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Somewhere in Between: The Classification and Standard of Review of Mixed Ministerial – Discretionary Land Use Decisions

Rozalynne Thompson*

I. Introduction

The California Constitution, along with federal case law, confers the police power to local agencies to regulate the health, safety, and welfare of its citizens. Under this authority, local agencies make land use decisions, from a simple grant of a business license to granting a general plan amendment along with associated entitlements. Since land use regulation has been a legitimate exercise of a local agency’s police power, challenges to these decisions have proliferated and courts have, accordingly, reviewed these decisions for conformance with applicable statutes and ordinances. As the principles from cases in this frontier of law have been refined, so too have the land use regulations. Since many of these land use regulatory tools are promulgated and adopted by cities, courts must strike a balance between ensuring proper enforcement of the laws by the agency and respecting the local agency’s legitimacy and authority in its jurisdiction.

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1. The California Constitution allows cities to “make and enforce within [their] limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws.” CAL. CONST. art. XI, § 7.


3. Associated Home Builders, Inc. v. City of Livermore, 18 Cal. 3d 582 (1976) (holding that a land use regulation is within a jurisdiction’s police power if it is reasonably related to the public welfare).

4. “Local agencies” refers broadly to the cities and counties as a whole, and also planning commissions, city councils, and board of supervisors.
when reviewing land use decisions. An important decision is the classification of an agency’s land use action as ministerial or discretionary, especially when it adopts a novel tool to address land use issues. Not only does this classification dictate the review process a local agency must undertake, but it also determines the standard of judicial review should the agency’s action be challenged.

This note will discuss land use actions of a mixed ministerial-discretionary character. In particular, this note will discuss the development of statutes and cases classifying certain actions as either ministerial or discretionary, first in the common law context, then in the context of the California Environmental Quality Act (“CEQA”). Then, it will give a basic overview of the judicial review process of land use decisions and discuss the appropriate standard of review for mixed ministerial-discretionary decisions. This Note contends that since it appears that no local agency has defined what constitutes a mixed ministerial-discretionary project and because there is disunity among the courts on this issue, the definition in CEQA of a mixed ministerial-discretionary should be the rule, not the exception. As a result, courts should apply the standard of review for mixed ministerial-discretionary actions – administrative mandamus – when reviewing an agency’s decision.

II. What are Mixed Ministerial – Discretionary Land Use Decisions?

A. The Ministerial/Discretionary Distinction Under the Common Law

As early as 1860, the Supreme Court of California established the general principle that ministerial acts are those that are “enumerated and defined by the law,” regarding which a government official “has no discretion.” As a wave of local governments implemented planning and zoning mechanisms during the first half of the twentieth century, California courts began to refine the meaning of “ministerial” in the land use context as legal challenges ensued.

5. The Separation of Powers doctrine does not apply to local agencies in California. In California, there are chartered cities and general law cities. Chartered cities have a charter that is the source of the primary law and under CAL. CONST. art. XI, § 7, they have the authority to make decisions concerning local affairs, such as land use, within their jurisdictional boundaries as long as no conflict of laws occurs. Scott D. Noble, Nuisance, Trespass, and Strict Liability for Ultrahazardous Activities, § 101 NUISANCE, CALIFORNIA ENVIRONMENTAL AND LAND USE PRACTICE (2008).

6. CAL. PUB. RES. CODE § 21000 et seq. (West 2009).

In 1956, the Court of Appeal in the First Appellate District addressed whether issuance of a land use permit to create a residential subdivision was a ministerial act in *Roney v. Board of Supervisors*. In *Roney*, the county of Contra Costa had adopted a zoning ordinance in which ninety percent of the county lands had zoning designations A through K. The districts progressed in intensity: the A zoning district only allowed single-family residential units, whereas uses in the K district were unrestricted. The plaintiff owned land in the J district, which allowed heavy industrial uses by right, but required a land use permit for any other use, including residential. The plaintiff applied for a land use permit to subdivide their land into a residential tract, but the Contra Costa Planning Commission and Board of Supervisors denied their request. In rejecting plaintiff landowner’s claim that the county officials had no discretion to deny their land use permit, the court reasoned that since the state legislature mandated master plans, the Board of Supervisors could not effectuate the master plan’s purpose if land use permits were ministerial. The court then evaluated the text and the history of the ordinance for additional evidentiary support. That the ordinance created an elaborate procedure for the land use permit, including notice, a public hearing, and a factual inquiry of the project, and that the county amended its ordinance to prevent residential uses in industrial districts, further convinced the court that the land use permits were discretionary, not ministerial.

