THE ADMINISTRATIVE RECORD

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Challenges to the validity of local government decisions are normally brought by means of mandamus, either as traditional writs of mandate under Code of Civil Procedure Section 1085, et seq., or as writs of administrative mandate under Code of Civil Procedure Sections 1094.5 and 1094.6. Invariably with respect to administrative mandate, and increasingly with regard to traditional writs of mandate, the administrative record is central to the judicial determination whether the challenged governmental action will be upheld or invalidated.

This paper will discuss the purpose and function of the administrative record in the context of local governmental decision-making, and judicial review of those decisions. In addition, this paper will describe the procedures for preparing and filing or lodging the administrative record when litigation has been filed to challenge governmental action. Finally, this paper will discuss some practical steps that will facilitate the preparation of a complete, accurate administrative record.

A. THE PURPOSE OF THE ADMINISTRATIVE RECORD

The purpose and function of the administrative record is perhaps best understood by analogy to civil litigation. Writs of mandate involve a trial court sitting in an appellate capacity to review the legality of legislative, administrative and quasi-judicial decisions of a local governmental entity. The administrative record, which consists of the entire body of evidence presented to the local decision-making body, is presented to the trial court to assist in its review of the agency's action. In this sense, the administrative record is analogous to the record on appeal and the clerk's transcript of the trial court proceedings that are presented to an appellate court when it reviews the propriety of a trial court decision.

With specific reference to governmental decision-making, the administrative record provides the basis upon which to judge whether sufficient evidence supports the findings and decision of the governmental agency. The process of rendering an administrative decision can be compared to a three-layer pyramid. The final decision of a governmental agency represents the pinnacle of the pyramid, and constitutes a determination with respect to the underlying application or case based upon required findings. The pinnacle of the pyramid rests upon a middle layer comprising the findings that must be made to support the decision. The findings, in turn, are based upon the evidence presented with respect to the application or case, and serve to “bridge the analytic gap between the raw evidence and the ultimate decision or order,” Topanga Association for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 515 (1974). The administrative record represents the compilation and organization of all of the evidence presented to the governmental entity for consideration in connection with the application or case.

The relationship between the evidence comprising the administrative record, the agency's findings and its ultimate decision, is analyzed at length in the Supreme Court's published decision in Topanga Association, supra. The Topanga court invalidated the granting of a variance by the Los Angeles Board of Supervisors because the administrative record did not support the findings required for granting a variance. Analyzing the relationship between the governmental decision, findings, and the supporting evidence, the Topanga court held that a governmental entity “must render findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a
reviewing court of the basis of the board's decision.” (Id. at 514.) Further, the reviewing court must “scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision.” (Id.)

Applying this test, the Topanga court concluded that the evidence in the administrative record was insufficient to support the requisite findings. Government Code Section 65906, which governs the grant of variances, authorizes a governmental entity to grant a variance “only when, because of special circumstances applicable to the property . . . the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classifications.” (Id. at 520.) The evidence presented to the county, and set forth in the administrative record, focused almost exclusively on the qualities of the property for which the variance was sought, rather than examining the difference between that property and the neighboring parcels. The Topanga court reasoned that, in the absence of comparative data on surrounding properties, information regarding the qualities of the subject property in the abstract lacked legal significance with regard to the finding of “special circumstances applicable to the property.” In addition, evidence in the administrative record suggesting that development of the subject property in conformance with the general zoning requirements would require substantial additional expenditures likewise was not relevant to determining whether the finding of “special circumstances applicable to the property” could be made. (Id. at 521.)

Thus, in Topanga, the court determined that the administrative record contained insufficient evidence from which the governmental entity could make the requisite finding in order to grant the variance. To sustain the validity of the governmental action, the administrative record must contain evidence sufficient to support the findings made by the agency, and those findings must be sufficient to support the final decision reached by the agency.

