

Memorandum 99-21

Judicial Review of Agency Action: Selected Issues

At the last meeting, the Commission asked the staff to bring back as free-standing proposals some of the salutary provisions of the Commission's 1997 recommendation on *Judicial Review of Agency Action*. This memorandum identifies and discusses issues that may be attractive as free-standing proposals.

GENERAL COMMENT

We recently received a communication from Jack Golden, Deputy County Counsel for Orange County, saying the "patchwork scheme of writ procedure is a nightmare for public agencies defending CEQA litigation":

- | | |
|---|--------------------|
| | <i>Exhibit pp.</i> |
| 1. Communication from Jack Golden | 1-2 |

Mr. Golden suggests revisions to the California Environmental Quality Act to address some of these problems. **The staff does not recommend doing this.** There are organizations with greater expertise in CEQA matters than our staff, and any proposed revisions of CEQA would likely be highly contentious. The staff would limit our proposal to piecemeal reform of judicial review procedure, where we have a reasonable possibility of obtaining a consensus for reform.

RECOMMENDED BY STAFF

Exhaustion of Administrative Remedies

A litigant must complete all federal, state, and local administrative remedies before coming to court or defending against administrative enforcement, unless an exception to the exhaustion of remedies rule applies. Two aspects of this rule appear too rigid, and may result in unnecessary loss of time and expense to litigants. These are (1) the rule that the exhaustion requirement is jurisdictional, and (2) the rule that the person seeking judicial review must first petition the agency for reconsideration of the decision. These are discussed below.

Court discretion to excuse failure to exhaust. By case law, the exhaustion requirement is jurisdictional, not discretionary. Thus a writ of prohibition or certiorari from a higher court will lie to prevent a lower court from hearing it. *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 102 P.2d 329 (1941). This means the objection cannot be waived by agreement or by failure to object. It can be initially raised at any time, even on appeal.

Professor Michael Asimow, the Commission's consultant on administrative law, recommended replacing the rule that the exhaustion requirement is jurisdictional with a more flexible rule that would allow courts to recognize new exceptions to the exhaustion requirement, to broaden existing exceptions, or to excuse a lack of exhaustion based on a balancing of factors. Asimow, *Judicial Review: Standing and Timing*, 27 Cal. L. Revision Comm'n Reports 1, 257-59 (1997). In fact, the rigid jurisdictional rule of *Abelleira* has been weakened by later cases that do use a flexible, balancing analysis to decide whether to excuse a failure to exhaust remedies. *Id.* at 258 n.97.

At the federal level and in most states, exhaustion of remedies is discretionary unless a specific statute requires exhaustion, in which case it is treated as jurisdictional. Federal cases often excuse exhaustion by determining whether the purposes of the exhaustion rule would be frustrated if an exception were to be allowed in the particular case in light of the costs that exhaustion would impose on the litigant. *Id.* at 257-59. Section 5-107(3) of the 1981 Model State Administrative Procedure Act gives the court discretion to relieve a petitioner of the exhaustion requirement along the lines recommended by Professor Asimow.

At the October 1992 meeting, the Commission rejected Professor Asimow's recommendation to replace the rule that exhaustion is jurisdictional with a more flexible rule. The Commission decided the exhaustion rule should be jurisdictional, not discretionary with the court. **The staff recommends the Commission reconsider its 1992 decision, and approve the following provision:**

(b) The court may relieve a party of the requirement to exhaust any or all administrative remedies if any of the following conditions is satisfied:

- (1) The remedies would be inadequate.
- (2) The requirement would be futile.
- (3) The requirement would result in irreparable harm disproportionate to the public benefit derived from exhaustion.
- (4) The party seeks judicial review on the ground that the agency lacks subject matter jurisdiction in the proceeding.

(5) The party seeks judicial review on the ground that a statute, regulation, or procedure is facially unconstitutional.

This provision and its Comment are set out under proposed Section 1098 below.

Reconsideration required? By statute, judicial review of administrative proceedings under the Administrative Procedure Act and of civil service proceedings of the State Personnel Board are not affected by failure to apply for a rehearing or reconsideration of the administrative decision. Gov't Code §§ 11523 (APA proceedings), 19588 (Personnel Board proceedings). However, unless a statute makes clear that a request for reconsideration is not necessary for judicial review, the doctrine of exhaustion of administrative remedies requires that the person seeking judicial review first petition the agency for reconsideration of the decision. *Alexander v. State Personnel Bd.*, 22 Cal. 2d 198, 137 P.2d 433 (1943). A recent court of appeal decision criticizes this case and calls on the Legislature to overturn the rule: “[I]n our view, the rule in *Alexander* is incorrect and outmoded. It presents a fitful trap for the unwary.” *Sierra Club v. San Joaquin Local Agency Formation Comm’n*, 64 Cal. App. 4th 1304, 75 Cal. Rptr. 2d 846, 851, review granted, 963 P.2d 1005, 78 Cal. Rptr. 2d 818 (1998). (A concurring opinion disagrees with this assessment, noting that the rule is venerable, readily understood, easy to comply with, and consistent with the purpose of the doctrine of exhaustion of administrative remedies to conserve judicial resources. “The problem here was not with the rule but with the fact petitioner’s counsel were unaware of it, or if aware of it, did not comply with it.” 75 Cal. Rptr. 2d at 851.)

