Study N-200 January 31, 1997

Memorandum 97-11

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. This memorandum addresses comments in Mr. Green's letter and other issues. It replaces Memorandum 97-2 and First Supplement. At the meeting, the staff plans to discuss only the material below preceded by a bullet [•].

§ 1121. Proceedings to which title does not apply

• Section 1121(d) exempts local agency ordinances from review under the draft statute. As directed by the Commission at the December meeting, this exemption should be expanded to include regulations of a county board of supervisors or city council. The local agency working group would like the exemption further expanded to include a resolution of a county board of supervisors or city council that is "legislative in nature." This will obviate objections of the local agency working group to closed record review of local agency nonadjudicative proceedings (see discussion *infra* under Section 1123.850). **The staff has no objection to exempting legislative resolutions as follows** (the revisions to subdivision (a) are technical):

> 1121. This title does not apply to any of the following:
> (a) Judicial review of agency action ~~provided by statute~~ by any of the following means:
> (1) ~~Trial~~ Where a statute provides for trial de novo.
> (2) Action for refund of taxes under Division 2 (commencing with Section 6001) of the Revenue and Taxation Code.
> (3) Action under Division 3.6 (commencing with Section 810) of the Government Code, relating to claims and actions against public entities and public employees.
> . . . .
> (d) Judicial review of ~~an ordinance of a local agency~~. either of the following enacted by a county board of supervisors or city council:
> (1) An ordinance or regulation.
> (2) A resolution that is legislative in nature.
> . . . .

> **Comment.** . . . Subdivision (d) provides that this title does not apply to judicial review of an ordinance or regulation of a county board of supervisors or city council, or of a resolution of those bodies that is legislative in nature. Concerning what is legislative in nature, see [citations]. These matters remain subject to judicial review by traditional mandamus or by an action for injunctive or declaratory relief. See, e.g., Karlson v. City of Camarillo, 100 Cal. App. 3d 789, 798, 161 Cal. Rptr. 260 (1980) (mandamus to review amendment of city's general plan); *cf.* Guidotti v. County of Yolo, 214 Cal. App. 3d 1552, 1561-63, 271 Cal. Rptr. 858, 863-64 (1986) (declaratory and injunctive relief and mandamus to review setting by county of levels of general relief). If a proceeding is brought under this title to review ministerial or informal action and a separate proceeding for traditional mandamus is brought to review an ordinance, regulation, or legislative resolution upon which the action is based, the two proceedings may be consolidated by the court under Section 1048. See Section 1123.710.

The staff will ask the local agency working group to provide us with case law defining "legislative in nature."

§ 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 is 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 may 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 December meeting, the Commission rejected a similar request from the working group to limit "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, so the staff added the following:

> 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.

• This revision may not be necessary if the Commission approves the staff proposal under Section 1121 *supra* to exempt local agency regulations and legislative resolutions from the draft statute.

§ 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 if the word order were changed:**

> 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

• Section 1123.240(c) 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 has safeguards by requiring consent of the person represented, that the person be either a member of the organization or someone the organization is required to represent, and 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 is concerned that independent judgment review of application questions under Section 1123.420 will swallow up abuse of discretion review 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 working group is concerned that if this language is not deleted, the court will use independent judgment in reviewing whether the facts, for example in a CEQA case, support the ultimate findings. But, if there is no application question involved, the court must uphold the findings under CEQA if "the act or decision is supported by substantial evidence in light of the whole record." See discussion *infra* under Public Resources Code Section 21168. Independent judgment for application questions does not go to the ultimate findings, but only to the particular question of application of law to fact. Although this already seems clear to staff, we could add the following to the Comment to Section 1123.420:

> Agency application of law to fact should not be confused with the court's determination whether the decision is supported by the evidence. This question is determined under Section 1123.430 or 11223.440 as appropriate, and not under Section 1123.420.