B. PROCEDURE FOR PREPARING AND FILING THE ADMINISTRATIVE RECORD

California law sets forth two principal statutory procedures for the judicial review of administrative and quasi-judicial decisions. The California Administrative Procedures Act, Government Code Section 11500, et seq. governs administrative proceedings of state agencies (e.g., Air Resources Board, Fair Political Practices Commission, Department of Motor Vehicles), and judicial review of those proceedings. With respect to proceedings under the Administrative Procedures Act, the administrative record includes the following types of documents:

1. The pleadings filed with the administrative law judge.
2. All notices and orders issued by the agency.
3. Any proposed decision by the administrative law judge.
4. The final decision or the administrative law judge.
5. A transcript of all proceedings before the administrative law judge.
6. The exhibits admitted or rejected.
7. The written evidence.
8. Any other papers in the case.

(Government Code Section 11523.)
Judicial review of most local governmental decisions that are administrative or quasi-judicial in character are governed by Sections 1094.5 and 1094.6 of the Code of Civil Procedure. Similar to Government Code Section 11523, Code of Civil Procedure Section 1094.6(c) defines the scope of the administrative record as follows:

Such record shall include the transcript of the proceedings, all pleadings, all notices and orders, any proposed decision by a hearing officer, the final decision, all admitted exhibits, all rejected exhibits in the possession of the local agency or its commission, board, officer, or agent, all written evidence, and any other papers in the case.

In addition to the general provisions of Code of Civil Procedure Section 1094.6(c), the California Environmental Quality Act, Public Resources Code Section 21000, et seq. (“CEQA”) establishes special procedures and requirements for administrative records in CEQA litigation. Public Resources Code Section 21167.6(e) provides that the “record of proceedings” shall include, but is not limited to, all of the following items:

1. All project application materials.

2. All staff reports and related documents prepared by the public agency with respect to its compliance with the substantive and procedural requirements of CEQA and with respect to the action on the project.

3. All staff reports and related documents prepared by the public agency and written testimony or documents submitted by any person relevant to any findings or statement of overriding considerations adopted by the agency pursuant to CEQA.

4. Any transcript or minutes of the proceedings at which the decision-making body of the public agency heard testimony on, or considered any environmental document on, the project, and any transcript or minutes of proceedings before any advisory body to the public agency which were presented to the decision-making body prior to action on the environmental documents or on the project.

5. All notices issued by the public agency to comply with CEQA or with any other log governing the processing and approval of the project.

6. All written comments received in response to, or in connection with, environmental documents prepared for the project, including responses to the notice of preparation.

7. All written evidence or correspondence submitted to, or transferred from, the public agency with respect to compliance with CEQA or with respect to the project.

8. Any proposed decisions or findings submitted to the decision-making body of the public agency by its staff, or the project proponent, project opponents, or other persons.
9. The documentation of the final public agency decision, including the final environmental impact report, mitigated negative declaration, or negative declaration, and all documents, in addition to those referenced in paragraph (3) cited or relied on in findings or in a statement of overriding considerations adopted pursuant to CEQA.

10. Any other written materials relevant to the public agency's compliance with CEQA or to its decision on the merits of the project, including the initial study, any drafts of any environmental document, or portions thereof, which have been released for public review, or other copies of studies or other documents relied upon in any environmental document prepared for the project and either made available to the public during the public review period or included in the public agency's files on the project, and all internal agency communications, including staff notes and memoranda relating to the project or in compliance with CEQA.

11. The full written record before any inferior administrative decision-making body whose decision was appealed to a superior administrative decision-making body prior to the filing of litigation.

