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Planning for the Legal Challenge

Success in the Courtroom Begins in the Council Chambers

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DOESN'T IT SEEM LIKE *EVERY* PROJECT IS IN *SOMEONE'S* BACKYARD?

If you are a planning professional working for a public agency in California or a volunteer serving on a planning commission, I know your pain. I have heard planners be accused of pandering to neighbors, of being controlled by developers, of taking bribes, of being incompetent and of being the best thing that ever happened to a city --- and I have heard all that said of the same planner for the same project!

Your job is not easy. You don't make the rules but you are charged with helping to see that the rules are applied fairly and produce the intended results. For controversial projects, that can be a daunting task. It is not easy to conduct business when someone (and many times there are multiple "someones") is breathing down your neck.

Here is the full text of an actual email exchange, which may look familiar; except for the "former network executive" threat which adds a little swank to the usual tirade, I blacked out some identifying information, although the entire document is a public record:

-----Original Message-----
From: flmbiz@[redacted] [mailto:flmbiz@[redacted]]
Sent: Wednesday, August 23, 2006 9:28 AM
To: [redacted]
Subject: RE: MEETING OF THE PLANNING COMMISSION ON 21ST.

DEAR [redacted]: I want you to know that I was very disappointed in the outcome of the Planning Commission meeting. You should be, too, since all three Commissioners said the development you supervised were a disappointment. I feel the meeting of the commission to approve [redacted]'s permit at [redacted] Pacific Coast Highway was discussed and decided between you and the Commissioners before Mr. & Mrs. [redacted], and I -- concerned Citizens, with a legal right to protest in this forum -- were given a full opportunity to address the issues. We certainly were not allowed a rebuttal when facts were presented that were in direct opposition to documents we received. We received the Coastal Letter by E-Mail one day before the meeting -- and Mr. Dave Crawford [the City Biologist] gave testimony in the meeting that was not in accord with the documents you issued to us as "Interested Parties" or "the Commission" -- since your documents reflect a 5 foot setback from ESHA and Mr. Crawford testified to the Commission that [redacted]'s Proposed Development setback was 25 ft. In addition, the Biologist who did Mr. [redacted]'s report is a Business Associate/Partner of Mr. Crawford's which appears to me to be a conflict of interest in the decision making process. I intend to hire a Biologist, recommended, by the Coastal Commission, to do another report on that ESHA Zone, and submit that report to the Mayor if it is not in agreement with Mr. Crawford's testimony about plant & animal life in that streambed. Mr. Crawford also testified that it was a dry streambed which does not reflect fact....when the rains come, it is fully active as a drainage corridor to the sea. You should know that Will and Mary and I have every intention of appealing the Commission Decision to the City Council. You work for

the People of Malibu and you have let the Homeowners of Winding Way down by approving two Developments which are detrimental to the Environment. I noticed Mr. [redacted] did not Pledge Allegiance to the Flag when we were asked to do so at the meeting. Is he a Citizen of the United States? Or is he just a foreign developer intent on polluting our Environment to make money?
Lin [redacted]

The Planner forwarded the neighbors' email to her supervisor and to me (her City Attorney) and the planner adds this:

P.S. I'm hoping someone can advise me of the protocol for forwarding emails such as this when inflammatory comments are also made about the applicant. I was advised that it was OK to forward other emails from this individual to the applicant, but she seems to have taken her comments to another level.

I replied to the email on the Planner's behalf:

-----Original Message-----
From: CHogin@localgovlaw.com
To: flmbiz@[redacted]
Cc: [redacted]@ci.malibu.ca.us; [redacted]
Sent: Wed, 23 Aug 2006 2:21 PM
Subject: Planning Commission decision 8/21/06 re [redacted] Pacific Coast Highway

Ms. [redacted]:

Earlier today you sent an email to planner [redacted] expressing, among other things, your disappointment in the outcome of the Planning Commission meeting last night with respect to the proposed single family home at [redacted] Pacific Coast Highway. Your email was brought to my attention and I want to respond to the extent that you may be confused about the process or under a misimpression about the Planning Commission hearing.

