Pete Wilson, *Governor*

BRIDGING THE GAP:

Using Findings in Local Land Use Decisions

Second Edition

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Note: Appendices are available in the print version only. Please contact the Office of Planning and Research for a copy.

BRIDGING THE GAP: Using Findings in Local Land Use Decisions

Revised Edition

In recent years, the struggle over land use planning and development has become more intense in state and local legislative arenas and the courtrooms. Typically, the parties have focused on issues like general plan adequacy, environmental impact report adequacy, voter-enacted growth controls, taking without compensation, and exactions. These controversies have had their share of impacts upon the continuous evolution of modern day planning in California. Meanwhile, a less heralded but equally important progression is affecting the way local officials must explain their land use decisions through the adoption of findings. Many citizens, planning commissioners, elected officials, and planning department staffs have indicated concern for a clearer understanding of what courts and state laws require in the realm of findings. In response, the Office of Planning and Research has prepared this advisory memorandum to explain the legal basis for findings. While this memorandum attempts to present the most current information available regarding findings, land use legislation and case law periodically establish new rules. For this reason, local agencies should consult their attorneys for advice on the latest developments.

Topanga: The Cornerstone for Findings

Any discussion of findings and decisions affecting land use must begin with the seminal case of *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506. In *Topanga*, the court defined findings, explained their purposes, and showed when they are needed.

Definition

The *Topanga* court defined findings as legally relevant subconclusions which expose the agency's mode of analysis of facts, regulations, and policies, and which bridge the analytical gap between raw data and ultimate decision. (*Topanga*, *supra* at pp. 515 and 516.) In other words, findings are the legal footprints local administrators and officials leave to explain how they progressed from the facts through established policies to the decision.

Purpose

The *Topanga* court also outlined five purposes for making findings, two relevant mainly to the decision making process, two relevant to judicial functions, and the last relevant to public relations. Findings should:

1. Provide a framework for making principled decisions, enhancing the integrity of the administrative process;
2. Help make analysis orderly and reduce the likelihood that the agency will randomly leap from evidence to conclusions;
3. Enable the parties to determine whether and on what basis they should seek judicial review and remedy;
4. Apprise a reviewing court of the basis for the agency's action; and,
5. Serve a public relations function by helping to persuade the parties that administrative decision making is careful, reasoned, and equitable.

(*Topanga, supra* at pp. 514, 516, fn. 14, and 517.)

Circumstances Requiring Findings

While the five purposes seem clear enough, state law has not clearly distinguished between situations which require findings and those which do not. Absent a specific legislative requirement for findings, the courts determine when they are necessary. In general, case law has required findings for land use decisions that are adjudicative in nature; these are also known as adjudicatory, quasi-judicial, or administrative decisions. In this type of decision, a reviewing body holds a hearing, as required by the Constitution, state statute, or local ordinance, takes evidence, uses discretion in determining the facts, and bases its decision on the facts. The decision involves applying a fixed rule, standard, or law to a specific set of existing facts. In land use cases, the 'existing facts' are often parcels of land. Adjudicative acts are also described as ones which "are necessary to carry out the legislative policies and purposes already declared by the legislative body." (*Fishman v. City of Palo Alto* (1978) 86 Cal.App.3d 506, 509.) Examples of adjudicative acts include variances, use permits, Williamson Act contract cancellations, coastal zone development permits, Coastal Commission review of local coastal plans, and tentative tract and parcel maps. In each case local officials apply existing land use or other development standards to specific parcels.

Not only do these approvals constitute adjudicative acts, their denials are adjudicative as well. Especially in the case of tentative subdivision maps, if the decision making body makes certain statutory findings, it must deny the tentative map (Government Code Section 66474). If the body makes certain other findings, it has the option of denying the subdivision (Government Code Section 66474.6).

By comparison, findings are not necessary for legislative or quasi-legislative acts, unless specifically required by statute. (*San Francisco Ecology Center v. City and County of San Francisco* (1975) 48 Cal.App.3d 584; *Ensign Bickford Realty Corp. v. City Council* (1977) 68 Cal.App.3d 467, 473.) While legislative acts may also entail holding a legally required hearing, taking evidence, using discretion in determining the facts, and making a decision based on the facts, they contrast with adjudicative acts in one major way: legislative acts generally formulate a rule to be applied to all future cases rather than applying an existing rule to a specific factual situation or parcel. They are also described as declaring "a public purpose and mak[ing] provisions of the ways and means of its accomplishment." (*Fishman v. City of Palo Alto supra*, at 509.) Examples are the adoption or amendment of a general plan or zoning ordinance. Even though a zone change or general plan amendment may be specific to a particular parcel, it is still a legislative act because its underlying effect is legislative in nature, regardless of the size or geographic scope of the property affected. (*Arnel Development Company v. City of Costa Mesa* (1980) 28 Cal.3d 511, 514; *Karlson v. City of Camarillo* (1980) 100 Cal.App.3d 789, 799.) Table I on page 25 lists examples of adjudicative and legislative acts as established by their case law precedents.