Given the analytical process that agencies must follow in making governmental decisions -- by which governmental decision must be based upon sufficient findings, which findings in turn must be based upon evidence in the administrative record -- the completeness of the administrative record is critical. Courts conducting judicial review of administrative or quasi-judicial governmental decisions will limit their evidentiary review only to those matters set forth in the administrative record. See, *Western States Petroleum Association v. Superior Court*, 9 Cal. 4th 559, 570 (1995); *Friends of the Old Trees v. Department of Forestry*, 52 Cal. App. 4th 1383, 1392 (1997). As a result, a person challenging the propriety of the governmental decision is entitled to have the entire record of the administrative proceedings presented to the court for review. When the administrative record is incomplete, the court may compel the parties to reconstruct the record. However, if they were unable or refuse to do so, courts have ordered new administrative hearings for the specific purpose of providing an adequate record to permit judicial review. See, *Chavez v. Civil Service Commission*, 86 Cal. App. 3d 324, 332, (1978); *Hadley v. City of Ontario*, 43 Cal. App. 3d 121, 127 (1974).

C. PROCEDURES FOR PREPARING AND FILING THE ADMINISTRATIVE RECORD

Governmental officials and employees frequently will become aware during the pendency of an administrative hearing that the decision likely will be the subject of a court challenge, and that the agency will be required to prepare an administrative record to facilitate judicial review of its action. In these cases, agency staff, working in conjunction with the clerk and counsel, may commence preparation of the administrative record prior to the formal commencement of litigation. Indeed, this advance knowledge provides legal counsel the opportunity to ensure the completeness of the administrative record, and the inclusion of all evidence necessary to support any required findings for the decision.

In this instance, legal counsel should work with the agency staff to determine what findings must be made in order for the agency to take the proposed action. Then, a careful
analysis should be undertaken of the type and nature of evidence necessary to provide a sufficient evidentiary basis for each of the required findings. Efforts should then be undertaken to gather this evidence and include it in the administrative record, in the form of staff analyses, memoranda to the governmental decision-makers or the advisory bodies or, in the case of technical studies and background works, appendices to staff reports or memoranda. Advance knowledge of the likelihood of litigation also permits legal counsel the opportunity to include in the administrative record resumes or curricula vitae of the staff employees or consultants providing analysis of the application or case, in order to establish evidence of their expertise and knowledge.

In most cases, however, efforts to compile the administrative record will not commence until litigation is formally instituted against the agency challenging the governmental decision. The following sets forth a general procedure for the preparation and filing or lodging of the administrative record subsequent to the initiation of litigation.

1. Request For Administrative Record

The preparation of the administrative record is typically triggered by a formal request served upon the agency by the petitioner (i.e., the plaintiff or challenger). Under both the Administrative Procedures Act and the Code of Civil Procedure provisions for administrative mandate, there is no formal deadline by which the petitioner must request the administrative record. (See, Government Code § 11523, Code of Civil Procedure § 1094.6). However, with respect to CEQA challenges, the petitioner must file with the court his or her request that the public agency prepare the record of proceedings relating to the subject of the action or proceeding, and serve that request upon the public agency no later than 10 business days from the date that the litigation was filed. Public Resources Code 21167.6(a).

2. Payment for Administrative Record

The various procedures for judicial review of governmental actions are consistent in requiring that the petitioner pay the cost of preparing the administrative record. The Administrative Procedures Act provides that the petitioner is responsible for paying a statutory fee for the preparation of any transcripts, as well as the cost of preparation of the other portions of the record and its certification (Government Code § 11523). Code of Civil Procedure section 1094.5(a) provides that, “[e]xcept when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner.” Code of Civil Procedure section 1094.6(c) further provides that the local agency “may recover from the petitioner its actual cost for transcribing or otherwise preparing the record.” Under section 1094.5(a), if the party paying the cost of preparing the administrative record ultimately prevails in the litigation, that prevailing party may recover the costs paid for the preparation of the record as court costs.