Five years later, in *Day v. Los Angeles*, the Court of Appeal in the Second Appellate District held that an enactment of a rezoning ordinance is not ministerial act. As in *Roney*, plaintiff landowner filed an application to rezone his parcel to permit residential uses. Los Angeles city officials approved the rezoning request subject to several conditions, including one that required submittal and approval of a tentative tract map and another that directed the Planning Director to forward his recommendation to city officials before the rezoning hearing. After city officials approved both the tentative and final maps, the City Council denied the rezoning request based on the Planning Director’s assertion that the “change of the property to the

9. Id. at 742.
10. Id.
11. Id.
12. Id.
14. Id. at 416-17.
15. In this case, “city officials” refers to the Los Angeles Planning Commission, City Council, and City Engineer.
RA Zone without the provision of necessary improvements would not conform with good zoning practice, and could therefore not meet the requirements for a change of zone established by Section 12.32 of the Municipal Code.\(^\text{17}\)

To distinguish ministerial actions from the actions undertaken by city officials in Day, the court relied on two California Supreme Court cases for guidance. Whereas the denial of the rezoning request was "an exercise of a discretion residing in the city council,"\(^\text{18}\) a ministerial action "require[d] an officer to do a prescribed act upon a prescribed contingency.\(^\text{19}\) The denial of the rezoning request, the court explained, was not ministerial because the City Council had the authority to choose whether to approve or deny the project.\(^\text{20}\)

Since Day, courts have distinguished ministerial acts from discretionary ones. For example, the following are all examples of ministerial acts: 1) approval of a final subdivision map that substantially conforms to the tentative map is ministerial;\(^\text{21}\) 2) issuance of a building permit that is consistent with the building and zoning code regulations;\(^\text{22}\) and 3) the issuance of a conditional use permit for a secondary dwelling unit which meets the state's statutory requirements.\(^\text{23}\) On the other hand, variances from development regulations,\(^\text{24}\) tentative subdivision and parcel maps,\(^\text{25}\) conditional use permits,\(^\text{26}\) planned unit developments,\(^\text{27}\) and coastal development permits,\(^\text{28}\) have been held to be discretionary land use decisions.

There are no cases in the common law addressing the issue as to whether an action is a mixed ministerial-discretionary one. All of the cases

\(^{17}\) 189 Cal. App. 2d at 418.
\(^{18}\) Id. at 419.
\(^{19}\) Id. at 420 (quoting Drummey v. State Bd. of Funeral Dirs., 13 Cal. 2d 75, 83 (1931)).
\(^{20}\) Id.
\(^{24}\) Topanga Ass’n for a Scenic Cmty. v. County of Los Angeles, 11 Cal. 3d 506, 517 (1974).
\(^{25}\) Horn v. County of Ventura, 24 Cal. 3d 605, 612 (1979).
\(^{26}\) Id. at 614; Johnston v. City of Claremont, 49 Cal. 2d 826, 834 (1958); Neighborhood Action Group v. County of Calaveras, 156 Cal. App. 3d 1176, 1186 (1984).
\(^{27}\) City of Fairfield v. Superior Court, 14 Cal. 3d 768, 773 (1973).
addressing this issue occur within the context of the California Environmental Quality Act ("CEQA"), as discussed below.

B. Ministerial and Discretionary Land Use Decisions as Defined by the California Environmental Quality Act

The California Legislature’s enactment of CEQA in 1970 was pivotal in clarifying the distinction between ministerial and discretionary land use decisions and creating uniformity among the courts. The main purpose of CEQA, like its federal predecessor, the National Environmental Policy Act (NEPA), was to identify and disclose potential significant environmental impacts of projects to the public and to mitigate those impacts. In its original form, the provisions of CEQA addressed environmental concerns in broad policy language, which raised problems of judicial interpretation.

29. See CAL. PUB. RES. CODE § 21000 et seq. (West 2009).
30. See 42 U.S.C. § 4321 et seq. Ch. 22, § 22.10, contains discussion of some of the similarities and differences between CEQA and NEPA.
31. The original provisions of CEQA were based on recommendations made by the California Assembly Select Committee on Environmental Quality in a legislative staff entitled the Environmental Goals and Policy Report. The composition of the Select Committee on Environmental Quality included chairs of Assembly committees and subcommittees, such as John Knox, George Milias, Jean Moorhead Duffy, John Foran, Robert Monagan, and Peter Schabarum. Specifically, the study recommended 34 policy changes to protect the environment, including an enumerated Environmental Bill of Rights, the adoption of an Environmental Quality Act modeled after NEPA, and an improved planning process across all levels of government overseen by the OPR. The OPR plays a critical role, for it promulgates the CEQA Guidelines. For further discussion on the development of the Environmental Goals and Policy Report, see Nico Calavita, Legislative History of the California Environmental Goals and Policy Report, in FACULTY FELLOWS PROGRAM CALIFORNIA STATE UNIVERSITY (1995).

The implementation language of the original version of CEQA passed in 1970 was as follows:

Chapter 3. STATE AGENCIES, BOARDS, AND COMMISSIONS

21100. All state agencies, boards, and commissions shall include in any report on any project they propose to carry out which could have a significant effect on the environment of the state, a detailed statement by the responsible state official setting forth the following:

- The environmental effect of the proposed action.
- Any adverse environmental effects which cannot be avoided if the proposal is implemented.
One such problem was determination of how to define the scope of the statute’s applicability. The California Supreme Court delineated the ambit of CEQA in the seminal case *Friends of Mammoth v. Board of Supervisors of Mono County*, holding that although the statute does not expressly define “project,” it applies to the regulation of private activities and government projects.\(^{32}\)

The broad sweep of the holding in *Friends of Mammoth* and the resultant outcry from the construction industry prompted the Legislature to refine the statute in the 1972 amendments, also known as Assembly Bill (AB) 889.\(^{33}\)

As

- Mitigation measures of the proposed action.
- Alternatives to the proposed action.
- The relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity.
- Any irreversible environmental changes which would be involved in the proposed action should it be implemented.

