Study N-200 October 4, 1999

Memorandum 99-71

Mandamus To Review Agency Action (Comments on Tentative Recommendation)

The Commission this past summer circulated for public comment its tentative recommendation, *Mandamus to Review Agency Action: Selected Issues* (June 1999). The tentative recommendation would make three changes in the law governing judicial review of agency action. These are:

(1) Abolish the case law rule that, if reconsideration of an administrative decision is authorized, a party must petition for reconsideration before seeking mandamus.

(2) Expand superior court venue for mandamus to review state agency action to include Sacramento County.

(3) Require a state agency to give notice to the parties of the calendar date of the last day for judicial review in an adjudication by the agency.

This memorandum reviews comments and developments on these issues. Attached are the following:

Reconsideration by Agency

Mr. Corn supports the recommendation to eliminate the case law requirement that reconsideration be requested as a precondition of judicial review . Exhibit p. 1. This recommendation is also supported by the California State Employees Association, which notes that it allows a party the option to request reconsideration if it believes the request would be worthwhile or bypass this if it would be futile. Exhibit p. 4.

Meanwhile, the California Supreme Court has judicially effectuated this proposal. Citing in support the Commission's recommendation on this point, the court has held that the right to petition for judicial review of a final decision of an administrative agency is not necessarily affected by the party's failure to file a

request for reconsideration or rehearing before that agency. *Sierra Club v. San Joaquin LAFCO*, 87 Cal. Rptr. 2d 702 (1999). The court observes that, "We recognize that, to date, the Legislature has not acted on the Law Revision Commission's recommendations; we do not suggest that the unenacted recommendation reflects the current state of California law. It does reflect, however, the opinion of a learned panel as to the wisdom of and necessity for the *Alexander* rule." 87 Cal. Rptr.2d at 712.

This decision obviates the need for legislation on the point, although it may nonetheless be helpful to codify the rule. The preliminary part of the recommendation, along with the Commission Comment, would need to be rewritten to reflect the fact that the proposal would now codify, rather than reverse, the case law rule.

Venue To Review State Agency Action

The California State Employees Association supports adding Sacramento County as a venue for challenging state agency action. Exhibit p. 4. Mr. Corn points out two problems with the provision as drafted. Exhibit p. 1. These are discussed below.

Interaction with CCP § 401. Under Code of Civil Procedure Section 401, whenever a statute provides for a judicial proceeding against the state in Sacramento, the proceeding may be commenced and tried in any city in the state in which the Attorney General has an office. Application of Section 401 would include Los Angeles, Oakland, San Diego, and San Francisco. That could frustrate the intent of the Commission's recommendation, which is to centralize administrative review proceedings in a court that has expertise.

There is at least one statute that places venue in Sacramento and precludes operation of Section 401. Code of Civil Procedure Section 1609, relating to an unclaimed property petition by the Attorney General, provides that, "The proceeding shall be commenced and heard in the superior court in the County of Sacramento and venue shall not be affected by the provisions of Section 401, Code of Civil Procedure." The staff recommends that a similar provision be added to the Commission's proposal:

> 1099. In addition to any other county authorized by law, Sacramento County is a proper county for proceedings in superior court under this chapter to review state agency action, and venue shall not be affected by the provisions of Section 401.

> **Comment.** Section 1099 is new, and authorizes Sacramento County as an additional county for administrative or traditional mandamus proceedings in superior court under this chapter to review state agency action. The general rule is that venue is proper in the county where the cause of action arose. See Sections 1109 (general rules of civil practice apply to proceedings under this title), 393(1)(b) (venue); Duval v. Contractors State License Bd., 125 Cal. App. 2d 532, 271 P.2d 194 (1954) (administrative mandamus).

Change of venue. As currently phrased, proposed Section 1099 could be construed to permit the state to obtain a change of venue to Sacramento for its own convenience, even though the proceeding has been properly commenced in another county. Our purpose here is not to force a petitioner to litigate in Sacramento, but provide an additional forum. This purpose could be better achieved by limiting proposed Section 1099 to read:

> 1099. In addition to any other county authorized by law, Sacramento County is a proper county for commencement of proceedings in superior court under this chapter to review state agency action.

Notice of Last Day to Review State Agency Adjudication

Mr. Corn supports the recommendation requiring a state agency to give notice to the parties of the calendar date of the last day for judicial review in an adjudication by the agency. Exhibit p. 1. This is also supported by the California State Employees Association. Exhibit p. 4.

The Board of Accountancy raises the concern that the last day for judicial review may not be clear at the time the notice is given, since there may be stays, reconsiderations, etc. The Commission has been around and around on this point. Initially the Commission proposed that the notice contain the actual date. Later the Commission revised the proposal, in response to concerns of a type the Board of Accountancy expresses, to require that the notice simply inform the parties of the rules governing the time for seeking judicial review, and leaving the calculations to the parties. This is the approach taken in Code of Civil Procedure Section 1094.6, which is applicable to judicial review of local agency decisions.

In the latest go-round, the Commission decided that simply informing the parties where the judicial review rules may be found isn't too helpful, particularly if a party is not represented by counsel. The agency should provide

the best date known at the time, along with a warning that the date applies "unless the time is extended as provided by law":

> **Gov't Code § 11518.3 (added). Notice of last day for judicial review**
>
> 11518.3. 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 a writ of mandate to review the decision is [date] unless the time is extended as provided by law."

Nonetheless, a specific date in the notice could easily mislead a party.