I understand that you are disappointed in the outcome and you are correct that you may appeal the Planning Commission's decision to the City Council. On appeal, you may present whatever evidence you feel was not properly considered and whatever new evidence (for example a report from a biologist) you have to support your position.

Having said that, please understand that the Planning Commissioners do not decide applications prior to the hearing. The Malibu Planning Commissioners are your neighbors and volunteer their time. They have a defined role in the development process: the Planning Commission does not create the rules or land use policies; instead, the Commission applies the rules to specific applications. The Commissioners do their best to get it right. They exercise their judgment with no other motive than the best interests of the community and deference to the rule of law. Whatever they decide is subject to appeal. Prior to the Commission hearing the planner evaluates the applicable regulations and makes a recommendation to the Planning Commission. Her analysis that led to her recommendation is provided in a written staff report. She too is motivated by only the community's interest, the rule of law, and her professional integrity. Her recommendations may be accepted or rejected by the Commission. All interested persons are afforded an opportunity to address the Commission and the Commission accepts all written testimony

and evidence. The Planning Commissioners read all the material submitted to the Commission prior to the hearing. You asserted in your email that you feel that the matter was pre-decided, but you offer no evidence to support that accusation. If you have more information than you revealed to the planner in your email, please let me know. Otherwise, I will assume that you simply meant that you were appalled by the Planning Commission's decision and the planner's recommendation.

Finally, it is irrelevant to the City that you observed that the applicant, Mr[redacted], did not say the pledge of allegiance. The land use regulations that the City implements through the CDP applications are available regardless of citizenship status or political belief.

The City Clerk, Lisa Pope, will be able to help you with an appeal. She may be reached at 310 456 2489 x228.

One might think the trail would end there, but the last word came next:

-----Original Message-----
From: flmbiz@[redacted] [mailto:flmbiz@[redacted]]
Sent: Thursday, August 24, 2006 11:07 AM
To: Christi Hogin
Cc: [redacted]
Subject: Re: Planning Commission decision 8/21/06 re [redacted] Pacific Coast Highway

Dear Christie: Thank you for your response. Unfortunately, I [redacted] and do not have time for the continuing rhetoric surrounding this unpleasant project. You are correct. I am very disappointed with both our City Planners and Commissioners. I am going to turn this matter over to my Real Estate Attorney with a copy of the hearing and all the documents I received from Planning prior to the hearing to make sure this project's development followed every letter of the law with due diligence. I will accept his legal judgment as to what my options might be in the future. However, as a former NBC VP, I will pay close attention to Mr. [redacted]'s development as it moves along and if and when he or his construction associates begin to drop concrete and debris into the ESHA DRAINAGE CORRIDOR and pollute it -- I will invite my friends in the News divisions at the TV Networks to come down and witness first hand how we treat the Environment in Malibu. I have lived in Malibu and owned homes here for 30 years. I am saddened by the direction our City has taken with uncaring developers. I never challenged Mr[redacted]'s right to build -- the question always was SIZE AND SITING FOR AN ENVIRONMENTALLY PROTECTED AREA. Thank you again for your thoughts. You need not respond to this E-Mail.
LIN [redacted]

Exchanges like this tend to increase the project planner's stress level and, in my experience, never contribute positively toward fair and accurate decisionmaking. However, I have also found that the best defense to these kinds of stressors (aside from the help of your city attorney) is a working understanding of due process, of exactly what rights people have and how to ensure that the process is fair.

When stripped of the personal attacks, racism and threats of media attacks, the neighbor above raises important questions.

Can staff make a recommendation to the Planning Commission in advance of the hearing without tainting the proceedings?

Does everyone who participates in a hearing have a right to rebut new information or respond to arguments that are raised? If not, then does anyone have the right to rebuttal?

Was there a conflict of interest? Did the City Biologist have a business relationship with the applicant's consultant?

What exactly are the "due process" rights of the applicants and the neighbors?

Planners and planning commissioners who know the answers to these questions are in a better position to discharge their duty to see that the rules are applied fairly and produce the intended results. Planners and planning commissioners who know the answers to these questions are also less likely to feel alarmed by the threat of "real estate lawyers" or even "friends in the News divisions."