CHAPTER 4. LOCAL AGENCIES

21150. State agencies, boards, and commissions, responsible for allocating state or federal funds on a project-by-project basis to local government agencies for land acquisition or construction projects which may have a significant effect on the environment, shall...require from the responsible local government agency a detailed statement setting for the matters specified in Section 21100 prior to the allocation of any funds, other than funds solely for planning purposes.

21151. The legislative bodies of all cities and counties which have an officially adopted conservation element of a general plan shall make a finding that any project they intend to carry out, which may have a significant effect on the environment, is in accord with the conservation element of the general plan. All other local government agencies shall make an environmental impact report on any project they intend to carry out which may have a significant effect on the environment and shall submit it to the appropriate local planning agency...


32. 8 Cal. 3d 247 (1972).

33. Assembly member John Knox (D-Richmond) authored the A.B. 889 while the public awaited the California Supreme Court’s decision on *Friends of Mammoth*. The main thrust of A.B. 889 was to “confirm that private projects were within the ambit of the Act.” The Bill was successfully passed in the state Assembly, but languished in the state Senate for months. Once the Supreme Court ruled on *Friends of Mammoth*, A.B. 889 “was seized upon by various interested parties as the vehicle to clarify the scope, and lessen the
a compromise between environmental organizations, local governments, and the construction industry, the Legislature codified the holding in *Friends of Mammoth* in the 1972 amendments, but it also added several statutory exemptions to the statute to constrict the scope of the holding. Thus, CEQA only applied to discretionary projects undertaken or approved by a government agency and exempted ministerial private and public activities from its reach.

Moreover, the 1972 amendments also added a chapter entitled "Definitions" to clarify the meaning of key terms, but the terms "ministerial" and "discretionary" were not included in the chapter. And, although the exemption provisions in AB 889 list examples of discretionary and nondiscretionary projects, the language of those provisions suggests that the Legislature did not intend the examples to be exhaustive. The CEQA Guidelines (the Guidelines), however, resolved some of the ambiguity. The final version of the Guidelines, assigned to the Office of Planning and Research (OPR) responsibility to provide guidance in implementing CEQA. The OPR completed the highly anticipated Guidelines shortly after the


34. Developers, lenders, contractors, and trade unions found themselves in general alliance seeking validation of completed and ongoing projects as well as delay in the implementation of the court’s decision. Local governmental entities, unsure of the effect of the ruling on their current practices relating to approval of private projects and ill-prepared to begin to apply the Act, desired clarification of the Act’s effect on their determinations. Environmental organizations sought to preserve the broad sweep of the court’s opinion. The varied and competing interests of these groups resulted in the numerous changes to the original version of A.B. 889 and the “haste with which the final version of AB 889 was written and considered.” *Id.* at 129-30.

35. *Id* at 164.

36. [CAL. PUB. RES. CODE §§ 21060-21072 (West 2009)].

37. *Id*.

38. *Id.* § 21080. Pursuant to Section 21083, the Secretary of the Resources Agency was required to adopt guidelines for the implementation of the Act for public agencies within 60 days after the effective date of A.B. 889. On February 3, 1973, the Secretary adopted the "Guidelines for Implementation of the California Environmental Quality Act of 1970" as Chapter 3, Div. 6, tit. 14 of the California Administrative Code. Seneker, *supra* note 33 at 127.
Legislature adopted AB 889.\textsuperscript{39} According to the Guidelines, a ministerial project is one that is

undertaken or approved by a governmental decision which a public officer or public agency makes upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority. With these projects, the officer or agency must act upon the given facts without regard to his own judgment or opinion concerning the propriety or wisdom of the act although the statute, ordinance, or regulation may require, in some degree, a construction of its language by the officer.\textsuperscript{40}

On the other hand, a project is "discretionary" when it "requires the exercise of judgment, deliberation, or decision on the part of the public agency or body in the process of approving or disapproving a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances or regulations."\textsuperscript{41} In effect, the OPR codified the definitions of ministerial and discretionary upheld in lower court decisions, such as \textit{Roney} and \textit{Day}, before the enactment of CEQA.

1. Judicial Interpretations of "Ministerial" and "Discretionary" Under CEQA in the Land Use Context

a. Land Use Entitlement Cases

Land use entitlements for private activities are presumptively discretionary, unless expressly exempted by CEQA.\textsuperscript{42} Consistent with the Supreme Court's holding in \textit{Friends of Mammoth}, land use entitlements are generally discretionary because the local agency exercises judgment in deciding whether to grant the entitlement. Thus, courts have held that the adoption and amendment of a jurisdiction's general plan is considered discretionary under CEQA,\textsuperscript{43} as is the enactment and amendment of a zoning

\textsuperscript{39} Of note is that the draft Guidelines were prepared in 1971, which would have only applied CEQA to major activities carried out or funded by government agencies. \textit{See id.} at 128.

