Study N-200 July 8, 1997

Memorandum 97-48

Judicial Review of Agency Action: SB 209 Issues

This Memorandum discusses issues raised by the Office of Administrative Law, issues left over from the May meeting, and issues raised in the attached letters. Some OAL concerns were addressed at the April and May meetings by deleting Section 1123.130 (court may not prohibit agency from adopting a rule; no judicial review of a rule until applied). The following letters are attached:

Mr. Bezemek tells us the California Federation of Teachers still opposes replacing traditional mandamus with the draft statute. He says he will elaborate in a separate letter.

After the meeting, the staff will send Commission-approved revisions to organizations that opposed SB 209 for comment and for identification of any unresolved issues. The text of sections set out below is from the last amended version of SB 209.

STATE AGENCY REGULATIONS

OAL asks that we exempt preenforcement review of state agency regulations from the draft statute. OAL is concerned with the effect of the draft statute on review of state agency regulations, and believes the safest course is to limit application of the draft statute to defensive challenges to a regulation in an adjudicative proceeding to enforce the regulation.

If this is done, it raises the question whether the judicial review project is worth pursuing. We have already exempted legislative ordinances, regulations, and resolutions of county boards of supervisors and city councils. If we also exempt preenforcement review of state agency regulations, we will have so far departed from our objective of having a single unified procedure for review of all forms of agency action that one may question the value of a statute that replaces

state and local administrative mandamus, and traditional mandamus for review of ministerial or informal action, but preserves traditional mandamus to review city and county legislative acts and declaratory relief for preenforcement review of state agency regulations. In short, we will have replaced one patchwork scheme with another.

Alternatives include:

(1) Keep judicial review of all state agency regulations under the draft statute. OAL is opposed to this. They say their concerns are so pervasive it would take excessive time to work through and resolve every detail.

(2) Abandon the judicial review project as politically unattainable. The Commission has made its report to the Legislature. That may be used by others as a basis for future legislation. The staff does not recommend this alternative. The staff would like to continue working with OAL to see if a compromise solution can be found, without abandoning our original objective of having a single judicial review procedure for review of most forms of agency action.

(3) Exempt all judicial review of state agency regulations, preenforcement and postenforcement, from the draft statute. Under this alternative, a petitioner for judicial review of an administrative adjudication would have to challenge a regulation on which the proceeding is based in a petition for declaratory relief under Government Code Section 11350. The petitioner could presumably join the petition for judicial review of the adjudication under the draft statute with the petition for declaratory relief to review the regulation, consistent with existing practice. See California Administrative Mandamus § 1.6, at 7 (Cal. Cont. Ed. Bar, 2d ed. 1989) ("established practice" to join petition for administrative mandamus with one for traditional mandamus when uncertain which is proper); Gong v. City of Fremont, 250 Cal. App. 2d 568, 574, 58 Cal. Rptr. 664 (1967) (declaratory relief asserting constitutional challenge to zoning ordinance may be joined with administrative mandamus to review decision on application for land use permit). The staff does not recommend this alternative. It would defeat our original purpose in proposing a new judicial review statute to have one procedure to replace the various complex procedures now required.

(4) Exempt preenforcement review of state agency regulations from the draft statute. OAL favors this alternative . Under this alternative, before an administrative adjudication to enforce a regulation, the regulation would have to be challenged in an action for declaratory relief under Government Code Section 11350, not under the draft statute. After an enforcement proceeding is