Although planners are usually not decisionmakers with respect to planning applications, the project planner plays an important role in assuring that all interested parties are afforded due process, as will be discussed below. However, in addition to actually affording interested parties due process, a city must also be able to demonstrate to a court that the hearing was fair. In this regard, the planners play a vital role, of which too many are unaware. The project planner is often the most important player in developing the administrative record on which a court will ultimately judge the proceedings.

This paper will address the legal issues of due process and the administrative record from the perspectives of the project planner and the planning commissioner.

DUE PROCESS MEANS REASONABLE NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD BEFORE AN UNBIASED TRIBUNAL

More times in your career as a planner than you will be able to count someone will claim that you or the City has violated his/her due process rights. As a public employee or a planning commissioner, you are charged with the responsibility of administering the rules in a manner that is consistent with the constitution. The constitution provides that

all persons are entitled to "due process of law." For our purposes, due process boils down to three components: reasonable notice, a meaningful opportunity to be heard and an unbiased decisionmaker.

REASONABLE NOTICE Most municipal codes set forth the notice requirements for various applications. Generally, these requirements are the same as state law or provide greater notice than is required by state law. If you provide this notice, it is presumed that you have provided reasonable notice. Often individuals will come to the meeting to complain that they did not get the mailed notice. Usually, these complaints are the least of your worries --- because the person *is at the meeting*. As a lawyer, I am more concerned with the people who should have been noticed and are not at the hearing. Notice is a key component to providing adequate notice. For that reason, I recommend that whoever is charged with mailing or posting the notice provide a statement under penalty of perjury that the mailing or posting is completed. The notice need only state the following:

CERTIFICATE OF MAILING

I am employed in the County of _____, State of California. I am over the age of 18. My business address is_____.

On [insert date], I mailed, with first class postage prepaid, a copy of the noticed attached to this statement to those persons listed on the attached mailing list.

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

X_____

CERTIFICATE OF POSTING

I am employed in the County of _____, State of California. I am over the age of 18. My business address is_____.

On [insert date], I posted a copy of the attached noticed at the following site: _____. Attached is a photograph of the posted sign, which I took at _____am/pm on _____.

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

X_____

For published notice, be sure to get a certificate of publication from the newspaper and keep it in the file.

MEANINGFUL OPPORTUNITY TO BE HEARD While virtually all cities limit the amount of time that a person may address the Commission or City Council during a public hearing, I am not aware of any city that limits the amount of *written* testimony that may be submitted to decisionmakers. Thus, when you are told that someone feels his/her due process rights are violated by the three minute time limit to address the Planning Commission, you may respond that the applicant and members of the public are free to submit written materials to the Commission or City Council for their consideration. Even though this sometimes places an enormous burden on decisionmakers, a city must accept all written submittals up until the close of the public hearing.

Unless you are revoking a permit, generally speaking, no one has the *right* to rebuttal. Rebuttal is basically a second right to speak in order to refute or respond to what others have said. As a matter of good practice, appellants and applicants should be offered an opportunity to reserve some of their allotted time for rebuttal. Obviously, if all members of the public were also allowed to offer rebuttal testimony, a hearing might theoretically go on forever. However, the degree of formality of a hearing is dependent on the particular city and application. The chair of the commission should be encouraged to adopt and apply fair rules, but also to be responsive to matters as they come up.

The Brown Act requires that any materials submitted by staff to the Commission or City Council must be made available to the public *at the meeting*.

UNBIASED TRIBUNAL Finally, the law requires an impartial decisionmaker. The Political Reform Act requires that public officials recuse themselves from participating in decisions where they have a conflict of interest and public officials (including a project planner) should also recuse themselves where they reasonably may

be perceived as biased. This does not mean, however, that a project planner's recommendation can be used as evidence of bias. The recommendation in a staff report should be accompanied by an analysis that demonstrates for the reader how the planner arrived at the recommendation. The best staff reports also explore any alternative perspectives and set forth why they were not adopted by the planner. In this way, reason and evidence govern the process and there is little room for suspicion that a decision was reached for nefarious reasons.