Judicial Standards of Review

Before a court determines if findings are faulty, sufficient, or even necessary, it must first determine whether the agency's decision is adjudicative or legislative. This in turn determines which judicial standard the court will use to review the decision. California courts use one of two different standards of review depending on the nature of the decision. For legislative acts, a court will apply the so-called "traditional mandamus" standard in Section 1085 of the Code of Civil Procedure (CCP), reserving the "administrative mandamus" standard in Section 1094.5 of the same code for adjudicative decisions.

Although statutes may designate which standard of review applies to given decisions, courts routinely examine the nature of the decision itself before determining the proper standard of review. (*City of Chula Vista v. Superior Court*(1982) 133 Cal.App.3d 472, 486.) Therefore, statutory designations of the judicial standard of review do not automatically categorize a decision, and the courts are not obligated to observe them.

Traditional Mandamus (or Ordinary Mandamus)

When a party challenges a legislative act the court will use traditional mandamus, a deferential standard of review, to determine:

1. Whether the action was arbitrary, capricious, or entirely lacking in evidentiary support; or,
2. Whether the legislative body has failed to follow the procedures and give the notices required by law.

In decisions affecting land use, the courts have unwaveringly employed this approach, first in *Miller v. Board of Public Works* (1925) 195 Cal. 477, 490, later in *Acker v. Baldwin* (1941) 18 Cal.2d 341, 344, and in *Swanson v. Marin Municipal Water District* (1976) 56 Cal.App.3d 512, 519. These courts held that they will not invalidate a legislative action unless it is unreasonable, lacking a rational basis, or unless the notice of hearing was defective or nonexistent.

In addition, if there is even one reasonable argument supporting the action, the court traditionally will defer to the legislative body and uphold the decision. Although courts consider a legislative act's reasonableness, they generally refuse to impose their judgment because a legislative body's action is presumed valid as it carries out its constitutional power to promote the general health, safety, morals, and welfare of the community. (Evidence Code Section 664 and *Miller, supra* at p. 477.)

The second element of traditional mandamus review concerns observance of legally prescribed procedure. Failure to give notices of public hearings required by law constitutes such an improper procedure, (*Brock v. Superior Court* (1952) 109 Cal.App.2d 594, 605) as does a notice "so defective as to be misleading." (*O.T. Johnson Corp. v. City of Los Angeles* (1926) 198 Cal. 308, 319.) In keeping with these longstanding precedents, the California Court of Appeal more recently invalidated a county's variance approval because its hearing notice did not apprise the recipients of the full proposal. The court concluded that an inaccurate notice is no notice at all. (*Drum v. Fresno County Public Works Department* (1983) 144 Cal.App.3d 777.)

The courts have consistently applied the traditional mandamus standard of review for local legislative actions, and have further ruled that such actions do not require findings to justify them. Time and again, case law has confirmed that findings are not needed for rezoning actions unless statutorily required. (*Williams v. City of San Bruno* (1963) 217 Cal.App.2d 480, 489-490; *Orinda Homeowners Committee v. Board of Supervisors* (1970) 11 Cal.App.3d 768, 774; and *Ensign Bickford, supra* at 473.) Also, annexations do not require findings because of their legislative nature. (*City of Santa Cruz v. LAFCO* (1978) 76 Cal.App.3d 381, 389.)

However, the Legislature on occasion has imposed findings requirements upon certain legislative actions. For example, legislation originally enacted in 1980 requires findings for general plan amendments and zoning ordinances that limit the number of housing units that can be built annually in a given jurisdiction (Government Code Sections 65302.8 and 65863.6). Because these statutes govern legislative actions, and because legislative actions typically do not require findings, much speculation about how courts would treat such findings has ensued. These issues are discussed further on pages 8 & 9.

Administrative Mandamus

Administrative mandamus is the standard of review that courts apply to adjudicative decisions. It asks (1) whether the agency has proceeded without or in excess of its

jurisdiction, (2) whether there was a fair hearing, and (3) whether there was any prejudicial abuse of discretion. The first two of these inquiries are similar to the court's inquiries under the traditional mandamus standard of review. The administrative review is far stricter, however, and is limited to the administrative hearing record, such as staff reports, public testimony, minutes, resolutions, and other submitted documents and exhibits. The major difference between the two standards is the inquiry into prejudicial abuse of discretion.

To establish abuse of discretion, courts will focus on whether the agency proceeded in the manner required by law, whether the agency's findings support its decision, and whether the evidence supports the findings. The reviewing court will employ one of two tests in its inquiry. The independent judgment test is used when the challenged decision involves a fundamental vested right. The substantial evidence test is used in all other cases.

• ***Substantial Evidence Test***

In the substantial evidence test, the court reviews administrative decisions for complete links between data, analysis, and final decision. The substantial evidence test requires that agencies make findings for all adjudicative decisions in order to "bridge the analytical gap between the raw evidence and ultimate decision" as the *Topanga* decision noted in 1974. The court will uphold an agency's action where the evidence, taken in light of the whole record, substantially supports the agency's findings or decision. The "whole record" consists of the testimony, staff reports, hearing transcripts, minutes, letters to the agency, commission, or legislative body, and all other material submitted for consideration before or during the hearing. "Substantial evidence" means just that, and should not be interpreted as merely any evidence. By definition, substantial evidence clearly implies that it must be of ponderable legal significance (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644). As stated in Teed, substantial evidence "'...must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case...'" (*supra*). Further, in accordance with long established administrative law precedents, findings based on insufficient evidence may result in the court remanding the matter to the agency to take further evidence. (*Keeler v. Superior Court* (1956) 46 Cal.2d 596, 600.)