\textsuperscript{40} \textit{CAL. CODE REGS.} tit. 14, \S\ 15369 (2009).

\textsuperscript{41} \textit{Id}, \S\ 15357.

\textsuperscript{42} \textit{Friends of Mammoth}, \textit{see supra} note 32.

\textsuperscript{43} \textit{CAL. PUB. RES. CODE} \S\ 21080 (West 2009); \textit{Devita v. County of Napa}, 9 Cal. 4th 763 (1995).
ordinance. Variances are also explicitly deemed discretionary under the statute, along with the approval of tentative subdivision maps. And, in one case, the approval of a development agreement was characterized as a discretionary act. In *Friends of Mammoth*, the California Supreme Court determined that a conditional use permit for the construction of a condominium project is discretionary.

Design review, also known in some jurisdictions as development review or architectural review, however, is not listed as an example of a discretionary entitlement in the statute. And, in the fairly recent CEQA cases involving design review entitlements, it is unclear whether design review entitlements are properly considered discretionary or ministerial actions under CEQA. In *Bowman v. City of Berkeley*, the court of appeal decided that aesthetic issues, which were part of the local ordinance’s design review process, were not within the province of CEQA. In that case, the neighbors challenged the design review approval and adopted mitigated negative declaration for a mixed-use building proposed in Downtown Berkeley. They contended that the City of Berkeley’s decision to approve the project violated CEQA because the adopted mitigated negative declaration did not consider the scale of the project, the area of shadow cast on neighboring properties due to its bulk, and its interference with scenic views. The court ruled in favor of the City of Berkeley, highlighting that the cases used to support the neighbors’ claims were distinguishable from the one at bar because one concerned preparation of an environmental impact report (EIR), and the others involved a development in a “environmentally sensitive area.” Moreover, the court noted that they did not believe the legislature enacted CEQA to require environmental review to assess the “aesthetic merits” of projects within highly developed urban areas. “To rule otherwise,” the court opined, “would mean that an EIR would be required for

44. Id. § 21080; *Northwood Homes v. Town of Moraga*, 216 Cal. App. 3d 1197 (1989).
45. Id.; *Youngblood*, see supra note 21.
47. Since CEQA is modeled after NEPA but did not expressly define “discretionary project,” the Court reasoned that a “project” under CEQA is analogous to “actions” in NEPA. Given that an “entitlement for use” is subsumed under the definition of “action” in NEPA, “projects” under CEQA include “entitlements for use” as well. See supra note 32 at 262.
49. Id. at 580.
50. Id. at 592.
51. Id.
52. Id.
every urban building project that is not exempt under CEQA if enough people could be marshaled to complain about how it will look.\textsuperscript{53}

While the Bowman court thought that the design review process was outside the ambit of CEQA, two other cases, in dicta, suggest that a design review decision is discretionary. The first case, Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga, considered whether the denial of a design review request warranted additional environmental review.\textsuperscript{54} The City of Rancho Cucamonga had approved a tentative tract map in 1990, and the developer filed a Development Review project application with the city’s planning department in 1997.\textsuperscript{55} After the planning commission approved the project, Cucamongans United for Reasonable Expansion (“CURE”) appealed the decision to the city council.\textsuperscript{56} After an extensive public hearing,\textsuperscript{57} the city council denied the developer’s development review application.\textsuperscript{58} CURE filed an action to direct the city to prepare further environmental review of the project. The court of appeal rejected their claim, referencing the applicable provision of the Guidelines when it stated that “an SEIR [supplemental environmental impact report] can only be prepared in connection with a discretionary approval (emphasis added).”\textsuperscript{59} The corollary to this, the court explained in dicta, is that since the city denied the development review permit – a discretionary decision – preparing an SEIR was unnecessary.\textsuperscript{60}

The other case, Friends of Davis v. City of Davis,\textsuperscript{61} was decided a month later. In that case, the appellate court addressed whether the city could use the design review ordinance to exclude a bookstore from locating in a proposed commercial center in downtown Davis.\textsuperscript{62} Although two EIRs on the subject property were certified and a negative declaration adopted for the annexed portion of the property, citizens attempted to challenge the developer’s pending lease agreement with Borders Bookstores during the staff-level design review process.\textsuperscript{63} Once the planning and building department staff issued the notice of intent to approve the project, citizens

