Study N-200 June 6, 1997

Memorandum 97-42

Judicial Review of Agency Action: SB 209 Issues

This Memorandum discusses issues on Senate Bill 209 left over from the last meeting, and issues raised in the attached letters. The staff is working with the Office of Administrative Law to try to address its concerns, and will present a Memorandum on this at a future meeting. The following letters are attached:

The staff plans to discuss only material below preceded by a bullet [•]. The text of sections set out below is from the latest amended version of SB 209.

General Comment

The California State Pipe Trades Council opposes SB 209, but "could, however, support a bill to codify existing law for judicial review of regulatory actions." The staff is working with OAL to achieve this.

§ 1121.150. Application of new law

Section 1121.150 must be revised, since SB 209 is now a two-year bill:

> 1121.150. (a) This title applies to a proceeding commenced on or after January 1, ~~1998~~ 1999, for judicial review of agency action.
>
> (b) The applicable law in effect before January 1, ~~1998~~ 1999, continues to apply to a proceeding for judicial review of agency action pending on January 1, ~~1998~~ 1999.

Similar revisions must be made to the uncodified transitional provision at the end of SB 209, and to the double-jointing provision at the end of SB 261.

§ 1121.290. Rule

Herb Bolz of OAL points out inconsistencies in the use of the terms "rule," "regulation," and "rulemaking." Section 1121.290 defines "rule" as follows:

> 1121.290. "Rule" means the whole or part of an agency regulation, including a "regulation" as defined in Section 11342 of the Government Code, order, or standard of general applicability that implements, interprets, makes specific, or prescribes law or policy, or the organization, procedure, or practice requirements of an agency, except one that relates only to the internal management of the agency. The term includes the amendment, supplement, repeal, or suspension of an existing rule.

Government Code Section 11342 defines "regulation" as follows:

> "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency.

There are five sections in the draft statute that use "regulation" when "rule" should be used as the defined term. The staff would revise these to substitute "rule" for "regulation": Sections 1121, 1123.320, 1123.340 (text set out below), 1123.630(b)(2)(C) (text set out below), and Government Code Section 65009(j)(1).

Section 1123.330(b) refers to "an agency's failure to adopt a rule under" the rulemaking portion of the APA. Here "regulation" seems like the better term, since that is the term used in the APA. The staff would change "rule" to "regulation" in Section 1123.330(b).

"Regulation" in Section 1123.450 is satisfactory because it refers to one adopted under the APA, which uses "regulation." "Regulation" in Section 1123.730 is satisfactory because it refers to one adopted pursuant to Government Code Section 935 (California Tort Claims Act), which uses "regulation."

Three sections refer to "judicial review of rulemaking." "Rulemaking" is not a defined term. The staff would revise two of these to substitute "a rule" for "rulemaking": Sections 1123.330 ("judicial review of ~~rulemaking~~ a rule") and 1123.850 ("judicial review of ~~rulemaking~~ a rule").

"Rulemaking" is used in two places in Section 1123.820(b). The staff would substitute "a regulation" for the first of these but not the second:

> 1123.820. (a) . . . .
> (b) The administrative record for judicial review of ~~rulemaking~~ a regulation under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code is the file of

the rulemaking proceeding prescribed by Section 11347.3 of the Government Code.

The second use of "rulemaking" in Section 1123.820 is satisfactory because Government Code Section 11347.3 refers to a "rulemaking proceeding."

§ 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." citing cases. Court discretion summarily to deny appears necessary to avoid constitutional issues. See *Tex-Cal*, cited in the Comment below.

• Robert Bezemek, California Federation of Teachers, objects to summary denial if the issue presented is not "substantial," citing cases where a substantiality requirement would have been detrimental to his client. **The staff recommends revising subdivision (b) to recognize the constitutional source of court discretion:**

(b) ~~The court may summarily~~ Nothing in this title limits court discretion conferred by Article VI of the California Constitution summarily to decline to grant judicial review ~~if the petition for review does not present a substantial issue for resolution by the court~~.

Comment. . . . Subdivision (b) recognizes that the California Constitution may confer court discretion summarily to decline to grant judicial review. 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). See also Section 1121.120 (judicial review as proceeding for extraordinary relief in the nature of mandamus).

§ 1123.230. Public interest standing

• Section 1123.230 continues existing public interest standing, which permits a person who suffers no individual harm nonetheless to enforce a public duty of the agency. The section adds a new requirement that petitioner must request the agency to correct its action, and show the agency did not do so within a reasonable time. (This may not apply to review of a rule, because Section 1123.330 says a person may obtain review of a rule notwithstanding failure to petition for or otherwise seek amendment, repeal, or reconsideration of the rule.)