The Commission’s 1997 judicial review recommendation had a general provision for judicial review of all state and local adjudicative proceedings that the party seeking judicial review need not seek reconsideration of the decision unless required by statute or regulation. Professor Asimow had similarly recommended that a “request for reconsideration should never be required as a prerequisite to judicial review unless specifically provided by statute to the contrary.” Asimow, *Judicial Review: Standing and Timing*, 27 Cal. L. Revision Comm’n Reports 1, 275 (1997). Although the Commission’s judicial review bill (SB 209) was defeated in the Legislature, no objection to the reconsideration provision was made during the legislative process.

The staff recommends renewing the Commission’s recommendation on the reconsideration question. It will improve the law and avoid procedural traps

for the unwary. This provision would go in subdivision (c) of a new Section 1098 in the chapter in the Code of Civil Procedure on writs of mandate:

Code Civ. Proc. § 1098 (added). Relief from exhaustion; reconsideration not required

1098. (a) As used in this section:

(1) “Adjudicative proceeding” means an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision.

(2) “Decision” means a state or local agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person.

(b) In a proceeding under this chapter, the court may relieve a party of the requirement to exhaust any or all administrative remedies if any of the following conditions is satisfied:

(1) The remedies would be inadequate.

(2) The requirement would be futile.

(3) The requirement would result in irreparable harm disproportionate to the public benefit derived from exhaustion.

(4) The party seeks judicial review on the ground that the agency lacks subject matter jurisdiction in the proceeding.

(5) The party seeks judicial review on the ground that a statute, regulation, or procedure is facially unconstitutional.

(c) The right to a writ of mandate under this chapter to review a decision in an adjudicative proceeding is not affected by failure to seek a rehearing or reconsideration before the agency, unless a statute or regulation requires a petition for rehearing or other administrative review.

Comment. Section 1098 is new. Subdivision (b) is drawn from 1981 Model State Administrative Procedure Act Section 5-107(3), and changes the former rule that failure to exhaust administrative remedies was jurisdictional. See *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 102 P.2d 329 (1941).

Subdivision (b) authorizes the court to relieve the person seeking judicial review of the exhaustion requirement in limited circumstances. This enables the court to exercise some discretion. See generally Asimow, *Judicial Review: Standing and Timing*, 27 Cal. L. Revision Comm’n Reports 229, 260-71 (1997). The exceptions to the exhaustion of remedies requirement consolidate and codify a number of existing case law exceptions, including:

Inadequate remedies. Under paragraph (1) of subdivision (b), administrative remedies need not be exhausted if the available administrative review procedure or the relief available through administrative review is insufficient. This codifies case law. See, e.g., *Common Cause v. Board of Supervisors*, 49 Cal. 3d 432, 443,

777 P.2d 610, 261 Cal. Rptr. 574 (1989); *Endler v. Schutzbank*, 68 Cal. 2d 162, 168, 436 P.2d 297, 65 Cal. Rptr. 297 (1968); *Rosenfield v. Malcolm*, 65 Cal. 2d 559, 421 P.2d 697, 55 Cal. Rptr. 505 (1967).

Futility. The exhaustion requirement is excused under paragraph (2) of subdivision (b) if it is certain, not merely probable, that the agency would deny the requested relief. See *Ogo Assocs. v. City of Torrance*, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (1974).

Irreparable harm. Paragraph (3) of subdivision (b) codifies the existing narrow case law exception to the exhaustion of remedies requirement where exhaustion would result in irreparable harm disproportionate to the benefit derived from requiring exhaustion. The standard is drawn from 1981 Model State APA Section 5-107(3), but expands the factors to be considered to include private as well as public benefit.

Lack of subject matter jurisdiction. Paragraph (4) of subdivision (b) recognizes an exception to the exhaustion requirement where the challenge is to the agency's subject matter jurisdiction in the proceeding. See, e.g., *County of Contra Costa v. State of California*, 177 Cal. App. 3d 62, 73, 222 Cal. Rptr. 750, 758 (1986).