\textsuperscript{53} 122 Cal. App. 4th at 592.
\textsuperscript{54} 82 Cal. App. 4th 473 (2000).
\textsuperscript{55} Id. at 478.
\textsuperscript{56} Id. at 477.
\textsuperscript{57} The city council hearing lasted over six hours. Id. at 476.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 479.
\textsuperscript{60} Id.
\textsuperscript{61} 83 Cal. App. 4th 1004 (2000).
\textsuperscript{62} Id.
\textsuperscript{63} Id.
appealed to the planning commission,64 but the planning commission upheld the staff’s approval of the project.65 The citizens then appealed to the city council and the city council rejected their request to deny the design review approval.66 The court sided with the city in this case, concluding that the design review ordinance does not extend to tenant approval.67 Although the court did not decide the issue of whether the design review approval constituted a ministerial or discretionary decision, it commented that the design review ordinance “entails an exercise of discretion.”68

b. Building Permit Cases

Whereas land use entitlement decisions are presumed discretionary, the Guidelines generally presume that in the absence of a governing law defining “ministerial,” the issuance of building permits is a ministerial act.69 There are numerous cases addressing whether an agency’s issuance of a building permit and related permits is ministerial or discretionary under CEQA. For instance, the appellate court held that issuance of the building permit was ministerial where an addition to a potential historic structure was consistent with applicable zoning and building code requirements.70 Also, courts have held that the issuance of a demolition permit to raze a historic dwelling is ministerial in nature.71 And, another court held that the issuance of a grading permit was ministerial when the grading conformed to specified, fixed standards.72 These cases illustrate that although there is a presumption that building, grading, and demolition permits are ministerial

64. Id.
65. Id.
66. Id.
67. Id.
68. Id. at 1015, see supra note 6.
69. CAL. CODE REGS. tit. 14, §15073 (2009); The guidelines provide, however, that the determination of what is “ministerial” can most be appropriately be made by each public agency based upon an analysis of its own governing laws, but that in the absence of any discretionary provision contained in a local ordinance, it will be presumed that the issuance of building permits, business licenses, the approval of subdivision maps, and the approval of individual utility service connections and disconnections are ministerial. Seneker, see supra note 33.
70. Prentiss, supra note 22.
under CEQA, there have been exceptions to that general presumption in recent cases where elements of discretion have been found. For example, recent cases have narrowed the general presumption to situations where the local agency’s discretion was limited to only determining compliance with zoning and building code requirements.

c. Historical Resource Cases

In cases involving historic structures, courts generally find that even if a building is listed, or eligible for listing, in a local, state, or national inventory of historic resources, a local agency’s decision regarding the alteration of the structure may not necessarily be discretionary. In one case, the court denied a writ of mandate request to compel compliance with CEQA before a historic structure was demolished because the issuance of the demolition permit was ministerial. Furthermore, the mere fact that the state’s Historic Building Code applies to the structure does not grant the local agency discretion in issuance of a building permit. Also, an ordinance giving the local historic resources board the authority to delay issuance of a building permit while assessing alternative preservation methods for a historic structure is ministerial. If, however, the structure is subject to a historic preservation ordinance or statute that encourages cooperation between the government agency and the property owner, then decisions involving preservation of the structure are discretionary. Whether an act is ministerial or discretionary in this context thus turns on the existence of a historic preservation ordinance and the extent to which the ordinance interferes with the owner’s use of the property. Statutes and

73. The Guidelines provide some assistance by setting forth a general presumption that building permit issuance is ministerial in the absence of any discretion. The Guidelines further provide that building permit issuance is considered ministerial if the building permit ordinance limits agency discretion to determining only whether the building construction meets zoning requirements, whether the structure meets Uniform Building Code strength requirements, and whether the applicant’s fee has been paid. CAL. CODE REGS. tit. 14, § 15369 (2009).


75. See Prentiss, supra note 22.

76. Id.

77. Id.


79. Id.
ordinances that compel property owners to preserve historic structures are viewed with disfavor by the courts because these laws significantly interfere with the owner’s use of their property and constitute a regulatory taking.\textsuperscript{80}

2. \textit{Judicial Interpretations of Mixed Ministerial-Discretionary Projects under CEQA in the Land Use Context}

The Guidelines acknowledge a third category of agency decisions: mixed ministerial-discretionary projects.\textsuperscript{81} Unlike discretionary and ministerial projects, the Guidelines neither have a separate provision for "mixed ministerial-discretionary" projects nor separate provisions that define them. Rather, the mixed ministerial-discretionary projects are mentioned as a subsection of the "ministerial projects" statutory exemption.\textsuperscript{82} At first glance, the reference to "mixed ministerial-discretionary projects" in the "ministerial projects" section implies that the Legislature intended to characterize those projects as ministerial. But, the provision states quite the contrary. "[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."\textsuperscript{83} This definition comports with the CEQA’s overarching aim to "afford the fullest possible protection to the environment..."\textsuperscript{84} Thus, where an agency’s ordinance or building code allows the local agency to exercise discretion beyond just determining a project’s consistency with applicable regulations, the courts have generally found that such discretion gives the local agency the opportunity to mitigate potential environmental impacts, and, therefore is a mixed ministerial-discretionary action under CEQA.\textsuperscript{85}

