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## Administrative Law—Review of Administrative Action by Extraordinary Writ

Charles B. Cooper

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# WASHINGTON LAW REVIEW

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## WASHINGTON CASE LAW—1962

Presented below is the tenth annual Survey of Washington Case Law. The articles in this survey issue have been written by second-year students as part of their program to attain status as nominees to the *Law Review*. They were guided in their work by the Casenote Survey Editor of the *Review* and by members of the law school faculty.

The case survey issue does not mention every Washington case decided in 1962. Rather, it discusses only those cases which add significantly to Washington law or which otherwise merit special attention.

### ADMINISTRATIVE LAW

**Review of Administrative Action by Extraordinary Writ.** In *State ex rel. Cosmopolis Consol. School Dist. No. 99 v. Bruno*,<sup>1</sup> a school district having no high school sought review of the procedure under which its pro-rata contribution to the building program of a neighboring high school district had been determined. The supreme court held that review by extraordinary writ was proper, and two aspects of its decision merit attention because of their implications concerning review of administrative action generally. First, although the district had proceeded under a writ of certiorari, which is by statute<sup>2</sup> restricted to the review of "judicial" functions, the supreme court in deciding that review was proper gave no consideration to whether the challenged administrative action was judicial or non-judicial in nature.<sup>3</sup> Secondly, reviewability was said to extend to allegedly arbitrary and capricious

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<sup>1</sup> 59 Wn.2d 366, 367 P.2d 995 (1962).

<sup>2</sup> RCW 7.16.040. "A writ of review shall be granted by any court . . . when an inferior tribunal, board or officer, exercising *judicial functions* . . ." (Emphasis added.)

<sup>3</sup> The appellant's brief is apparently devoted in its entirety to convincing the court of the "judicial" nature of the participation determination within the meaning of RCW 7.16.040, and ignores the arguments which might be available in terms of a proper allocation of functions between courts and administrative agencies. Brief for Appellant, pp. 7-19.

conduct by the officials, as well as to the legality of the procedure under the controlling statute.<sup>4</sup>

Under the applicable statute,<sup>5</sup> the responsibility for making a proper allocation of building costs between school districts is placed in the county committee.<sup>6</sup> The determination is made after a public hearing,<sup>7</sup> and is forwarded to the State Board of Education for approval<sup>8</sup> prior to its submission to the district voters.<sup>9</sup> If the original plan is unacceptable to the Board of Education, it is returned to the county committee with "suggestions for revision."<sup>10</sup> The county committee then holds new hearings, drafts a revised plan, and resubmits it to the Board of Education.<sup>11</sup> Thus, the responsibility for originating a participation remains in the county committee, presumably so that the public hearing provided at that level will have maximum influence on the result.

In the present case, the Board of Education disapproved the plan first submitted, and allegedly conditioned the continuance of the building program upon the acquiescence of the county committee in a new participation determined by the Board of Education itself. The county committee accepted the plan as determined by the Board of Education, thereby placing a greater burden upon the non-high school district than had been placed upon it under the committee's original plan. The proceedings were immediately arrested by the appellant's suit, alleging arbitrary and capricious action and seeking to prevent submission to the district voters of the plan as illegally adopted.

The sole basis for the dismissal of the appellant's action in the lower court was the unavailability of statutory certiorari to review a non-judicial function.<sup>12</sup> In reversing, however, the supreme court stated that the judicial or non-judicial nature of the function was not controlling on the question of reviewability.<sup>13</sup> The court thus ignored the

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<sup>4</sup> RCW 28.56.005 - .170.

<sup>5</sup> RCW 28.56.005 - .170.

<sup>6</sup> RCW 28.56.010.

<sup>7</sup> RCW 28.56.030.

<sup>8</sup> RCW 28.56.040.