commenced, the regulation could be challenged defensively in that proceeding, consistent with existing law. See Woods v. Superior Court, 28 Cal. 3d 668, 620 P.2d 1032, 170 Cal. Rptr. 484 (1981) (regulation may be challenged in administrative mandamus to review administrative adjudication based on the regulation); California Administrative Mandamus, *supra*, § 1.7, at 8, § 3.12, at 83-84. Since both the adjudicative portion of the decision and the regulation on which it is based would be reviewed under the draft statute, they would both be subject to the same rules and standards. Under existing law, when an agency decision that is both adjudicative and quasi-legislative is reviewed, the court applies the appropriate standard of review to each. See Dominey v. Department of Personnel Admin., 205 Cal. App. 3d 729, 252 Cal. Rptr. 620 (1988); Mountain Defense League v. Board of Supervisors, 65 Cal. App. 3d 723, 727, 135 Cal. Rptr. 588, 589 (1977). A disadvantage of this alternative is that, although we believe the draft statute is consistent with existing law on all important points, the rules for preenforcement review by declaratory relief might differ slightly from the rules for postenforcement review under the draft statute. The staff prefers to have the same rules and standards for review of state agency regulations, whether the review is preenforcement or postenforcement.

(5) Exempt only underground regulations from the draft statute. The most serious problems identified by OAL involve application of the draft statute to underground regulations, i.e., those not adopted in compliance with the notice and comment requirements of the Administrative Procedure Act. OAL asks the following questions concerning underground regulations: Does the finality requirement of Section 1123.120 preclude review of underground regulations because they are not final? Does judicial deference to agency action required by Sections 1123.420 (interpretation of law) and 1123.460 (determination of appropriate procedures) require deference to an agency's construction of a statute when the construction is required to be, but was not, adopted in compliance with the rulemaking portion of the APA? Does this require deference to an agency's determination that a regulation need not be adopted in compliance with the APA, or was so adopted? Does Section 1123.470, which puts the burden of persuasion on the party challenging agency action, change existing law for review of underground regulations? The staff had hoped these questions could be addressed by appropriate drafting, but this goal has proven elusive. **The staff recommends exempting review of underground regulations from the draft statute, and continuing review of such regulations under the Government**

Code. This may be done by revising Section 1121 and Government Code Sections 11340.5, 11350, and 11350.3, and by adding a new Section 11340.8 to the Government Code, as follows:

1121. (a) This title does not apply to any of the following:

(1) Judicial review of agency action by any of the following means:

(A) Where a statute provides for trial de novo.

(B) Action for refund of taxes or fees under Section 5140 or 5148 of the Revenue and Taxation Code, or under Division 2 (commencing with Section 6001) of the Revenue and Taxation Code.

(C) Action under Division 3.6 (commencing with Section 810) of the Government Code, relating to claims and actions against public entities and public employees.

(2) Litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(3) Judicial review of a decision of a court.

(4) Judicial review of an ordinance, ~~regulation~~ rule, or resolution , enacted by a county board of supervisors or city council , that is legislative in nature.

(5) Judicial review of agency proceedings pursuant to a reference to the agency ordered by the court.

(6) Judicial review of a state agency regulation alleged to be in violation of Section 11340.5 of the Government Code.

(b) This title applies to an original proceeding in the Supreme Court or court of appeal under Section 10 of Article VI of the California Constitution only to the extent provided by rules of court adopted by the Judicial Council.

11340.5. (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

(b) If the office is notified of, or on its own , learns of , the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general

application, or other rule is a regulation as defined in subdivision (g) of Section 11342.

(c) The office shall do all of the following:

(1) File its determination upon issuance with the Secretary of State.

(2) Make its determination known to the agency, the Governor, and the Legislature.

(3) Publish its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

(4) Make its determination available to the public and the courts.

(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published. Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure does not apply to the proceeding.

(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

(1) The court or administrative agency proceeding involves the party that sought the determination from the office.

(2) The proceeding began prior to the party's request for the office's determination.

(3) At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that is the legal basis for the adjudicatory action is a regulation as defined in subdivision (g) of Section 11342.

11340.8. Notwithstanding Section 11350, nothing in Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure creates any exceptions to this article or to Article 2 (commencing with Section 11342), Article 3 (commencing with Section 11343), Article 4 (commencing with Section 11344), Article 5 (commencing with Section 11346), Article 6 (commencing with Section 11349), Article 7 (commencing with Section 11349.7), or Article 9 (commencing with Section 11351) of this chapter.

