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by Mitchell E. Abbott and T. Peter Pierce

Writ Large

The issuance of a writ of mandate before final judgment creates a Hobson's choice for the potential appellant

A city denies a property owner's application for a use permit and variance to build a large addition to an existing residential structure. The property owner promptly files a petition for a writ of mandate to compel the city to issue the approvals and combines the petition with a complaint for 1) inverse condemnation, 2) civil rights damages based on a denial of due process and equal protection, and 3) injunctive and declaratory relief. As is often the case, the property owner obtains a hearing on the writ petition even before the court sets a trial date on the other causes of action. The court grants the writ petition and issues a writ compelling the city to set aside its earlier decisions and to issue a new decision granting the development approvals.

The city prefers to appeal the trial court's decision granting the writ, but the city attorney is concerned that not only is there no appealable judgment at this stage of the proceedings but one will not be rendered until the trial court disposes of the other causes of action, perhaps months later. Opposing counsel understandably has no intention of dismissing the other causes of action and fully intends to enforce the writ if the city does not immediately comply. The city attorney fears that compliance will render any future appeal moot.

This common conundrum highlights an unresolved issue in California law: whether a writ of mandate may be issued and enforced prior to entry of a final judgment on all causes of action. This issue has the potential to confront every practitioner who handles writ litigation, no matter whether the client is the petitioner, the public agency or public official,

or the real party in interest. Addressing the contours and implications of this issue first requires an understanding of the nature of the two types of writs frequently sought in trial courts as well as the history of writs and appealable judgments in California.

Lawsuits filed against public agencies in California frequently seek to compel an agency to issue a particular discretionary approval or to set aside an approval already issued.¹ Code of Civil Procedure Section 1094.5 provides redress—in the form of a writ of administrative mandamus—for those who believe an agency has wrongly denied, or wrongly granted, an application. In consid-

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ering an application for a land use permit or for any other discretionary approval, an agency must ensure that 1) it has acted within its jurisdiction, 2) it has provided the applicant with a fair hearing, 3) it has proceeded in the manner required by law, and 4) its ultimate decision is supported by evidence in the record of the proceedings.² If a court concludes a public agency violated any of these statutory dictates in granting or denying an application, the court may issue a peremptory writ of administrative mandamus requiring the public agency to set aside its decision and take the necessary action to reach a new decision. Courts may specify what that new decision must be, but they do not always do this. A court also may vacate the public agency's decision and require the agency to rehear the matter.

Perhaps the most common error identified by courts in administrative mandamus proceedings occurs when a public agency makes a decision that is not supported by substantial evidence in the record.³ In those cases, the court may not take additional evidence to supply the basis for the agency's decision because doing so would interfere with the agency's exclusive discretionary powers to make decisions supported by substantial evidence.⁴ Moreover, a court remanding a matter to an agency may not order the agency to exercise its discretion in a particular manner when considering or reweighing the evidence.⁵

Public agencies and officers may not always enjoy discretion in performing official duties. In some instances, the law compels a public agency or official to take a particular action. One of myriad examples is found in Government Code Section 34460, which requires the mayor and clerk of a charter city to certify any charter amendment ratified by the voters. If an agency or official refuses to perform an act required by law, an aggrieved person may file a petition in court for a writ of "traditional" mandate under Code of Civil Procedure Section 1085. If the court concludes the agency or official had no valid reason for refusing to perform the act, the court may issue the writ compelling the agency or official to perform the particular act.

In practice, writs of administrative mandamus issued pursuant to Section 1094.5 or traditional writs of mandate under Section 1085 customarily impose a deadline for a public agency or public official to reach a new decision or to perform the required action. The agency or official later files with the court a "return" attesting to compliance with the writ.

Petitions for writs of administrative mandamus or for traditional writs of mandate often are joined with other causes of action. The California Supreme Court expressly authorized the combined writ/complaint pro-

cedure in *Hensler v. City of Glendale*.⁶ The court also recognized an alternative approach: A property owner, for example, may opt to initiate a writ proceeding and simultaneously or later file a separate lawsuit asserting one or more other causes of action, such as inverse condemnation, for money damages. The choice lies with the petitioner/plaintiff. Almost invariably, however, a petitioner/plaintiff will choose to file one omnibus action, pleading the petition for writ and other causes of action together. That decision may be driven by cost considerations, future res judicata concerns, or other factors.