<sup>9</sup> RCW 28.56.050. The voters of the district can reject the plan, but this will result in the recalcitrant district being annexed to the high school district under RCW 28.56.060. For an unsuccessful challenge to the statute and the annexation proceeding, see *Goodnoe Hills School Dist. No. 24 v. Forry*, 52 Wn.2d 868, 329 P.2d 1083 (1958).

<sup>10</sup> RCW 28.56.040.

<sup>11</sup> RCW 28.56.040.

<sup>12</sup> 59 Wn.2d 366, 368, 367 P.2d 995, 996 (1962).

<sup>13</sup> 59 Wn.2d 366, 369, 367 P.2d 995, 997 (1962). The court also recognizes that the failure of the legislature to provide specifically for review in RCW 28.56 did not deprive the courts of jurisdiction. This seems clearly established. See Peck, *The Scope of Judicial Review of Administrative Action in Washington*, 33 WASH. L. REV. 55 (1958).

definitional requirements of certiorari which both the parties and the lower court had expected to be determinative of the case.<sup>14</sup> Since reviewability must be in the end a policy decision, based upon some concept of a proper allocation of functions between the courts and the administrative agencies, it seems difficult to improve upon the court's approach to this issue.

Confusion as to the effect of an improper choice of writ persists, however, largely due to the continuing practice of affirming dismissals on definitional grounds when nonreviewability might better be explained on a policy basis.<sup>15</sup> Likewise, there exists a tendency to grant review when desirable by simply finding a "judicial" function, and the term is hardly confining.<sup>16</sup> Many cases maintain the appearance of a definitional approach, only to avoid the result that would seem to follow from its rigorous application. Thus, the statutory writ of certiorari<sup>17</sup> has been expanded to allow review of non-judicial action, expressly recognizing that the word "judicial" could be deleted from the statute if the issue concerned jurisdiction or statutory procedure.<sup>18</sup> There is also some indication that the common law writ of certiorari, existing under the state constitution<sup>19</sup> independently of any statute, can be used to review non-judicial determinations of the same limited issues.<sup>20</sup>

In response to this state of affairs, a few cases have expressed a willingness to treat the extraordinary writs interchangeably, treating the application as if made for the proper writ whenever the record has shown the relator entitled to some extraordinary relief.<sup>21</sup> Thus, the recent case of *Tuschoff v. Westover*<sup>22</sup> contains the statement that the court has traditionally regarded substance rather than form, and has

<sup>14</sup> For a comprehensive analysis of the requirements of extraordinary writs, see Larson, *Administrative Determinations and the Extraordinary Writs in the State of Washington*, 20 WASH. L. REV. 22, 81 (1945).

<sup>15</sup> See *Okanogan County School Dist. No. 400 v. Andrews*, 58 Wn.2d 371, 363 P.2d 129 (1961).

<sup>16</sup> Apparently, nearly anything can amount to a "judicial function." For discussion and unfavorable comment, see 3 DAVIS, ADMINISTRATIVE LAW § 24.06, at 425 (1958).

<sup>17</sup> RCW 7.16.040.

<sup>18</sup> *State ex rel. Klaas v. Shumway*, 140 Wash. 43, 248 Pac. 76 (1926). See *Wilsey v. Cornwall*, 40 Wash. 250, 82 Pac. 303 (1905) (dictum).

<sup>19</sup> WASH. CONST. art. IV, § 6.

<sup>20</sup> See *State ex rel. McCallum v. Superior Court*, 72 Wash. 144, 129 Pac. 900 (1913).

<sup>21</sup> *State ex rel. Meehan v. Superior Court*, 193 Wash. 249, 74 P.2d 1012 (1938); *State ex rel. Shallenberger v. Superior Court*, 174 Wash. 627, 25 P.2d 1041 (1933); *State ex rel. Resburg v. Superior Court*, 168 Wash. 384, 12 P.2d 420 (1932); *State ex rel. Crockett v. Sutton*, 159 Wash. 307, 293 Pac. 469 (1930).