A recent decision by the California Court of Appeal offers some insight into the bias issue. In *Nasha LLC v. City of Los Angeles* (2004) 125 Cal.App.4th 470, a planning commissioner was also a member of a local homeowners' association and had authored an article in the HOA's newsletter that was critical of a project's environmental impacts. The court held that the fact that the commissioner had expressed such concerns as a member of the HOA "gave rise to an unacceptable probability of actual bias and was sufficient to preclude [him] from serving as a 'reasonably impartial, noninvolved reviewer'" when the matter was heard by the Los Angeles Planning Commission.

The applicant proposed to construct five three-story homes on five lots in Los Angeles and obtained design review approval from the LA's Planning Director. The approval was appealed by project neighbors to the Los Angeles Planning Commission. Before the Commission heard the appeal, one commissioner authored an article, critical of the project, for a local homeowner's newsletter.[1] The article was printed in full in the

[1]The article was actually *unsigned*. It was discovered later during a deposition in the lawsuit that the article had been authored by the Commissioner. Read carefully what the article said:

> MULTIVIEW DRIVE PROJECT THREAT TO WILDLIFE CORRIDOR
>
> A proposed project taking five legal lots totaling 3.8 acres for five proposed large homes with swimming pools served by a common driveway off Multiview Drive is winding its was through the planning process. The Mullholland Design Review Board denied it unanimously. However, the Deputy LA Planning Director overrode that denial. The Santa Monica Mountains Conservancy and the neighbors both appealed it to the South Valley Area Planning Commission. The Appeal hearing is set for June 28th after 4:30 pm in Van Nuys. (Please see Hearings/Meetings, Page Two.) After wildlife leaves Briar Summit heading eastward they must head either south towards Mt. Olympus or north to the slopes above Universal City. *The Multiview Drive site is an absolutely crucial habitat corridor.* Please contact Paul Edelman with the Conservancy at 310...or Mark Hennessy who lives adjacent to the project at 323...if you have any questions.

court's decision and the italics were added by the court to signify the troubling language. Again, the article was unsigned when it appeared in the newsletter. The offending portion is quite broad; thus the courts have signified that it is better to err on the side of caution when it comes to due process issues. At the hearing, the Commissioner was joined by two other Commissioners who voted 3-1 to uphold the appeal and thus deny the project.

The Applicant challenged the hearing and the vote, arguing that the Commissioner's article provided evidence of bias against the project which should have prevented his participation in the matter. The Court of Appeal agreed.

The Court first noted that standards of fairness before a local board such as a planning commission cannot be as strict as they would be in a judicial proceeding because local decision makers, especially in a small city, are likely to know some or all of the parties to the proceeding. Nevertheless, a project applicant is entitled to a *reasonably impartial, noninvolved reviewer*. The Court of Appeal held that in order to prevail on a claim of bias violating fair hearing requirements the petitioner must establish, with concrete facts, an unacceptable probability of actual bias on the part of the decision makers: "[b]ias and prejudice are never implied and must be established by clear averments."

In the Los Angeles case, the Court found that the HOA newsletter article constituted the concrete fact necessary to prove an "an unacceptable probability of actual bias." Because three votes were required to pass a motion upholding an appeal, without the biased Commissioner's vote the motion would have failed. Therefore, the Court found that the Commissioner's vote prejudiced the applicant.

P.S. PAY ATTENTION: THE LESSON OF *LACY STREET HOSPITALITY*
Lacy Street Hospitality Services, Inc. v. City of Los Angeles, Supreme Court ordered on June 15, 2005 that the case not be officially published: **Due Process Requires Reasonable Attentiveness by the Decisionmakers**

The article was printed in full in the court's decision and the italics were added by the court to signify the troubling language. Again, the article was unsigned when it appeared in the newsletter. As you can see, the offending portion is quite broad; so you can understand why my advice tends to be conservative in this area – better to err on the side of caution.

The Court of Appeal overruled a Los Angeles City Council decision relating to conditions imposed on a sexually-oriented business. The Court was clearly offended by the behavior of the city councilmembers during the quasi-judicial hearing, in which the council was charged to decide the application of the city's law to a specific property. In such a hearing, due process principles apply; the city council was obligated to be fair and impartial.