One might reasonably assume that the courts have resolved many issues implicated by the simultaneous prosecution of a writ of mandate and other causes of action against public agencies. But the courts have not addressed whether a court may issue and enforce a peremptory writ (under either Section 1085 or Section 1094.5) when other causes of action remain pending and no final judgment has been entered.

The California Supreme Court has held that an action concludes with only one final judgment. In a 1942 decision, *Bank of America v. Superior Court*,⁷ the court held that "there can be but one judgment in an action no matter how many counts the complaint contains." Three years after deciding *Bank of America*, however, the court held in *Steen v. Board of Civil Service Commissioners*⁸ that an order issued by a superior court denying a writ petition was appealable immediately. According to the court, a final judgment was not necessary to perfect an appeal from the decision on the petition for a writ of mandate.

Divergent Paths

These early decisions of the supreme court apparently prompted the intermediate appellate courts to tread two divergent paths. Some courts of appeal readily concluded that an appeal lies from an order granting or denying mandamus relief, regardless of whether there is an entry of final judgment.⁹ In several of these cases, other causes of action were still pending when an appeal was taken from the trial court's decision on the writ petition.¹⁰ In others the writ petition was the only cause of action asserted and the appellate court treated the order adjudicating the writ as a final judgment in a special proceeding.¹¹

At least one court of appeal departed from this line of cases. In *Hadley v. Superior Court*,¹² a 1972 decision, the court expressly disagreed with *Daggs v. Personnel Commission*,¹³ a 1969 decision holding that an order granting or denying writ relief is appealable absent a final judgment. *Hadley* involved a minute order issued by the trial court denying a mandamus petition. The losing party,

Hadley, moved for entry of judgment, presumably in order to clear the way for filing an appeal. After the trial court denied the motion for entry of judgment, Hadley petitioned the court of appeal for a writ commanding the trial court to enter a judgment. Hadley's petition did not challenge the trial court's decision on the merits. Instead, it sought narrowly to compel the trial court to enter a judgment on the ground that only a judgment could properly terminate the proceedings in the trial court. The appellate court granted relief and commanded the trial court to enter a judgment consistent with its minute order.

The court in *Cody v. Superior Court*,¹⁴ although not as strident in its language as the *Hadley* court, observed that "the granting or denial of relief in mandamus proceedings is effectuated by a judgment rather than an order."¹⁵ Unlike *Hadley*, *Cody* did not expressly criticize any earlier appellate decisions that noted that an order granting or denying writ relief could be appealed without a final judgment. Nevertheless, the *Cody* court treated an appeal from an order denying writ relief as an appeal from a final judgment in a special proceeding.

Adding to the splintered authorities on the issue of whether an order adjudicating a single cause of action is appealable (be it a writ cause of action or otherwise) was the decision in *Schonfeld v. City of Vallejo*,¹⁶ which has since been overruled. *Schonfeld* created a somewhat amorphous exception to the "one final judgment rule" announced by the California Supreme Court in *Bank of America*. The trial court in *Schonfeld* rendered a judgment dismissing two causes of action and leaving a remaining severed cause of action for declaratory relief. The court of appeal declined "to rigidly adhere to the one final judgment rule" and created the new rule that an appeal may be taken when causes of action remain in the trial court if "the circumstances...are so unusual that postponement of the appeal until the final judgment...would cause so serious a hardship and inconvenience as to require us to augment the number of existing exceptions [to the one final judgment rule]."¹⁷

Relying upon *Schonfeld*, the court in *Highland Development Company v. City of Los Angeles*¹⁸ concluded that a separate judgment on a writ of mandate petition was appealable even though causes of action for declaratory and injunctive relief had not been tried: "[I]n recent years, 'the number of existing exceptions' to the one final judgment rule has been augmented so that 'separate appealable judgments may be rendered on counts that present separate claims for relief,' where the trial court has severed such causes of action from those remaining to be tried."¹⁹

At least two appellate courts disagreed in principle with *Schonfeld's* erosion of the one final judgment rule. In *Armstrong Petroleum Corporation v. Superior Court*,²⁰ the court went to great pains to harmonize its decision with *Schonfeld* but nevertheless recognized the lack of any authority for enlarging the class of appealable judgments beyond that authorized by statute. The court in *Day v. Papadakis*²¹ upheld the one final judgment rule, citing *Armstrong* with approval and distinguishing *Schonfeld*.

