Study N-200 January 23, 1997

First Supplement to Memorandum 97-2

Judicial Review of Agency Action: Local Agency Issues

Attached is a letter from Lou Green for the working group of the County Counsels' Association and League of California Cities. Mr. Green expressed his regret at being unable to attend this meeting, and plans to attend the February meeting in Sacramento.

This supplement addresses comments in Mr. Green's letter and other issues. At the meeting, the staff plans to discuss only the material below preceded by a bullet [•].

§ 1121. Proceedings to which title does not apply

• In the basic memo, the staff suggests broadening the local agency exemption to say the draft statute does not apply to:

> (d) Judicial review of an ordinance or regulation enacted by a county board of supervisors or city council pursuant to authority granted by the California Constitution.

• The local agency working group would revise this as follows:

> (d) Judicial review of an ordinance or regulation enacted by a county board of supervisors or city council ~~pursuant to authority granted by the California Constitution~~.
>
> (e) Judicial review of a resolution of a county board of supervisors or city council that is legislative in nature.

• The working group says some of the most fundamental legislative actions of local agencies, such as adoption of a general plan, are done by resolution, and asks that they be exempted also. Their real concern appears to be that including such matters under the draft statute will subject them "potentially to a more exacting standard of review." The staff does not believe the new review standards are any more exacting than existing law, and thinks this concern is misplaced.

• Secondly, the working group objects to limiting the exemption to ordinances and regulations adopted under constitutional authority, saying that

many such actions are taken pursuant to statutory authorization, such as adoption of general plans and zoning ordinances. This limitation was a considered decision of the Commission, and was supported by Professor Asimow. Moreover, the working group says "general planning and zoning decisions are exercises of the constitutional police power," and are "regulated" by statute. If so, and if adopted by ordinance or regulation, they would appear to be exempt from the draft statute, and we could say so in the Comment with appropriate case citations

• Thirdly, the working group objects to the litigation-engendering uncertainty of the "authority granted by the California Constitution" language.

• A number of objections of the working group to other provisions could be obviated by broadening the exemption provision, for example, concerning standard of review and closed record review. **This suggests we should adopt the revisions above to exempt resolutions that are legislative in nature.** The staff is concerned the term "legislative" is not well-defined in case law. The working group says the term "legislative" has been "the subject of extensive litigation so that both standards used to define legislative acts, and numerous specific actions which are legislative in nature, have been identified by the courts." On the other hand, Professor Asimow has written:

> While the adjudication/legislation distinction is clear at the poles, there is a large middle ground where the distinction is not clear at all. The cases are muddled, particularly in connection with local land use planning and environmental decisions.

Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus* 12 (Nov. 1993).

• If we exempt "legislative" resolutions, we will need help from the working group to include cases in the Comment that define what "legislative" means.

• **Does the Commission wish to revisit this?**

§ 1121.240. Agency action

• Section 1121.240 defines "agency action" broadly to include an agency's failure to perform any duty, function, or activity, discretionary or otherwise. The working group remains concerned about groundless court challenges where the agency in the exercise of sound discretion declines to act or where the act would not be within the agency's authority. The working group wants to limit judicial review of agency inaction to action "the agency is required by law to perform."

This language is not satisfactory because it would preclude judicial review of discretionary inaction where not to act would be an abuse of discretion, overturning case law. See, e.g., Lindell Co. v. Board of Permit Appeals, 23 Cal. 2d 303, 315, 144 P.2d 4 (1943) (court could compel agency to exercise discretion authorized but not required by ordinance).

• The staff believes this is addressed by Section 1121.140, which says "[n]othing in this title authorizes the court to interfere with a valid exercise of agency discretion or to direct the agency how to exercise its discretion." At the last meeting, the Commission rejected a similar request from the working group to limit the definition of "agency action" to include only inaction "which the law specifically enjoins to be performed." The Commission asked the staff to cover this in the Comment. The staff added the following to the Comment to Section 1121.240:

> Although under subdivision (c) agency inaction is subject to judicial review under this title, this of course contemplates that the agency is authorized by law to perform the duty, activity, or function.