In contrast, the traditional mandamus standard restricts the level of judicial scrutiny to a lower threshold. As a result, local legislative actions remain virtually invulnerable and will likely withstand legal challenges more easily than adjudicative actions.

• ***Independent Judgment Test***

When a fundamental vested right is at stake, the reviewing court will exercise its independent judgment to determine whether an agency's findings are supported by the weight of the evidence. This review is likened to a limited trial de novo — a new hearing in which new evidence and testimony are permitted. While the court is confined to the administrative record, it reviews the evidence afresh and is not bound by the local agency's findings.

Predictably, the court is often called upon to determine whether a local decision has implicated a fundamental vested right. Courts have noted that vesting for the purposes of administrative mandamus review is different from vesting in the land use context. (*McCarthy v. California Tahoe Regional Planning Agency* (1982) 129 Cal.App.3d 222.) The judicial reviewer looks to see if an existing right is being withdrawn or compromised while the land use applicant seeks to acquire a right, usually through the permit process. An apartment owner for example, has no fundamental right to convert the units to condominiums. (*Rasmussen v. City Council of the City of Tiburon* (1983) 140 Cal.App.3d 842.) Nor does a subdivider have a fundamental right to a final map based on an approved tentative tract map where conditions of approval remain unsatisfied. (*Del Mar v. California Coastal Commission* (1984) 152 Cal.App.3d

49.)[1] Neighbors who claim a project will affect them adversely have no fundamental vested rights at stake. (*Guardians of Turlock's Integrity v. Turlock City Council* (1983) 149 Cal.App.3d 584.)[2] Landowners have no fundamental right to dispose of their land through gift deeds creating distinct salable parcels without following the Subdivision Map Act. (*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964.)

• ***Appellate Review***

A trial court will review an agency's decision under either the substantial evidence or independent judgment test. The appellate court always conducts a substantial evidence review. Where the trial court has exercised its independent judgment, the appellate court will consider whether the trial court's findings are supported by substantial evidence. Where the trial court applied the substantial evidence test to an agency's findings, the appellate court will likewise look for substantial evidence to support the agency's action.

Principles Regarding Standards of Review

Traditional mandamus for legislative decisions and administrative mandamus for adjudicative decisions are easily distinguished in California statutes. The distinction is less clear in practice. The fact that a legislative body is the decisionmaker is not a reliable indicator as to which kind of decision has been made. In many instances, locally elected bodies sometimes act in both legislative and adjudicative capacities. For example, a city council or board of supervisors may perform a legislative function by adopting a general plan or a zoning ordinance. But the same body may also perform an adjudicative function, perhaps during the same meeting by acting on a tentative subdivision map, use permit, or variance. In *Sierra Club v. Hayward* (1980) 28 Cal.3d 840, for example, the State Supreme Court set aside a Williamson Act contract cancellation by the Hayward City Council. It held that contract cancellations are adjudicative acts reviewable under Code of Civil Procedure Section 1094.5, in spite of the fact that the City Council often sits as a legislative decision making body. Courts have shown that they will use the administrative mandamus standard of review for any adjudicative act, regardless of the type of body that makes the decision.

Further, the distinction between ministerial and discretionary acts does not provide a sure signal that courts will use one standard of review over the the other. Planners frequently refer to ministerial acts as mechanical, in-house procedures which can be approved by staff, such as zoning clearances and building permits without conditions of approval. Traditional mandamus is the proper means to compel an agency to perform a ministerial act. (*Kirk v. County of San Luis Obispo* (1984) 156 Cal.App.3d 453.) To the judicial reviewer, however, a permit is discretionary if any conditions or qualifications bar its immediate issuance. A building permit, therefore, is discretionary if it has a condition that school impact fees be paid prior to issuance. A developer challenging the condition uses administrative mandamus. (*McLain Western #1 v. County of San Diego* (1983) 146 Cal.App.3d 772.) Once the fees are paid and no conditions remain, the developer uses traditional mandamus to compel issuance of the permit. To be safe, some attorneys recommend to their local planning agencies that they use findings to support *every discretionary action* that may significantly affect the developer or the public.

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[1]In 1984 and 1985 the Legislature amended the Subdivision Map Act to create vesting tentative maps (Government Code Sections 66498.1-66498.9: Statutes of 1984, Chapter 1113; Statutes of 1985, Chapter 995; and Statutes of 1986, Chapter 613). The new provisions confer a right to develop according to the approved tentative map without the risk that conditions will be added or changed at the parcel/final map or time extension stages (Government Code Section 66498.1). Future legal challenges will determine whether an approved vested tentative map confers a fundamental vested right for judicial review purposes.

[2]Editorial modifications (1984) 150 Cal.App.3d 1141c.

