

Memorandum 95-38

**Judicial Review of Agency Action: Draft of Tentative Recommendation**

Attached are a staff draft of a tentative recommendation on judicial review incorporating Commission decisions at the last meeting, and letters from the following persons:

Professor Michael Asimow	Exhibit pp. 1-6
Attorney General Daniel Lungren	Exhibit pp. 7-14
Thomas Sobel, Chief Administrative Law Judge, ALRB	Exhibit pp. 15-19
Bernard McMonigle, Senior Counsel, PERB	Exhibit pp. 20-24

The following issues are discussed in this memorandum:

STATUTE REPLACES OTHER FORMS OF JUDICIAL REVIEW . . . . .	2
Exclusive Procedure . . . . .	2
Interim or Extraordinary Relief . . . . .	3
Scope of Review . . . . .	3
STANDARD OF REVIEW . . . . .	4
Questions of Law . . . . .	4
Local Agency Interpretation of Its Own Ordinance . . . . .	5
Agency Fact-Finding . . . . .	6
Review of Hospital Decisions . . . . .	7
Review of Decisions of Particular Agencies . . . . .	8
JUDICIAL REVIEW OF NONGOVERNMENTAL ENTITY ACTION . . . . .	8
PROPER COURT FOR JUDICIAL REVIEW . . . . .	9
OTHER PROCEDURAL PROVISIONS . . . . .	11
Court Discretion to Dismiss Summarily on the Pleadings . . . . .	11
Name of Initiating Document . . . . .	12
Contents of Notice of Review . . . . .	12
Limitations Period for Judicial Review . . . . .	13
Rules of Pleading and Practice . . . . .	16
Briefing Schedule . . . . .	17
Trial Preference . . . . .	18
PREPARATION OF THE RECORD . . . . .	18
Time to Prepare the Record . . . . .	18
Cost of Preparing the Record . . . . .	19
ATTORNEY GENERAL'S LETTER . . . . .	21
Revisions Accomplished by Staff . . . . .	21
Revisions on Which the Staff Is Neutral . . . . .	22
Revisions Not Recommended by Staff . . . . .	23
CIVIL ENFORCEMENT OF AGENCY RULE OR ORDER . . . . .	25

OPERATIVE DATE .....	29
CONFORMING REVISIONS .....	29

## STATUTE REPLACES OTHER FORMS OF JUDICIAL REVIEW

### **Exclusive Procedure**

Under existing law, a number of procedures may be used for judicial review of agency action — administrative mandamus, ordinary mandamus, certiorari, prohibition, declaratory relief, and injunctive relief. Model Act Section 5-101 says the act “establishes the exclusive means of judicial review of agency action.” The Commission thought the draft statute should make clearer that it replaces all existing procedures and provides the exclusive method for judicial review of agency action, as recommended by Professor Asimow. Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus* 18 (Nov. 1993).

Under existing law, when administrative mandamus is available it generally may not be joined with other causes of action such as declaratory relief. However, joinder of causes of action stating independent grounds for relief is permissible, for example, joining a cause of action to declare a statute facially unconstitutional. Also, it is established practice to join a petition for administrative mandamus with a petition for traditional mandamus, because it may be uncertain which is the proper form. California Administrative Mandamus § 1.6, at 6-7 (Cal. Cont. Ed. Bar, 2d ed. 1989).

Under the proposal to make the new review procedure exclusive, it would be unnecessary to join other causes of action. A statute may be declared facially unconstitutional under the draft statute, the court may give declaratory relief, and traditional mandamus would be wholly replaced by the draft statute.

The exclusivity approach would be implemented by adding the following provision to the statute:

#### **§ 1121.120. Exclusive procedure**

1121.120. This title provides the exclusive means of judicial review of agency action and replaces other forms of judicial review of agency action, including administrative mandamus, ordinary mandamus, certiorari, prohibition, declaratory relief, and injunctive relief. Other types of actions may not be joined with a proceeding under this title.