Morehart and the One Final Judgment Rule

Finally, in 1994, the California Supreme Court brought much-needed clarity to the issue of whether an appeal may be taken from anything other than a final judgment disposing of all causes of action. The supreme court unanimously reaffirmed the one final judgment rule in its decision in *Morehart v. County of Santa Barbara*²² and expressly disapproved the line of cases commencing with *Schonfeld* that had recognized an exception to the rule.

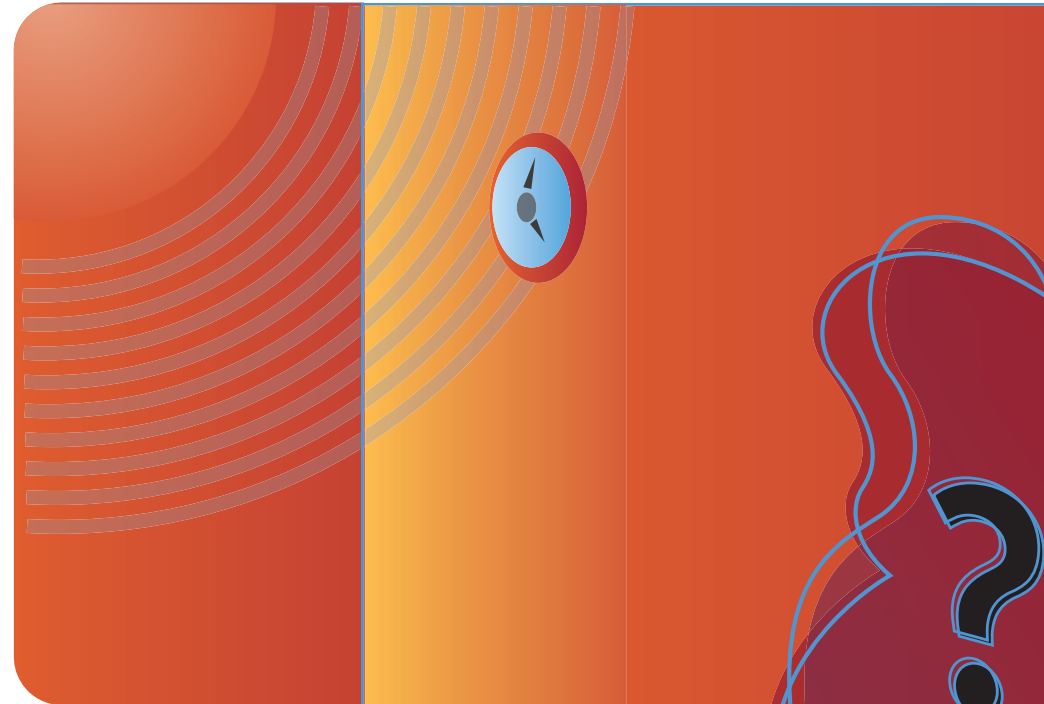
In *Morehart*, the County of Santa Barbara denied a property owner a permit to build a single-family dwelling. The property owner petitioned for a writ of mandate directing the county to set aside the permit denial. In the same action, the property owner brought damages claims for inverse condemnation and civil rights violations and sought declaratory and injunctive relief. The trial court ordered the causes of action for the writ and declaratory and injunctive relief to be tried separately from the causes of action seeking damages. Thereafter, the trial court entered a judgment on the writ and declaratory and injunctive relief. The property owner appealed that judgment, and the court of appeal treated the judgment as appealable under the *Schonfeld* line of cases.