The applicant video taped the proceedings, which showed the applicant asking for the attention of the Councilmembers and most Councilmembers apparently ignoring the applicant. The court ruled that the lack of councilmember attentiveness at the hearing suggested that the council could not have made a reasoned decision based on hearing all of the evidence and arguments, which due process requires. The court based its conclusion at least in part on a videotape of the hearing. Indeed the court states that a picture is worth a thousand words and in this case the picture was a video tape that applicant had taken during the hearing. The court noted that most councilmembers were not in their seats during the hearing, some were engaged in cell phone conversations, others were talking with one another and others were reviewing paperwork and eating.

In my experience most local government officials, whether elected or appointed, take their jobs seriously and understand that their decisions affect the lives and livelihoods of various stakeholders. Generally, councilmembers, commissioners and board members are engaged in the hearing and reflect that with their body language, questions and deliberations. Although the Supreme Court chose to "de-publish" the *Lacy Street Hospitality Services* case, meaning that it is not precedent that may be cited as legal authority in other cases, nevertheless, its outcome should serve as a reminder that the actions of the decisionmakers and staff are part of the record of proceedings.

THE ADMINISTRATIVE RECORD MUST BE A TELL-ALL

The Administrative Record tells the story of the city's proceedings. A well told story is essential to success in the courtroom. The project planner, like it or not, is generally the person most responsible for building the written record that will be used to defend the City's action.

TWO REASONS WHY THE RECORD COUNTS: EXHAUSTION AND THE SUBSTANTIAL EVIDENCE TEST

A. Exhaustion. Before one may file a lawsuit challenging a city's land use

decision, specific objections, either orally or in writing, must be presented to the lead agency/city before or at the public hearing on the project. The purpose of this requirement is to give the city a chance to correct errors and address concerns. This requirement also avoids the possibility of a project opponent laying in wait and then bringing a legal challenge after the agency has acted. The exhaustion requirement helps to assure that the required public hearings on a project are real hearings where the issues of consequence are raised and addressed. If an issue is not raised during the public hearing, it is almost always precluded from being raised in court. Indeed, at least one court has held that it is not enough to raise an issue before the Planning Commission where the project is appealed to the City Council; instead, to preserve an issue, it must be raised before the decisionmaking body. *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577.

Exhaustion is a threshold issue. Opponents especially will want to assure that the record reflects that each issue they wish to raise in court has been raised before the city. The preservation of issues is best done in writing and well in advance of the hearing. The more typical scenario involves dumping a 20-page (or longer!) Lawyer Letter on the city at the hearing. This method, though common, generally irritates the commission and its staff. I suppose it has been used effectively enough as a delay tactic; however, the better practice is to prepare in advance and give the decisionmakers a chance to prepare too. After all, the ultimate goal is to persuade the decisionmakers, not irritate them.

To avoid scuffles over exhaustion, should a lawsuit become necessary, the recording secretary or city clerk should indicate each document that is included in the administrative record. A City is not required to take these steps but it will certainly eliminate any doubt with respect to whether an issue was raised and will promote confidence in the City's record of proceedings. A sample stamp is attached to this paper.

B. Substantial Evidence test. After the City makes a final decision, the decision is subject to judicial review by way of writ of mandate.[2] The court's role in reviewing an administrative decision of a city is to determine whether substantial evidence supports the required findings. In the case of a challenge to the environmental review under the California Environmental Quality Act (CEQA), the court's role is to ensure that the

[2]A "writ of mandate" is a court order to a government agency, including other courts, to correct its prior actions or cease illegal acts and follow the law, such as a trial court order directing the city to vacate a decision.

public and responsible officials are adequately informed "'of the environmental consequences of their decisions *before* they are made.'" *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1356 (quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123 (*Laurel Heights II*), original italics.) In *Laurel Heights II*, the Supreme Court described the standard of the court's review in these cases: "In reviewing an agency's determination, finding or decision under CEQA, a court must determine whether the agency prejudicially abused its discretion. (Pub. Resources Code § 21168.5.) '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.' *Id*. The State CEQA Guidelines further define 'substantial evidence' as 'enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.' (Guidelines, §§ 15384, subd. (a).)" *See also* Public Resources Code § 21168.