• The staff believes the standard of review provisions are in good shape, and make significant clarifications and improvements in the law. For 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.

§ 1123.520. Superior court venue

Section 1123.520 has separate venue rules for state and local agencies. However, there may be agencies that are neither state nor local, e.g., the San Francisco Bay Conservation and Development Commission and Tahoe Regional Planning Agency, which consist of representatives from both state and local government. Gov't Code §§ 66620, 66801. (The Golden Gate Bridge, Highway and Transportation District is governed by directors appointed by counties of the region, and so appears to be an "other local public agency" within the meaning of Government Code Section 54951. See Sts. & Hy. Code § 27510.)

Under Section 1123.520, venue for review of state agency action is in the county where the cause of action arose, or Sacramento County. For local agency action, venue is in the county or counties of jurisdiction of the local agency.

Under existing administrative and traditional mandamus, venue is determined under the rules for civil actions generally, viz., the county where the cause of action arose. California Administrative Mandamus, *supra*, § 8.16, at 269; California Civil Writ Practice § 5.4, at 185, § 9.29, at 308 (Cal. Cont. Ed. Bar, 3d ed. 1996). Thus, for state agencies, the draft statute continues existing law, except for the addition of Sacramento County. For local agencies, as the Comment notes, Section 1123.520 "is probably not a substantive change, since the cause of action is likely to arise in the county of the local agency's jurisdiction."

Section 1123.520 is silent on venue for nongovernmental entities, so venue rules for civil actions generally will apply under Section 1123.710(a), the same as under existing law. Thus under the draft statute and existing law, judicial review of action of a nongovernmental entity is where the entity is located. See Code Civ. Proc. § 395; California Administrative Mandamus, *supra*, § 8.16, at 270.

It seems better to apply the local agency rule (county of agency's jurisdiction) for hybrid agencies. Otherwise, the judicial review proceeding might be brought in Sacramento County, even though the agency's jurisdiction does not extend to Sacramento County. See, e.g., Gov't Code §§ 66603, 66651 (BCDC responsible for San Francisco Bay Plan), Gov't Code § 66801 (Tahoe Regional Planning Agency responsible for regional plan for Tahoe Basin). **Thus Section 1123.520 should be revised as follows:**

> 1123.520. (a) Except as otherwise provided by statute, the proper county for judicial review under this chapter is:
>
> (1) In the case of state agency action, the county where the cause of action, or some part thereof, arose, or Sacramento County.
>
> (2) In the case of action of a nongovernmental entity, the county where the entity is located.
>
> (3) In cases not governed by paragraph (1) or (2), including local agency action, the county or counties of jurisdiction of the agency.
>
> (b) [change of venue]
>
> **Comment.** Subdivision (a)(1) of Section 1123.520 continues prior law for judicial review of state agency action, with the addition of Sacramento County. See Code Civ. Proc. § 393(1)(b); California Administrative Mandamus § 8.16, at 269 (Cal. Cont. Ed. Bar, 2d ed. 1989); Duval v. Contractors State License Bd., 125 Cal. App. 2d 532, 271 P.2d 194 (1954). Subdivision (a)(2) continues what appears to have been existing law for judicial review of action of a nongovernmental entity. See California Administrative Mandamus, *supra*, § 8.16, at 270.
>
> Subdivision (a)(3) is new, but is probably not a substantive change for local agencies, since the cause of action is likely to arise in the county of the local agency's jurisdiction. In addition to applying to local agencies (defined in Section 1121.260), subdivision (a)(3) applies to hybrid agencies made up of representatives both of state and local government. See, e.g., Gov't Code §§ 66620 (San Francisco Bay Conservation and Development Commission), 66801 (Tahoe Regional Planning Agency).
>
> . . . .
>
> The venue rules of Section 1123.520 are subject to a conflicting or inconsistent statute applicable to a particular entity (Section 1121.110), such as Business and Professions Code Section 2019 (venue for proceedings against the Medical Board of California). For venue of judicial review of a decision of a private hospital board, see Health & Safety Code § 1339.63(b).