3. Completion of the Administrative Record

California law establishes very different deadlines for completing the administrative record, depending upon the statute that governs the litigation. Under the Administrative Procedures Act, the agency must complete and deliver to the petitioner the administrative record within 30 days after the petitioner makes a request for the administrative record, provided that
the petitioner has paid the requisite fees for the transcript and other portions of the record and its certification. This time period may be extended by the administrative law judge for good cause shown (Government Code § 11523). Further, under the Administrative Procedures Act, if the petitioner prevails in overturning the governmental decision, the agency shall reimburse the petitioner for all costs paid to the agency for transcript preparation, compilation of the record and its certification. By contrast, Code of Civil Procedure section 1094.6(c) requires that the administrative record shall be prepared by the agency that made the decision, and delivered to the petitioner within 190 days following the date that the petitioner files his or her written request for the administrative record.

The CEQA procedure governing administrative records is somewhat different. Under Public Resources Code section 21167.6(b)(1), the respondent public agency shall prepare and certify the administrative record no later than 60 days from the date that the petitioner serves upon the agency the request for preparation of the record. This time limit may only be extended upon the stipulation of all of the served parties, or by court order. While “[e]xtensions shall be liberally granted by the court when the size of the record of proceedings renders infeasible compliance with that time limit,” and “[t]here is no limit on the number of extensions which may be granted by the court,” the court may not grant any single extension for more than 60 days unless the court makes a finding that a longer extension is in the public interest (§ 21167.6(c)). If the respondent public agency fails to prepare and certify the record within the time limit established by the statute, subject to any continuances, the petitioner may move for sanctions; and Public Resources Code section 21167.6(d) provides that the court may grant “appropriate” sanctions against the public agency for failure to timely prepare the administrative record.

4. Lodging the Administrative with the Court

The Administrative Procedures Act does not specifically provide for the lodging or filing of the administrative record with the court reviewing the agency's action. Code of Civil Procedure section 1094.5(a), by contrast, provides that “all or part of the record proceedings . . . may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court.” In this regard, Rule 347 of the California Rules of Court provides that any party intending to use part of the Administrative Record in a case brought under section 1094.5 must lodge that part of the record with the court at least 5 days before the hearing. In CEQA cases, Public Resources Code section 21167.6(b)(1) provides that, upon certifying the administrative record, the governmental agency must lodge a copy of the administrative record with the court, and serve upon the parties a written notice that the record has been certified and lodged.

D. PRACTICAL POINTERS FOR PREPARING THE ADMINISTRATIVE RECORD

Administrative records vary considerably in size, depending upon the nature of the application or case, the extent of public agency review and analysis, and the level of public controversy and input. For example, a governmental decision to grant a conditional use permit for the construction of a car wash, based upon the adoption of a negative declaration, will likely generate a much smaller administrative record than a decision to certify an environmental impact report and approve a general plan amendment, zone change and subdivision map to accommodate the development of 2,000 residential units and 1 million square feet of retail
commercial uses. Regardless of the size of the administrative record, however, the agency should act with care to ensure that the administrative record includes all required and relevant documents, and is organized in a way that will facilitate judicial review of the governmental decision.

The following is a proposed chronological procedure for the preparation of a relatively large administrative record. While it may be possible to forego some of the detailed suggestions in connection with a relatively small administrative record, it is recommended that all of the following steps be taken to ensure completeness and accuracy of the record.

1. **Defining the Scope of Administrative Record.** Upon receiving a request for the administrative record, or upon determining the need to prepare the administrative record, the clerk or legal counsel should convene a meeting of all individuals who will have responsibility for participating in the preparation of the record. This group will normally include a representative from the clerk's office, legal counsel, the staff employee who served as the project manager or responsible staff member for the application or case, and any other staff employees who played a significant role in processing the application or case for which the administrative record is sought. The purpose of the meeting is to define the scope of the administrative record, identify the major components to be included within the record, and assign responsibility for the compilation of various portions of the administrative record under the ultimate supervision and control of the clerk and/or legal counsel. With regard to assignment of roles, in a case involving a challenge to a conditional use permit, for example, the clerk (or legal counsel) would normally be responsible for collecting the public hearing notices and preparing the transcripts of the public hearing leading up to the conditional use permit decision, while the staff planner assigned to oversee the application would be responsible for collecting and organizing the staff reports, environmental documents, and all correspondence or other transmittals relating to the project.