Legal observers concede that the distinctions between adjudicative and legislative decisions are not often clear. Through the intersection of land use law with administrative law, California cases reflect the judiciary's infrequent attempts to distinguish between adjudicative and legislative land use decisions. Rare is the case that overturns a precedent establishing a given land use decision as either adjudicative or legislative. Even rarer is the case that performs a "double reversal," resulting in the reversal of a case so that a ruling is restored to is original precedent-setting status. One of these rare double-reversals came in a 1984 Court of Appeal decision. The court overturned a case which itself had overturned an early line of cases, and in the process confirmed earlier decisions that road abandonments are legislative acts. (*Heist v. County of Colusa* (1984) 163 Cal.App.3d 841.) *Heist* overturned *City of Rancho Palos Verdes v. City Council* (1976) 59 Cal.App.3d 869, which held that street abandonments are adjudicative acts. *Rancho Palos Verdes* had overturned *Ratchford v. County of Sonoma* (1972) 22 Cal.App.3d 1056. *Heist* restored *Ratchford*, which held that vacation of a city street is a legislative act, supporting a long line of cases dating back to the 1890s. While the distinction between legislative and adjudicative acts remains unclear, case law has produced several principles to guide local planning agencies on standards of judicial review.

1. **When a decision making body makes both adjudicative and legislative decisions simultaneously, judicial review must follow the more stringent standard of administrative review.**

In *Mountain Defense League v. Board of Supervisors of San Diego County* (1977) 65 Cal.App.3d 723, 729, the Court ruled that when two decisions are made simultaneously, one requiring findings (a private development permit) and the other not requiring findings (a general plan amendment), only one set of findings is necessary. However, judicial review of the entire decision must follow the more stringent administrative mandamus standard.

2. **When a decision is both legislative and administrative, courts will determine which standard prevails and will apply the judicial review accordingly.**

Local coastal plans (LCPs) adopted pursuant to the Coastal Act are the best example of decisions which are both adjudicative and legislative. The local agency uses its LCP as a general plan for its coastal zone. That same LCP is reviewed by the Coastal Commission for consistency with the Coastal Act much the same way that a local agency adjudicatively reviews a development request for consistency with the general plan. Following a detailed analysis, the Court of Appeal concluded that Coastal Commission certification of an LCP is an administrative act reviewable under Code of Civil Procedure 1094.5. (*City of Chula Vista, supra*, p. 488.)

More recently the California Supreme Court showed how narrowly the courts analyze threshold decisions. The court ruled that when a city amended its LCP by approving a land use plan change, rezoning, and specific plan, it clearly acted in its legislative capacity. (*Yost v. Thomas* (1984) 36 Cal.3d 561, 571.) The statewide policy mandate of the Coastal Act and the Coastal Commission's subsequent administrative review of the changes do not transform the City's legislative act into an administrative one.

3. **A court may decline to decide the threshold issue of whether an act was adjudicative or legislative if it can dispose of the case by rendering a decision on other grounds.**

A city's bad faith refusal to issue a business license entitled an applicant to relief one way or another, irrespective of which form of mandamus was appropriate. (*Kieffer v. Spencer* (1984) 153 Cal.App.3d 954.) In another case, a city treated its consent to a private condemnation action as adjudica-

tive and the court found its decision to satisfy the stricter administrative standard. (*L & M Professional Consultants Inc. v. Ferreira* (1983) 146 Cal.App.3d 1038.) Although the court analyzed the decision as if it were adjudicative, it stopped short of actually identifying it as such. Further, it determined that it did not need to resolve the issue of whether the city's consent really was administrative or not. (*L & M Professional Consultants, Inc., supra* at p. 1054.) By the same token, several other California decisions have reviewed redevelopment agency findings of blight and redevelopment plan adoptions as if they were adjudicative — with findings supported by substantial evidence — but stopped short of identifying them expressly as such. (*Emmington v. Solano County Redevelopment Agency* (1987) 195 Cal.App.3d 491; *Fosselman's, Inc. v. City of Alhambra* (1986) 178 Cal.App.3d 806; *National City Business Association v. City of National City* (1983) 146 Cal.App.3d 1060; *Regus v. City of Baldwin Park* (1977) 70 Cal.App.3d 968; and *In re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21.)

4. Statutes may limit the right to judicial review.

Specific statutory time frames govern how soon a party must file lawsuits challenging certain types of land use decisions. For example, the Subdivision Map Act allows 90 days to challenge a Map Act decision, while the Coastal Act allows a 60 day challenge period. The right to judicial review is waived if not exercised within these statutory limits. (*Griffis v. County of Mono* (1985) 163 Cal.App.3d 414, *Kirk v. County of San Luis Obispo* (1984) 156 Cal.App.3d 453, *Leimert v. California Coastal Commission* (1983) 149 Cal.App.3d 222.)

5. Where a statutory remedy is explicitly provided, judicial review must address its applicability.

Under the hierarchical relationship of land use laws, land use permits are issued pursuant to a zoning ordinance which must be consistent with a general plan. Challenging the validity of a use permit on the basis of a defective general plan also challenges the zoning ordinance under which the permit was issued. (*Neighborhood Action Group for the Fifth District v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1184.) Since Government Code Section 65850(b) provides an explicit remedy for residents or property owners to enforce compliance of ordinances with the general plan, any judicial review must consider this remedy even if it is ultimately found inapplicable. (*Neighborhood Action Group, supra* at p. 1187.)