• **If the Commission wants to go further, we could adopt language along the following lines:**

> 1121.240. "Agency action" means any of the following:
> . . . .
> (c) An agency's performance of, or failure to perform, any other duty, function, or activity, discretionary or otherwise that the law requires to be performed or that would be an abuse of discretion if not performed.

§ 1123.150. Proceeding not moot because penalty completed

Section 1123.150 says a judicial review proceeding "is not made moot by satisfaction of a penalty imposed by the agency during the pendency of the proceeding." This comes from the administrative mandamus statute. Code Civ. Proc. § 1094.5(g)-(h). It is apparent from the latter that "during the pendency of the proceeding" refers to satisfaction of the penalty, not its imposition. **Section 1123.150 would be clearer in this respect if it were revised as follows:**

> 1123.150. A proceeding under this chapter is not made moot by satisfaction during the pendency of the proceeding of a penalty imposed by the agency ~~during the pendency of the proceeding~~.

§ 1123.240. Standing for review of decision in adjudicative proceeding

• Subdivision (c) of Section 1123.240 permits public interest standing under Section 1123.230 to review formal adjudication under the Administrative Procedure Act. We need not expand public interest standing to this extent. The Commission wanted to preserve public interest standing to review land use decisions, as in Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282 (1975). **This may be done without extending public interest standing to review formal adjudication under the APA by revising Section 1123.240 as follows:**

> 1123.240. Notwithstanding ~~any other provision of this article~~ Sections 1123.220 and 1123.230, a person does not have standing to obtain judicial review of a decision in an adjudicative proceeding unless one of the following conditions is satisfied:
>
> (a) The person was a party to the proceeding.
>
> (b) The person was a participant in the proceeding ~~,~~ and (1) is either interested or the person's participation was authorized by statute or ordinance, or (2) the person has standing under Section 1123.230 [public interest standing]. This subdivision does not apply to judicial review of a proceeding under the formal hearing provisions of the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.
>
> ~~(c) The person has standing under Section 1123.230.~~

• The revision in the introductory clause permits organizational standing under Section 1123.250 to review all forms of adjudication, consistent with case law in administrative mandamus. See California Administrative Mandamus § 5.8, at 216 (Cal. Cont. Ed. Bar, 2d ed. 1989). Section 1123.250 is fairly circumscribed by requiring consent of the person represented, by requiring the person represented to be either a member of the organization or a person the organization is required to represent, and requiring that the agency action be related to the purposes of the organization.

§ 1123.420. Review of agency interpretation or application of law

• The working group remains very concerned that independent judgment review of application questions under Section 1123.420 will swallow up abuse of discretion review of an exercise of agency discretion under Section 1123.450. The working group wants to delete paragraph (5) from Section 1123.420(a) — "[w]hether the agency has erroneously applied the law to the facts."

• The staff believes the standard of review provisions are in good shape, and make significant clarifications and improvements in the law. With respect to application questions, the draft statute eliminates the untenable distinction of existing law under which the standard of review of application questions turns on whether or not the basic facts are disputed. **The staff does not want to abandon these significant reforms, and prefers to address the working group's concern by broadening the exemption in Section 1121 for local agency legislative acts, if need be.**

§ 1123.630. Time for filing petition for review in adjudication of agency other than local agency and formal adjudication of local agency
§ 1123.640. Time for filing petition for review in other adjudicative proceedings

• Sections 1123.630 and 1123.640 extend the limitation period for judicial review until 30 days after the record is delivered if, within 15 days after the decision is effective, the party seeking review requests the agency to prepare the record and pays the required fee. This may cause a problem because it may take the agency some time to estimate the cost of the record, so that the party seeking review would be unable to pay it within the 15-day period. **This may be addressed by revising Sections 1123.630 and 1123.640 as follows:**

> 1123.630. . . .
> (c) Subject to subdivision (d), the time for filing the petition for review is extended for a party:
> . . . .
> (2) ~~If,~~ Until 30 days after the record is delivered to the party if, within 15 days after the decision is effective, the party makes a written request to the agency to prepare all or any part of the record , and promptly pays the fee provided in Section 1123.910, ~~until 30 days after the record is delivered to the party~~.
> . . . .
>
> 1123.640. . . .
> (b) Subject to subdivision (c), the time for filing the petition for review is extended for a party:
> . . . .
> (2) ~~If,~~ Until 30 days after the record is delivered to the party if, within 15 days after the decision is effective, the party makes a written request to the agency to prepare all or any part of the record , and promptly pays the fee provided in Section 1123.910, ~~until 30 days after the record is delivered to the party~~.