**Comment.** Section 1120.120 is drawn from 1981 Model State APA § 5-101. By establishing this title as the exclusive method for review of agency action, Section 1120.120 continues and broadens the effect of former Section 1094.5. See, e.g., *Viso v. State*, 92 Cal.

App. 3d 15, 21, 154 Cal. Rptr. 580, 584 (1979). . . . Nothing in this section limits the type of relief or remedial action available in a proceeding under this title. See Section 1123.660 (type of relief).

### **Interim or Extraordinary Relief**

Existing remedies, such as the extraordinary writs and injunctive relief provide a means of immediate action to restrain a public entity or officer, if necessary. Replacing existing remedies with the new judicial review scheme requires expansion of the review procedure to provide for immediate temporary relief, as well as for appropriate procedural protections for the entity or officer restrained. The stay provisions of the draft statute offer such a procedure, at least to the extent the relief sought is prohibitory in character. Section 1123.650. The stay procedure does not work particularly well where the relief sought is mandatory in character. **We would supplement the statute with existing injunction procedures, including temporary restraining orders:**

#### **§ 1121.125. Injunctive relief ancillary**

1121.125. Injunctive relief is ancillary to and may be used as a supplemental remedy in connection with a proceeding under this title.

We must also be careful in the area of judicial review to avoid running afoul of separation of powers requirements. The California Constitution gives the judicial branch "original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." Cal. Const. Art. VI, § 10. To the extent the Legislature seeks to eliminate the ability of the courts to make use of these constitutional remedies, there is the potential for the statute to be held unconstitutional. **For this reason we have added a severability clause to the draft.**

### **Scope of Review**

At the June meeting, the Commission thought the statute should make clear it does not authorize courts to interfere with a valid exercise of agency discretion or to direct an agency how to exercise its discretion. The Attorney General is also concerned about the open-endedness of permissible court orders. **The following new Section 1123.160 would be added to general provisions in Chapter 3 (judicial review):**

1123.160. Nothing in this title authorizes the court to interfere with a valid exercise of agency discretion or to direct an agency how to exercise its discretion.

## STANDARD OF REVIEW

### Questions of Law

Mr. McMonigle and Judge Sobel want to keep the "clearly erroneous" standard for judicial review of interpretations of law by PERB and ALRB. The draft statute (Section 1123.420) requires the court to use its independent judgment with appropriate deference to the agency interpretation depending on the circumstances. At the June meeting, the Commission wanted to preserve the existing standard of review in labor law cases without codifying a special standard for PERB and ALRB. The staff has revised the Comment to Section 1123.420 to say the section

is consistent with and continues the substance of cases saying courts must accept statutory interpretation by an agency within its expertise unless "clearly erroneous" as that standard was applied in *Nipper v. California Automobile Assigned Risk Plan*, 19 Cal. 3d 35, 45, 560 P.2d 743, 136 Cal. Rptr. 854 (1977) (courts respect "administrative interpretations of a law and, unless clearly erroneous, have deemed them significant factors in ascertaining statutory meaning and purpose"). The "clearly erroneous" standard was another way of requiring the courts in exercising independent judgment to give appropriate deference to the agency's interpretation of law. See *Bodinson Mfg. Co. v. California Employment Comm'n*, 17 Cal. 2d 321, 325-26, 109 P.2d 935 (1941). For cases applying the "clearly erroneous" standard in the labor law context, see, e.g., *Agricultural Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 400, 411, 546 P.2d 687, 128 Cal. Rptr. 183 (1976); *Banning Teachers Ass'n v. Public Employment Relations Bd.*, 44 Cal. 3d 799, 804, 750 P.2d 313, 244 Cal. Rptr. 671 (1988); *San Mateo City School Dist. v. Public Employment Relations Bd.*, 33 Cal. 3d 850, 856, 663 P.2d 523, 191 Cal. Rptr. 800 (1983); *San Lorenzo Education Ass'n v. Wilson*, 32 Cal. 3d 841, 850, 654 P.2d 202, 187 Cal. Rptr. 432 (1982). These cases should guide the courts in determining the appropriate degree of deference in this context.