In defining the scope of the administrative records, it is first necessary to identify the major components of the record. Staff employees familiar with application or case should explain to the others at the meeting the general chronology leading up to the governmental decision, including the dates of each hearing or meeting before the decision making body, before each advisory body (e.g., planning commission). This definition will assist all members of the group in understanding the types of evidence that must be included in the administrative record.

In the land use context, development approvals are frequently granted in the form of concurrent agency approvals of a various different land use entitlements or regulations. For example, a large development project may entail certification of an environmental impact report, approval of a general plan amendment and zone change, and the approval of a subdivision map and development agreement. Even if the legal challenge is directed only to one of the governmental approvals for the development (i.e., the litigation challenges only the subdivision map for the project), it may be important to define the scope of the administrative record to include all of the land use entitlements and regulations that were concurrently approved by the agency because of the overlapping relevance of the evidence relating to each of the approvals.

2. **Designating the Documents to Be Included in the Record.** After defining the scope of the administrative record, the next step is a careful review of all of the documents
relating to the application or case for which the record is sought, and the preparation of a preliminary index or table of contents based upon those documents. During this process, numerous documents will be identified that seemingly do not belong in the administrative record. These documents normally include preliminary drafts of staff reports, memos and other analyses; internal memos that relate only to procedural matters such as the scheduling of staff meetings or the internal circulation of documents; and copies of otherwise relevant documents. Although not included in the initial risk of documents for the administrative record, these other documents should be retained in the agency's files for later review and to assist in a final review of record to ensure its completeness.

In defining the components of the administrative record, the agency should not overlook documents that may not have been physically presented to the decision-makers in connection with the challenged decision, but which are referred to or incorporated by reference in staff reports, environmental documents and other materials provided to the governmental decision-makers. In the CEQA context, it is important that the administrative record include all technical studies and reports (e.g., traffic studies, noise studies, biological surveys, archaeological reports) which provide the foundation for the analyses and conclusions in the environmental impact report or negative declaration. Similarly, where the application or case involves findings relating to the general plan, or the decision relates in some manner to one or more provisions of the municipal code, general plan or municipal code excerpts should be included in the administrative record. Finally, a review should be undertaken of e-mail correspondence between staff members and consultants participating on the project, as the e-mails may be appropriate for inclusion in the administrative record.

3. **Preparing the Hearing Transcripts.** Because public hearings play such an important role in evaluating the propriety of governmental decisions, the agency must take particular care in preparing the evidence relating to those public hearings. In most agencies, meetings and hearings are audio tape recorded; in some cases, where either the agency or a challenger anticipates the litigation, a certified shorthand reporter ("CSR") will transcribe the proceedings, either in addition or to or as a substitute to the audio recording. Where a written transcription of the proceeding has been prepared, it may be used if it was prepared in a professional manner by a neutral preparer. Courts have excluded transcriptions of hearings prepared by persons deemed to have an interest in the litigation (see *Watts v. Civil Service Board*, 59 Cal. App. 4th 939 (1997)).

Where the agency's record of the proceedings is based upon audio tapes, either the clerk or legal counsel should oversee the retention of a CSR to prepare a transcription of the audio tapes. As difficult as it may be for a CSR to attend a public hearing and transcribe all of the proceedings, it is considerably more difficult for a CSR to transcribe the proceedings from an audio tape. This results from the fact that, in a typical public hearing, numerous staff employees and members of the public speak (many without identifying themselves), in addition to frequent questions and comments from the members of the decision making body. If the agency videotapes its meetings, a copy of the videotape should be provided to the CSR to assist in identifying the person speaking at any given time during the hearing. In addition, the staff employee most familiar with the application or case for which the record is being prepared should assist the CSR at the outset by identifying from the tape the various members of the decision making body, as well as the staff employees.
Once the CSR completes the draft transcription of the proceedings, the draft should be circulated for review by the clerk, legal counsel and the staff employee most familiar with the application or case, with particular emphasis on verifying the correct identification of each speaker and the transcription of names and technical terms and phrases. Through this process, the final transcription of the proceedings should accurately reflect what each participant said during the hearing.