§ 1123.820. Administrative record exclusive basis for judicial review

The working group suggests revising Section 1123.820 substantially as follows:

> 1123.820. (a) Except as provided in subdivision (b), the administrative record for judicial review of agency action consists of all of the following:
>
> . . . .
>
> (7) Any other matter expressly prescribed for inclusion in the administrative record by rules of court adopted by the Judicial Council

The working group is concerned that without this language existing rules of court for judicial proceedings may arguably apply to judicial review. **The staff has no objection to this language.**

The staff did not include the suggested reference to the record "of a state or local agency subject to judicial review," because the draft statute applies not only to state and local agencies, but also to public corporations, nongovernmental entities, and hybrid agencies. See Section 1120.

§ 1123.830. Preparation of record

In the basic memo, the staff recommends adding authority for the court to order the agency to deliver the record, and for the court to impose sanctions. The working group suggests revising this language as follows:

> (c) The time limits provided in subdivision (b) may be extended by the court for good cause shown. If the agency fails timely to deliver the record, the court may order the agency to deliver the record, and may impose sanctions and grant other appropriate relief for failure to comply with any such order.

The staff has no objection to this revision.

The working group also suggests that comparable provisions be drawn for CEQA cases, where the petitioner "may elect to prepare the record of proceedings or the parties may agree to an alternative method of preparation of the record of proceedings, subject to certification of its accuracy by the public agency, within the time limit specified in this subdivision." Pub. Res. Code § 21167.6. The working group says "comparable deadlines should be incorporated in such cases to prevent the election from being made and then allowing preparation of the record to drag on." However, the quoted language

of Section 21167.6 appears to apply the time limits of that section to the case where petitioner elects to prepare the record. Possibly we could add authority to CEQA for the court to order production of the record and to impose sanctions for failure to do so. **The staff will discuss this with the working group to see if there is a problem that should be addressed.**

§ 1123.850. New evidence on judicial review

• Local agency representatives have expressed concern about the closed record requirement of the draft statute on their nonadjudicative proceedings. They say they will have to build a record in every case that will withstand judicial review, increasing the cost of local agency proceedings. To address this concern, the staff suggested in the basic memo that the Judicial Council be authorized to provide by rule for open record review in additional cases not contemplated in the statute. Dan Siegel of the Attorney General's Office is concerned this provision will undermine closed record review of state agency proceedings.

• We can address both the concerns of local agency representatives and the Attorney General's Office by limiting the suggested Judicial Council authority to judicial review of local agency action:

> 1123.850. . . .
>
> (c) Whether or not the evidence is described in subdivision (a), the court may receive evidence in addition to that contained in the administrative record for judicial review without remanding the case in ~~either~~ any of the following circumstances:
>
> (1) No hearing was held by the agency, and the court finds that remand to the agency would be unlikely to result in a better record for review and the interests of economy and efficiency would be served by receiving the evidence itself. This paragraph does not apply to judicial review of rulemaking.
>
> (2) Judicial review is sought solely on the ground that agency action was taken pursuant to a statute ~~or ordinance~~ that is unconstitutional.
>
> (3) For local agency action, as provided by rules of court adopted by the Judicial Council.

The staff would delete "ordinance" from subdivision (c)(2) as suggested by the working group because of the exemption for local agency ordinances in Section 1121.

Pub. Res. Code § 21168. Conduct of proceeding

The staff agrees with the working group that we should restore the existing standard of review language to the California Environmental Quality Act that reads: "In any such action, the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in light of the whole record." See Pub. Res. Code § 21168.

Respectfully submitted,

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Re: Judicial Review of Agency Action

Dear Bob:

I am forwarding these comments on your letter of January 7, 1997. In addition, I am incorporating some comments on the draft provisions in your letter of December 18, 1996. In some cases, the Commission's actions reflected in your January 7 letter modified the proposals in your earlier draft. I have attempted to address what I believe to be the most current position of the Commission.