Constitutional issues. Under paragraph (5) of subdivision (b), administrative remedies need not be exhausted for a challenge to a statute, regulation, or procedure as unconstitutional on its face. See, e.g., *Horn v. County of Ventura*, 24 Cal. 3d 605, 611, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979); *Chevrolet Motor Div. v. New Motor Vehicle Bd.*, 146 Cal. App. 3d 533, 539, 194 Cal. Rptr. 270 (1983). There is no exception for a challenge to a provision as applied, even though phrased in constitutional terms.

Subdivision (c) generalizes existing provisions that a petition for a rehearing or reconsideration is not a prerequisite to judicial review of an adjudicative decision under the Administrative Procedure Act or of a proceeding before the State Personnel Board. See Gov't Code §§ 11523 (APA), 19588 (Personnel Board). This overrules any contrary case law implication in cases not covered by the two Government Code sections. See *Alexander v. State Personnel Board*, 22 Cal. 2d 198, 137 P.2d 433 (1943).

Venue for Judicial Review of State Agency Action

Under existing law, both for administrative mandamus (to review administrative adjudication) and traditional mandamus (to review other forms of agency action), venue is determined under ordinary rules of civil practice. California Administrative Mandamus § 8.16, at 269 (Cal. Cont. Ed. Bar, 2d ed. 1989); California Civil Writ Practice § 5.4, at 185 (Cal. Cont. Ed. Bar, 3d ed. 1997). Thus venue for both forms of mandamus is in the superior court of the county where the cause of action arose. Code Civ. Proc. § 393(1)(b); *Duval v. Contractors*

State License Bd., 125 Cal. App. 2d 532, 271 P.2d 194 (1954); California Administrative Mandamus, *supra*; California Civil Writ Practice, *supra*.

Professor Asimow recommended venue for judicial review of state agency action be in Sacramento County or, where the agency is represented by the Attorney General, in counties where the Attorney General has an office (Sacramento, Los Angeles, San Francisco, and San Diego). Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus*, 27 Cal. L. Revision Comm'n Reports 1, 434-35 (1997). Professor Asimow argued,

It is probable that superior court judges in small counties are inexperienced in administrative law matters. Most counties do not maintain a specialized writ and receiver department, so the cases are assigned to judges at random. Some say there is a significant hometown advantage for the petitioner.

The Commission adopted a hybrid approach, generally keeping venue in the place where the cause of action arose, but adding Sacramento County as another permissible county for judicial review of state agency action. The justification was that most state agencies have their headquarters offices in Sacramento, and that the Sacramento County Superior Court is likely to have or to develop expertise in judicial review proceedings.

The staff recommends adding Sacramento County as a permissible county for review of state agency action, consistent with our 1997 recommendation:

Code Civ. Proc. § 1099 (added). Venue in Sacramento County

1099. In addition to any other county authorized by law, Sacramento County is a proper county for proceedings under this chapter to review state agency action.

Comment. Section 1099 is new, and authorizes Sacramento County as an additional county for administrative or traditional mandamus proceedings under this chapter to review state agency action. The general rule is that venue is proper in the county where the cause of action arose. See Sections 1109 (general rules of civil practice apply to proceedings under this title), 393(1)(b) (venue); *Duval v. Contractors State License Bd.*, 125 Cal. App. 2d 532, 271 P.2d 194 (1954) (administrative mandamus).

NOTICE OF LAST DAY FOR REVIEW

The Commission recommendation included a provision drawn from the local agency administrative mandamus provision requiring the local agency to give “notice to the party that the time within which judicial review must be sought is governed by this section.” Code Civ. Proc. § 1094.6(f). Two other sections require merely that the party be advised of the right to review. Unemp. Ins. Code § 410; Veh. Code § 14401. In the last amended version of SB 209, the Commission recommendation was more specific — it required the agency to give notice of the date of the last day for review. The limitations period would not begin to run until the required notice was given.

We could add a new section along these lines to the formal hearing provisions of the APA, as Government Code Section 11518.3:

11518.3. The agency shall, in the decision or otherwise, give notice to the parties in substantially the following form:

“The last day to file a petition with a court for a writ of mandate to review the decision is [date] unless the time is extended as provided by law.”

Comment. Section 11518.3 is new, and is drawn from Code of Civil Procedure Section 1094.6(f). For provisions extending the time to petition for review, see Section 11523.

An agency notice that erroneously shows a date that is too soon does not shorten the period for review, since the substantive rules in Section 11523 govern. If the notice erroneously shows a date that is later than the last day to petition for review and the petition is filed before that later date, the agency may be estopped to assert that the time has expired. See *Ginns v. Savage*, 61 Cal. 2d 520, 523-25, 393 P.2d 689, 39 Cal. Rptr. 377 (1964).

