

Admissibility of Extra-record Evidence in CEQA Actions

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In February of this year, the California Supreme Court decided *Western States Petroleum Assoc. v. Sup. Ct.* (1995) 9 Cal. 4th 559 (WSPA). In WSPA, the court significantly restricted the admissibility of extra-record evidence in CEQA mandamus proceedings. Although the Supreme Court expressly stated that there are circumstances in which extra-record evidence will be admissible, it is likely that trial courts will be extremely reluctant to admit extra-record evidence in these cases after WSPA.

As a result, the WSPA case will affect the manner in which attorneys who represent parties in CEQA matters represent their client's interests in administrative proceedings, as well as mandamus actions. This article discusses when such evidence may be admissible and makes suggestions as to how CEQA practitioners can better protect and perfect their record.

The WSPA Case

In WSPA, the Western States Petroleum Association (the "Association"), an oil industry trade group, brought an action against the Air Resources Board (ARB). The action sought declaratory and mandamus relief. The action challenged certain air quality regulations adopted by the ARB after public hearings and comments under the Administrative Procedure Act. The Association contended that the regulations were based upon inaccurate and unsound scientific data and that ARB had adopted them without complying with the California Environmental Quality Act (CEQA). At trial, the Association moved to admit eight items of evidence, none of which was contained in the Administrative Record. The Association's proffered evidence challenged the scientific basis of the regulations.

The trial court refused to admit the evidence. The Association then petitioned the Court of Appeal for a writ of mandate, which was granted. The Supreme Court reversed the decision of the Court of Appeal.

Form of Review in CEQA Actions

Challenges brought under CEQA must be brought under Pub. Res. Code §21168 (administrative mandamus) or §21168.5 (traditional mandamus). These statutes determine the form of review.

Section 21168 provides that administrative mandamus is required where the petitioner seeks review of any "determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of

facts is vested in a public agency, on the ground of noncompliance with CEQA". The statute states that such an action shall be brought in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure (administrative mandamus) and that "the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record."

Section 21168.5 provides that in any action, other than one under Section 21168, to attack "a determination, finding or decision of a public agency on the grounds of noncompliance with [CEQA], the inquiry shall extend only to whether there was a prejudicial abuse of discretion". The statute states that an agency has abused its discretion if it "has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." Case law has established that actions subject to Pub. Res. Code §21168.5 must be brought as traditional mandamus proceedings under CCP §1085. (Laurel Heights Improvement Assoc. v. Regents of the University of California (1988) 47 Cal.3d 376, 392, fn. 5.)

Deciding which section applies to a given agency determination, finding or decision has proven to be a difficult task. The courts interpreting these sections have advanced various tests. Kostka and Zischke, Practice Under the California Environmental Quality Act, §23.39, et seq. No single test has been universally accepted. None of the tests have proven to be totally satisfactory or to lead to consistent results. "Case law determining the applicability of Sections 21168 and 21168.5 is in disarray." (Kostka and Zischke, supra, Section 23.39). Consequently, a considerable amount of confusion currently exists as to which section applies to a particular agency action.

Standard of Review in CEQA Actions

Confusion over the proper form of action - administrative or traditional mandamus - is compounded because Pub. Res. Code §§21168 and 21168.5 seem to require a different standard of review. Section 21168 provides that "the court shall ... only determine whether the act or decision is supported by substantial evidence in light of the whole record". Section 21168.5 on the other hand, provides that review "shall extend only to whether there was a prejudicial abuse of discretion". Abuse of discretion is established "if the agency has not proceeded in matter required by law or if the determination or decision is not supported by substantial evidence".

The courts grappled with the differences in statutory wording for a number of years. The California Supreme Court acknowledged in a footnote in 1988 "the dispute is mostly academic because the standard of review is essentially the same under either section...."; namely, (1) whether there is substantial evidence to support the agency's decision; and (2) whether the agency abused its discretion by failing to proceed in the manner required by law. (Laurel Heights Improvement

Assoc. v. Regents of the University of California (1988) 47 Cal.3d 376, 392, fn. 5, citing Bowman v. City of Petaluma (1986) 185 Cal.App.3d 1065, 1072, fn. 7 and Citizens Association for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal.App.3d 151, 164; see also, Sierra Club v. Gilroy City Council (1990) 222 Cal.App.3d 30, 39, fn. 2.)

Because the courts have held that the standard of review is essentially the same under either section, courts discussing the form of action generally conclude that one or the other form is appropriate. If the issue of the form of action is close or in doubt, courts add that the form of action is not critical to its determination because the standard of review is the same in either case. However, before WSPA, when the issue to be decided was the admissibility of extra-record evidence, the determination of the form of action remained pivotal.