6. A combination of administrative and traditional mandamus may be necessary in some cases.

Government Code Section 65750 provides for traditional mandamus as the exclusive means to challenge the adequacy of a general plan. Where a permit may be invalid because of a defective general plan, however, the adequacy issue may also be addressed through administrative mandamus action on the permit. A challenge to a conditional use permit on the grounds that the county's general plan was deficient has to include not only traditional mandamus to satisfy Section 65750 but also administrative mandamus to review the permit. (*Neighborhood Action Group, supra* at p. 1176.)

A variation on this situation may arise where a project involves a series of approvals. One kind of review may be pursued at one step in the process and the other kind at a later step. For example, traditional mandamus is appropriate to review a resolution of necessity which identifies property to be condemned. (Code Civil Procedure Section 1245.255.) The inclusion of a particular property may also be attacked in the subsequent eminent domain proceedings through administrative mandamus procedures. (*Huntington Park Redevelopment Agency v. Duncan* (1983) 142 Cal.App.3d 17.)

7. Courts have honored statutory variations on basic mandamus standards.

As discussed earlier, courts will examine an agency's action to determine whether it is legislative or administrative even when the statute specifies one or the other review. (*City of Chula Vista, supra* at p. 486.) Some statutes, however, prescribe a standard of review which reflects past judicial decisions but varies the scope of review. A resolution of necessity may be invalidated in an eminent domain action if the reviewing court finds gross abuse of discretion (Code of Civil Procedure 1245.255(b)). The administrative mandamus statute, Code of Civil Procedure Section 1094.5, however, does not require that the abuse of discretion be gross. Another example of statutory deviation from the administrative mandamus standard is found in the California Environmental Quality Act (CEQA). Public Resources Code Section 21168 specifically proclaims Code of Civil Procedure Section 1094.5 review for administrative decisions under CEQA. But then the section goes on to forbid the court to exercise its independent judgment. So far, the variant scope of review has not been directly at issue before the courts, but in the fertile field of land use litigation, it is a question to be watched.

8. CEQA decisions reviewed under either Public Resources Code Sections 21168 or 21168.5 are subject to the substantial evidence test.

Implicit in these provisions is the determination that all CEQA determinations are adjudicatory. It's not altogether clear why separate provisions for judicial review were made when the ultimate scope of review is virtually the same.

9. Statutory findings requirements do not automatically categorize a land use decision as adjudicative; courts have the final say as to its classification.

The Legislature often requires that specific findings accompany certain land use decisions. Specific statutory findings requirements are commonplace for adjudicative decisions but rare for legislative decisions. In fact, statutory findings requirements for legislative land use decisions did not exist at all until findings for EIRs came to be required under CEQA. Subsequently, Government Code Sections 65302.8 and 65863.6 required findings for mandated general plan elements or plan amendments and rezoning which had the effect of limiting the number of housing units that could be constructed annually. It is important to note, however, that a statutory findings requirement does not automatically categorize the decision as adjudicative, resulting in the court applying the administrative mandamus standard of review. Rather, the court will consider all relevant circumstances surrounding the decision, with an emphasis on function rather than process, to decide the appropriate standard of review. (*City of Chula Vista, supra* at p. 488.)

Land Use Control by Initiative and Referendum

California voters have often used initiatives to establish direct control of land use decisions. These voter approved actions are restricted to legislative types of actions of planning and zoning, but may not be used for adjudicatory acts. (*Arnel Development Company v. City of Costa Mesa* (1980) 28 Cal.3d 511; *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 170.) Until recently, from the perspective of local land use decisions, the fundamental issue had been whether an initiative must contain any statutory findings that would be required of a city council or board of supervisors, if the same actions were approved by the council or board.

As mentioned on page 3, Government Code Sections 65302.8 and 65863.6 require findings that justify reducing regional housing opportunities before any zoning ordinance or mandatory general plan element may be adopted or amended to limit the number of housing units that may be built annually. These statutes are silent as to their applicability to actions taken by initiative.

However, a recent California Supreme Court decision held that Government Code Section 65863.6's findings requirements for growth-limiting zoning ordinances do not not apply to initiatives, because otherwise, the requirement "would place an insurmountable obstacle in the path of the initiative process and effectively give legislative bodies the only authority to enact this sort of zoning ordinance." (*Building Industry Association v. City of Camarillo* (1986) 41 Cal.3d 810, 824.)

Case law has also established that California voters may also intervene in local land use planning through the referendum. (*Yost v. Thomas* (1984) 36 Cal.3d 561.)

Other Guidelines for Making Findings

Despite the uncertainty in statutory findings requirements for legislative actions and in land use controls by initiative and referendum, *Topanga* still provides the clearest direction for making findings. Other guidelines have emerged from case law in *Topanga's* wake to help local officials make sound, legally sufficient findings.

1. A final decision making body may use a subordinate body's findings, but it is not obligated to do so.

Final decision making bodies such as city councils are free to reject the findings of their planning commissions or boards of zoning adjustment, if they deem appropriate (*Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal.App.3d 893, 906), especially in light of new evidence submitted on appeal. (*Lagrutta v. City Council of Stockton* (1970) 9 Cal.App.3d 890, 895.)

Administrative appeals also involve issues of the adequacy of findings. The extent to which a subordinate body's findings govern the appellate body's decision will be determined by local procedures. If local regulations require a hearing de novo, the body conducting the hearing is not bound by the subordinate body's findings. In other jurisdictions, the appeal hearing may be limited to only those aspects of the decision actually appealed. In these cases, prior findings not raised on appeal are left undisturbed.