The addition of a provision for nongovernmental entities is necessitated by the broadening of paragraph (3), above. A similar revision for hybrid agencies is also needed in Section 1123.630, discussed below. Three other sections that refer to a "state" agency appear satisfactory as drafted. See Sections 1120, 1123.430(b), 1123.730(c).

§ 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

• At the December meeting, the Commission asked the staff to replace the single form of notice of the last day for judicial review with a more finely-tuned notice to reflect the limitations period applicable in the particular proceeding. **To do this, the staff deleted the notice section (Section 1123.630), put separate notice provisions in each of the two limitations sections, and renumbered them, as set out below.**

• Sections 1123.630 and 1123.640 (as renumbered) 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 requiring the fee to be paid "promptly" as set out below.**

~~1123.630. In addition to any notice of agency action required by statute, in an adjudicative proceeding, 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 review of the decision is [date] unless the time is extended as provided by law."~~

~~1123.640~~ 1123.630. (a) The petition for review of a decision of ~~a state~~ an agency, other than a local agency, in an adjudicative proceeding, and of a decision of ~~any~~ a local agency in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, shall be filed not later than 30 days after the decision is effective or after the notice required by ~~Section 1123.630~~ subdivision (e) is delivered, served, or mailed, whichever is later.

(b) For the purpose of this section:

(1) A decision in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code is effective at the time provided in Section 11519 of the Government Code.

(2) ~~A decision of a state agency in~~ In an adjudicative proceeding other than under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code , a decision of an agency other than a local agency is effective 30 days after it is delivered or mailed to the person to which the decision is directed, unless any of the following conditions is satisfied:

(A) Reconsideration is ordered within that time pursuant to express statute or rule.

(B) The agency orders that the decision is effective sooner.

(C) A different effective date is provided by statute or regulation.

(c) Subject to subdivision (d), the time for filing the petition for review is extended for a party:

(1) During any period when the party is seeking reconsideration of the decision pursuant to express statute or rule.

(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~~.

(d) In no case shall a petition for review of a decision described in subdivision (a) be filed later than one hundred eighty days after the decision is effective.

(e) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), 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 review of the decision is [date] unless another statute provides a longer period or the time is extended as provided by law."

~~1123.650~~ 1123.640. (a) The petition for review of a decision in an adjudicative proceeding, other than a petition governed by Section ~~1123.640~~ 1123.630, shall be filed not later than 90 days after the decision is announced or after the notice required by ~~Section~~ ~~1123.630~~ subdivision (d) is delivered, served, or mailed, whichever is later.

(b) Subject to subdivision (c), the time for filing the petition for review is extended for a party:

(1) During any period when the party is seeking reconsideration of the decision pursuant to express statute, rule, charter, or ordinance.

(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~~.

(c) In no case shall a petition for review of a decision described in subdivision (a) be filed later than one hundred eighty days after the decision is announced or reconsideration is rejected, whichever is later.

(d) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), 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 review of the decision may be as early as 90 days after the decision is announced, or in the case of a decision pursuant to environmental laws, as early as 30 days after the required notice is filed."

• **Are these revisions satisfactory?**

Applying the 30-day limitation period of Section 1123.630(a) to hybrid agencies is consistent with existing administrative mandamus, where the 90-day limitations period applies only to local agencies (other than school districts) as defined in Government Code Section 54951. Code Civ. Proc. § 1094.6. For agencies other than local agencies, the existing limitations period is prescribed in Government Code Section 11523 for review of formal adjudication under the APA, or by special statutes applicable to the particular proceeding. California Administrative Mandamus, *supra*, § 7.3, at 240. We also preserve the existing 30-day limitations period in Government Code Sections 66639 and 66641.7 for judicial review of action of BCDC.