In applying the substantial evidence test, the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision. *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514; *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 393 ("*Laurel Heights I*"). A court may not overturn a city's decision the ground that an opposite conclusion would have been equally or more reasonable. This is important for agency staff to realize because sometimes there is a tendency to want to exclude evidence that supports a conclusion other than the recommended action. Some people believe that a lopsided record helps in defending a decision. The law recognizes, however, that a full hearing is designed to generate all the information, including conflicting evidence. My experience has been that the best decisions are made when all the facts and arguments are fully vetted. Records with conflicting evidence are expected by reviewing courts and, under the substantial evidence test, the court is not second guessing the decision. Instead, if the record supports the city's decision the court must uphold the decision, even if different or wiser conclusions could be reached from the same record. In applying the substantial evidence standard to review, the court must resolve reasonable doubts in favor of the administrative finding and decision. *Berkeley Keep Jets Over Bay Com. v. Bd of Port Comm'n* (2001) 91 Cal.App.4th 1344, 1356.

Environmental review often involves hiring experts/consultants or relying on in-house expertise. In order to establish that the opinions of these "experts" are informed and their testimony is of substance ("substantial evidence"), it is always a good idea to

submit into the record resumes that emphasize relevant work. This is even true for in-house planning staff in cases where the city is relying on planning opinions.

The administrative record contains all the evidence relied on by the city when making its findings. The court evaluates the city's decision in light of the whole record. A traffic report or a drainage study prepared by opponents after the project is approved generally will not be admitted in evidence in a lawsuit challenging the city's decision. Remember, the court is not trying to determine whether the project should be approved or denied, the court is looking *at the record* to see if the record supports the decision the city made.

NEATNESS IS A VIRTUE: THE PAINFUL LESSON OF *MERCED*

You know you are in trouble when the Court of Appeal opens its opinion by restating the cliché of the three cardinal rules of appellate practice:

> **When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two**.

Protect Our Water v. County of Merced (2003) 110 Cal.App.4th 362, emphasis added.

As you may have guessed from its opening salvo, in the *County of Merced* case, the Court goes on to slam the parties for failing to produce an adequate record and, pretty much on that ground, hands a victory to the opponents of a project approved by the County after having prepared and certified an EIR (and prevailed at trial):

> In this case, the parties totally missed the appellate mark by failing to provide an adequate record for review. Appellants Protect Our Water, San Joaquin Raptor Rescue Center, and the Merced River Valley Association (collectively POW) filed a petition for writ of mandate. POW challenged the approval by respondent County of Merced (County) of a massive project involving the mining of 15 million tons of aggregate reserves on 456 acres near the Merced River by respondent Calaveras Materials Incorporated (CMI). The trial court denied POW's writ petition. POW appeals, claiming a number of California Environmental Quality Act (CEQA) [Footnote omitted] violations.

> The administrative record is large--14 binder-sized volumes. It reads as if its preparers randomly pulled out documents and threw them into binders, failing to organize them either chronologically or by subject matter. Key findings required under CEQA are impossible to find--let alone sufficient to enable us to determine whether they are supported by substantial evidence. **We publish not because the merits of this case warrant public proclamation but because we have observed a pattern of CEQA cases with poorly prepared records making review difficult, if not impossible. We iterate to anyone who will listen: CEQA has very specific requirements regarding what findings must be in the record. Do not ignore the requirements or, like these parties, you will find yourself in the unenviable position of having your judgment reversed and being forced to start over at great public and personal expense.**

Id. Emphasis added here because, although worded as a threat (from a source capable of making good on it), I found something a little sympathetic in the exasperation that must have built up before the court decided to unleash on the County of Merced.[3] "We iterate to anyone who will listen" has a note of desperation in it, like a note in bottle tossed out to sea or a chapter from Dr. Seuss' *Horton Hears a Who*.

