CEQA Administrative Records: Fifth District Opinion Elucidates Rules Governing Contents and Disputes

By Arthur F. Coon on January 5th, 2012

The proper content of CEQA administrative records is frequently a subject of intense dispute in CEQA litigation, resulting in partial certifications by agencies, and motions to strike and augment by various parties. In a recent case addressing a number of other interesting CEQA topics, the Fifth District Court of Appeals devoted a significant portion of its published opinion to administrative record issues, in order to "provide guidance to practitioners in subsequent cases so that they will proceed more efficiently in the expenditure of their own time and that of the courts." (*Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 61.)

The Court prefaced its "discussion of the rules of law concerning administrative records" by positing a two-step inquiry for determining the admissibility of evidence in general in CEQA cases: (1) is the item in question part of the administrative record pursuant to Public Resources Code, § 21167.6(e)? and (2) if not, is the item admissible under the rules applicable to extra-record evidence? (*Id*. at 62.)

In terms of the creation of the administrative record, the Court noted it may be prepared by the agency, the plaintiff, or an alternative agreed method, but in any event it is "subject to certification of its accuracy by the public agency. …" pursuant to Public Resources Code § 21167.6(b)(2). (*Ibid*.)

Following preparation, any disputes over contents must be resolved. While the Court noted that "[n]either CEQA nor the Guidelines specify the procedures parties should follow in presenting these disputes[,]" it construed the statutory language referencing "determination of the completeness" of the record to "necessarily impl[y] that trial courts have the authority to resolve those disputes." (*Id*. at 63.) It next observed that CEQA's statutory language specifying contents (1) enumerates 11 categories of items that are *mandatory* to include in the record, and (2) is *not exclusive*. (*Id.* at 63-64.)

Departing from the "independent review" approach advocated by the parties before it for reviewing the trial court's CEQA administrative record decisions, the Court decided an appellate court should review such trial court determinations "as it would review procedural or evidentiary determinations in other civil cases." (*Id*. at 64.) Among the relevant principles elaborated upon in the Court's opinion is this regard are:

- "When a[ ] [public] agency prepares and certifies the administrative record, it exercises no discretion and employs no specialized expertise; it performs a ministerial task when it applies the mandatory language in section 21167.6, subdivision (e)." (*Ibid*.)
- Accordingly, "when a trial court applies section 21167.6, subdivision (e) and determines the contents of the administrative record, it does so in its role as a trier of fact, … and it resolves

the factual and legal disputes between the parties without deference to the agency's certification." (*Ibid*.)

- "The trial court's determinations regarding the scope of the administrative record are reviewable on appeal." (*Id*. at 71.)

- The trial court's order is presumed correct, placing the burden on an appellant to affirmatively demonstrate error. (*Id*. at 66.)
- "[A]n appellate court reviews the trial court's [and not the agency's] determinations regarding the scope of the administrative record[.]" (*Id*. at 65.)

- The trial court's factual findings are reviewed under the substantial evidence standard. (*Id*. at 65.)
- "The trial court's conclusions of law are subject to independent review on appeal." (*Ibid*.)
- In deciding whether to include in the administrative record documents not submitted to the agency, "it is within the province of the trial court, sitting as the trier of fact to decide factual questions such as reasonable diligence and the persuasiveness of the evidence presented, [and the appellate court] will not second-guess the implied findings made by the trial court." (*Id*. at 71-72.)
- Whether the trial court had correctly determined a document shall be included in the administrative record on the ground it is "written material [ ] *relevant to the … public agency's compliance with [CEQA]* …" (§ 21167.6(e)(10), emph. added) is properly treated as a "factual determination" to which the appellate court must "give the required deference[.]" (*Id*. at 73.)

In stating and applying these governing principles, the Court of Appeal indicated that, in large part, its "discussion breaks new ground only by being explicit in its reasoning and conclusions." (*Id*. at 65.)

A final point of interest is that the Court assumed – without deciding – that a consultant's *withdrawn* comment letter should have been made part of the administrative record, but held that its exclusion was not *prejudicial* error. (*Id*. at 75.) The Court noted in its footnote 12 that: "By making this assumption, we avoid deciding a question of first impression: When a person submits a comment letter regarding a draft EIR and subsequently requests that the letter be withdrawn, does that letter constitute written comment for purposes of [§21167.6(e)(6)] and thus qualify as part of the administrative record?"

That is a very interesting question, indeed, implicating the extent of administrative agency and commenter autonomy in administrative proceedings involving CEQA issues, as well the operation of CEQA's statutory rules for "issue exhaustion" as they are set forth in Public Resources Code §21177(a)-(c), but its decision will have to await another day.