4. **Organizing the Administrative Record.** After the hearing transcripts are complete, and all of the relevant notices, staff reports, memoranda and correspondence regarding the application or case have been gathered, the agency should copy and organize the documents. (Copies of the documents should be made at this point, in order to maintain the integrity of the agency's original documents.) Typically, administrative records are assembled in chronological order. However, depending upon the nature of the challenge, a different organization of the record should be considered. For example, if the principal issues in dispute relates to the adequacy of notice of the public hearing on the application or case, the agency may wish to aggregate all of the public notices, mailing lists and similar documents in the first volume of the administrative record. However, in most cases, particularly those in which the agency's action is challenged because of the claim that insufficient evidence supports the findings made by the agency to support its decision, a chronological ordering of the administrative record is preferred.

Upon assembling and organizing the administrative record, the record should be marked to permit quick, easy access to the portions sought to be reviewed. The older, less common method of marking the administrative record involves a numerical or alphabetical designation for each component of the record but without marking each page of every document. For example, each separate document might be chronologically marked by number or letter. The modern, more common method of marking the administrative record is to chronologically paginate each page of the administrative record using a “bate stamp” or similar device. Litigants and the court prefer the “bate stamp” method of marking the administrative record, because it allows them to easily and specifically identify where relevant information or evidence is located.

5. **Assembling the Administrative Record.** Once the administrative record is organized and marked, the agency should prepare the index or table of contents to it. Based upon the size of the administrative record, the agency should determine whether the record may be assembled in a single volume, or whether it should be divided into multiple volumes. The division of the record into volumes affects the format of the table of contents to the record.

The table of contents should separately designate each document in the administrative record by title, date and, if applicable, author, as well as note where in the administrative record (i.e., at what page) the document may be found. Where the administrative record consists of more than one volume, the complete table of contents should precede the first volume of the record. With regard to subsequent volumes of the record, either the complete table of contents (if it reflects the division of the record by volume), or that portion of the table of contents relating to the specific volume, should be included at the beginning of each subsequent volume of the administrative record.

6. **Final Review and Certification.** After the administrative record is fully assembled with the table of contents, the individual most familiar with the record should carefully review it
to ensure its accuracy and completeness. Upon determining the completeness and accuracy of the administrative record, the clerk should prepare and execute a certification, to be placed at the front of the first volume of the record. While administrative record certifications vary considerably by form, and no specific statutory language is required, the following is one possible form of certification:

CERTIFICATION OF ADMINISTRATIVE RECORD

I hereby certify that the following documents, consisting of _____ bound volumes, consecutively paginated as pages ___ through ___ inclusive, constitute the full, true and correct Administrative Record relating to ____________________ [name of application or case]. These volumes comprise the Administrative Record for __________ [title of lawsuit] Superior Court Case No. ____________.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at _________________, California on ________, 2001.

[ name and title ]

Copies of the completed administrative record should be made for each of the parties to the litigation, as well as the court. Further, it is common in many jurisdictions to provide an additional, “courtesy” copy of the administrative record, or the most relevant excerpts of the administrative record, to the court for quick and easy review by the judge hearing the matter.

E. CONCLUSION

As stated at the outset, the administrative record plays a crucial role in the judicial review of governmental decision-making, because the record constitutes the entirety of the evidence which the court will review in determining whether the agency acted appropriately. For this reason, and because each party to the litigation should have the full opportunity to represent its interests before the court, the agency must expend the time, effort and resources necessary to ensure that the administrative record includes all of the documents relevant to a review of the governmental decision under challenge. By preparing a complete, full, accurate, and well-organized administrative record, the agency helps to ensure that its challenged decision will be fully and fairly adjudicated.