The staff believes this portion of the Comment preserves the essence of existing law for PERB and ALRB, without having to write a special statutory standard for those agencies.

## Local Agency Interpretation of Its Own Ordinance

The Commission asked the staff to draft a provision for abuse of discretion review of a local legislative body's interpretation of an ordinance it enacted. Proposed Section 1123.420 could be revised to do this as follows:

1123.420. (a) This section applies to a determination by the court of any of the following issues:

(1) Whether the agency action, or the statute or regulation on which the agency action is based, is unconstitutional on its face or as applied.

(2) Whether the agency acted beyond the jurisdiction conferred by the constitution, a statute, or a regulation.

(3) Whether the agency has decided all issues requiring resolution.

(4) Whether the agency has erroneously interpreted the law.

(5) Whether the agency has erroneously applied the law to the facts.

(b) Except as provided in subdivision (c), the standard for judicial review under this section is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action.

(c) ~~If a statute delegates to an agency interpretation of a statute or application of law to facts, the standard for judicial review of the agency's determination is abuse of discretion. The standard for judicial review under this section of the following agency action is abuse of discretion:~~

(1) An agency's interpretation of a statute or application of law to facts, where a statute delegates that function to the agency.

(2) A local agency's construction or interpretation of its own legislative enactment.

Existing judicial review of a state agency construing its own regulation is independent judgment with appropriate deference. Professor Asimow argues against giving a local agency interpreting its own ordinance a more review-resistant standard than a state agency interpreting its own regulations. Under existing law, the same standard of review applies to decisions of local and state agencies, there being no "rational or legal justification for distinguishing" between them. *Strumsky v. San Diego County Employees Retirement Association*, 11 Cal. 3d 28, 32, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

A possible argument for treating a local agency construing its own ordinance more favorably by providing abuse of discretion review is that the local agency may be viewed as analogous to the Legislature itself, while a state agency merely

receives delegated powers from the Legislature. But it is the courts, not the Legislature, that construes statutes. The inquiry should be: Is the local agency in a better position than the courts to determine the meaning of its own enactments? Or, as suggested by Professor Asimow's study, is the agency "likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation as opposed to another"? Such agency familiarity justifies deferential review, but not necessarily abuse of discretion review. Independent judgment with appropriate deference promotes statewide uniformity of interpretation. Although an ordinance has only local application, there is value in promoting statewide uniformity in interpreting language in legislative enactments, whether the enactment is local or statewide. Independent judgment review also encourages local agencies to act consistently and abide by precedent. There is also a danger that, if a local agency were subject to abuse of discretion review in construing its own ordinance, the local agency could in effect legislate retroactively by construing its ordinance, something it could not constitutionally do in enacting or amending an ordinance. **For these reasons, the staff recommends applying the same standard of review to a local agency construing its own ordinance as to a state agency construing its own regulation — independent judgment with appropriate deference.**

#### **Agency Fact-Finding**

At the April meeting, the Commission approved substantial evidence review for agency fact-finding, except that independent judgment review would continue to apply to a decision by an administrative law judge of the Office of Administrative Hearings in a formal adjudicative proceeding under the Administrative Procedure Act where the agency has changed a finding of fact of, or has increased the penalty imposed by, the administrative law judge. The exception was a political compromise to anticipate objections of the private bar, principally those who represent physicians in licensing cases.

Perhaps we can better accomplish the goal of providing substantial evidence review of fact-finding except where politically problematic by narrowing the exception to apply only to occupational licensing cases. See Asimow, *The Scope of Judicial Review of Administrative Action* 50 (Jan. 1993). This would preserve substantial evidence review in non-occupational cases adjudicated under the APA, where parties have considerable due process protection which minimizes

the need for intense judicial scrutiny. *Id.* at 50-51. **The staff recommends going at least as far as revising Section 1123.430 as follows:**

1123.430. (a) This section applies to a determination by the court of whether agency action is based on an erroneous determination of fact made or implied by the agency.