The California Supreme Court held that the judgment disposing of fewer than all causes of action was not a true final judgment and thus was not appealable:

Accordingly, we hold that an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as "separate and independent" from those remaining. Statements to the contrary in [*Schonfeld*] and its progeny are disapproved.²³

In the wake of *Morehart*, several appellate courts have held that an order granting or denying a writ of mandate is not appealable if other causes of action remain pending and thus no final judgment has been entered. The

court in *Nerhan v. Superior Court*,²⁴ relying upon *Morehart*, concluded that an order denying a petition for a writ of mandate was not appealable when a cause of action for damages for a regulatory taking still was pending. Several years after *Nerhan*, the California Supreme Court reaffirmed its holding in *Morehart*:



When an order denying a petition for writ of administrative mandate does not dispose of all causes of action between the parties, allowing an appeal from the denial order would defeat the purpose of the one final judgment rule by permitting the very piecemeal dispositions and multiple appeals the rule is designed to prevent.²⁵

Morehart plainly does not limit its holding to cases in which writ petitions were denied. Allowing an appeal from an order *granting* a writ petition would also contravene the one final judgment rule, and for the same reason—the prospect of multiple appeals.

Thus, in *Connell v. Superior Court*,²⁶ the court concluded that an order granting a writ commanding the state controller to take certain actions was not appealable because other claims remained undecided. Last year, the court in *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*²⁷ observed that any appeal from the grant or denial of a writ under the California Environmental Quality Act must await the entry of final judgment on all causes of action.

With courts now uniformly applying the one final judgment rule to preclude appeals from orders disposing of fewer than all causes

of action, public agencies and officials often find themselves in a quandary when a trial court issues a peremptory writ of mandate commanding them to act while other causes of action still remain pending. In those instances, the one final judgment rule precludes an appeal from the order granting the writ. Some writs require public agencies or

officials to take action within a matter of days or weeks. But because an appeal cannot be perfected at that point, litigants against whom peremptory writs have been issued are deprived of the automatic stay of enforcement²⁸ that usually results when an appeal is taken from a judgment granting a writ of mandate.

Petition for Extraordinary Relief

Short of seeking reconsideration in the trial court, the only possible judicial relief from the command of a writ issued in the middle of a case, without a final judgment, is to file a petition for extraordinary relief—typically styled as a petition for a writ of mandate—in the court of appeal. A few post-*Morehart* appellate decisions have treated premature notices of appeal from writs granted by trial courts as petitions for extraordinary relief.²⁹

But a petition for extraordinary relief in the court of appeal under Rule 56 of the California Rules of Court differs markedly from an appeal filed as a matter of right under Code of Civil Procedure Section 904.1(a). The court of appeal is required to hear an appeal and issue an opinion. In sharp contrast, petitions for extraordinary relief frequently are denied without comment. In fiscal year 2003-2004, 92 percent of original proceedings filed in civil cases in the courts of

appeal in California were disposed of without opinion.³⁰ It is therefore no surprise that one court of appeal has observed, “Experienced lawyers know how difficult it often is to persuade a Court of Appeal to grant extraordinary relief.”³¹ Another appellate court candidly stated, “Courts of Appeal are normally reluctant to grant petitions for extraordinary relief.”³² It appears to be the rare exception when courts are willing to exercise their discretion and treat premature appeals as petitions for extraordinary relief that yield opinions fully adjudicating the issues.³³

Confronted with this remote chance of success in seeking extraordinary relief, a public agency or official might decide to comply with a trial court’s writ of mandate and take the action ordered by the court. That approach, however, could forever deprive the agency or official of its right to appeal from the writ once a final judgment is entered. Compliance with a writ of mandate may render moot any subsequent appeal.³⁴

Given the current legal landscape, a trial court’s issuance of a writ of mandate without a final judgment presents public agencies and officials with a Hobson’s choice—either comply with the writ and risk losing any right of a subsequent appeal because of mootness, or ignore the writ until a final judgment is entered, thereby risking a citation for contempt of court. Despite this untenable situation, however, no appellate court in California has expressly decided the question of whether a peremptory writ of mandate may be issued and enforced prior to entry of a final judgment (although many appellate decisions, without discussion, presume this to be the case).³⁵ Perhaps courts have not had an opportunity to answer this question because of a confluence of circumstances that simply could not have been foreseen:

- The effect of *Morehart*.³⁶
- The reluctance by courts of appeal to grant petitions for extraordinary relief.
- The mootness effect of complying with a peremptory writ.
- The possible contempt citation for disobeying a writ.

Adopting the Right Solution

Nonetheless, there are three possible answers to the question. The first is that a writ of mandate may be issued and enforced absent entry of a final judgment. In that case, however, the only possible remedy would be appealing the grant or denial of a writ of mandate regardless of the lack of a final judgment. That solution would contravene *Morehart*³⁷ directly. It also would create interlocutory proceedings which, as the *Morehart* court cautioned, would clog the courts with a multiplicity of appeals. Furthermore, this

solution almost certainly would require legislative action. Unless and until any legislative action is forthcoming, issuing and enforcing writs absent entry of a final judgment defies logic.