Admissibility of Extra-Record Evidence Before WSPA

Before WSPA California appellate courts agreed that extra-record evidence was generally not admissible in CEQA administrative mandamus proceedings. Schaeffer Land Trust v. San Jose City Council (1989) 215 Cal.App.3d 612, 624, fn. 9; City of Carmel By The Sea v. Board of Supervisors (1986) 183 Cal.App.3d 229, 249, fn. 11; Browning-Ferris Industries v. City Council (1986) 181 Cal.App.3d 852, 861. The courts relied in part on the words of the statute limiting review to "substantial evidence in light of the whole record". Public Resources Code §21168. (emphasis added). An exception allowing extra-record evidence in CEQA administrative mandamus proceedings was recognized where the evidence could not, with the exercise of reasonable diligence, have been produced before the agency. Toyota of Visalia, Inc. v. New Motor Vehicle Board (1987) 188 Cal.App.3d 872, 881. Also, the courts acknowledged an exception where evidence was improperly excluded at the hearing before the agency. No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 79, fn. 6.

The statute relating to traditional mandamus proceedings does not contain similar language. Therefore, in traditional mandamus CEQA actions, the courts held that extra-record evidence was admissible to show that the administrative agency had not proceeded in a manner required by law or had reached a decision that was not supported by substantial evidence. Sierra Club v. Gilroy City Council (1990) 222 Cal.App.3d 30, 40; Friends of La Vina v. City of Los Angeles (1991) 232 Cal.App.3d 1446; Del Mar Terrace Conservancy, Inc. v. City Council (1992) 10 Cal.App.4th 712. This position was based upon dicta in the California Supreme Court opinion of No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 79, fn. 6; see also, cases cited in WSPA, p. 570 fn 2.

WSPA Standard for Admissibility of Extra-Record Evidence

In WSPA the California Supreme Court held that in traditional mandamus actions the admissibility of extra-record evidence depends on the two prong, standard of

review test. That is, the admissibility of extra-record evidence depends upon whether the challenge to the agency action is based upon (1) whether its decision is supported by substantial evidence or (2) whether the agency abused its discretion by failing to proceed in the manner required by law.

The court in WSPA discussed the issue of the form of action in some detail. WSPA, pgs. 567-8. The court concluded that because the Association sought review of a quasi-legislative decision of the ARB (adoption of emission regulations), the form of action was traditional mandamus. WSPA, p. 567. Consequently, the court found that the form of action was traditional mandamus. As a result of this finding, the court's discussion was restricted to traditional mandamus actions.

Because the issue was not presented, the court in WSPA did not reach the issue of the standard of admissibility of extra-record evidence in administrative mandamus actions. There was language in the case that did indicate that the standard would be the same. WSPA, p. 578. Since the standard of review is the same under both sections, it is logical to assume that the same standard of admissibility of extra-record evidence discussed in WSPA will apply to both traditional and administrative mandamus actions.

As a result of WSPA, if the challenger in either an administrative or traditional mandamus action contends that the agency decision is not supported by substantial evidence, the court generally may consider only evidence in the administrative record. The factual bases of quasi-legislative administrative decisions are entitled to the same deference as the factual determination of trial courts. As a result of WSPA, extra-record evidence is generally not admissible under a substantial evidence challenge regardless of whether the form of action is under β 21168 or β 21168.5. WSPA, p. 573.

The court in WSPA is less definitive in elucidating the scope of admissibility of extra-record evidence in proceedings where the petitioner contends that an administrative agency has not proceeded in a manner required by law; that it, its action or decision does not substantially comply with the requirements of CEQA. The court seems to recognize that the factual bases for a challenge under this test cannot be neatly put into a simple formula. The primary reason for the need for more flexibility is that an administrative agency can proceed contrary to the manner required by law in a variety of ways and the failure may often take place outside of the administrative record. The Supreme Court recognized that it must give the trial court flexibility to deal with these situations.

The WSPA court stated a general rule that extra-record evidence "is generally not admissible in traditional mandamus actions challenging quasi-legislative administrative decisions on the ground that the agency 'has not proceeded in a manner required by law'...". WSPA, p. 576. Having said this, the court then went onto to discuss three possible exceptions that were proffered by the Association

and referred to a number of other possible exceptions that were not at issue in the WSPA case.

The Association proposed three exceptions that it contended would justify the admission of extra-record evidence: (1) to determine whether the agency considered all relevant factors in making its decision; (2) to determine whether the evidence considered by the agency supports its decision; and (3) when the evidence could not be produced at the hearing, in the exercise of reasonable diligence.

