Study N-200 April 29, 1997

First Supplement to Memorandum 97-26

Judicial Review of Agency Action: Senate Bill 209

Attached is the following letter of support for SB 209:

Exhibit pp.

1. Larry Doyle, State Bar of California 1-4

The staff plans to discuss only the material below preceded by a bullet [•].

Support of State Bar Public Law Section

The attached letter reports unanimous support of the Executive Committee of the State Bar Public Law Section for SB 209. The Section report says existing procedures are Byzantine and that SB 209 will "clarify and simplify the law."

§ 1123.110. Requirements for judicial review

Section 1123.110(b) says the "court may summarily decline to grant judicial review if the petition for review does not present a substantial issue for resolution by the court." The Comment says this "continues the former discretion of the courts to decline to grant a writ of administrative mandamus." Robert Bezemek, California Federation of Teachers, objects to giving the court discretion summarily to deny a petition for review. He said this is not the rule in traditional mandamus, and that the draft statute eliminates important rights.

Traditional mandamus is commenced either by petition for an alternate writ (an order to show cause for the agency to show why a peremptory writ should not issue) or, in many counties, more directly by noticed motion for a peremptory writ. Code Civ. Proc. §§ 1087, 1088; California Civil Writ Practice § 9.52 (Cal. Cont. Ed. Bar, 3d ed. 1996). The court may summarily deny a petition for an alternate writ without a responsive pleading having been filed. Kingston v. Department of Motor Vehicles, 271 Cal. App. 2d 549, 76 Cal. Rptr. 614 (1969).

Noticed motion procedure. If traditional mandamus is commenced by noticed motion for a peremptory writ, respondent may answer, demur, or move to strike, dismiss, or for summary judgment. California Civil Writ Practice, *supra*, §§ 9.61-9.62. The motion is calendared for hearing the same as for civil motions generally. *Id.* § 9.71. The hearing need not be formal — the court may decide on

the papers, and in most cases the hearing will consist only of argument. *Id.* § 9.72. Because petitioner has the burden of proof, the court may deny the motion even though unopposed. Code Civ. Proc. § 1088; California Civil Writ Practice, *supra*, § 9.70.

Discretionary denial constitutionally required. Court discretion summarily to deny appears necessary to avoid constitutional issues. The Legislature may not give courts jurisdiction beyond that conferred by the Constitution. Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd., 24 Cal. 3d 335, 347, 595 P.2d 579, 156 Cal. Rptr. 1 (1979). The Constitution gives superior courts "original jurisdiction in proceedings for extraordinary relief in the nature of mandamus." Cal. Const. Art. VI, § 10. "Unlike an appeal, a petition for writ of review or mandamus may be summarily denied, without a statement of reasons, on the face of the petition and any memorandum opposing it." *Tex-Cal*, 24 Cal. 3d at 350. And "virtually all petitions to California courts for review of agency decisions are subject to summary denial," but courts should not do so "until after the petitioner has had a reasonable time to file points and authorities." *Id.* at 351.

It is apparent that court discretion summarily to deny a petition for review cannot be eliminated without creating constitutional problems. **Instead, the staff recommends adding the following to the Comment to Section 1123.110:**

> The court should not summarily decline to grant judicial review without considering petitioner's written argument, if any. See Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd., 24 Cal. 3d 335, 351, 595 P.2d 579, 156 Cal. Rptr. 1 (1979).

§ 1123.430. Review of agency factfinding

The State Bar Public Law Section says that, if substantial evidence review of state agency factfinding is kept, an exception should be made for driver's license hearings of the Department of Motor Vehicles. The Section says independent judgment review of such hearings should be preserved because DMV is exempt from separation of functions required by the administrative adjudication bill of rights. Veh. Code § 14112. The staff sees some merit to this view. But if the Commission decides to restore existing law on standard of review of state agency factfinding (basic memo, p. 3), a special rule for DMV hearings will be unnecessary.

§ 1123.730. Type of relief

• Section 1123.730(d) permits the court to "award attorney's fees or witness fees only to the extent expressly authorized by statute." This comes from Model State Administrative Procedure Act Section 5-117(c) (court may award fees expressly authorized by "other law"). Mr. Casey of the Consumer Attorneys of California objects (letter attached to basic memo), saying it would prohibit attorneys' fees under the equitable theory of Serrano v. Priest, 20 Cal. 3d 25, 35, 569 P.2d 1303, 141 Cal. Rptr. 315, 318 (1977). See generally California Attorney Fee Awards § 7.4 (Cal. Cont. Ed. Bar, Sept. 1996). Section 1123.730 was not intended to abolish the court's authority to award attorneys' fees under the equitable theories discussed in *Serrano*, but the staff agrees that, in its present form, it may be susceptible of that construction.