(b) Except as provided in subdivision (c), the standard for judicial review under this section is whether the agency's determination is supported by substantial evidence in the light of the whole record.

(c) The standard for judicial review under this section is the independent judgment of the court whether the decision is supported by the weight of the evidence only if both of the following conditions are satisfied:

(1) The proceeding involves an occupational license provided for in the Business and Professions Code.

(2) The agency has changed a finding of fact, or has increased the penalty imposed, in a proposed decision is made by an administrative law judge employed by the Office of Administrative Hearings in a formal adjudicative proceeding under the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

~~(2) The agency has changed a finding of fact of, or has increased the penalty imposed by, the administrative law judge in the proceeding.~~

The Attorney General argues for completely abolishing independent judgment review of fact-finding. The State Bar Committee on Administration of Justice opposes eliminating independent judgment review of agency fact-finding. (2nd Supp. to Memo 95-30.) On the merits, the staff agrees with the Attorney General. The staff is unsure about the political factors, and how important for enactment of the recommendation it will prove to be to preserve independent judgment review in occupational licensing cases.

### **Review of Hospital Decisions**

Section 1123.460 in the draft statute continues subdivision (d) of Code of Civil Procedure Section 1094.5, which provides substantial evidence review of findings by hospital boards, except that independent judgment review applies if a podiatrist claims the hospital discriminated in awarding staff privileges. This provision was enacted in 1978 at the behest of the California Hospital Association to overturn a 1977 case applying independent judgment review to dismissal of a

physician by a private hospital. Goldberg, *The Constitutionality of Code of Civil Procedure Section 1094.5(d): Effluvia From an Old Fountainhead of Corruption*, 11 Pac. L.J. 1 (1979).

The substantial evidence review portion of this provision need not be continued. Except for review of APA proceedings, the draft statute provides substantial evidence review of all fact-finding, including hospital findings. **The staff recommends deleting the special hospital section (1123.460) from the draft statute, and instead applying the general standards of review to hospital findings.** This will change the standard of review of alleged hospital discrimination against a podiatrist, but the staff thinks it is hard to justify a special standard for podiatrists alone.

#### **Review of Decisions of Particular Agencies**

Statutes applicable to the Department of Alcoholic Beverage Control, Alcoholic Beverage Control Appeals Board, Public Utilities Commission, Public Employment Relations Board, and Workers' Compensation Appeals Board provide special standards of review. **By conforming revisions, the draft statute makes review of decisions of these agencies subject to the general standards of review in the draft statute.**

#### **JUDICIAL REVIEW OF NONGOVERNMENTAL ENTITY ACTION**

The Model Act and the statute recommended by Professor Asimow apply only to actions of governmental agencies. MSAPA § 1-102; Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus* 17 (Nov. 1993). The draft statute generally applies to judicial review of governmental agencies (Section 1120.110), but it continues a special provision discussed above on the standard of review of actions of hospitals, including private hospitals (Section 1123.460). The staff recommendation (above) to delete Section 1123.460 from the draft statute raises a more important question: Assuming the draft statute should not apply to nongovernmental entities generally, should it apply to actions of private hospitals?

The draft statute would repeal and replace Section 1094.5 of the Code of Civil Procedure, which now applies to judicial review of actions of private hospitals and possibly other nongovernmental agencies. See *Anton v. San Antonio Community Hospital*, 19 Cal. 3d 802, 814-20, 567 P.2d 1162, 140 Cal. Rptr. 442 (1977) (private hospital); *Delta Dental Plan v. Banasky*, 27 Cal. App. 4th 1598, 33

Cal. Rptr. 381 (1994) (dental health plan); California Administrative Mandamus, *supra*, §§ 3.18-3.19, at 87-90. The *Banasky* case "may open the door for courts to review a wide range of private administrative decisions by administrative mandamus" under Section 1094.5. California Administrative Mandamus Supplement § 3.19, at 31 (2d ed., Cal. Cont. Ed. Bar 1995).