80. Id.
82. Id.
83. Id.
84. \textit{Friends of Mammoth, supra} note 32 at 259.
85. "The final version of A.B. 889 deleted the reference to building permits being ministerial in nature, but retained the exemption for ministerial project, thus in effect leaving to the State Guidelines and local regulations the resolution of the issue whether environmental impact reports are required prior to the issuance of building permits for projects which meet all local zoning requirements and for which an environmental impact report has not previously been prepared. Since the Guidelines have specifically provided that the issuance of building permits is presumed to be ministerial, and since local zoning ordinances typically authorize various permitted uses within districts without further local approval even though a
Cases involving mixed ministerial-discretionary projects are rare in CEQA jurisprudence. In total, there are eight cases addressing mixed ministerial-discretionary projects, and five of them concern land use decisions. The first issue addressed in this line of cases was whether a construction permit for a mobile home park is discretionary or ministerial. In ruling that the construction permit issued was of a mixed ministerial-discretionary character, the court focused on the fact that the permit had to comply with "fixed design and construction statutes in specification and regulation" yet had to meet standards which were dependent on the expertise and personal judgment of the decision maker. The court, however, did not make a bright-line determination about when the character of a decision crosses the threshold from being wholly ministerial or discretionary to being a mixture of both. Rather, it expressed that the underlying principle governing these cases is that "statutory policy, not semantics, forms the standard for segregating ministerial projects from discretionary ones."

The next four cases in this jurisprudence establish that building, grading, and demolition permit processes that give the local agency the latitude to modify a project are mixed ministerial-discretionary actions. The courts did not make bright-line rules determining what degree of latitude exercised is dispositive of a mixed ministerial-discretionary action. Instead, they made factual inquires into the decision makers' actions and focused on the circumstances of each case. In the building permit context, the fact that a permit involves general rather than specific standards is an important factor. For instance, determinations as to whether a site was well substantial actual change in land use results, it appears that environmental impact reports will not be required prior to the issuance of building permits for projects meeting all local zoning requirements unless local ordinances specifically grant discretion to local officials in granting such permits. However, use of this potential loophole will probably be rare in that most projects which might have a significant effect on the environment will normally require other discretionary approvals prior to the issuance of a building permit such as a subdivision map approval..." Seneker, supra note 35 at 165 n.14.


87. Id. at 193.

88. 45 Cal. App. 3d at 194.

drained,"90 "addressed to the sound judgment and enlightened choice of the administrator,"91 and had adequate ingress and egress,92 are considered such general standards. Another factor is whether the local agency has "shape[d] the project in any way which would respond to any of the concerns which might be identified in an environmental impact report."93 In other words, approval of the project cannot be legally compelled unless the design of the project is changed to minimize environmental impacts.94 Examples of such action include conditioning a permit upon completion of traffic, soils, and drainage impact analyses,95 developing internal parking standards without planning commission or city council approval,96 and waiving development standards.97 In Friends of Westwood v. City of Los Angeles, the court found the issuance of a building permit for a 26-story office tower discretionary when the local agency relaxed some building and zoning standards and waived others for its construction.98 The court in that case emphasized that by modifying and waiving some of the zoning and building standards for the project, the local agency had the opportunity to mitigate the project's potential environmental impacts on traffic controls, parking, and vehicle ingress and egress, but chose not to do so.99 Finally, in one instance, courts have found issuance of a building permit to be a mixed-ministerial discretionary action when the project at issue is a component of a larger project subject to CEQA.100 The issuance of a building permit for a project is a component of a larger project where other discretionary approvals are required, like a variance, conditional use permit, or subdivision.101

A grading permit is a compound ministerial-discretionary decision where the local agency could impose numerous conditions to the permit with the goal of reducing hazards to private and public property and
protecting the safety of pedestrians and motorists. In one case, *Day v. City of Glendale*, the court remarked that the decision to condition a grading permit is an “exercise of judgment [and] deliberation” and was therefore discretionary. That case involved the excavation and fill of earth within a 70-acre canyon. That the conditions imposed on the grading permit were not based on “fixed standards or objective measurements” convinced the court that the issuance of the grading permit was of a mixed ministerial-discretionary character.

A demolition permit is a mixed ministerial-discretionary action when local agency officials must be consulted prior to permit issuance. This is so because it is assumed that a local agency would prefer to preserve the structure as an alternative to demolishing it. *San Diego Trust and Savings*

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102. See *Day*, *supra* note 72.

103. Id. at 823.

104. Id. at 819.

105. The City of Glendale Municipal Code imposes the following duties on the city engineer. The City Engineer, in turn, imposes conditions in accordance to the Code:

-- after visual inspection of the grading site the city engineer may require submission of geological and soil reports with recommendations regarding the effect of geological and soil conditions on the proposed development, and those recommendations approved by the city engineer must be incorporated in the grading plan (§§ 23-15(b) and (c));

-- the city engineer may impose regulations with respect to access routes to hillside grading projects “as he shall determine are required in the interest of safety precautions involving pedestrian or vehicular traffic” (§ 23-16(f));

-- in granting the permit the city engineer must attach such conditions as may be necessary to prevent creation of hazard to public or private property (§ 23-16(g)(5));

-- if the city engineer determines that the land area for which grading is proposed is subject to geological or flood hazard to the extent that no reasonable amount of corrective work can eliminate or sufficiently reduce the hazard to persons or property, he must deny the grading permit (§ 23-18).

*Day, supra* note 72 at 823.

106. Id.

107. See *San Diego Trust & Sav., supra* note 78.

108. Id.
Bank v. City of San Diego illustrates this rule. In San Diego Trust, the court ruled that the issuance of permit to demolish a historic structure was a mixed ministerial-discretionary project because under the city’s historic preservation ordinance the “[Historic Resources] Board [had to] investigate and confer with the responsible parties and under these powers impliedly will attempt to secure themselves alternatives where appropriate.” Since the Historic Resources Board had several options in how it acted on the project, exercising their options resulted in a discretionary decision.