However, the reversal of the trial court's judgment upholding the Merced County's decision in a harshly worded opinion was not the end of this lesson in the importance of the Administrative Record. POW went for attorneys fees. The trial court denied POW's motion for attorneys fees. However, the Court of Appeal reversed finding POW entitled to attorneys fees, even though POW had prepared the inadequate record, because it held

[3]Lest Merced go down in history as the Home of the Inadequate Admin Record, I looked up a few facts which I offer to create a more diverse view of the County. The population of the County is 237,155; it is located in the heart of the San Joaquin Valley, the world's most productive agricultural area, and spans from the coastal ranges to the foothills of Yosemite National Park. Merced County's vision statement is "Promote the growth of healthy families, strong minds, food and fiber, and economic diversity through innovative governance." The first three entries under the category of Things I Want To Know on the Merced County Official Website are (1) what I need to do to start a new food business, (2) why Merced County can't establish a child support order and (3) when I will receive my permit and invoice. A Wine and Dine for Canines and Felines at Lake Yosemite Fish and Game Building in Merced County is held annually.

Merced County ultimately responsible due to faulty record keeping. The Court of Appeal described its earlier decision as follows:

> In March 2001, appellants Protect Our Water, San Joaquin Raptor Rescue Center, and Merced Valley River Association (collectively POW), filed a petition for writ of mandamus setting aside a conditional use permit issued by respondent County of Merced (County). The permit allowed real party in interest Calaveras Materials, Inc. (CMI), to conduct surface mining operations (project) at a site known as Woolstenhulme Ranch. The petition also sought mandamus setting aside the certification of the Environmental Impact Report (EIR) for the project and alleged that County had violated the California Environmental Quality Act (CEQA) [Footnote omitted] and the Surface Mining and Reclamation Act of 1975 [Footnote omitted] (SMARA) in approving the project. The trial court denied the petition in July 2002, and POW appealed to this court.
>
> In July 2003, we reversed the trial court's order denying the petition and directed the trial court to issue a peremptory writ of mandate to the County to set aside its approval of the project. (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 1 Cal.Rptr.3d 726 (Opinion).) Our Opinion did not address the merits of the substantive issues raised by POW but instead concluded that the administrative record was so inadequate that the County could not demonstrate on appeal that it had made the CEQA findings required for approval of the project. Although we chided POW (who had elected to prepare the administrative record) for the poor organization of that record and the deficient master index, we placed primary responsibility for the problem-laden record on the County because the County had failed to properly label or draft the documents it was required to prepare in order to satisfy CEQA's requirement of disclosure "to the public the reasons for a project's approval if the project has significant environmental effects." (*Protect Our Water v. County of Merced, supra*, 110 Cal.App.4th at p. 373, 1 Cal.Rptr.3d 726.) [FN3]
>
> FN3. At oral argument, when County noted that POW prepared the record, Justice Wiseman responded, "But who created the documents? " County's attorney stated, "The documents were created from the Planning Commission and from the Board of Supervisors, from the records of Merced

> County." Justice Wiseman then noted "... [POW's attorney] was responsible to prepare the record or opted to prepare the record, but how can you prepare a record when you have those kind of documents to work with in the first place? " The Opinion notes the problem was more "fundamental" than organization and stated that the documents generated by the County were "inadequate for review." (*Protect Our Water v. County of Merced, supra*, 110 Cal.App.4th at p. 372, 1 Cal.Rptr.3d 726.)

Protect Our Water v. County of Merced (2005) 130 Cal.App.4th 488, 491-492.

To avoid these problems, the city should impose certain formalities for each public hearing, regardless of whether litigation is anticipated. Planners should be charged with keeping complete and accurate records. Someone should be in charge of making sure that all files contain proofs of publication, certificates of mailing, sign-in sheets from scoping meetings, copies of all circulated draft documents, copies of all staff reports and correspondence (including printed copies of all email correspondence relating t the item). Each item submitted to the decisionmaking body should bear a stamp indicating the time, date and item number (see attached sample). This way, the record begins to take shape long before it is requested. Regardless of whether litigation is filed challenging a decision, the city is obligated to make its decision in light of the whole record. That being the case, city staff should make sure that the record of proceedings is clear and accessible for the decisisionmakers.

SAMPLE STAMP FOR DOCUMENTS SUBMITTED FOR ADMINISTRATIVE RECORD

CITY OF MALIBU –

OFFICE OF THE CITY CLERK

RECEIVED

Date _____

Item # _____ __