The Commission asked if there are special limitation periods shorter than 30 days that should be taken into account in the notice. All limitation periods for judicial review are 30 days or longer. The State Department of Health Services wanted to preserve its requirement that a licensee who wants to contest a citation must notify the agency within 15 days. Health & Safety Code § 1428. The draft statute does not affect internal agency procedures such as this one.

§ 1123.820. Administrative record exclusive basis for judicial review

The working group would revise 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, the unintended effect might be to apply general court rules. **The staff has no objection to this revision.** 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

• At the December meeting, the Commission approved a requirement of advance payment of the fee for the record. The Commission asked the staff to consider whether there should be a provision for the court to order the agency to produce the record, or to require the agency to refund the fee, when the agency fails to do so in a timely manner. Existing statutes have no remedy for the agency's failure to deliver the record within the required time, but "the petitioner may be able to persuade the court to grant an appropriate remedy, such as an order requiring the record to be delivered by a particular date." California Administrative Mandamus, *supra*, § 8.10, at 265. **The staff recommends including this in Section 1123.830 as follows:**

(b) Except as otherwise provided by statute, the administrative record shall be delivered to the petitioner as follows:

(1) Within 30 days after the request and payment of the fee provided in Section 1123.910 in an adjudicative proceeding involving an evidentiary hearing of 10 days or less.

(2) Within 60 days after the request and payment of the fee provided in Section 1123.910 in a nonadjudicative proceeding, or in an adjudicative proceeding involving an evidentiary hearing of more than 10 days.

(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 last clause in the underscored language in subdivision (c) — "for failure to comply with any such order" — was suggested by the local agency working group. 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

• The local agency working group is concerned the draft statute goes too far in imposing a closed record requirement on nonadjudicative proceedings of local agencies. They say they will have to build a more elaborate administrative record in every case to prepare for a possible court challenge, increasing the cost of local agency proceedings. The Commission considered this in December, and decided not to create additional exceptions to the closed record requirement.

• The Commission may wish to consider authorizing the Judicial Council to provide by rule for open record review for local agencies in cases not mentioned in the statute. This could be done by revising Section 1123.850 as follows:

> 1123.850. (a) If the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded in the agency proceedings, it may enter judgment remanding the case for reconsideration in the light of that evidence. Except as provided in this section, the court shall not admit the evidence on judicial review without remanding the case.
>
> (b) The court may receive evidence described in subdivision (a) without remanding the case in any of the following circumstances:
>
> (1) The evidence relates to the validity of the agency action and is needed to decide (i) improper constitution as a ~~decision making~~ decisionmaking body, or grounds for disqualification, of those

taking the agency action, or (ii) unlawfulness of procedure or of ~~decision making~~ decisionmaking process.

(2) The agency action is a decision in an adjudicative proceeding and the evidence relates to an issue for which the standard of review is the independent judgment of the court.

(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 addition of paragraph (3) to subdivision (c) will not be necessary if the Commission approves the staff proposal under Section 1121 *supra* to expand the local agency exemption to include regulations and legislative resolutions.

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." Pub. Res. Code § 21168.

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
VICKI J. RINUCANE
THOMAS D. CUMPSTON
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

January 22, 1997

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

Robert J. Murphy, Esq.
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

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.

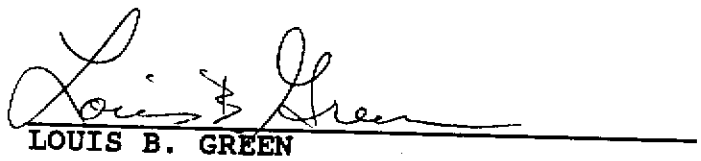
Public Resources Code Section 21168:

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,



LOUIS B. GREEN

LBG/stl
f:murphy3.ltr
cc: Dwight L. Herr, Esq.
Buck E. Delventhal, Esq.
Ruth Sorensen, Esq.