The person must also exhaust available administrative remedies, subject to specified exceptions.

• Mr. Baker of ACSA, CAPS, & PECG (letter attached to Memorandum 97-26) objects to requiring a request to the agency to correct its action. He says it is unnecessary because administrative remedies must be exhausted, and it "only works to slow down the process of putting a stop to an improper governmental activity." This requirement dates from the earliest staff drafts on judicial review in 1993, and was drawn from shareholder derivative suits where plaintiff must show efforts to secure action from the corporation's board of directors, including informing the board in writing of the nature of the complaint. Corp. Code § 800(b)(2).

• In view of the requirement that petitioner must exhaust all available administrative remedies, an additional requirement of a request to the agency to correct its action seems unnecessary. **Accordingly, the staff would delete it:**

> 1123.230. Whether or not a person has standing under Section 1123.220:
>
> ~~(a) A~~ , a person has standing to obtain judicial review of agency action that concerns an important right affecting the public interest ~~if the person has previously requested the agency to correct the agency action and the agency has not, within a reasonable time, done so. The request shall be in writing unless made orally on the record in the agency proceeding. The agency may by rule require the request to be directed to the proper agency official. As used in this subdivision, a reasonable time shall not be less than 30 days unless the request shows that a shorter period is required to avoid irreparable harm.~~
>
> ~~(b) Notwithstanding subdivision (a), a person has standing to obtain judicial review of a regulation adopted pursuant to the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, if the regulation concerns an important right affecting the public interest.~~

§ 1123.310. Exhaustion required

• Section 1123.310 requires a petitioner for review to exhaust "all administrative remedies available within the agency." Mr. Hatch, California Firefighters, objects because this provision does not say what an administrative remedy is (letter attached to Memorandum 97-26). He would limit the required administrative remedy to one prescribed by statute or regulation.

• Under existing law, the exhaustion requirement applies where the administrative remedy is created by statute or agency rule. 3 B. Witkin, California Procedure *Actions* § 309, at 396 (4th ed. 1996). But it is not so limited. It applies, for example, to private association proceedings where the administrative remedy is provided by internal procedures of the association. California Administrative Mandamus, *supra*, § 2.39, at 56. **The staff recommends revising Section 1123.310 and Comment as follows:**

> 1123.310. (a) A person may obtain judicial review of agency action only after exhausting all administrative remedies available within the agency whose action is to be reviewed and within any other agency authorized to exercise administrative review, unless judicial review before that time is permitted by this article or otherwise expressly provided by statute.
>
> (b) For the purpose of subdivision (a), an administrative remedy is available within a public agency only if the remedy is provided by statute or rule.
>
> **Comment.** . . . Subdivision (b) codifies Lopez v. Civil Service Comm'n, 232 Cal. App. 3d 307, 314, 283 Cal. Rptr. 447 (1991). For a private association, an "available" administrative remedy is one provided by internal procedures of the association. Westlake Community Hosp. v. Superior Court, 17 Cal. 3d 465, 474, 131 Cal. Rptr. 90, 94 (1976).

§ 1123.350. Exact issue rule

• Consistent with the exhaustion requirement, Section 1123.350 requires each issue on judicial review to have first been presented to the agency. It is unclear whether the exceptions to the exhaustion requirement in Section 1123.340 apply also to the exact issue rule in Section 1123.350, although it seems they should: "Apparently the same exceptions that apply to the general exhaustion rule also apply to the exact issue rule." Asimow, *Judicial Review: Standing and Timing*, 27 Cal. L. Revision Comm'n Reports 229, 260 (1997). **The staff recommends making this clear by revising Section 1123.350 as follows:**

> 1123.350. (a) Except as provided in subdivision (b), a person may not obtain judicial review of an issue that was not raised before the agency either by the person seeking judicial review or by another person.
>
> (b) The court may permit judicial review of an issue that was not raised before the agency if any of the following conditions is satisfied:

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

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

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

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

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

(6) Any of the conditions in Section 1123.340 for relief from the requirement of exhaustion of administrative remedies is satisfied.

§ 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 last meeting, the Commission revised the notices required in state and local agency proceedings to make them identical to each other. It would be better drafting to have one section rather than two to prescribe the form of the notice. **The staff recommends deleting the notice provisions from Sections 1123.630 and 1123.640, and putting the notice in a new Section 1123.650:**

1123.630. (a) The petition for review of a decision of an agency, other than a local agency, in an adjudicative proceeding, and of a decision of 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 ~~subdivision (e)~~ Section 1123.650 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) 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~~ rule.

