited to aesthetic impacts and did not allow them to deny or modify the project to address the larger alleged land-use related impacts raised by the appellants. The appellants filed a Petition for Writ of Mandate challenging the City's claimed CEQA exemption and asserting that they were not afforded a true appeal on the whole of the project due to the City Attorney's advice. The trial court denied the Petition and the Petitioners appealed.

Before delving into the Court of Appeal decision, it is important to look at St. Helena's Design Review Ordinance because, as noted above, whether the approval at issue is discretionary or ministerial for purposes of CEQA depends largely if not entirely on the language of the applicable local law, not on anything in CEQA.

The City of St. Helena's Design Review Ordinance contains three very important provisions. First, the Ordinance's statement of policy expressly acknowledges that Design Review is separate and distinct from discretionary land use zoning provisions found elsewhere in the Municipal Code and is intended only to cover the general form, special relationships and appearance of a project's proposed design. (St. Helena Municipal Code ("SMC"), § 17.164.010.) Second, the Ordinance limited the applicable design criteria to issues such as scale, orientation, bulk, mass, materials and colors. (SMC, § 17.164.030.) Third, and perhaps most important, in a section entitled "[l]imitations of review," the Ordinance expressly prohibited the City from denying design review approval based on non-design criteria items or from using design review to unduly restrict building types or to vary the Zoning Ordinance's specific allowances or other development controls. (SMC, § 17.164.040.)

In their briefing on appeal, the Appellants focused primarily on the argument that they were not afforded a true/full appeal to the elected City Council as required under Public Resources Code Section 21151 due to the City Attorney's advice regarding the City's limited discretion, which they felt led the City Councilmembers to ignore the traffic, public safety and soil contamination impacts they believed would result from the project's underlying multi-family residential land use. Because Public Resources Code Section 21151 was an odd vehicle to advance Appellants' main argument, because the administrative record fully supported the City's claimed in-fill exemption, and because no published CEQA decision had yet applied the above-referenced

ministerial/discretionary concepts in the same design review-only context,[12] the City's defense focused primarily on the fact that appellants received a full and fair appeal hearing and on the fact that the project satisfied all elements of the in-fill exemption and no exceptions applied. That is, until the Court of Appeal issued an order shortly before oral argument essentially directing the parties to focus their arguments on the Municipal Code and be prepared to argue whether the design review approval was ministerial or discretionary.

The rest is history, and documented in the Court of Appeal's published *McCorkle* decision. In short, the Court of Appeal essentially moved quickly to the ministerial/discretionary issue and, citing the aforementioned Municipal Code sections at length, held that the City didn't need to rely on the in-fill exemption because the City Attorney's statements and advice were correct - the City had no discretion to disapprove the project based on the type of non-design related land use matters and impacts alleged by the Appellants. In essence, the Court held that the City's design review approval of the multi-family residential land use was ministerial as the project's proposed land use was permitted by right and the City's findings regarding the project's consistency with the applicable design criteria focused on aesthetic and General Plan consistency issues were supported by substantial evidence.

One final note is necessary as some have argued that the *McCorkle* decision is in conflict with two other recent decisions similarly involving aesthetic issues subject to local design review. (See *Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal.App.5th 358 and *Protect Niles v. City of Fremont* (2018) 25 Cal.App.5th 1129.) In both *Georgetown Preservation Society* and *Protect Niles*, Mitigated Negative Declarations were rejected and full Environmental Impact Reports were required based on the projects' potentially significant aesthetic impacts. However, unlike the facts of *McCorkle*, those cases involved bigger projects proposed in truly and particularly sensitive contexts, namely a historic landmark Gold –rush era downtown in *Georgetown Preservation Society* and an officially mapped historic district in *Protect Niles*. Importantly, the parties in those cases apparently didn't argue that the agency's scope of

[12] **Writ Litigation Practice Tip**: Including unpublished decisions in your Administrative Record. An unpublished decision on all fours with the facts of *McCorkle* did exist, see *Venturans for Responsible Growth v. City of San* Buenaventura (2013) 2103 WL 3093788. There, the Second District Court of Appeal held that the City of Ventura's design review approval tied to exterior improvements and a sign variance for a 24-hour grocery store (otherwise allowed by right without any operating hour restrictions) was ministerial and exempt from CEQA because the City of Ventura had no discretion to address the challenger's alleged air quality and traffic impacts under its Design Review Ordinance. While not binding precedent, the St. Helena City Council expressly referred to the *Venturans for Responsible Growth* decision and took notice of it in its *McCorkle* administrative findings such that it was proper to include the opinion in the administrative record and refer the trial court and court of appeal to it in our briefing.

discretion was so limited that CEQA did not apply and it is unclear from those decisions whether use permits (as opposed to design review only) were required for those projects. Most importantly, the opponents in those cases specifically advanced alleged aesthetic impacts whereas in *McCorkle* the opponents were more concerned with traffic and public safety related impacts associated with the underlying and permitted by right multi-family residential land use. In sum, upon a closer look there is no conflict between *McCorkle*, on the one hand, and *Georgetown Preservation Society* and *Protect Niles*, on the other hand.

V. Conclusion

CEQA only applies to discretionary project approvals, not ministerial approvals. But the defining the line between a ministerial and a discretionary approval is not always easy, and CEQA practitioners should not jump to the conclusion that an agency has the discretion to deny or condition a project based on any/all issues and potential environmental impacts cognizable under CEQA simply because the agency approval involves some discretionary aspects. The discretion must be of the type that allows the agency to meaningfully address the specific impact(s) of concern. As the housing crisis worsens and the Governor and Legislature continue to look for more ways to facilitate/force new housing on cities (including by limiting cities' discretion on certain types of housing in certain locations [i.e., infill near transit]), it will be imperative for city attorneys to fully understand the ministerial/discretionary dichotomy and the CEQA provisions and decisions that address it.