The above provision would require a parallel provision in Government Code Section 11523 that the limitations period does not run until the notice is given:

11523. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section, the petition shall be filed within 30 days after the last day on which reconsideration can be ordered, or after the notice required by Section 11518.3 is delivered, served, or mailed, whichever is later. The right to petition shall not be affected by the failure to seek reconsideration before the agency. On request of the petitioner for a

record of the proceedings, the complete record of the proceedings, or the parts thereof as are designated by the petitioner in the request, shall be prepared by the Office of Administrative Hearings or the agency and shall be delivered to petitioner, within 30 days after the request, which time shall be extended for good cause shown, upon the payment of the fee specified in Section 69950 for the transcript, the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which is collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until 30 days after its delivery to him or her. The agency may file with the court the original of any document in the record in lieu of a copy thereof. In the event that the petitioner prevails in overturning the administrative decision following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification.

Comment. Section 11523 is amended to extend the limitations period under the section to 30 days after the notice required by Section 11518.2 is delivered, served, or mailed.

At least 95% of state agency adjudications in California are conducted other than under the formal hearing provisions of the APA, but rather under statutes applicable to the particular agency. Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 25 Cal. L. Revision Comm'n Reports 55, 327 (1995). For a listing of these statutes, see California Administrative Hearing Practice, Appendix A (Cal. Cont. Ed. Bar, 2d ed. June 1998 update). Perhaps the notice provision suggested above for formal APA hearings should apply also to the other 95% of state agency adjudications. This

could be done by adding the following subdivision to the administrative mandamus statute, Code of Civil Procedure Section 1094.5:

(k) In a proceeding subject to review under this section, the agency shall, in the order or decision or otherwise, give notice to the parties in substantially the following form: “The last day to file a petition with a court under Section 1094.5 of the Code of Civil Procedure to review the order or decision is [date] unless the time is extended as provided by law.” The limitations period for commencing a proceeding under this section runs from the date the notice is delivered, served, or mailed, or the date or event otherwise provided by law, whichever is later. This subdivision does not apply to review of proceedings under the California Environmental Quality Act.

Comment. Subdivision (k) is added to Section 1094.5 to require notice to the parties of the last date for review by administrative mandamus, and to extend the limitations period under the section to 30 days after the notice is delivered, served, or mailed. For limitations periods that may be extended by this section, see Bus. & Prof. Code §§ 4875.6, 7071.11, 10471.5, 12015.3, 19463; Code Civ. Proc. § 706.075; Educ. Code § 94323; Fin. Code § 8055; Food & Agric. Code §§ 5311, 11512.5, 12999.4, 12999.5, 21051.3, 24007, 46007, 47025, 59234.5, 60016, 61899, 62665; Gov’t Code §§ 8670.68, 8670.69.6, 31725, 54740.6, 66641.7; Health & Safety Code §§ 1793.15, 18024.4, 25398.10, 25514.6, 40864, 42316, 44011.6, 108900, 110915, 111855, 111940, 112615, 116700, 121270, 123340; Ins. Code §§ 791.18, 1065.4, 1780.63, 12414.19; Lab. Code § 1964; Pub. Res. Code §§ 2774.2, 2774.4, 3333, 25534.2, 25901, 29602, 29603, 29772, 30801, 30802, 41721.5, 42854, 50000; Pub. Util. Code §§ 13575.7, 21675.2; Unemp. Ins. Code § 1243; Veh. Code §§ 3058, 3068, 13559, 14401; Water Code §§ 1126, 6357.4, 6461, 13330; Water Code Appendix § 65-4.8; Welf. & Inst. Code §§ 10962, 11468.5, 11468.6, 14105.405, 14171, 19709.

Proposed subdivision (k) above would also apply to local agency adjudications where a statute so provides. See Code Civ. Proc. § 1094.6(e) (suspending, demoting, or dismissing local officer or employee, revoking or denying application for a permit, license, or other entitlement, imposing a civil or administrative penalty, fine, charge, cost, or denying an application for a retirement benefit or allowance); Educ. Code § 44945 (review by administrative mandamus applies to Commission on Professional Competence). A conforming

revision may be required to the “[n]otwithstanding any other provision of law” language of Insurance Code Section 1780.63.

NOT RECOMMENDED BY STAFF

Primary Jurisdiction

Under the doctrine of primary jurisdiction, a case properly filed in court may be shifted to an administrative agency that also has statutory power to resolve some or all of the issues in the case. Thus the agency makes the initial decision in the case, but the court retains power to review the agency action.

