Study N-200 October 8, 1996

First Supplement to Memorandum 96-69

Judicial Review of Agency Action:
Comments on Revised Tentative Recommendation

Attached is a letter from Louis Green, County Counsel for El Dorado County, writing for the County Counsel's Association of California and the California State Association of Counties. He supports the staff recommendation to exempt local ordinances from judicial review under the draft statute (basic memo, p. 4). He agrees with the staff that the closed record requirement does not work well for judicial review of local ordinances, because formal local agency fact-finding is not required in such cases.

It is not clear whether he would object to applying the draft statute to judicial review of local agency regulations. As noted in the basic memo (pp. 3-4), the staff recommends applying the draft statute to review of local regulations. It applies to review of state agency regulations, and it seems hard to justify a different rule for local agency regulations.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

EL DORADO COUNTY
OFFICE OF
THE COUNTY COUNSEL

COUNTY COUNSEL
LOUIS B. GREEN

CHIEF ASS'T. COUNTY COUNSEL
EDWARD L. KNAPP

DEPUTY COUNTY COUNSEL
CHERIE J. VALLELUNGA
THOMAS R. PARKER
THOMAS D. CLIMPSTON
JUDITH M. KERR
PATRICIA E. BECK
CAROLYN N. PHILLIPS

COUNTY GOVERNMENT CENTER
330 FAIR LANE
PLACERVILLE, CALIFORNIA 95667
(916) 621-5770
FAX# (916) 621-2937

Legal Assistants
RUDY LIMON
JOHN F. MARTIN

October 7, 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-1827

VIA FACSIMILE: (415) 494-1827 and U.S. MAIL

Re: Judicial Review of Local Agency Action

Honorable Chairman and Commission Members:

I am writing on behalf of the County Counsels' Association of California and the California State Association of Counties to provide our joint response to the above-referenced item. We appreciate the Commission's recognition of the vital interest we and our clients, the counties of California, have in this matter. This letter addresses a fundamental issue raised by the current proposal. We expect to provide additional comments on more technical aspects of the proposal prior to your November meeting in Sacramento.

Summary:

Our primary concern is that the proposed legislation threatens to significantly alter the standard of review applied to legislative acts of local agencies as well as the evidentiary procedures used in reviewing such actions. The result would be to greatly expand the scope of judicial power at the expense of local legislative power.

Like the state, local agencies act in both legislative and administrative capacities. The current proposal does not apply to acts of the state performed by the Legislature. It does, however, extend to the legislative acts of the governing bodies of local agencies. These actions include legislative enactments ranging from adoption of a general plan to guide the future development of an agency to ordinances adopted for the protection of the public health, safety and welfare.

What distinguishes these legislative actions from administrative or quasi-judicial acts is that, in reaching

legislative decisions, local agencies exercise their judgment to make broad policy decisions to further the public health, safety and welfare. The process does not involve formal fact-finding, nor the application of well-defined standards to the facts of specific situations to determine a required course of action as is the case in administrative proceedings.

The application of the current proposal to legislative acts of local agencies threatens long-standing procedures which derive from constitutional standards and which maintain the proper balance between the jurisdiction of the courts and that of local legislative bodies under the doctrine of separation of powers.

Historically, discretionary acts of local agencies have been subject to review under traditional mandamus (Code of Civil Procedure Section 1085). The standard of review is an "abuse of discretion" or "arbitrary and capricious" standard. The discretion of the local agency will be disturbed only if the action is arbitrary and capricious; that is, no rational basis for the action can be established. Proceedings normally are not limited to the record and the action of the agency is upheld if any rational basis can be conceived, whether or not it was set forth as the basis for the action in the record.

Since review of legislative acts often is not limited to the record and typically findings of fact are not required, the issue of an "independent judgment" standard is not really pertinent. As to the court's review of the evidence presented to it, the rule is clear that the court is to determine whether any rational basis to uphold the action can be conceived. The court is not to substitute its judgment for that of the local legislative body. We have concerns as to how the proposal would affect both the substantive and procedural aspects of this process.

Standard of Review:

The counties are firm in their position that all legislative acts of local agencies should be reviewable only under an "abuse of discretion" standard. At your September 12, 1996 meeting, Mr. Murphy noted the intent of the drafters of the proposal that discretionary actions of local agencies be subject to the "abuse of discretion" standard set forth in section 1123.450 of the proposal. However, we note the uncertainty caused by section 1123.420 which applies the "independent judgment" standard to several types of challenges which could be brought against legislative actions of local agencies.