Section 1121:

This section is problematic in several ways. First, the Commission's action in removing "resolutions" from the exemption makes some of the most fundamental and legislative actions of local agencies, such as adoption of a general plan, subject to the new legislation and potentially to a more exacting standard of review than is currently the case. We feel this is inappropriate and should be addressed, perhaps by defining the substance of those resolutions exempt from the provisions of the title (e.g. resolutions which are legislative in nature).

Second, the ordinances and resolutions which are exempt from the title appear to be qualified by the phrase "enacted . . . pursuant to authority granted by the California Constitution." This can be read to be extremely limiting. Many actions of local agencies which are exercises of the constitutional police power and clearly are legislative in nature are taken pursuant to statutory schemes which define applicable procedures and, in some cases, substantive requirements. The most obvious examples are enactment

of general plans and zoning ordinances, whether site-specific or general in their applicability. I believe we discussed this issue at some length at the Commission's November meeting. The cases are absolutely clear that general planning and zoning are exercises of the constitutional police power. They are just as clear that these are legislative acts. Nevertheless, they are regulated by extensive statutory provisions. In this context, the proposed exemption could be read so narrowly to be virtually meaningless.

In addition, we are not aware that the phrase "enacted . . . pursuant to authority granted by the California Constitution" has been the subject of interpretation by the courts, especially in the context of powers granted by the constitution but exercised in a manner prescribed by statute. Rather than clarifying and simplifying existing law, which is the purpose of the proposal, this would be adding an issue ripe for litigation with an uncertain outcome. This is in contrast to making reference to "legislative" acts which has been the subject of extensive litigation so that both the standards used to define legislative acts, and numerous specific actions which are legislative in nature, have been identified by the courts.

In light of these concerns, we would recommend that subsection (d) of Section 1121 be modified, and subsection (e) added, to read:

> (d) Judicial review of an ordinance or regulation enacted by a county board of supervisors or city council.
>
> (e) Judicial review of a resolution of a county board of supervisors or city council that is legislative in nature.

Section 1121.240:

We continue to feel strongly that Section 1121.240 should read as follows:

> Judicial review . . . that the agency is required by law to perform the duty, activity, or function.

Again, we feel that use of the word "authorized" rather than "required" would open agencies up to extensive litigation simply for failing to take discretionary actions which they are empowered, but not obligated, to take. The term "required" is broad enough to cover both the situation where a local agency fails to take any action where it is required to do so, and the situation where discretion not to take an action was exercised in a manner which constitutes an abuse of discretion.

Sections 1123.410 and 1123.420:

In the proposed comment to Section 1123.410, we would request

that the phrase "and the application of the law to the facts" be deleted. In Section 1123.420, we would again request that subsection (a)(5) "[whether the agency has erroneously applied the law to the facts" be deleted.

This continues to be one of our most major concerns which we see as potentially affecting the standard of review in fundamental ways, notwithstanding your and the Commission's repeated assurances that other provisions of the legislation are intended to avoid that consequence. The concept of "applying the law to the facts" arises in many contexts and could be confused with an exercise of discretion, resulting in confusion as to whether Section 1123.420 or Section 1123.450 should apply. Under current law, courts show great deference to local agency determinations, especially in areas involving factual inquiry.

We discussed this issue at length with you in our meeting. An example is the fact that, with respect to legislative matters, the courts, applying an abuse of discretion standard, will uphold agency actions if the court can conceive of a basis for the action, whether or not in the record. The inclusion of Section 1121.420(a)(5) could result in an erroneous change to this standard, despite the fact that the Commission has indicated its intent that such circumstances be covered by Section 1121.450. We do not feel that the comment to Section 1121.420 adequately mitigates this concern, especially in light of the discussion in the third, fourth, and eighth paragraphs of that comment which clearly portends some change in current law. This type of consideration arises frequently in land use matters and under CEQA. For example, based upon evidence presented, local agencies must make determinations whether the facts support a finding that a project will or will not have significant adverse environmental impacts. This is at the heart of the CEQA process and is a process in which the courts show great deference to local decision-makers, and the judicial trend is to strengthen those presumptions in favor of the local agencies. If such decisions are interpreted to constitute the application of facts to the law (cf. the determination of whether facts support a finding of negligence which has been cited as an example of applying facts to the law), the proposed legislation could apply an independent review test. The result would be increased litigation and a shift of discretion and authority from local agencies to the courts.