(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) 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, within 15 days after being notified of the estimated fee and cost, pays the fee and cost provided in Section 1123.910.

(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 the time is extended as provided by law."~~

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

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

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

(2) 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, within 15 days after being notified of the estimated fee and cost, pays the fee and cost provided in Section 1123.910.

(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 is [date] unless the time is extended as provided by law."~~

1123.650. In addition to any other 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."

This will also require revision of cross-references to these sections in Government Code Section 65009(j)(2) and Public Resources Code Section 21168 (see below), and in SB 261 (conforming revisions).

Pub. Res. Code § 21168 (amended). Conduct of proceeding

Under existing law, judicial review of proceedings under the California Environmental Quality Act is by administrative or traditional mandamus. Pub. Res. Code §§ 21168, 21168.5; S. Kostka & M. Zischke, Practice Under the California Environmental Quality Act § 23.39, at 956 (Cal. Cont. Ed. Bar, Jul. 1996). SB 209 amends Public Resources Code Section 21168 to make CEQA proceedings subject to review under the draft statute. Section 1123.470 in the draft statute puts the burden of persuasion on the person seeking review, consistent with existing administrative and traditional mandamus. See California Administrative Mandamus, *supra,* §§ 4.157, 12.7; California Civil Writ Practice, *supra,* § 9.70, at 325. Until recently, this was the rule for review of CEQA proceedings. See S. Kostka & M. Zischke, *supra,* § 23.71. However, a recent CEQA case (cited in the Comment below) held that in some cases the agency has the burden of showing a project will not have a significant environmental impact. **The staff recommends recognizing the special CEQA rule by amending Public Resources Code Section 21168 as follows:**

21168. (a) Except as provided in subdivision (b), an action or proceeding to attack, review, set aside, void , or annul a

determination, finding, or decision of a public agency on the grounds of noncompliance with this division shall be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. The court shall not exercise its independent judgment on the evidence, but shall determine only whether the act or decision is supported by substantial evidence in light of the whole record.

(b) Sections 1123.470, 1123.630 ~~and~~ , 1123.640 , and 1123.650 of the Code of Civil Procedure do not apply to judicial review of proceedings under this division.

Comment. . . . Under subdivision (b), some provisions of the judicial review statute do not apply to review of proceedings under this division. Because Section 1123.470 on burden of proof does not apply to review of proceedings under this division, existing law continues to apply. See, e.g., Davidon Homes v. City of San Jose, __ Cal. App. 4th __, 62 Cal. Rptr. 2d 612, 617-18 (1997).

Respectfully submitted,

Robert J. Murphy
Staff Counsel

ROBERT J. BEZEMEK
ADAM H. BIRNHAK
DEBORAH L. DUBROFF

LAW OFFICES OF
ROBERT J. BEZEMEK
A PROFESSIONAL CORPORATION
THE LATHAM SQUARE BUILDING
1611 TELEGRAPH AVE., SUITE 936
OAKLAND, CALIFORNIA 94612
(510) 763-5690
144

May 13, 1997

Robert J. Murphy, Staff Counsel
California Law Revision Commission
4000 Middlefield Rd, Suite D-2
Palo Alto, Ca 94303-4739

Re: Staff Memo of April 29, 1997
First Supplement to Memo 97-26
Opposition to Proposal

Dear Mr. Murphy:

I write to express opposition to Section 1123.110(b), which expressly authorizes superior courts to summarily deny a petition which "does not present a substantial issue for resolution by the court." Even with the proposed new commentary, Section 1123.110(b) is a wrongful enlargement of superior court authority and it is unconstitutional.

The basic problem is that the proposal confuses the standard for an appellate court denial of a petition for review of an administrative agency order with the standards for a superior court's denial. Appellate court review of agencies such as the ALRB or PERB, is based on the legislation governing the ALRB and PERB. Review of these agency decisions is not a matter of right (like a civil appeal), but within the discretion of the appellate court. An appellate court often will decline review because it does not view the issues raised as being significant or "substantial."