The court acknowledged that a review of certain quasi-legislative administrative decisions should include a judicial examination of whether the agency adequately considered all relevant factors and demonstrated a rational connection among those factors, the choice made and the purposes of the enabling statute. WSPA, p. 577. However, without being specific, the court rejected a broad application of this rule out of fear that it would place an "unworkable qualification on the general rule of inadmissibility". WSPA, p. 577. The court rejected any application of that rule which would involve a particular review of specific items of evidence or which would involve determination as to whether the agency decision was wise or scientifically sound in light of the extra-record evidence. WSPA, p. 577. The court found that the second proposed exception was no more desirable than the first. It too was rejected by the court, under the facts of this case, as a backdoor attempt by the petitioner to introduce extra-record expert witness testimony and to question the wisdom of the agency's decision. Because these rejections were fact-based, the possibility exists that extra-record evidence might be admissible in other situations to show that the agency failed to consider relevant factors and/or that the evidence the agency considered is not "reasonable in nature, credible, and of solid value..." (Id. at 577.) If these exceptions have any life after WSPA, it will be in circumstances where the agency decision is demonstrably erroneous, irrational and/or arbitrary.

As to the third proposed exception, the court held that extra-record evidence should be admissible "only in those rare instances in which (1) the evidence in question existed before the agency made its decision, and (2) it was not possible in the exercise of reasonable diligence to present this evidence to the agency before the decision was made so that it could be considered and included in the administrative record". (WSPA, p. 578.)

The court inserted a footnote listing other possible "limited exceptions" proposed by commentators which may permit the introduction of extra-record evidence in traditional mandamus actions challenging quasi-legislative, administrative decisions: "(1) issues other than the validity of the agency's quasi-legislative decision, such as the petitioner's standing and capacity to sue, (2) affirmative defenses such as laches, estoppel and res judicata, (3) the accuracy of the administrative record, (4) procedural unfairness, and (5) agency misconduct ...". The court concluded the footnote by stating that "because none of these

exceptions apply to the case at bar, we need not consider them". WSPA, p. 575, fn.5.

At the end of the opinion, the court further opened the door to the admission of extra-record evidence by stating "we do not foreclose the possibility that extra-record evidence may be admissible in traditional mandamus actions challenging quasi-legislative administrative decisions under unusual circumstances and for limited purposes not present in the case now before us". WSPA, p. 578. The court gave the following examples of possible exceptions: "... only for background information ... or for the limited purposes of ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision.". The court also recognized that federal authority in the area of environmental law might provide additional exceptions. WSPA, p. 579. The foregoing exceptions make it clear that the court has vested the trial court with some discretion to deal with the unique factual situations that may evolve. However, in light of the Supreme Court's emphasis on the general rule that such evidence is not generally admissible, it is submitted that trial courts will be very reluctant to exercise this discretion.

Implications of the WSPA Holding

The Supreme Court in WSPA articulated the proposition that extra-record evidence is generally not admissible in traditional mandamus proceedings under Pub. Res. Code §21168.5. This being said, the Supreme Court also made it clear that there are a number of potential exceptions. The Court gave some specific and some general guidelines to identify the additional exceptions.

The policy considerations underlying the court's decision are: (1) respect for the separation of powers between the legislative and judicial branches of government and the resulting judicial deference to legislative actions; (2) recognition of the legislative delegation of certain matters to agencies with special expertise; and (3) a desire to achieve finality by requiring that all available information be presented to the administrative agency in the first instance. While the courts will not second guess the wisdom of such decisions, they are particularly well suited to determine whether the result is supported by evidence and whether the agency is proceeding according to law. These are, and will remain, areas within the court's province.

Although not expressly stated, it seems logical that the admissibility of extra-record evidence will be determined by the same standards in administrative mandamus actions. The designation of the form of action will no longer determine the admissibility of this evidence. To determine the appropriate standard of admissibility the courts will look to the two prongs of the standard of review test (substantial evidence and abuse of discretion).

At one extreme, extra-record evidence that merely contradicts the evidence the administrative agency relied upon or which is intended to raise questions

regarding the wisdom of its rulings is not admissible. On the other hand, evidence improperly excluded at the agency hearing is admissible. Also, evidence that existed before the agency made its decision is admissible where it was not possible in the exercise of reasonable diligence to present the evidence before the decision was made.

If the challenge to agency action is based upon the substantial evidence test, extra-record evidence will rarely be admitted under circumstances other than those discussed in the paragraph above. The issue of whether there is substantial evidence to support an administrative decision is a question of law and the agency findings are entitled to the same deference as factual determinations made by trial courts. As to this issue, the established body of law relating to appellate court review of trial court factual determinations is now controlling. WSPA, p. 571.

When the issue is whether the administrative agency has proceeded according to law, the Court said that there are a number of possible exceptions, which it suggested but did not define in this case. It is apparent that the exceptions will be closely scrutinized and narrowly construed. However, the Supreme Court wisely did not attempt to identify or fix all of the exceptions to the general rule in the abstract. Further clarification must await the presentation of specific factual situations.