The Commission’s judicial review recommendation would have codified the primary jurisdiction doctrine, solving a recurring problem in the early cases by making clear the doctrine of primary jurisdiction is distinct from exhaustion of remedies. Recent cases have cleared up this confusion. See, e.g., *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 826 P.2d 730, 6 Cal. Rptr. 2d 487 (1992); *Miller v. Superior Court*, 50 Cal. App. 4th 1665, 58 Cal. Rptr. 2d 584 (1996); *State Farm Fire & Casualty Co. v. Superior Court*, 45 Cal. App. 4th 1093, 53 Cal. Rptr. 2d 229 (1996). Given the present satisfactory state of the case law, there is no pressing need to codify the primary jurisdiction doctrine.

Standing to Seek Judicial Review

The Commission’s judicial review recommendation had rules on standing to seek judicial review. For review of nonadjudicative agency action, the recommendation would have authorized private interest standing by an “interested person,” consistent with existing statutes. It would have authorized public interest standing by any person who “will adequately protect the public interest” where “an important right affecting the public interest” is involved. For review of formal APA adjudication, the person seeking review would have had to be a party to the proceeding. For review of other forms of adjudication, the person seeking review would have had to be either a party to the proceeding, a “participant” in the proceeding and either “interested” or authorized to participate by statute or ordinance. or have public interest standing.

Most of the controversy over the standing provisions concerned public interest standing. The California Attorney General objected to codifying public interest standing. Public interest groups objected to conditions and limitations on public interest standing in the recommendation. Ultimately, the Commission yielded and revised the public interest standing provision to eliminate all

conditions and restrictions. The last amended version of SB 209 said simply, “a person has standing to obtain judicial review of agency action that concerns an important right affecting the public interest.”

The Commission’s judicial review recommendation does not identify any serious problems with current California law on standing. It merely proposed to codify rules that, except for private interest standing, are mostly uncodified. The staff does not see any significant benefit in renewing the Commission’s recommendation on standing, and the public interest standing question would again be likely to generate controversy.

Comprehensive Codification of Exhaustion Rules

In the first part of this memorandum, the staff recommends adding a new section to the Code of Civil Procedure (1) to give the court discretion to relieve a party of the exhaustion requirement where administrative remedies are inadequate or requiring exhaustion would result in irreparable harm disproportionate to the public benefit from requiring exhaustion, and (2) to provide that the person seeking review need not petition the agency for reconsideration unless required by statute or regulation.

The Commission’s judicial review recommendation went well beyond this. It would have enacted a new article with five sections on exhaustion and its exceptions. These generated controversy, particularly from the Office of Administrative Law. These five sections are set out in the Exhibit to this memorandum, showing the original text as recommended by the Commission and the amendments made to this portion of the bill. Most of these amendments were made to address objections of OAL. The staff is not certain these amendments completely resolved the objections of OAL.

If the Commission’s complete recommendation on exhaustion is to be revived, we will either have to resolve all of OAL’s objections or provide that these rules do not apply to review of a state agency regulation adopted under the rulemaking portion of the APA. Moreover, public employee, environmental, and public interest groups objected to applying the Commission’s recommendation to traditional mandamus. They argued that traditional mandamus is in satisfactory condition, and revisions could only create problems. The staff would not try to apply any general provisions on exhaustion to traditional mandamus. Thus application of any general exhaustion rules should be limited to administrative mandamus for review of administrative adjudication.

A staff draft of such a recommendation is in the Exhibit. **The staff thinks this codification is not worth doing because of its necessarily limited application.**

Standards of Review

The Commission's judicial review recommendation had comprehensive rules on standards of review. The significant innovation of the recommendation was to overturn the long-standing rule that findings of fact in an adjudicative proceeding are reviewed by the court using its independent judgment if a fundamental vested right is affected. The recommendation would have required the court to uphold state agency findings of fact if supported by substantial evidence in the record as a whole. This was the most controversial aspect of the Commission's recommendation. Ultimately, the Commission had to yield. The last amended version of SB 209 avoided the issue by a circular provision authorizing the court to use its independent judgment in "an adjudicative proceeding in which the court is authorized by law to exercise its independent judgment on the evidence." **The staff recommends we not revisit this issue.**

We could renew the Commission's recommendation on standards of review other than for factfinding. The Commission's recommendation provided for independent judgment review of questions of law, with appropriate deference to the agency's determination. Even this innocuous provision generated controversy over the question of how much deference, if any, is "appropriate."

The Commission's recommendation required the court to uphold agency exercise of discretion absent abuse of discretion. This was controversial. It was feared that a broad reading of when an agency has discretion might undermine tougher standards of review for questions of fact or law.