First corollary: Local procedures governing appeals may affect the proper adoption of findings.

Whitman v. Board of Supervisors of Ventura County (1979) 88 Cal.App.3d 397, 416, illustrates how local procedures governing appeals affect the adoption of findings. In *Whitman*, the Planning Commission and staff recommended that the Board certify an environmental impact report (EIR) and approve a conditional use permit with 59 conditions. The applicant appealed seven of the 59 conditions, but the Commission and staff recommended that the Board deny the appeal. The recommendation included findings to support the denials. In keeping with a local ordinance, the Board's approval of the conditional use permit automatically meant approval of the findings that the lower body, in this case the Planning Commission, made. The Board granted the appeal, thereby eliminating the seven conditions and retaining the rest. Acknowledging that the local ordinance resulted in the Board's automatic adoption of the lower body's findings, the Court held that when the Board certified the EIR and approved the conditional use permit, it also adopted the pertinent record and findings concerning the EIR and conditional use permit. Thus, the record lacked findings necessary to support granting the appeal, and the court remanded the decision for the Board to adopt the necessary findings.

Second corollary: When a decisionmaker declines to follow a staff recommendation that includes proposed findings, the decisionmaker may have to make additional findings.

Whitman also demonstrated that when a decisionmaker declines to follow a staff recommendation that includes proposed findings, the decisionmaker may be obligated to make additional findings. A subsequent case presented this same issue in the CEQA context. (*Environmental Council of Sacramento v. Board of Supervisors of Sacramento County* (1982) 135 Cal.App.3d 428.) Here, the Board adopted a supplemental EIR on a project, but contrary to staff's recommendation, concluded that the impacts had been reduced to insignificance. The court ruled that the Board must adopt complementary findings to meet the Public Resources Code Section 21081 requirement to show how the impacts had been mitigated.

2. Findings must be substantive, not just recitations of the law.

Generally, findings are not sufficient if they merely recite the very language of the local ordinance or state statute that requires them. (*Carmel-by-the-Sea v. Board of Supervisors of Monterey County* (1977) 71 Cal.App.3d 84, 92.) For example, whenever a statute requires a local legislative body to find that a proposal be consistent with the local general plan, the board or council cannot discharge its responsibility by simply stating that there is consistency. The decision making body must set forth the basis for the consistency between the project and the plan. The mere recitation of statutes is a self-serving exercise that is more conclusory than analytical. This same principle applies to CEQA findings. (*Village Laguna of Laguna Beach, Inc. v. Board of Supervisors of Orange County* (1982) 134 Cal.App.3d 1022.) A local agency must expressly reject as infeasible each mitigation measure or project alternative identified in an EIR but not adopted in a project approval in order to satisfy findings requirement of Public Resources Code Sections 21081 and 15088 (now Section 15091). This documentation discloses the decisionmaker's thinking process and satisfies the *Topanga* mandate because it provides the intermediate analytical step linking the basic data to the decision. However, there are some instances when statutorily required findings are so detailed and precise that merely reciting them would satisfy the Topanga mandate. (*Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389-392.)

3. Findings need not be formal, but may be included in the agency's order or resolution.

A pre-*Topanga* zoning decision held that the findings of a local commission, composed of laymen, are expected to be informal, and that they are not required to meet the standards of judicial findings of fact. (*Swars v. Council of City of Vallejo* (1949) 33 Cal.2d 867, 872; and *County of Santa Barbara v. Purcell* (1967) 251 Cal.App.2d 169, 177.) In *Hadley v. Ontario* (1974) 43 Cal.App.3d 121, 128, the Court ruled that an administrative agency's findings need not be formal, but may be included in the agency's resolution. However, findings must be set forth clearly — they cannot be vague or ambiguous. (*Rural Land Owners Assn.* v. *City Council of Lodi* (1983) 143 Cal.App.3d 1013, 1023-1024.) Nevertheless, local agencies have discretion in the manner that they record findings. Thus, findings contained in the minutes and references to staff reports in motions will satisfy the courts. On the other hand, a legislative body's debate and oral remarks at a hearing are not sufficient to meet the *Topanga* requirements. (*Pacifica Corp. v. City of Camarillo* (1983) 149 Cal.App.3d 168, 179.) An early environmental case established a related guideline regarding the formality of findings, addressing EIRs and written findings required by local ordinance. (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 270.) The court determined that when an EIR provides the same informational benefits that locally required written findings do, no additional findings are required.

4. Administrative findings will not rescue a decision when an agency has not followed the procedure required by law.

Failure to proceed in a manner required by law is a separate ground for finding abuse of discretion. In a recent case, the court held that an additional or supplemental EIR should have been performed when, after EIR certification, a Board of Supervisors discovered that a proposed road would encroach on a significant wetland. (*Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal.App.3d 357.) The fact that the Board had adopted findings addressing wetlands pursuant to the original EIR was insufficient to consider the full range of impacts, alternatives and mitigation measures when the wetland extended further that the original project description contemplated.