The Board of Accountancy's immediate concern is that an agency could be required to provide legal advice on complex timing issues when all facts affecting the review deadline are not yet known. Perhaps it would give solace to an agency concerned about the consequences of providing a date that proves to be incorrect, to add some exculpatory language to the statute. However, that would not resolve the related question of the legal effect of an incorrect date — do estoppel principles apply, etc.?

In light of these concerns, the staff thinks it may be better to return to a less precise form of notice, such as that found in Section 1094.6(f) — the agency must provide notice to the parties of the statute governing the time within which notice must be sought. This will alert a party to the existence of a limitations period without imposing on an agency the burden of providing legal advice that could mislead the party.

Technical Correction

The California State Employees Association notes that the text of the tentative recommendation sets out a version of Code of Civil Procedure Section 1094.5 that does not incorporate last session's amendments to the section. We will set out the current version of that statute in our final recommendation.

To Proceed or Not To Proceed?

The major reform that would be achieved by this tentative recommendation — elimination of the requirement of a request for a rehearing as a prerequisite to judicial review — has already been effectuated by court decision. The other two reforms — venue in Sacramento and notice of last date for review — are fairly modest and are not free of problems.

This raises the question in the staff's mind whether it is worth proceeding with this proposal. In favor of going ahead are that the Commission has now sunk time into this, and the recommended changes are salutary. Opposed to going ahead are that the changes are so modest that the expenditure of resources necessary to get a bill enacted, and devoting a bill to this endeavor, are problematic.

One possibility is to take a low-key approach to this recommendation. We could omit as unnecessary the provision relating to reconsideration, and hold the other two proposals for possible incorporation in an omnibus committee bill or an administrative mandamus bill, if one comes along within the next few legislative sessions.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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July 15, 1999

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Mandamus to Review Agency Action: Selected Issues

Dear Mr. Sterling:

The undersigned reviewed the tentative recommendation of the California Law Revision Commission regarding Mandamus to Review Agency Action: Selected Issues.

Generally, we believe that the tentative recommendations numbers 1 and 3 are appropriate and we support those recommendations.

Recommendation number 2, which adds Code of Civil Procedure section 1099, appears to have several dimensions. By adding an alternative venue authorization for a petitioner to choose Sacramento County — where a state agency is the respondent — Code of Civil Procedure section 401(1) seems effectively to authorize suit in any city or city and county in which the Attorney General has an office. Since the evident intent is to merely authorize venue in Sacramento County, some consideration should be given to the interrelationship of newly-added section 1099 and Code of Civil Procedure section 401.

Also, from a policy standpoint, it would be preferable to limit newly-added section 1099 so that the State of California does not have the authority to change venue to Sacramento whenever, for the state's convenience, that is desirable. It is not clear to me that such authorization exists under current law, but I would expect the Attorney General's Office may seek to use the statute in that manner. Hence, the provisions of the Code of Civil Procedure section 1099 should include language that the new section is not the basis for change of venue to Sacramento County by respondent, State of California.

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Thank you for the opportunity to comment. If I can provide additional information, I would be happy to do so.

Very truly yours,

James P. Corn

JPC/mws

cc: Richard Markuson, Legislative Director
Consulting Engineers and Land Surveyors of California

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September 30, 1999

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Commissioners:

This letter is in response to your Tentative Recommendation, Mandamus to Review Agency Action: Selected Issues, June 1999.

The Board of Accountancy is concerned about the proposed addition of Government Code Section 11518.3. The Board notes that the deadline referenced in this section is not necessarily known to the agency at the time the decision is mailed to the respondent. Time frames vary depending on how the options outlined in Government Code Section 11521 are exercised. Proposed Section 11518.3 may require the agency to provide legal advice to the respondent on complex timing concerns. This role would be inappropriate for a state agency.

Thank you for the opportunity to comment. If you would like additional information about the Board's concern, please contact Gregory Newington, Chief, Enforcement Division, at (916) 263-3960.

Sincerely,

Aronna Granick
Legislation/Regulations Coordinator

c: Gregory Newington, Chief, Enforcement Division
Carol Sigmann, Executive Officer

VIA FACSIMILE AND U.S. MAIL
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September 30, 1999

California Law Revision Commission
Attn: Robert J. Murphy, Staff Counsel
4000 Middlefield Road, Room D-1
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Re: Mandamus to Review Agency Action: Selected Issues
June 1999 Tentative Recommendation

Dear Mr. Murphy:

As addressed in our earlier comments, the California State Employees Association (CSEA) supports both adding Sacramento County as a venue for challenging state agency action (proposed Code of Civil Procedure § 1099) and mandating agencies to provide specific notice of the last calendar day for review (proposed Code of Civil Procedure § 1094.5(k); Government Code § 11518.3).

CSEA also supports abolishing the rule that a party must petition for reconsideration before seeking mandamus (proposed Code of Civil Procedure § 1098). This allows parties the option to either seek a request for reconsideration if the party believes such a request is worthwhile, or bypass this option if it would be merely a futile exercise or fails to provide an adequate remedy, without first having to prove and defend a challenge alleging the failure to exhaust administrative remedies.

Thank you for your consideration. Please call me if you have any questions.

Sincerely,

NANCY T. YAMADA
Attorney

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Note that the text of CCP 1094.5 in the tentative recommendation did not incorporate the 1998 amendments to the statute. I am assuming that this was a clerical error, and not a substantive change.