Repeal of Section 1094.5 will require judicial review of nongovernmental agencies to be by traditional mandamus under Section 1085. See *Anton v. San Antonio Community Hospital*, *supra*, at 813. There are many differences between traditional and administrative mandamus. Juries may be used in traditional mandamus but generally not in administrative mandamus. A longer limitations period (three or four years) applies in traditional mandamus. The rule for exhaustion of remedies is different, as is the requirement that the agency make findings. Some rules are unclear under traditional mandamus — whether a stay is available, whether the court makes a new record or reviews the administrative record, and whether the standard of review is independent judgment or substantial evidence. Asimow, *supra*, at 7-9.

The *Anton* case said that, because the California Medical Association and California Hospital Association recommend uniform hearing procedures for all hospitals, whether public or private, it is "peculiarly appropriate" to have the same procedure for judicial review of decisions of both types of hospitals. **The staff would therefore preserve application of the judicial review statute to private hospitals, while making clear that it does not apply to nongovernmental entities generally:**

1120.110. ...

(b) This title does not govern judicial review of action of a nongovernmental entity, except a decision of a private hospital board in an adjudicative proceeding.

**Comment.** In applying this title to judicial review of a decision of a private hospital board, subdivision (b) continues the effect of subdivision (d) of former Section 1094.5 of the Code of Civil Procedure.

#### PROPER COURT FOR JUDICIAL REVIEW; VENUE

At the last meeting, the Commission decided to preserve existing law by keeping most judicial review in superior court. The Attorney General agrees with this decision.

Section 1123.520 in the draft statute preserves existing venue rules. Under existing law, unless a statute provides otherwise, venue rules for administrative mandamus are the same as for civil actions generally. Thus, as provided in Sections 393 and 395 of the Code of Civil Procedure, proper venue is in the county where the cause arose or where the defendants or some of them reside or have a principal office. Special statutes prescribe venue rules for proceedings involving the various medical boards (Los Angeles, Sacramento, San Diego, or San Francisco). California Administrative Mandamus, *supra*, § 8.16; Regents of the University of California v. Superior Court, 3 Cal. 3d 529, 534-35, 476 P.2d 457, 91 Cal. Rptr. 57 (1970). Review of a drivers' license suspension is in the county of the *plaintiff's* residence. Veh. Code § 13559.

Professor Asimow recommended that venue for superior court proceedings should be in Sacramento County or, if the agency is represented by the Attorney General, in counties where the Attorney General has an office (Los Angeles, Sacramento, San Diego, and San Francisco). The argument for this approach is that it will avoid local judicial bias, and permit development of expertise in judicial review of agency action. The Attorney General approves of this approach. **This approach could be codified as follows:**

**§ 1123.520. Superior court venue**

1123.520. (a) Venue of proceedings in superior court under this title is as follows:

(1) For judicial review of action of a state agency, in Sacramento County or, if the agency is represented by the Attorney General, in any county or city and county in which the Attorney General has an office.

(2) For judicial review of action of a local agency, in the county or city and county in which the local agency is located.

(b) A case filed in the wrong court shall not be dismissed for that reason, but shall be transferred to the proper court.

**Comment.** Paragraph (1) of subdivision (a) of Section 1123.520 is drawn from Section 401 and from Business and Professions Code Section 2019. Paragraph (2) is drawn from Section 394.

Subdivision (b) codifies case law. See *Lipari v. Department of Motor Vehicles*, 16 Cal. App. 4th 667, 673, 20 Cal. Rptr. 2d 246, 250 (1993).