The second possible solution is for the parties to stipulate that 1) the public agency will comply with the writ, subject to its right to appeal the order granting the writ after final judgment is entered, and 2) the public agency may rescind the act by which it complied with the writ if it prevails on appeal. At least one appellate court, in an unpublished opinion, has recognized the validity of this type of stipulation.³⁸ The problem inherent in this solution is that it will not work unless the prevailing party who secured the peremptory writ agrees to remain suspended in a state of legal limbo for the extended period of time it will take to litigate the remainder of the case in the trial court and then defend any appeal. Many parties, if not most, will be unwilling to dilute their trial court victory by agreeing that the public agency, after taking the commanded action, may rescind that action if successful on appeal.

The third possible solution—and the one that courts should adopt in a post-*Morehart* world—is a rule that a peremptory writ of mandate simply cannot be issued and enforced except upon entry of a final judgment. This rule would spare the appellate courts the flood of additional appeals *Morehart* anticipated and presumably would reduce the number of petitions for extraordinary relief seeking review of orders granting or denying peremptory writs.

In practice, this rule need not hamstring plaintiffs and petitioners by requiring them to await final judgment on all causes of action before enforcing a writ. A party seeking a writ of mandate as well as other relief based on non-writ causes of action has the choice of filing two actions—1) a writ proceeding, and 2) another action seeking all other relief. This course was expressly approved by the California Supreme Court in *Hensler*³⁹ and is certainly the preferable approach if there is an urgent need for the writ to be issued and enforced as soon as possible. If the party has filed a separate writ proceeding, the peremptory writ may be issued as part of the final judgment, thus paving the way for enforcement of the writ without compromising the responding party’s right to meaningful appellate review. Even when enforcement of the writ is stayed pending appeal, the petitioner benefits because appellate review will not be delayed by any ongoing adjudication in the trial court of other causes of action. Otherwise, if the writ is brought as one of many causes of action in the same lawsuit, not only are the responding party’s appellate rights potentially compromised if a writ issues

without a final judgment, but the appellate proceedings that may eventually conclude in the petitioner’s favor on the writ cause of action are delayed by the length of time it takes the trial court to adjudicate all other causes of action and enter a final judgment.

The one final judgment rule endorsed by *Morehart*⁴⁰ promotes judicial economy and efficiency and ultimately reduces the legal costs borne by the parties. The unfortunate and no doubt unintended consequence of *Morehart*, however, is that its rule—applied to cases in which writs are issued long before other causes of action are decided—yields harsh results. The only workable solution, absent revisiting the one final judgment rule, is to preclude issuance and enforcement of a peremptory writ until the trial court enters a final, appealable judgment. ■

¹ See, e.g., *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725 (1994); *Consaul v. City of San Diego*, 6 Cal. App. 4th 1781 (1992).

² CODE CIV. PROC. §1094.5(b).

³ See CODE CIV. PROC. §1094.5(c).

⁴ *Sunrise Retirement Villa v. Dear*, 58 Cal. App. 4th 948, 955 (1997).

⁵ CODE CIV. PROC. §1094.5(f); *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1174-75 (1996).

⁶ *Hensler v. City of Glendale*, 8 Cal. 4th 1 (1994).

⁷ *Bank of Am. v. Superior Court*, 20 Cal. 2d 697, 701 (1942).

⁸ *Steen v. Board of Civil Serv. Comm’rs*, 26 Cal. 2d 716 (1945).

⁹ *Dunn v. Municipal Court*, 220 Cal. App. 2d 858 (1963); *Daggs v. Pers. Comm’n*, 1 Cal. App. 3d 925 (1969); *Healdsburg Police Officers Ass’n v. City of Healdsburg*, 57 Cal. App. 3d 444 (1976); *California Teachers Ass’n v. Board of Educ.*, 109 Cal. App. 3d 738 (1980); *Elmore v. Imperial Irrigation Dist.*, 159 Cal. App. 3d 185 (1984); *Highland Dev. Co. v. City of Los Angeles*, 170 Cal. App. 3d 169 (1985); *Bollengier v. Doctors Med. Ctr.*, 222 Cal. App. 3d 1115 (1990); *Consaul v. City of San Diego*, 6 Cal. App. 4th 1781 (1992).