The original Commission recommendation provided independent judgment review (with appropriate deference) of whether the agency engaged in an unlawful procedure or failed to follow prescribed procedure. At the suggestion of commentators, this was expanded to apply also to "unfair" procedures, other than adjudication or adoption of a regulation under the APA, which was presumed fair as a matter of law. The end result was a complex provision to deal with an ostensibly simple problem.

Finally, the article on standards of review included a provision codifying case law to the effect that the burden of showing the invalidity of agency action or entitlement to relief is on the party asserting the invalidity or entitlement.

The staff believes a main benefit of the Commission-recommended provisions was that they dealt comprehensively with standards of review. To recommend as free-standing proposals one or two of the less controversial provisions on standards of review, such as review of agency procedure, would appear to exalt the codified standard of review over others not codified. The staff would either codify the standards of review comprehensively or not at all. A comprehensive codification is probably not achievable in view of its controversial nature.

Procedural Provisions

Contents of petition for review. The Commission's judicial review recommendation prescribed contents of the petition for review. This document was to replace the many documents now used to commence judicial review proceedings — petition for administrative mandamus, petition for an alternative writ of (traditional) mandamus, notice of motion for a peremptory writ of (traditional) mandamus, and complaints for declaratory judgment and injunctive relief. It is not practical to renew this recommendation. One of the main arguments that resulted in the defeat of SB 209 was that one size cannot fit all.

Limitations periods. The Commission's judicial review recommendation had limitations periods for review of state and local administrative adjudication. It had no effect on limitations periods for traditional mandamus. It continued the 30-day limitations period for judicial review of formal adjudication under the APA, and generalized it to apply to most state agency adjudication. It preserved a few limitations periods longer than the 30-day period for APA review — one year for review of certain state personnel decisions, six months for review of decisions of the Unemployment Insurance Appeals Board, 90 days for review of certain driver's license orders, and one year for review of a welfare decision of the Department of Social Services. It also preserved special limitations periods under the California Environmental Quality Act, for review of an administratively-issued withholding order for taxes, notice of deficiency of an assessment due from a producer under a commodity marketing program, cancellation by a city or county of a contract limiting use of agricultural land under the Williamson Act, decision of a local legislative body adopting or amending a general or specific plan, zoning ordinance, regulation attached to a specific plan, or development agreement, and a cease and desist order of the San Francisco Bay Conservation and Development Commission and complaint by BCDC for administrative civil liability. The Commission was unable to achieve

its original goal of simplify these various limitations periods. The Commission was presented with vigorous arguments why each special limitations period had to be preserved. The result was a scheme no simpler than existing law.

Record for Judicial Review

The Commission's judicial review recommendation prescribed the contents of the record for review. Under existing law, the court reviews the administrative record developed before the agency. Review of formal adjudication under the APA is now governed by an express provision prescribing the contents of the record for review: "The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case." Gov't Code § 11523. The staff believes this provision is satisfactory.

The controversial issue is the extent to which evidence not in the administrative record may be admitted in the judicial review proceedings. See, e.g., *Western States Petroleum Ass'n, v. Superior Court*, 9 Cal. 4th 559, 888 P.2d 12168, 38 Cal. Rptr. 2d 139 (1995). The Commission's recommendation generally codified the closed record rule of *Western States*, with the result that evidence not in the administrative record was admissible only in rare instances. This was opposed by public employee groups, who argued that under existing traditional mandamus they are entitled to a full trial with ordinary rules of evidence. **The staff would not revisit this issue.**

Costs and Fees

The Commission's recommendation had a general provision on costs and fees, drawn from the formal adjudication provisions of the APA. See Gov't Code § 11523, set out above. The staff believes the APA provision is satisfactory.

If we draft notice provisions for non-APA hearings of state agencies, we could examine the question of costs and fees in that context as well.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

Golden, Jack, 3/5/99 4:01 PM -0800, Judicial Review of Agency Action

1

From: "Golden, Jack" <jgolden@coco.co.orange.ca.us>
To: "'sterling@clrc.ca.gov'" <sterling@clrc.ca.gov>
Subject: Judicial Review of Agency Action
Date: Fri, 5 Mar 1999 16:01:57 -0800
MIME-Version: 1.0
X-Rcpt-To: sterling@clrc.ca.gov

Thank you for your letter dated March 3, 1999. I am the CEQA lawyer for the Orange County Counsel's Office. The patchwork scheme of writ procedure is a nightmare for public agencies defending CEQA litigation.