Because the term "rule" is defined to include a local agency ordinance (Section 1121.290(c)), and "agency action" includes a "rule" as well as "[a]n agency's performance of, or failure to perform, any other duty, function, or activity, discretionary or otherwise", Section 1123.420 could easily be interpreted to apply an independent judgment standard to the adoption of, or alleged

failure to adopt, local agency ordinances and other legislative acts. This result, either intended or inadvertent, is unacceptable.

While a revision of the draft to ensure that legislative acts of local agencies would be reviewed under the standards currently in effect is feasible, the complexity of the task, as well as uncertainty as to how the vast existing body of case law will be applied to the proposed legislation prompts the County Counsels' Association and the California State Association of Counties to urge the Commission to modify the definitions sections of the proposal to expressly exclude legislative acts of local agencies from the provisions of the proposal and to allow those actions to continue to be reviewed under ordinary mandamus or declaratory relief.

Procedural Issues:

Another problem arises procedurally which complicates the task of incorporating local legislative decisions within the scope of the proposal while retaining current standards for review. The proposal contemplates an administrative mandamus type of review. Section 1123.810 provides that, with limited exceptions, "the administrative record is the exclusive basis for judicial review of agency action."[1] Under current law, upon reviewing the validity of a legislative action, the court may entertain evidence outside of the record and is to uphold the act if any rational basis for the act can be conceived, whether or not it appears in the record. Limiting review of legislative acts to "on the record review" would be a major circumscription of the legislative powers of local agencies.[2]

Similarly, Section 1123.850 prohibits a court from admitting evidence on judicial review without remanding the case, except in certain limited circumstances. This also is an administrative mandamus procedure at odds with current practices in ordinary mandamus applicable to review of legislative acts.

---

[1]The comment under this section states that it codifies existing practice, citing to Beverly Hills Fed. Sav. & Loan Ass'n v. Superior Court, 259 Cal.App.2d 306, 324 (1968). However, that case involved an administrative mandamus action to review a denial by the Savings and Loan Commissioner of an application to operate a branch office. Application of strict "on the record" review of legislative actions currently reviewed in ordinary rather than administrative mandamus would be an immense change in current law and practice.

[2]Since most legislative actions do not require formal fact-finding and involve broad exercise of judgment by political bodies, this change would also require substantial changes in the procedures before the local agencies in order to make such review effective.

Section 1123.820(d) provides:

> (d) If an explanation of reasons for the agency action is not otherwise included in the administrative record, the court may require the agency to add to the administrative record for judicial review a brief explanation of the reasons for the agency action to the extent necessary for proper judicial review.

This may be appropriate for review of an administrative or quasi-judicial action in which the agency is required to make findings of fact adequate to allow a reviewing court to understand the rationale for the decision. It is totally inappropriate, however, in review of a legislative action which is an exercise of broad discretion, which does not require findings of fact, and which may be sustained on any rational basis, whether or not articulated by the decision-making body. Furthermore, this provision could lead to judicial inquiry into the thought processes of legislative decision-makers, a practice uniformly condemned under present law except in certain cases involving illegal motivation such as racial discrimination.

These examples demonstrate why the inclusion of local legislative actions in the current proposal will result in major changes in existing law which are adverse to the well-established deference shown by the courts to the legislative acts of local agencies. The only way to avoid this result is to re-create within the proposal a form of review comparable to ordinary mandamus. This obviously is a fruitless effort which would produce none of the benefits sought by the proposal. This is especially true since the remedies of ordinary mandamus and declaratory relief must remain in existence because the proposal does not purport to cover legislative acts of the state.

Even though the standard of review issue may be susceptible to clarification, the procedural concerns of the local agencies are not. They can only be addressed through major revisions which would basically replicate current ordinary mandamus procedures in the new legislation to no productive end.

Recommendation:

For these reasons, the County Counsels' Association of California and the California State Association of Counties recommend that:

1. The definition of "rule" contained in Section 1121.290 be amended by deleting subsection (c) which reads: "(c) A local agency ordinance."; and,

2. Section 1121.240, definition of "agency action", should be amended to add subsection (d) to read: "(d) 'Agency action' does not include any legislative action of a local agency."

Thank you for your consideration and courtesy. As mentioned previously, this letter reflects a fundamental concern of the counties relative to the import of the proposal on legislative acts. We expect to provide addition comment on the application of the proposal to other forms of local agency action for your November meeting, and to have a representative at that meeting to respond to any questions on any of these issues.

Very truly yours,

LOUIS B. GREEN
County Counsel

cc: Ruth Sorensen, Esquire
Dwight L. Herr, Esquire
Buck E. Delventhal, Esquire
Douglas C. Holland, Esquire
Joanne Speers, Esquire
Tom Curry, Esquire

f:2lawrev.ltr
10-7-96
LBG