There are several important implications of the WSPA holding for attorneys representing parties before administrative agencies subject to CEQA. One of the express purposes of the WSPA holding is to encourage interested parties to present all of their evidence to the administrative agency in the first instance. WSPA, at 575. Because most courts will now be reluctant to admit any evidence that is not in the record of the public agency, interested parties cannot simply react to the agency's decision after it is made. They must proactively participate and present evidence in the official record of the proceedings at all stages. As a result, attorneys should encourage their clients to assemble a team of consultants (planners, engineers, environmental consultants, public relations professionals, etc.) from the inception and confer with those consultants at every phase of the administrative process. Interested parties must be prepared to submit comments, reports, studies, alternatives, data, as well as legal authorities throughout the process to ensure that the record contains evidence to support their position in the event of a court challenge. CEQA practitioners who are not litigators would be well advised to consult with trial attorneys to make sure that the record is complete and to plan for the submission of evidence to the agency in a compelling manner that will enhance the presentation of the matter to the court in a mandamus proceeding. Presentations before the administrative agency should be planned and coordinated with the mandamus action in mind. In general, evidence should be presented to the administrative agency in a form (exhibits, charts, maps, illustrations, graphs, compilations, summaries, etc.) similar to that employed in the presentation of evidence to a trial court. These presentations should be viewed like offers of proof in litigated matters.

The parties appearing before the administrative agency should assume that any evidence, which is not in the administrative record, would not be considered in the mandamus action. Any gaps or deficiencies in the agency's deliberative process should be brought to the agency's attention on the record along with a request that the agency address and correct the deficiency. Thus, if the agency fails to consider all relevant evidence or if its decision is inadequately supported by the evidence, interested parties must be prepared to place these deficiencies on the record and support them with available evidence and, on occasion, appropriate legal authorities. Parties involved in CEQA administrative proceedings should also make offers of proof regarding inaccuracies in the record, procedural unfairness and agency misconduct, whether it takes place on or off the record, and should document these contentions to the extent possible in order to expressly raise the issues on the administrative record.

In the event litigation does become necessary and the record is not complete, the party seeking to discover or introduce extra-record evidence will face an uphill fight. As a result, appropriate pleadings will be crucial. Parties involved in CEQA litigation who wish to introduce extra-record evidence will generally be required to justify its admissibility under a challenge based upon the agency's failure to proceed in a manner required by law. In such circumstances, it is obviously important that the petition contain causes of action that will require application of this test. Because the WSPA case leaves some ambiguity as to whether its holding applies to both traditional and administrative mandamus actions, until this issue is finally resolved, it is advisable to elect traditional mandamus where possible in order to take advantage of the potential exceptions set forth in WSPA.

In addition, the pleadings should contain factual allegations that will support the need for extra-record evidence. If appropriate, the petition should contain specific allegations of agency misconduct or procedural unfairness in such a way as to demonstrate the need for evidence from outside of the record of proceedings. For example, a petition may allege that the agency truncated or otherwise subverted the EIR process by means that will not appear in the record. If, for example, representatives of an agency instruct the environmental consultants to ignore and exclude reference to reasonable alternatives or to include false or misleading information or to otherwise deprive the public of a true picture of the environmental consequences, alternatives or mitigation measures, the petition should include appropriate factual allegation. Admissibility of extra-record evidence may also require pleading causes of action for violation of substantive or procedural due process that contain factual allegations which support the admission of the desired extra-record evidence. Lawyers preparing mandamus petitions may also wish to consider causes of action based on violations of the Brown Act (Government Code §§54950, et seq.), the Political Reform Act (Government Code §§87100 et seq.) and Cortese-Knox Local Government Reorganization Act (Government Code 56000 et seq.). Petitioners who believe that extra-record evidence is important to their claims should consider these and

other causes of action, as well as factual allegations which can be used to show the court why evidence from outside of the administrative record is relevant and should be admitted.

Conclusion

The WSPA case contains a number of significant general statements that readily lend themselves to an over-simplified reading of the case. It is likely that trial and law and motion courts will be inclined to use the broad language of WSPA to exclude discovery and admission of extra-record evidence.

As a result of WSPA, CEQA practitioners will be required to go to greater lengths to make sure that the administrative record includes all of the evidence that they may need in mandamus proceedings. They will be required to look at the administrative proceedings in much the same fashion as they would a trial. They must be prepared not only to introduce evidence and make offers of proof, but also to make a record of the administrative agency's errors, omissions, failures to consider relevant factors, failures to support its decision, procedural unfairness and agency misconduct.

Where the record is incomplete and extra-record evidence is needed in a mandamus proceeding, discovery and admission of this evidence will depend upon careful and specific pleading of a variety of legal theories and factual allegations that will support a compelling argument that the evidence falls within the generally acknowledged, but yet to be defined, exceptions to the general rule precluding the introduction of extra record evidence.