There are writ cases that hold that the public agency has only two options after a writ of mandate is issued: comply with the writ, or appeal. This would make sense if the prevailing petitioner could not appeal its victory, but that procedure is not designed for a situation wherein the prevailing party can appeal. In nearly every CEQA case where the Petitioner prevails on one or more issues, there are other issues that the Respondent wins. This gives the Petitioner the opportunity to appeal even though it "won" the case. Further, if the agency chooses to appeal, but also wants to comply with the writ of mandate, its writ compliance can either waive its right to appeal or moot its issues on appeal. There is also an issue of whether it has any jurisdiction to take actions to comply with the writ if it has already appealed.

Further, if the agency takes further actions under CEQA to comply with the writ, the Petitioners have at least three procedural options: file a motion objecting to the writ return, file a supplemental petition for writ of mandate, or file a petition for writ of mandate under a new case number. The latter procedure allows the petitioner to go forum shopping or to delay the case while motions to consolidate or coordinate are addressed. (In cases between cities and their county, any party is entitled to a change of venue, which complicates motions to consolidate or coordinate.) (In some cases a party may be able to exercise a peremptory challenge to the judge who heard the original writ after a new case is consolidated or coordinated with the original case.)

Thus, I would love to see a revamping of writ procedure under CEQA. What I would propose is as follows:

- That Public Resources Code section 21168.9(b) be amended to clarify that:
- 1) the trial court retains jurisdiction to assure compliance with its writ and CEQA even when an appeal by one or more parties is pending. (The automatic stay of trial court proceedings under Code of Civil Procedure section 916 does not apply to CEQA cases.)
 - 2) The agency does not waive its right to appeal by attempting to comply with the writ, and does not lose jurisdiction to comply with the writ if it has filed an appeal.
 - 3) Petitioners who wish to challenge writ compliance must do so by filing a motion or a supplemental petition for writ of mandate under the same case number and before the same judge that issued the writ. The trial court does not have discretion to reject the supplemental petition for writ of mandate, but must allow it to be filed.
 - 4) Neither party may exercise a peremptory challenge under Code of Civil Procedure section 170.6 during proceedings involving writ compliance adjudication after the first peremptory writ of mandate has been issued, so long as the judge that issued the writ remains the judge assigned to the case.

These changes would facilitate the goal of CEQA to expedite proceedings expressed in Public Resources Code sections 21003(f) and 21157.1.

Please let me know if I can be of assistance, should submit a more formal proposal with suggested language, etc.

Thanks.

Jack W. Golden
Deputy County Counsel
(714)834-3357
fax 834-2359

Exhibit

**COMMISSION'S 1997 RECOMMENDATION ON
EXHAUSTION OF ADMINISTRATIVE REMEDIES**

[amendments to Commission recommendation in SB 209
shown below in ~~strikeout~~ and underscore]

§ 1123.310. Exhaustion required

1123.310. (a) A person may obtain judicial review of agency action only after exhausting all administrative remedies available within the agency whose action is to be reviewed and within any other agency authorized to exercise administrative review, unless judicial review before that time is permitted by this article or otherwise expressly provided by statute.

(b) For the purpose of subdivision (a), an administrative remedy is available within the agency only if the remedy is provided by statute, by a duly adopted state agency regulation, or by a local agency rule.

§ 1123.320. Administrative review of adjudicative proceeding

1123.320. If the agency action being challenged is a decision in an adjudicative proceeding, all administrative remedies available within ~~an~~ the agency are deemed exhausted for the purpose of Section 1123.310 if no higher level of review is available within the agency, whether or not a rehearing or other lower level of review is available within the agency, unless a statute or ~~regulation~~ rule requires a petition for rehearing or other administrative review.

§ 1123.330. Judicial review of rulemaking

1123.330. (a) A person may obtain judicial review of ~~rulemaking~~ a rule notwithstanding the person's failure to ~~do either of the following:~~

~~(1) Participate~~ participate in the rulemaking proceeding on which the rule is based.

~~(2) Petition~~ , or to petition the agency promulgating the rule for, or otherwise to seek, amendment, repeal, or reconsideration of the rule after it has become final.

(b) A person may obtain judicial review of ~~an agency's failure to adopt a rule under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, notwithstanding the person's failure to request or obtain a determination from the Office of Administrative Law under Section~~

11340.5 of the Government Code a rule whether or not a proceeding to enforce the rule has been commenced.

(c) Without exhausting administrative remedies, a person may obtain judicial review of a state agency regulation adopted or amended under the rulemaking portion of the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, on the grounds that the regulation is not authorized by or is facially inconsistent with a statute, if the person seeking review is not a party to an adjudicative proceeding that was commenced before the filing of the petition for review and in which the validity of the regulation is at issue.