• Subdivision (d) of Section 1123.730 appears unnecessary for attorneys' fees. Section 1123.710 applies civil practice rules in Part 2 of the Code of Civil Procedure (Sections 307 to 1062.20) to proceedings under the draft statute. Thus it picks up the rule in Section 1021 that each party bears his or her own attorneys' fees unless otherwise provided by contract or "specifically provided for by statute." This should be sufficient.

• Subdivision (d) also appears unnecessary for witness' fees. In civil litigation, statutory per diem fees of witnesses are allowable as costs to the prevailing party. 7 B. Witkin, California Procedure, Judgment § 112, at 543 (3d ed. 1985). A witness gets $35 a day and 20 cents a mile for travel. Gov't Code § 68093. Special provisions provide witness fees for a public employee. Gov't Code §§ 68096.1-68097.10. Expert witness fees above the statutory per diem are ordinarily not allowable. 7 B. Witkin, *supra*, §§ 112-113, at 543-44. Mileage to and from the place of trial is ordinarily an allowable cost. 7 B. Witkin, *supra*, § 114, at 544. These rules do not depend for their operation on subdivision (d).

• **The staff recommends deleting subdivision (d) from Section 1123.730:**

~~(d) The court may award attorney's fees or witness fees only to the extent expressly authorized by statute.~~

Respectfully submitted,

Robert J. Murphy
Staff Counsel

Serrano was not a mandamus case. It was a class action for declaratory and injunctive relief under the equal protection clause of the U. S. Constitution and the parallel provision of the California Constitution. Can the draft statute constitutionally apply to such an action? Class actions are authorized by statute. See Code Civ. Proc. §§ 382, 384. But the statute appears to impose no limitation that might raise a constitutional question for a constitutional cause of action.

Inverse condemnation is analogous. Inverse condemnation arises directly from the California Constitution, exists outside the Tort Claims Act, is self-executing, and therefore the Legislature cannot curtail this constitutional right. Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942); California Government Tort Liability Practice § 2.97, at 182 (Cal. Cont. Ed. Bar, 3d ed. 1992). But constitutional and statutory provisions must be harmonized so all may stand. Rose v. State, *supra*, at 723. See also Hensler v. City of Glendale [cite] (exhaustion of administrative remedies applies to inverse condemnation); 3 B. Witkin California Procedure *Actions* § 312, at 401-02 (4th ed. 1996).

Compliance with the claims presentation requirements was for many years a condition precedent to an action for inverse condemnation. Stone v. City of Los Angeles, 51 Cal. App. 3d 987, 124 Cal. Rptr. 822 (1975); California Government Tort Liability Practice, *supra*, § 2.98, at 185. And the statutory limitations period (three years) applies to inverse condemnation proceedings. California Government Tort Liability Practice, *supra*.

THE STATE BAR OF CALIFORNIA

OFFICE OF GOVERNMENTAL AFFAIRS

915 L STREET, SUITE 1260, SACRAMENTO, CALIFORNIA 95814 TELEPHONE: (916) 444-2762 FAX: (916) 445-0562

April 29, 1997

The Honorable Quentin Kopp
Member of the Senate, 8th District
State Capitol, Room 2057
Sacramento, CA 95814

SB 209, as amended 4/16/97: SUPPORT
Public Law Section

Dear Senator Kopp,

The Public Law Section of the State Bar of California, composed of experts in administrative and public law, is pleased to support your SB 209 for the reasons detailed in the attached report.

THIS POSITION IS ONLY THAT OF THE PUBLIC LAW SECTION OF THE STATE BAR. IT HAS NOT BEEN APPROVED BY THE STATE BAR'S BOARD OF GOVERNORS OR OVERALL MEMBERSHIP, AND IS NOT TO BE CONSTRUED AS REPRESENTING THE POSITION OF THE STATE BAR OF CALIFORNIA. MEMBERSHIP IN THE PUBLIC LAW SECTION OF THE STATE BAR IS VOLUNTARY. THE SECTION IS COMPOSED OF 1,367 MEMBERS FROM AMONG THE MORE THAN 120,000 ACTIVE MEMBERS OF THE STATE BAR OF CALIFORNIA.

It is the policy of the State Bar to refer legislative proposals affecting specific legal questions or the practice of law to the appropriate State Bar Committee or Section for review and comment. If you wish to discuss this position further, please feel free to contact me.