11350. (a) Except as provided in ~~subdivisions (d) and (e)~~ this section and in Section 1121 of the Code of Civil Procedure, a person may obtain a judicial declaration as to the validity of any regulation under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. The regulation may be declared to be invalid for a substantial failure to comply with this chapter, or, in the case of an emergency regulation or order to repeal, upon the ground that

the facts recited in the statement do not constitute an emergency within the provisions of Section 11346.1.

(b) In addition to any other ground that may exist, a regulation may be declared invalid if either of the following exists:

(1) The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.

(2) The agency declaration pursuant to paragraph (8) of subdivision (a) of Section 11346.5 is in conflict with substantial evidence in the record.

(c) The approval of a regulation by the office or the Governor's overruling of a decision of the office disapproving a regulation shall not be considered by a court in a proceeding for judicial review of a regulation.

(d) ~~Notwithstanding Sections 1123.820 and 1123.850 of the Code of Civil Procedure, on judicial review~~:

~~(1) The~~ On judicial review, the court may not require the agency to add to the administrative record an explanation of reasons for a regulation~~.~~

~~(2) No~~ , and no evidence is admissible that was not in existence at the time of the agency proceeding under this chapter.

(e) ~~Section 1123.460~~ Nothing in Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure ~~does not apply to a proceeding under this section~~ prevents judicial review or limits remedies in judicial review of a regulation that is required to be, but was not, adopted in compliance with this chapter.

(f) No deference shall be given by the court to either of the following:

(1) An agency regulation or interpretation of a statute when the regulation or interpretation is required to be, but was not, adopted in substantial compliance with this chapter.

(2) An agency's determination that a regulation of that agency need not be adopted in compliance with this chapter, or that the regulation was adopted in substantial compliance with this chapter.

11350.3. ~~Any interested~~ A person may obtain a judicial declaration under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure as to the validity of a regulation which the office has disapproved or ordered repealed pursuant to Section 11349.3, 11349.6, or 11349.7 ~~by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure~~. The court may declare the regulation valid if it determines that the regulation meets the standards set forth in Section 11349.1 and that the agency has complied with this chapter.

If the court so determines, it may order the office to immediately file the regulation with the Secretary of State.

OTHER SECTIONS IN DRAFT STATUTE

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

General Comment

The California State Pipe Trades Council opposes SB 209 in its present form, but says it could "support a bill to codify existing law" for review of regulations.

§ 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

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.

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

"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 defined. The staff would revise two of these to substitute "a rule" for "rulemaking": Sections 1123.330 (set out below) and 1123.850 ("judicial review of ~~rulemaking~~ a rule").

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

• Mr. Bezemek has reviewed this change and finds it satisfactory.

§ 1123.160. Condition of relief

At the May meeting, the Commission approved the staff recommendation to delete the harmless error rule from Section 1123.160, and to note in the Comment that Section 1123.710(a) (applicability of rules of practice for civil actions) applies the harmless error rule of Code of Civil Procedure Section 475. The staff is concerned Section 475 might be read to apply only to judicial proceedings, and not to administrative proceedings under review by the court. The CEB treatise suggests Section 475 does apply to administrative error: In traditional mandamus, "petitioner must persuade the court that the abuse [of discretion] was prejudicial. See CCP §475, made applicable by CCP §1109." California Civil Writ Practice § 3.29, at 71 (Cal. Cont. Ed. Bar, 3d ed. 1996). Apart from Section 475, there is a case law doctrine of harmless error in judicial review of administrative proceedings. **The staff recommends making this clear in the Comment**:

Comment. . . . In addition to the grounds specified in Article 4 (Sections 1123.410-1123.470), for judicial review of adjudication or ministerial or informal action, the court must determine that the error was prejudicial. See, e.g., Guilbert v. Regents of the University of California, 93 Cal. App. 3d 233, 241, 155 Cal. Rptr. 583 (1979) (administrative mandamus: "[t]here is a generally accepted principle that the appellant must show prejudicial error affecting his interests in order to prevail on appeal"); Neto v. Conselho Amor da Sociedade No. 41, 18 Cal. App. 234, 239, 122 Pac. 973 (1912) (traditional mandamus: writ "not issued on mere technical grounds," but is to "prevent substantial injury").