Preparation of Findings: A Question of Timing and Justification

In resolving the question at which point in the process the decision making body should adopt findings, *Topanga* again provides guidance. *Topanga* states that findings should enhance the integrity of the administrative process, help make analysis orderly, and reduce the likelihood that the agency will randomly leap from evidence to conclusions. This requires the decisionmakers to identify the reasons supporting a decision prior to taking action.

However, in the daily reality of acting on a myriad of different land use applications, a local body may face a number of factors making it difficult to formulate detailed and well-articulated findings and reduce them to writing at the point of the decision. Factors affecting this include the nature of the decision, the evidence, and the presence or absence of external factors like state mandated time limits requiring local agencies to act within specific time periods. The following example illustrates how these factors influence the adoption of findings.

> Late in the evening, after lengthy public testimony and extensive post-hearing discussion of the basis for the decision, a planning commission has reached consensus to approve a tentative subdivision contrary to staff recommendation. The staff report contains suggested findings supporting denial of the tentative subdivision. The commission must act on the application that evening because of statutory time limits. The planning commission acts by motion on all matters, and the sponsor of the approving motion, a lay person, has difficulty articulating all the reasons which have been discussed for approving the project. Because of the time limits, there is no future opportunity to incorporate the findings into the decision, since the planning commission acts by motion on all matters.

This illustration shows several practical difficulties in adopting adequate findings. First, lay commissioners may not readily assimilate new information and may have difficulty verbalizing their rationale in the form of structured findings needed to support their decisions, especially if such decisions closely follow lengthy public hearings and statutory time limits are present. Second, in jurisdictions where commissions act by motion without a required resolution, no ready mechanism exists by which to prepare findings.

In this example, had the commission agreed with the staff analysis, it could have adopted findings by reference to the staff report, since making findings by reference is permissible. (*McMillan v. American General Finance Company* (1976) 60 Cal.App.3d 175, 184.) Many agencies have their staffs prepare proposed findings for their decisionmakers to consider and then use, revise, or reject. Suggested findings can help the decisionmakers identify the appropriate in-

formation, policies, and regulations governing the proposed project and guide them in making the necessary findings. Of course, before adopting any staff-prepared findings, the decisionmakers must review them objectively and, where necessary, revise them to make sure that they accurately reflect both their own conclusions and the evidence in the record — which is likely to be supplemented in the hearing after the preparation of the staff report. In addition, the decision making body's failure to review these findings objectively exposes them to a challenge for acting without appropriate deliberation. That is, in the end, the commissioners would not have adopted findings of their own design but, instead, would adopt findings reflecting the staff opinion of what the decision should be.

Where the opportunity exists, many local land use decision making bodies take tentative action and then direct staff to draft a written statement of the supporting reasons as reflected in the evidence and the deliberative discussion. The staff prepared draft can then be reviewed for adoption as the agency's findings at a later meeting. This method provides the opportunity to review the entire record carefully, including the evidence presented during the public hearings. Of course, if this review of the record reveals that there is an evidentiary gap, the decisionmakers must be prepared to alter their decision. This method, however, is not without its drawbacks, particularly when time is of the essence in arriving at a decision. In a decision making body's haste to act, it may overlook essential information that would have an impact on the outcome. Such an oversight may lead to a post hoc rationalization — a rationalization of the decision after the fact. At least six California courts in the past have indicated their disapproval of post hoc rationalizations as a basis for land use decisions. (*Environmental Defense Fund, Inc. v. Coastside County Water District* (1972) 27 Cal.App.3d 695, 706; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 79 & 81; *Mount Sutro Defense Committee v. Regents of University of California* (1978) 77 Cal.App.3d 20, 36-37; *Rural Land Owners Assn. v. City Council of Lodi* (1983) 143 Cal.App.3d 1013, 1021; *Resources Defense Fund v. Local Agency Formation Commission of Santa Cruz Co.* (1987) 191 Cal.App.3d 886, 900; and *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 394).

Whether or not a decision making body relies on staff-prepared findings pre- or post-hearing, the goals are the same. These goals are to ensure that decisions are made in an open and reasonable manner, based upon articulated reasons which in turn are based upon the evidence in the record.

Summary

California courts have demonstrated their concern for rational and open land use decisions that protect the public interest. The *Topanga* ruling offered five purposes for findings, all emphasizing these concerns. The now familiar language of "bridging the analytical gap between raw data and ultimate decision" leaves no doubt that courts intend that decisionmakers follow an orderly path of logic before arriving at their decisions. While the political reality of making land use decisions involved compromises at times, political reality should also involve rational and dispassionate deliberation in the decision making process.

In the area of land use planning, local decision making bodies must adopt findings when making adjudicative decisions — variances, conditional use permits, tentative subdivision and parcel maps, Williamson Act contract cancellations, local coastal plans, coastal commission permits, and the like. Further, Public Resources Code Section 21081 requires decision making bodies to make one or more findings when an EIR identifies a proposed project's significant effects. Though some state statutes require findings before jurisdictions approve certain legislative decisions, such as growth limiting general plans, growth limiting zoning ordinances, and timberland preserve rezoning, courts have not yet reviewed these findings requirements.

The process of making land use decisions has its rough edges: economic impacts, election campaigns, tender egos, and neighborhood conflicts. Making findings as an integral part of the decision making process will not guarantee that all of the rough edges will be smoothed out. However, if decision making officials take findings seriously, they can reduce the public's doubts about the wisdom of their decisions and reduce public skepticism about their motivations. Using findings builds an excellent defense for local officials' decisions, and ultimately more justly serves the public purposes of regulating land use.