Best Regards,

Larry Doyle
Chief Legislative Counsel

Enclosure

cc: Senate Committee on Judiciary
Kevin E. Smith, Republican Committee Counsel
Bob Murphy, California Law Revision Commission
Silvano Marchesi, Section Legislative Chair
Kerry Weisel, Member, Public Law Section Executive Committee
Dan Siegel, Member, Public Law Section Executive Committee
Anne Ravel, Section BCLCR Liaison
Diane C. Yu, General Counsel, State Bar of California
David Long, Director, State Bar Office of Research
Susan Orloff, Section Administrator

TO: Larry Doyle, Chief Legislative Counsel

FROM: Kerry Weisel

DATE: April 21, 1997

RE: SB 209 (Kopp), as amended April 16, 1997

SECTION/COMMITTEE POSITION:

Support

Date position recommended: April 18, 1997
Executive Committee vote: Ayes 11 Noes 0
Subcommittee vote: Ayes 4 Noes 0

ANALYSIS:

(1) Summary of existing law

Currently most agency actions are reviewed by ordinary mandamus under Code of Civil Procedure section 1085 or by administrative mandamus under Code of Civil Procedure section 1094.5, complaints seeking declaratory or injunctive relief, or other forms of action. Courts currently independently reweigh the evidence where a state or local quasi-judicial decision substantially affects a "fundamental vested interest," unless the California Constitution has conferred adjudicatory powers on the agency, or a statute explicitly calls for the use of a different test. Where the independent judgment test does not apply, the courts generally use the "substantial evidence test." Under this test, an agency's findings are upheld unless they "are not supported by substantial evidence in the light of the whole record." There are a number of statutes of limitations under current law including a three to four year "catch all" provision for the relatively few decisions not covered by a specific statute. Local agencies currently have a 90 day limitation period. Under current law, courts may empanel an advisory jury in mandamus actions. The case law now provides that it is necessary to have a rule or policy applied to a specific factual situation before it is challenged (ripeness), that it is necessary to pursue administrative remedies before going to court (exhaustion of remedies), and that a case properly filed in court may nonetheless be transferred to an administrative agency (primary jurisdiction).

(2) Changes to existing law proposed by this bill.

SB 209 eliminates administrative mandamus and retains ordinary mandamus only for actions excluded from its coverage. It provides that most agency actions be reviewed through a new "petition for review," rather than by ordinary or administrative mandamus or any of the other methods currently available. SB 209 would eliminate the independent

judgment test and apply the substantial evidence test across the board. A number of statutes of limitations would be altered by SB 209. A 30-day limitations period would apply to most state agency adjudications. The current 90-day period would continue to apply to local agency adjudications, except that where a hearing is conducted under the newly-revised Administrative Procedure Act's formal adjudication provision, a 30-day period would apply. Limitations periods would be extended to 180 days where the state or local agency failed to provide notice of the deadline for filing a petition. Under SB 209 advisory juries would be eliminated when courts review decisions covered by the bill. The bill would codify the current case law regarding ripeness, exhaustion of remedies, and primary jurisdiction.

(3) Analysis of proposed changes and recommended amendments.

The changes proposed in SB 209 would eliminate the current byzantine procedure for obtaining review of an agency's actions and would clarify and simplify the law. Eliminating the independent judgment test would require courts to give deference to an agency's decision so long as substantial evidence supported the decision. This would leave the primary decision making responsibility in the hands of the entity with the expertise in the area to be reviewed. It would also make California law consistent with federal law and the law of all other states, which, with isolated exceptions, apply variations of the substantial evidence test.

The committee does have some concerns about the application of this bill to the Department of Motor Vehicles ("DMV"). So long as the DMV's hearing officers are also the department's "prosecutors", the committee believes that an independent review by the court is essential. The committee urges the Legislature either to amend this bill to exempt the DMV from its coverage or to provide that the DMV be required, like other state agencies, to have separate prosecutors and fact finders. The committee, however, supports SB 209 even without these changes.

(4) Germaneness.

SB 209 is clearly related to the regulation of the legal profession and the committee believes it's adoption will improve the quality of legal services available to the people of the state. The area addressed by the bill, the review of agency decisions, is clearly one which requires the special knowledge, training, experience, and technical expertise of the public law section. By definition, those lawyers regularly practicing in this arena are public lawyers. Finally, as noted above, the changes proposed by SB 209 would promote clarity, consistency and

comprehensiveness in the law.