¹⁰ *California Teachers Ass’n*, 109 Cal. App. 3d 738; *Elmore*, 159 Cal. App. 3d 185; *Highland Dev. Co.*, 170 Cal. App. 3d 169.

¹¹ *Dunn*, 220 Cal. App. 2d 858; *Healdsburg Police Officers Ass’n*, 57 Cal. App. 3d 444; *Consaul*, 6 Cal. App. 4th 1781.

¹² *Hadley v. Superior Court*, 29 Cal. App. 3d 389 (1972).

¹³ *Daggs*, 1 Cal. App. 3d 925.

¹⁴ *Cody v. Superior Court*, 238 Cal. App. 2d 275 (1965).

¹⁵ *Id.* at 277 n.1.

¹⁶ *Schonfeld v. City of Vallejo*, 50 Cal. App. 3d 401 (1975), *overruled by Morehart v. County of Santa Barbara*, 7 Cal. 4th 725 (1994).

¹⁷ *Schonfeld*, 50 Cal. App. 3d at 418.

¹⁸ *Highland Dev. Co. v. City of Los Angeles*, 170 Cal. App. 3d 169 (1985).

¹⁹ *Id.* at 179 (quoting *Schonfeld*, 50 Cal. App. 3d at 418).

²⁰ *Armstrong Petroleum Corp. v. Superior Court*, 114 Cal. App. 3d 732 (1981).

²¹ *Day v. Papadakis*, 231 Cal. App. 3d 503 (1991).

²² *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725 (1994).

²³ *Id.* at 743.

²⁴ Nerhan v. Superior Court, 27 Cal. App. 4th 536 (1994).

²⁵ Griset v. Fair Political Practices Comm'n, 25 Cal. 4th 688, 697 (2001).

²⁶ Connell v. Superior Court, 59 Cal. App. 4th 382 (1997).

²⁷ In re Bay-Delta Programmatic Emtl. Impact Report Coordinated Proceedings, 133 Cal. App. 4th 154 (2005).

²⁸ CODE CIV. PROC. §916.

²⁹ See Connell, 59 Cal. App. 4th 382; Cohan v. City of Thousand Oaks, 30 Cal. App. 4th 547 (1994).

³⁰ JUDICIAL COUNCIL OF CALIFORNIA, 2005 COURT STATISTICS REPORT 33 (Table 13—Dispositions of Original Proceedings, Fiscal Years 2002-03 and 2003-04).

³¹ Green v. Amante, 3 Cal. App. 4th 684, 690 (1992).

³² City of Half Moon Bay v. Superior Court, 106 Cal. App. 4th 795, 803 (2003).

³³ See Connell, 59 Cal. App. 4th 382; Cohan, 30 Cal. App. 4th 547.

³⁴ MHC Operating Ltd. P'ship v. City of San Jose, 106 Cal. App. 4th 204 (2003); Ryan v. California Inter-scholastic Fed'n, 94 Cal. App. 4th 1033 (2001).

³⁵ See, e.g., Connell, 59 Cal. App. 4th 382; Kavanaugh

v. West Sonoma County Union High Sch. Dist., 111 Cal. Rptr. 2d 829 (2001) (unpublished); MHC Operating Ltd. P'ship, 106 Cal. App. 4th 204; City of Half Moon Bay, 106 Cal. App. 4th 795.

³⁶ Morehart v. County of Santa Barbara, 7 Cal. 4th 725 (1994).

³⁷ *Id.*

³⁸ Yamagiwa v. City of Half Moon Bay, 2005 WL 1774402 (2005) (unpublished).

³⁹ Hensler v. City of Glendale, 8 Cal. 4th 1 (1994).

⁴⁰ Morehart, 7 Cal. 4th 725.

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Mr. Pierce is a member of the California State Bar Committee on Appellate Courts and is a contributing author of the CEB treatise, *California Administrative Mandamus* (3d ed.). He also is an adjunct professor at the University of Southern California Law School. He has served as a volunteer in Los Angeles County's Temporary Judge Program.

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