§ 1123.230. Public interest standing

• Section 1123.230 continues existing public interest standing, which permits a person with 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. 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 slows the process of stopping 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).

§ 1123.330. Judicial review of rulemaking

The staff recommendation above to exempt underground regulations from the draft statute requires deletion of subdivision (b) from Section 1123.330:

> 1123.330. ~~(a)~~ A person may obtain judicial review of ~~rulemaking~~ a rule notwithstanding the person's failure to ~~do either of the following~~:
>
> ~~(1) Participate~~ participate in the rulemaking proceeding on which the rule is based~~.~~
>
> ~~(2) Petition~~ , or to petition the agency promulgating the rule for, or otherwise to seek, amendment, repeal, or reconsideration of the rule after it has become final.
>
> ~~(b) A person may obtain judicial review of an agency's failure to adopt a rule under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, notwithstanding the person's failure to request or obtain a determination from the Office of Administrative Law under Section 11340.5 of the Government Code.~~

§ 1123.340. Exceptions to exhaustion of administrative remedies

• Section 1123.340(f) permits the court to relieve a person of the exhaustion requirement if the person "seeks judicial review on the ground that a statute, regulation, or procedure is facially unconstitutional." The Comment cites Horn v. County of Ventura, 24 Cal. 3d 605, 611, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979) ("need not exhaust inadequate remedies" to challenge their sufficiency), and Chevrolet Motor Div. v. New Motor Vehicle Bd., 146 Cal. App. 3d 533, 539, 194 Cal. Rptr. 270 (1983) (person challenging constitutionality of statute under which agency operates need not raise that issue before the agency). *But see* Eye Dog Found. v. State Board of Guide Dogs for the Blind, 67 Cal. 2d 536, 544, 432 P.2d 717, 63 Cal. Rptr. 21 (1967) (dictum: exhaustion requirement applies even though statute attacked on constitutional grounds); County of San Mateo v. Palomar Holding Co., 208 Cal. App. 2d 194, 24 Cal. Rptr. 905 (1962) (exhaustion required for due process challenge to county subdivision ordinance as applied).

• OAL says exhaustion should be excused if a regulation is challenged as facially inconsistent with statute. Gene Livingston made a similar point at the April meeting. **Since Section 1123.340 merely gives the court discretion to excuse exhaustion, the staff would expand subdivision (f) as suggested:**

> 1123.340. The requirement of exhaustion of administrative remedies is jurisdictional and the court may not relieve a person of the requirement unless any of the following conditions is satisfied:
>
> . . . .
>
> (f) The person seeks judicial review on the ground that a statute, ~~regulation~~ rule, or procedure is facially unconstitutional or is facially in conflict with statute.

§ 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 May 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).

§ 1123.820. Contents of administrative record

The staff recommends revising Section 1123.820(b) as suggested by OAL:

(b) The administrative record for judicial review of a regulation adopted under the rulemaking ~~under~~ portion of the Administrative Procedure Act, 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.

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, 54 Cal. App. 4th 106, 62 Cal. Rptr. 2d 612, 617-18 (1997).

Respectfully submitted,

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May 13, 1997

Robert J. Murphy, Staff Counsel
California Law Revision Commission
4000 Middlefield Rd, Suite D-2
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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

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May 7, 1997

Mr. Robert J. Murphy
Staff Counsel
California Law Review Commission
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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