Comment. Subdivision (a)(2) of Section 1123.330 continues the former second sentence of subdivision (a) of Government Code Section 11350, and generalizes it to apply to local agencies as well as state agencies. See Sections 1120 (application of title), 1121.230 (“agency” defined), 1121.290 (“rule” defined). The petition to the agency referred to in subdivision (a) is authorized by Government Code Section 11340.6.

Subdivision (b) is new, and makes clear that exhaustion of remedies does not require filing a complaint with the Office of Administrative Law that an agency rule is an underground regulation. *Cf.* Gov’t Code § 11340.5.

§ 1123.340. Exceptions to exhaustion of administrative remedies

1123.340. The requirement of exhaustion of administrative remedies is jurisdictional and the court may not relieve a person of the requirement unless any of the following conditions is satisfied:

- (a) The remedies would be inadequate.
- (b) The requirement would be futile.
- (c) The requirement would result in irreparable harm disproportionate to the public and private benefit derived from exhaustion.
- (d) The person was entitled to notice of a proceeding in which relief could be provided but lacked timely notice of the proceeding. The court’s authority under this subdivision is limited to remanding the case to the agency to conduct a supplemental proceeding in which the person has an opportunity to participate.
- (e) The person seeks judicial review on the ground that the agency lacks subject matter jurisdiction in the proceeding.
- (f) The person seeks judicial review on the ground that a statute, regulation, or procedure is facially unconstitutional.

§ 1123.350. Exact issue rule

1123.350. (a) Except as provided in subdivision (b), if exhaustion of administrative remedies is required, a person may not obtain judicial review of an issue that was not raised before the agency either by the person seeking judicial review or by another person.

(b) The court may permit judicial review of an issue that was not raised before the agency if any of the following conditions is satisfied:

- (1) The agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue.

(2) The person did not know and was under no duty to discover, or was under a duty to discover but could not reasonably have discovered, facts giving rise to the issue.

(3) The agency action subject to judicial review is a rule and the person has not been a party in an adjudicative proceeding that provided an adequate opportunity to raise the issue.

(4) The agency action subject to judicial review is a decision in an adjudicative proceeding and the person was not adequately notified of the adjudicative proceeding. If a statute or rule requires the person to maintain an address with the agency, adequate notice includes notice given to the person at the address maintained with the agency.

(5) The interests of justice would be served by judicial resolution of an issue arising from a change in controlling law occurring after the agency action or from agency action occurring after the person exhausted the last feasible opportunity to seek relief from the agency.

STAFF DRAFT OF POSSIBLE NEW ARTICLE ON EXHAUSTION OF ADMINISTRATIVE REMEDIES

Article 2. Exhaustion of Administrative Remedies

§ 1098.1. Application of article

1098.1. This article applies only to proceedings pursuant to Section 1094.5.

§ 1098.2. Exhaustion required

1098.2. (a) A person may obtain a writ under Section 1094.5 only after exhausting all administrative remedies available within the agency whose order or decision is to be reviewed and within any other agency authorized to exercise administrative review, unless judicial review before that time is expressly provided by statute.

(b) For the purpose of subdivision (a):

(1) An administrative remedy is available within the agency only if the remedy is provided by statute or by a duly adopted state agency regulation.

(2) All administrative remedies available within the agency are deemed exhausted if no higher level of review is available within the agency, whether or not a rehearing or other lower level of review is available within the agency, unless a statute or regulation requires a petition for rehearing or other administrative review.

§ 1098.3. Exceptions to exhaustion of administrative remedies

1098.3. The court may relieve a person of the requirement to exhaust any or all administrative remedies if any of the following conditions is satisfied:

(a) The remedies would be inadequate.

- (b) The requirement would be futile.
- (c) The requirement would result in irreparable harm disproportionate to the public and private benefit derived from exhaustion.
- (e) The person seeks judicial review on the ground that the agency lacks subject matter jurisdiction in the proceeding.
- (f) The person seeks judicial review on the ground that a statute, regulation, or procedure is facially unconstitutional.

§ 1098.4. Exact issue rule

1098.4. (a) Except as provided in subdivision (b), if exhaustion of administrative remedies is required, a person may not obtain judicial review of an issue that was not raised before the agency either by the person seeking judicial review or by another person.

(b) The court may permit judicial review of an issue that was not raised before the agency if any of the following conditions is satisfied:

- (1) The agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue.
- (2) The person did not know and was under no duty to discover, or was under a duty to discover but could not reasonably have discovered, facts giving rise to the issue.
- (3) The interests of justice would be served by judicial resolution of an issue arising from a change in controlling law occurring after the agency action or from agency action occurring after the person exhausted the last feasible opportunity to seek relief from the agency.