## OTHER PROCEDURAL PROVISIONS

### **Court Discretion to Dismiss Summarily on the Pleadings**

Existing mandamus proceedings follow the same pleading rules as civil actions generally: The petition must allege specific facts showing entitlement to relief; if specific facts are not alleged, the petition is subject to general demurrer or summary dismissal. 2 G. Ogden, California Public Agency Practice § 53.04[1][a] (1995). (Summary dismissal is not available if the noticed motion procedure is used instead of an alternative writ of mandamus. California Administrative Mandamus, *supra*, § 9.1, at 307.) Although concern was expressed at the April meeting that summary dismissal might not work well in superior court because of lack of staff to provide analysis, superior courts now have authority to dismiss summarily. The staff would not take away that authority — to do so would affect the workload of the courts with significant fiscal and constitutional (separation of powers) implications. And Professor Asimow recommended continuing existing discretion for the court to decline to grant relief. Asimow, *supra*, 20. The staff believes summary dismissal will be workable, whether proceedings are in superior court or the Court of Appeal.

**To preserve summary dismissal, we should revise Section 1123.110 as follows:**

1123.110. A Subject to subdivision (b), a person who qualifies under this chapter regarding standing and who satisfies other applicable provisions of law regarding exhaustion of administrative remedies, ripeness, time for filing, advancement of costs, and other pre-conditions is entitled to judicial review of final agency action.

(b) The court may summarily decline to grant judicial review if the notice of review does not present a substantial issue for resolution by the court.

**Comment.** . . . Subdivision (b) continues the former discretion of the courts to decline to grant a writ of administrative mandamus. Parker v. Bowron, 40 Cal. 2d 344, 351, 254 P.2d 6, 9 (1953); Dare v. Board of Medical Examiners, 21 Cal. 2d 790, 796, 136 P.2d 304, 308 (1943); Berry v. Coronado Board of Education, 238 Cal. App. 2d 391, 397, 47 Cal. Rptr. 727 (1965); California Administrative Mandamus § 1.3, at 5 (Cal. Cont. Ed. Bar, 2d ed. 1989). Cf. Code Civ. Proc. § 437c (summary judgment in civil action on ground that action has no merit).

### **Name of Initiating Document**

Under the draft statute, judicial review is initiated by filing a "notice" of review. Section 1123.610. **The staff believes "petition" would be better terminology.** Under existing law, administrative mandamus is initiated by a "petition." Code Civ. Proc. §§ 1088.5, 1089.5, 10904.5, 1094.6; Gov't Code § 11523. The Model Act uses "petition." "Petition" better suggests the discretionary nature of judicial review, and would improve drafting by allowing us to substitute "petitioner" for "person seeking judicial review." The Attorney General says that, as between a notice of and petition for review, "a petition for review is more appropriate."

### **Contents of Notice of Review**

At the April meeting, the Commission wanted the notice of review to be simplified, since all that is needed is a document to initiate judicial review. Factual material will be in the administrative record, and legal issues will be explored in the briefs. But the goal of simplifying the notice of review conflicts with the goal of preserving court authority to dismiss summarily for insufficient allegations in the notice of review, discussed above. To preserve summary dismissal, we will either have to require detailed factual allegations in every notice of review, or permit a skeletal notice with respondent having the right to require the person seeking review to file an amended notice with factual allegations to expose it to demurrer or summary dismissal.

**Section 1123.620 in the attached draft still requires the notice of review to set out factual allegations.** If the Commission prefers a skeletal notice with facts to be furnished on demand, that may be done by revising Section 1123.620 as follows:

1123.620. (a) The notice of review must set forth all of the following:

(a) (1) The name and mailing address of the person seeking review.

(b) (2) The name and mailing address of the agency whose action is at issue.

(c) (3) Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action.

(d) (4) Identification of persons who were parties in any adjudicative proceedings that led to the agency action.