We would be happy to address this matter further at the Commission's February meeting.

Section 1123.810:

If the Commission exempts legislative acts of local agencies from the coverage of the bill, the current draft is acceptable. If not, however, we are faced with the same concern over the standard of review applicable to legislative actions as was discussed above

under Section 1121.420. Currently, courts may look beyond the record for a basis to uphold legislative action. Limiting review of legislative acts to a closed record review could have the effect of forcing the application of a different standard of review. Therefore, unless legislative acts are exempt, we would recommend allowing evidence outside the record where a legislative act is challenged. We are particularly concerned that any action will meet the notice and hearing criteria of Section 1123.810 given the Brown Act's requirement for a posted agenda and an opportunity to speak on all agenda items. Some additional consideration will need to be given to distinguishing legislative acts from those actions discussed in Western States Petroleum Association v. Superior Court, 9 Cal.4th 559 (1995). Upon rereading that case, it appears that two concepts appear to limit its holding. One is its repeated reference to the "quasi-legislative" acts under consideration as "administrative", and its reference to review under the statutorily mandated "substantial evidence" rule. These concepts may form the basis for differentiating legislative acts from those covered by Western States.

This is one of the most difficult concepts of the proposal to deal with, and we recognize varying views on it. Again, our concerns are two-fold. One is the added expense of creating a record sufficient for judicial review on virtually every matter before our governing boards as a result of this state mandate. The second is the potential for impacting the extremely deferential standard of review now applied to legislative actions. As suggested in your letter, we would be pleased to further address this issue at the Commission's February meeting.

Section 1123.820(a)(7):

We recommend rewording this subsection as follows:

> (7) Any other matter expressly prescribed for inclusion in the administrative record of a state or local agency subject to judicial review by rules of court adopted by the Judicial Council.

We believe that a general reference to rules of court without the rules being expressly applicable to administrative records pursuant to this statute would lead to confusion and the argument that a myriad of rules relating to judicial proceedings may be applicable.

Section 1123.830(c):

We would suggest that this subsection be amended to read as follows:

> (c) The time limits provided in subdivision (b) may be extended by the court for good cause shown. If the

agency fails timely to deliver the record, the court may order the agency to deliver the record, and may impose sanctions and grant other appropriate relief for failure to comply with any such order.

Preparation of an administrative record can be extremely time consuming regardless of the length of any hearing. Often the time is spent not on transcribing the record of the hearing but in collecting, reviewing and preparing documents. Time-frames are frequently agreed to by the parties and submitted for ratification by the court. In light of these practical considerations, we believe it would be appropriate to require non-compliance with a court order before sanctions or other relief be imposed.

On a related point, certain statutes such as CEQA authorize a petitioner to prepare the record at his or her option, subject to certification by the agency. Some comparable deadlines should be incorporated in such cases to prevent the election from being made and then allowing preparation of the record to drag on.

Section 1123.850(c)(2):

The reference to actions taken pursuant to an "ordinance" which is unconstitutional should be deleted if ordinances are exempt from the title.

Public Resources Code Section 21168:

We strongly urge the Commission to retain language in this section adopting the substantial evidence test. Combined with various ambiguities we feel exist in the applicable standards of review, especially with regard to the current language relating to the application of the facts to the law, we are concerned that the deletion of the portion of Section 21168 which expressly prohibits the court from exercising its independent judgment on the evidence may foster an interpretation which would lead to the exercise of such independent judgment where the courts are now limited to applying the substantial evidence standard.

We appreciate the Commission's efforts to clarify and streamline the law in this area. However, we remain concerned that, because of various issues we have identified, the proposed legislation may not achieve its goals and may instead generate substantial litigation in substantive areas which are now matters of settled law. As we have stated repeatedly, we are particularly concerned that, as drafted, the legislation may effect a substantial shift of authority from local legislative bodies to the courts.

As always, we appreciate the opportunity to provide input. We look forward to continuing the dialogue at your February meeting.

Sincerely,

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