Table 1

Local Land Use Decisions and Judicial Standards of Review

Adjudicative Acts (also known as quasi-judicial, adjudicatory, and administrative)

Reviewed under Code of Civil Procedure Section 1094.5

- Conditional Use Permits (*Essick v. City of Los Angeles*)
- Variances (*Topanga v. Co. of Los Angeles*)
- Coastal Zone Development Permits (*Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Commission*)
- Private Development Plans, when coupled with a tentative subdivision map (*Mountain Defense League v. Board of Supervisors*)
- Tentative Subdivision Maps (*Big Rock Mesas v. Board of Supervisors*)
- Tentative Parcel and Subdivision Maps (*Horn v. Ventura*)
- Williamson Act Contract Cancellations (*Sierra Club v. Hayward*, Government Code Section 51282.1[a])
- Local Coastal Programs (*City of Chula Vista v. Superior Court*)
- Condo Conversion Permit Issuance under Conversion Ordinance (separate permit from tentative map) (*Rasmussen v. City Council of the City of Tiburon*)
- Certificate of Compliance Issuance (*Pescosolido v. Smith*)
- Development Allotment Per Growth Control Ordinance (*Pacifica Corp. v. City of Camarillo*)
- Resolution of Development Project consistency with local General Plan (*Guardians of Turlock's Integrity v. Turlock City Council*)
- Tentative Map Time Extension (*Griffis v. County of Mono*)
- Habitat Conservation Plan Amendments, pursuant to the Federal Endangered Species Act (*W.W. Dean & Associates v. City of South San Francisco*)
- CEQA decisions requiring public hearings, acceptance of evidence, and local decision making body's discretion in determining facts; courts will determine whether substantial evidence supports the decision (Public Resources Code Section 21168)

Legislative Acts (also known as quasi-legislative)

Reviewed under Code of Civil Procedure Section 1085

- Airport Land Use Plans (*City of Coachella v. Riverside County Airport Land Use Commission*.)
- Water District Annexations and Exclusions (*Wilson v. Hidden Valley Municipal Water District*)
- Certain types of Planned Unit Development, including Project Precise Plans, Floating Zones, and Cluster Zones (*Millbrae Association for Residential Survival v. City of Millbrae* [dicta*] and *Orinda Homeowners Committee v. Board of Supervisors* [dicta*])
- Rezoning and Zoning Ordinance Amendments (*Ensign Bickford Realty v. City Council*; *Arnel v. Costa Mesa*; and, *Orinda Homeowners Committee v. Board of Supervisors*)
- General Plan Adoption and Amendments (*Karlson v. Camarillo* and *Duran v. Cassidy*)
- LAFCO Detachments (*Simi Valley Recreation and Park District v. LAFCO*)
- Special Assessment District Establishment (*Dawson v. Los Altos Hills*)
- Annexations (*City of Santa Cruz v. LAFCO*)
- LAFCO Boundary Decisions, e.g., Reorganizations, Dissolutions, Consolidations, and Incorporations (*Morro Hills Community Services District v. Board of Supervisors*)
- Road Abandonments (*Heist v. County of Colusa*)
- Specific Plans, even where adopted as an implementation tool of a Local Coastal Plan (*Yost v. Thomas* and *Mitchell v. Orange County*)
- Habitat Conservation Plans and Habitat Conservation Plan Agreements pursuant to the Federal Endangered Species Act (*W.W. Dean & Associates v. City of South San Francisco*)
- CEQA decisions not requiring public hearings or acceptance of evidence; courts are limited to inquiry of prejudicial abuse of discretion (Public Resources Code Section 21168.5)

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* Dicta are incidental comments in a court opinion that are not necessarily essential to determining the case at hand.

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Preface to Appendices

The purpose of including the first three appendices is to demonstrate how findings are used in staff reports and officials resolutions. In **Appendix A**, a Monterey County Planning Commission staff report concisely describes the background data and analysis for a subdivision extension of time proposal. The staff concludes that there is insufficient justification to grant the extension of time and recommends denial.

Appendix B consists of a lengthy Alameda County document concerning a surface mining permit, including a board of supervisors resolution approving the application, adopting CEQA findings, a statement of overriding considerations, and conditions of approval. Its findings are plentiful and substantiated.

In **Appendix C**, the Santa Barbara County Resource Management Department staff reports its recommendation of approval to planning commission on a preliminary development plan and conditional use permit for a mixed use commercial/residential project. Its findings are set forth clearly and are supported by the analysis preceding it, the subsequent environmental impact summary, and accompanying mitigation measures.

By comparing all three sets of documents, the variation in the level of detail and types of information required in different circumstances becomes apparent. In all three cases, however, the agency provides its decision making body with information necessary to "bridge the analytical gap between raw data and ultimate conclusion".

Appendix D comprises an alphabetical, cross-referenced index of findings statutes used in land use decisions in California. The statutes are drawn from California Planning Law, Redevelopment Law, Coastal Act, and many other bodies of law, commonly used and obscure, alike. This compendium is not a complete list, but includes most of the statutorily required land use findings existing as of January, 1988.