There are no cases, however, considering whether administrative land use entitlements, such as administrative conditional use permits or administrative design review, are mixed ministerial-discretionary actions under CEQA. Rather than requiring traditional requirements of notice and public hearing, planning commission and/or committee review, and extended length of review, these projects only require review at the staff level and within a shortened period of time. Many jurisdictions have the administrative design review and/or administrative conditional use permit options to streamline the review process for projects that are presumed less intrusive and controversial. Given that the CEQA Guidelines deem conditional use permits as discretionary, it would seem logical that an administrative conditional use permit would be a mixed ministerial-discretionary project under CEQA. But characterizing an administrative design review decision is more problematic. The Guidelines make no mention of design review as a discretionary action. Although some courts have deemed design review discretionary under CEQA, see supra, other courts have been reluctant to acknowledge that design review is within the reach of CEQA because it addresses purely aesthetic issues. Following the rationale of the former group of courts and those in the building permit cases, administrative design review would be of a mixed ministerial-discretionary character since the decision contains discretionary elements, like recommendations for design modifications and evaluations of the project’s aesthetic compatibility with the surrounding natural and built environment. If the rationale of the latter courts is followed, the local

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109. Id.
110. Id. at 211.
111. See id.
113. Id.
115. Id.
agency’s designation of the action controls, and courts must defer to the local ordinance’s characterization of administrative design review actions. According to this reasoning, if the local ordinance defines administrative design review actions as ministerial, then they fall outside the ambit of CEQA; if the local ordinance characterizes administrative design review actions as discretionary, then CEQA applies. This rationale does not address the problem when a local ordinance does not designate an administrative design review action as either ministerial or discretionary. And this is likely in jurisdictions where land use tools are adopted to address pressing land use issues.

III. The Appropriate Standard of Review for Mixed Ministerial – Discretionary Land Use Decisions

A. Overview of Judicial Review in the Land Use Context

When a local agency’s land use decision is challenged, the petitioner usually files a writ of mandate action with the court. The writ of mandate is a court action to review a decision by the local agency. The mandate proceeding functions as an appeal of the local agency’s decision to the court because it is reviewing the agency’s decision in light of evidence presented to the agency. Once the petitioner has filed an appeal, the respondent local agency must prepare an administrative record for the court, consisting usually of staff reports, meeting minutes, and resolutions, and after hearing oral argument from both sides, the court enters a decision.

There are two different types writ of mandate applicable in the land use context: traditional mandamus and administrative mandamus. The type of mandate available depends on the classification of the land use decision. For legislative and ministerial decisions, traditional mandamus is the appropriate writ; for discretionary actions, an administrative mandate is appropriate. Ultimately, the classification of the land use decision gives rise to an important difference in the nature and scope of review of the local agency decisions by the courts. Thus, the nature of the agency’s action dictates the scope of judicial review.

117. DANIEL J. CURTIN ET. AL., CURTIN’S CALIFORNIA LAND USE AND PLANNING LAW (Solano Pr, 26th ed. 2006).
118. Id.
119. Id.
120. Id.
121. CURTIN, supra note 117.
capricious, or lacking in evidentiary support. The writ in ministerial decisions can only be used to compel the agency to act, but not challenge the substance of its decision. For discretionary decisions, the court evaluates whether the local agency has made findings to support its decision and whether those findings are supported by substantial evidence, also known as the substantial evidence test.

B. Suggested Standard of Review for Mixed Ministerial-Discretionary Action

As discussed in previous sections, under common law, the court on a case-by-case basis evaluates the characterization of agency’s action. Generally, when an agency is required by law to make a decision and the decision involves “only the use of fixed standards or objective measures, and the public official cannot use personal subjective judgment in deciding

122. Id.
123. Id.
124. Judicial review of quasi-legislative planning and zoning decisions, such as the adoption or amendment of general plans and the enactment of zoning ordinances, is normally obtained by a petition for a writ of ordinary mandamus under Code Civ. Proc. § 1085. In such a proceeding, the scope of review is limited to a determination of whether the agency’s action was arbitrary, capricious, or entirely lacking in evidentiary support, or whether the agency failed to follow the procedure and give the notices required by law.

Judicial review of an agency’s quasi-judicial planning and zoning decisions, such as approvals of conditional use permits and tentative tract maps, is normally obtained by a petition for a writ of administrative mandamus under Code Civ. Proc. § 1094.5. In general, the appropriate standard of review of an agency’s quasi-judicial actions under local planning and zoning laws is the “substantial evidence” test. A reviewing court must determine whether substantial evidence supports the agency’s findings and whether the findings support the agency’s decision. In making these determinations, the court must resolve reasonable doubts in favor of the agency’s administrative findings and decision. Nevertheless, despite the applicability of the substantial evidence rule and the deference due to the administrative findings and decision, judicial review of planning and zoning decisions must not be perfunctory or mechanically superficial. Vigorous and meaningful judicial review facilitates the intended division of decision-making labor in land-use control.