<sup>22</sup> 160 Wash. Dec. 723, 375 P.2d 254 (1962), involving review of a decision in an unlawful detainer proceeding.

treated any application as proper, irrespective of the writ asked. There the court considered as on certiorari a matter which had been raised by prohibition. While such cases have normally involved writs issued by the supreme court to the superior court, there seems no reason why the doctrine should not be applied as generally as it is stated.

The intentional avoidance in *Bruno* of any writ theory whatsoever, notwithstanding the availability of loose definitions, may indicate a growing impatience with the extraordinary writs. Other states have shown a willingness to avoid such limitations,<sup>23</sup> and at least one commentator<sup>24</sup> has recognized, and applauded, the possibility of a trend in this direction. The Washington court has now indicated that it can be persuaded to ignore the extraordinary writs by arguments addressed directly to policy considerations.

But the court's decision was not confined to whether judicial review must be sought by means of the technically proper extraordinary writ. In addition the court had to decide whether judicial review was available, assuming that it was sought by a procedurally correct means. With respect to this part of the case, the language of the court, if not its decision, is somewhat questionable. It is generally thought that the availability of review should turn in part on the comparative abilities of courts and administrators to deal with the kind of decision sought to be reviewed.<sup>25</sup> The decision to review the procedure by which the participation was determined can be reconciled with this standard, because statutory interpretation is an area where the court rightly feels especially competent.<sup>26</sup> This watchdog activity on agency procedure under controlling statutes may be questionable on policy grounds,<sup>27</sup> but it seems to be the usual result in Washington.<sup>28</sup> Less convincing is that

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<sup>23</sup> *New York Post Corp. v. Leibowitz*, 163 N.Y.S.2d 409, 143 N.E.2d 256 (1957).

<sup>24</sup> 3 DAVIS, *op. cit. supra* note 16, at 427.

<sup>25</sup> 4 DAVIS, *op. cit. supra* note 16, at § 30.09; Peck, *supra* note 13.

<sup>26</sup> See *Floe v. Cedergreen Frozen Pack Corp.*, 37 Wn.2d 886, 226 P.2d 871 (1951). Here the legality of the Board of Education's action apparently turns upon the meaning of the words "suggestions for revision" in RCW 28.56.040.

<sup>27</sup> See Peck, *Standing Requirements for Obtaining Review of Governmental Action in Washington*, 35 WASH. L. REV. 362, 370 (1960), noting the pervasive policy that lets some wrongs go unremedied to encourage the efficiency of public officials and to prevent harassment by suits; consider *e.g.*, public officer tort immunity. Compare the attitude taken in *Bruno* with the refusal of the court to review the constitutionality of the legislative process found in the rule that it will not look behind an enrolled bill to the method, procedure or manner in which the bill was passed. *Morrow v. Henneford*, 182 Wash. 625, 47 P.2d 1016 (1935); *State ex rel. Dunbar v. State Board*, 140 Wash. 433, 249 Pac. 996 (1926).

<sup>28</sup> *Allen v. Public Utility Dist. No. 1*, 55 Wn.2d 226, 347 P.2d 539 (1959), granting an injunction against a tax levy on the ground of no substantial compliance with notice and hearing provisions of the statute. There, as in *Bruno*, the agency was not

part of the holding which includes within the scope of review arbitrary and capricious conduct in actually dividing the costs between the districts, irrespective of the procedure employed.

The process of determining whether a given decision is arbitrary or capricious is one of measurement against acceptable principles or standards. The standards set down by the statute<sup>29</sup> are general and non-exclusive, and further direct the county committee to consider "any other factors found by the committee to have a bearing on the preparation of an equitable plan."<sup>30</sup> Under this provision, the participation plan was based upon relative assessed valuations and the ability to issue bonds, ignoring the number of students from each district. Such a choice must be a value judgment, a pure policy decision, and the only question is whether it is to be made by the court or the administrative agency. The contrast between the limited judicial means of gathering information and the day to day experience of expert administrative specialists evoked a strong dissent:

It is difficult for me to conceive just what duties the court intends to impose upon itself in deciding whether the state board acted arbitrarily . . . . [I]t would have to study all of the evidence which was before the board when it made its determination, make an independent study of the principles which ordinarily guide an administrative body of this kind and which have proved most effective, and interview all of the members . . . in order to learn what their experience had taught them about the problems. . . .<sup>31</sup>

It seems doubtful that *Bruno* should be read to imply that the allegation of arbitrary and capricious conduct will alone entitle a party to judicial review. The traditional use of these terms has been to limit the scope of judicial review, the courts deferring to agency discretion where the circumstances of the case permit a number of diverse conclusions.<sup>32</sup> It has never been thought to relieve the plaintiff of pleading facts sufficient to support a claim for relief. If the dissenting opinion is correct in its complaint that the court is about to substitute its judgment for that of the agency as to the proper factors to consider in making the plan, *Bruno* may well be an unsound development in Washington law. However, it seems preferable to view the

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bound by the hearing results, but the court noted a legislative intent that through the hearing the public have an opportunity to influence any decision.

<sup>29</sup> RCW 28.56.020.

<sup>30</sup> 59 Wn.2d 366, 373, 367 P.2d 995, 1001 (1962).

<sup>31</sup> *Id.* at 379, 367 P.2d at 1005.

<sup>32</sup> See *Sweitzer v. Industrial Ins. Comm.*, 116 Wash. 398, 199 Pac. 724 (1921) (defining "arbitrary and capricious").

majority as agreeing to review only the procedure employed, assuring that the plan is originated as the statute directs, in the agency for which a hearing is provided.

The Petition alleged that the county committee was not privileged to exercise its discretion . . . but was coerced by the State Board of Education into adopting a participation suitable to it . . . . The legality of the act of the officials is subject to review, as well as their alleged arbitrary and capricious conduct.<sup>33</sup>

If such an interpretation is justified, the problem is not that the court has intervened where the judgment of the agency ought to be preferred.<sup>34</sup> Rather, the problem is that judicial intervention absent an open and explicit evaluation of the comparative abilities of the courts and the agency has made the policy basis of reviewability appear broader than intended and, to that extent, unsound.<sup>35</sup>

#### ADDENDUM

This case was reviewed on the merits in *State ex rel. Cosmopolis Consol. School Dist. No. 99 v. Bruno*, 161 Wash. Dec. 459, 378 P.2d 691 (1963). "Arbitrary and capricious conduct" was found to be negated by a showing that the Board of Education "gave consideration" to all of the statutory factors, although its ultimate suggested plan turned completely upon the relative assessed valuations of the two districts. The only inquiry of substance was whether the Board of Education had acted within its statutory authority in making "suggestions for revision," which amounted to specifying a single acceptable plan. It was held that it had so acted, and that when the county committee adopted the plan of the Board rather than delay construction, it exercised its discretion in sufficient compliance with RCW 28.56.

CHARLES B. COOPER

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<sup>33</sup> 59 Wn.2d 366, 369, 367 P.2d 995, 997 (1962).

<sup>34</sup> Granting that the courts ought to intervene more freely in questions of statutory interpretation, subject to the reservations expressed in note 26 *supra*.

<sup>35</sup> Note that in granting review, the majority choose to by-pass solid issues of standing and ripeness, important concepts in preventing the courts from being led into a supervisory position over the legislative branch of government. Such is common when it is impracticable to wait for an actual injury (see note 9 *supra*) or when a "public interest" is thought to be involved. See *Malaga School Dist. No. 115 v. Kinkade*, 47 Wn.2d 516, 288 P.2d 467 (1955) (district had standing to challenge the transfer of valuable taxable property to another district); *Huntamer v. Coe*, 40 Wn.2d 767, 246 P.2d 489 (1952) (potential candidates for public office, standing to challenge loyalty oath requirement).