In contrast, at the Superior Court level, when review is sought by ordinary mandate under CCP 1085 or administrative mandate under CCP 1094.5, the *significance* of the issue in dispute is not a basis for denying a petition for writ of mandate. Although I have not yet reviewed all of the handful of cases which upheld summary denial by a superior court, I have not found a single case where the superior court denied review based on the weight of the issue in dispute. Instead, as in Wine v. Council of City of Los Angeles (1960) 177 Cal. App. 2d 157, 164, 2 Cal. Rptr. 94, 99, the court summarily denied a petition seeking to half annexation of land because the land had already been annexed. In Kingston v. DMV (1969) 271 Cal. App. 2d xx, 76 Cal. Rptr. 614, 616, what is referred to as "summary denial" was denial after review of an administrative record and petitioner's arguments, on the merits.

The staff analysis wrongly concludes that summary denial due to the weight of the issue is a constitutionally mandated choice. This plainly misreads the holding of Tex-Cal Land Management, Inc. v. ALRB (1979) 24 Cal. 3d 335, 156 Cal. Rptr. 1. In Tex-Cal the court never holds or intimates that summary denial by a superior court based on the weight of the

issue in dispute is permissible. If the current procedure for trial courts acting on petitions for writs under either CCP 1085 or 1094.5 were changed to permit summary denial based on the weight of the issue, this will lead to further litigation and likely appeals over the weight of the issue.

The Commission disregards the fact that many California labor laws are administered via CCP 1085 writs, especially the Meyers-Milias-Brown Act, Gov. Code Sec. 3500 et seq. Under this law, employer actions to unilaterally change the conditions of employment without notice or negotiations are unfair labor practices. There are over a thousand cities, counties and special districts which are governed by this law. Under CCP 1085, labor unions have successfully pursued petitions to require bargaining when an employer unilaterally prohibited fire fighters from continuing to wash their cars at work while off duty. This issue was decided in Vernon City Firefighters v. City of Vernon (1980) 107 Cal. App. 3d 802, 811, 817, 818. In Los Angeles Police Protective League v. City of Los Angeles (1985) 166 Cal. App. 3d 55, 60-61, the court held an employer was required to bargain before imposing a $5 per day parking fee.

The cases are numerous in which many perquisites of employment, which a trial judge might view as "non-substantial" have been held negotiable, from access to vending machines to Christmas turkeys! About two years ago I won a case against the Peralta Community College District, which suddenly required its low paid, part-time, temporary faculty to pay for parking. The rates had been increased from 25 cents to about $10 a night. If a trial court could have dismissed a petition based on lack of this being a "substantial issue", I can assure you we would have been forced by the employer to litigate the substantiality issue, and then, had we lost, would have challenged the trial court for abuse of discretion. But the proposed change would create new standards, and open new avenue to employers who want to act unilaterally and violate the law.

For the above reasons, I and my clients will fight any attempt to permit this standard at the trial court level. It is flat-out wrong to authorize summary denial at the superior court level based upon the "substantial" nature of the right in dispute.

Very truly yours,

Robert J. Bezemek

cc: CFT
CELA
Stephen Berzon, counsel, AFL-CIO
Consumer Attorneys of California
3800/3801 Letter to Commission May 13, 1997

THOMAS R. ADAMS
ANN BROADWELL
DANIEL L. CARDOZO
MARC D. JOSEPH
LIZANNE REYNOLDS
JOANNE SPALDING

ADAMS & BROADWELL
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
651 GATEWAY BOULEVARD, SUITE 900
SOUTH SAN FRANCISCO, CA 94080

TELEPHONE
(415) 589-1660
FACSIMILE
(415) 589-5062

144

May 7, 1997

Mr. Robert J. Murphy
Staff Counsel
California Law Review Commission
4000 Middlefield Rd., Suite D-2
Palo Alto, CA 94303

Re: Senate Bill 209

Dear Mr. Murphy:

The California State Pipe Trades Council continues to oppose Senate Bill 209. The Pipe Trades Council could, however, support a bill to codify existing law for judicial review of regulatory agency actions to the greatest extent possible. The codification of existing law could greatly assist individuals and organizations by providing a clear, unified framework for judicial review of agency adjudication and rulemaking.

Senate Bill 209, however, cannot be supported because it goes beyond codification of existing law, and instead, proposes changes which, in numerous ways, make it more difficult to challenge agency actions. The Commission's own staff memorandum indicates that the bill faces overwhelming opposition due to its vast scope and its unwarranted changes to current law. It is unlikely that this bill will gain sufficiently widespread acceptance if it continues to make substantial revisions in existing law. In fact, without significant reform, the Bill will continue to face notable resistance from a multitude of organizations, including the Pipe Trades Council.

Accordingly, the Pipe Trades Council suggests that the Commission revise its approach and that a new bill consist of a codification of existing law.

Sincerely,

Thomas R. Adams

EKM:dk

C1093-004