Carlyle W. Hall Jr., Writs of Administrative or Traditional Mandamus or “Ordinary” Mandamus, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE (2008).

125. See § II.A. of this Note.
whether or how the project should be carried out," it is a ministerial action. In a discretionary action, on the other hand, a local agency applies its judgment to determine whether the project complies with general standards. No rule or line of cases has developed under common law that could provide guidance on the appropriate standard of review for decisions which have both ministerial and discretionary elements. A line of cases has developed, however, in the mixed discretionary-legislative context that addresses the appropriate standard of review for those decisions.

The courts are split in the mixed discretionary-legislative context on which standard of review should apply to those decisions. Some courts look to the nature and function of the agency’s action. One court ruled that when a local agency determines a project’s conformance or nonconformance with a local coastal plan, but did not have the authority to promulgate any specific development rules, it constituted a predominately discretionary act. Thus, the substantial evidence test under the administrative mandate applied. Other courts in this context, however, have applied the more stringent standard of review when a decision simultaneously involves both discretionary and legislative acts, such as reviewing a general plan amendment and design review application concurrently. A third group of courts have used a “bifurcated standard of review”, which parse out legislative aspects from discretionary aspects and analyze the component under their respective standards of review.

Given this disunity among the courts in the discretionary-legislative context, and given that mixed ministerial-discretionary decisions are contemplated in CEQA, the appropriate standard of review should be dictated by CEQA, and not by the common law. Under CEQA, judicial review of a discretionary decision must follow the administrative mandamus procedure. Just like decisions deemed discretionary under the common

126. Mountain Lion Found. v. Fish & Game Comm’n, 16 Cal. 4th 105, 117 (1997).
127. See supra note 124.
129. Id.
131. See Hall, supra note 128.
132. Id.
133. CAL. PUB. RES. CODE § 21168 provides that review of an agency’s adjudicatory or quasi-judicial CEQA decision, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in a public agency, must follow the administrative mandamus procedure of CAL. CIV. PROC. CODE § 1094.5. CAL. PUB. RES. CODE § 21168.5 provides for
law, the court may not substitute its own judgment for the local agency's, but may only determine whether the act or decision is supported by substantial evidence based on the administrative record. When in doubt, projects of a mixed ministerial-discretionary character are resolved under CEQA as discretionary, so the administrative mandamus and the accompanying substantial evidence test would apply. Even though there are courts that defer to the local ordinance to determine whether an action is discretionary or ministerial, many jurisdictions have appropriated their definitions of ministerial and discretionary from the Guidelines. Moreover, when a local agency codifies entitlements in the zoning ordinance, a threshold issue is whether such action is discretionary or ministerial. This can be attributed to the mandate of CEQA to provide the broadest protection to the environment. Furthermore, when a planner chooses to place conditions on a building permit application or when a planner determines whether an administrative design review or conditional use permit complies with the enumerated standards, such determinations go beyond being merely routine. The decision to impose a particular condition or standard on a project varies from project to project, and requires an assessment of the circumstances specific to each case rather than applying the same specifications and rules to every project. This, in turn, requires the judgment of the individual to effectuate the overarching goals of the policy power of the agency.

review of quasi-legislative agency actions by petition for traditional mandamus. Under § 21168.5, the inquiry extends only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. The California Supreme Court has held that courts generally may consider only the administrative record in determining whether there has been a prejudicial abuse of discretion within the meaning of CAL. PUB. RES. CODE § 21168.5 (West 2009).

134. Id.

135. § 21080.


137. A cursory review of over 149 jurisdictions' zoning ordinances has found that approximately 38 of them have adopted some or all of the Guidelines definitions of ministerial and discretionary in their "Definitions" sections.
IV. Conclusion

Land use regulation has developed as an instrumental means of ensuring the health, safety, and welfare of the public. As it has rapidly evolved over the last century, so too have mechanisms to implement land use regulation policy. Simultaneously, the number of cases challenging land use decisions have increased exponentially and the courts have not kept up with the novel ways in which local agencies have addressed land use concerns. As the public demands more transparency and consistency from local agencies, especially in the land use realm, local agencies are pressed to find more immediate solutions to imminent land use problems. The response of local agencies to land use problems has been creation of a fairly novel category of decisions: mixed ministerial-discretionary decisions. Although CEQA makes explicit mention of such agency actions in the statute, there have been a limited number of cases which have addressed this issue. Based on the failure of the courts within the context of mixed discretionary-legislative cases to establish a uniform set of rules determining the standard of review for courts to follow, and given that CEQA is invoked in so many planning decisions, the taxonomy of land use decisions should apply to all land use decisions, regardless of whether CEQA applies to the project. This would result in a more predictable and transparent process not only for the courts, but for also for local agencies. In addition, a uniform definition of mixed ministerial-discretionary project and standard of review would not come at the danger of usurping local government authority because many jurisdictions have appropriated the CEQA classifications in their own ordinances. Finally, and most importantly, it would mend relations between the local agencies and their citizens and help restore the perception of the local agency’s legitimacy among its constituents.