(e) ~~Facts to demonstrate that the person seeking judicial review is entitled to it.~~

(f) ~~The reasons why relief should be granted.~~

(g) (5) A request for relief, specifying the type and extent of relief requested.

(b) On a party's written demand filed with the court, the person seeking review shall file with the court a pleading that states facts to demonstrate that the person is entitled to judicial review, and the reasons why relief should be granted.

### **Limitations Period for Judicial Review**

Under existing law, judicial review of an adjudication under the APA must be commenced within 30 days after the last day on which reconsideration can be ordered. Gov't Code § 11523. Judicial review of specified adjudications of a local agency (other than a school district) must be commenced within 90 days after the decision is final, or 30 days after delivery or mailing of a timely-requested agency record, whichever is later. Code Civ. Proc. § 1094.6. In non-APA cases, the agency's statute may specify the limitations period. If not, the limitations period for ordinary civil actions applies, as determined by the nature of the right asserted. California Administrative Mandamus, *supra*, §§ 7.6-7.7, at 243.

Professor Asimow recommended a uniform 90-day limitations period for judicial review of all adjudicatory action by state and local agencies, and of agency refusal to hold an adjudicatory hearing required by the APA or other law. Asimow, *Judicial Review: Standing and Timing* 88-97 (Sept. 1992). He was unsure about the desirability of a single limitations period for non-adjudicatory action. He thought the existing three or four years for civil actions generally is "far too long" for review of non-adjudicatory action, but noted the difficulty of determining when the cause of action accrues in the vast array of non-adjudicatory actions. He recommended against shortening the existing three or four year period for review of regulations, since the public is often unaware of a regulation until long after it is adopted. *Id.* at 99.

Under Model Act Section 5-108, a petition for judicial review must be filed within 30 days after rendition of the order, although "30" is in brackets so the adopting jurisdiction may choose some other time period.

The Commission considered these issues at the January and July 1993 meetings. The Commission first decided there should be a uniform 60-day limitations period for judicial review of state and local adjudications, an increase from the existing 30-day APA limitations period and a decrease from the 90-day local agency limitations period. But the Commission wanted to preserve special limitations periods supported by policy reasons, such as the 30-day PERB and

ALRB judicial review periods. The Commission thought there should be no limitations period for compelling an agency to issue a decision when it has failed to do so.

Later, the Commission wanted the limitations provision to parallel the procedure for appeals in civil actions, with a relatively short period — for example, 30 days — within which to file a notice of review. The 30-day period was adopted because that is the rule now in APA proceedings. There was some concern that, in a case where the ALJ orders a license suspension or revocation and the licensee gets a stay, a longer period would permit the licensee to delay the suspension or revocation.

The draft statute (Section 1123.630) prescribes a uniform 30-day limitations period for adjudicatory action only. The time period commences to run from the date the decision is “effective.” In APA proceedings, a decision is effective 30 days after it is delivered or mailed to the respondent, unless reconsideration is ordered, the agency orders that the decision shall become effective sooner, or a stay of execution is granted. Gov’t Code § 11519(a). Thus for review of most APA proceedings, the party seeking review will have 60 days from receipt of the decision in which to file a notice of review — 30 days until it becomes effective and an additional 30 days from the effective date. For review of adjudication not under the APA, any uncertainty about when the decision is “effective” will be minimized by the requirement that the agency give notice of the time period for filing the notice of review. Section 1123.630(c).

The limitations period for non-adjudicatory action would remain the same as under existing law — three years or four years, subject to laches. See Code Civ. Proc. §§ 338 (liability created by statute), 343 (limitation period when no other period applies); California Administrative Mandamus, *supra*, §§ 7.7-7.10, at 243-46.

Conforming revisions in the attached draft make the following adjudicatory actions of state and local agencies subject to the uniform 30-day requirement of Section 1123.630:

- Specified local agency adjudication other than by school districts, now 90 days after the decision is final, or 30 days after delivery or mailing of a timely-requested agency record, whichever is later. Code Civ. Proc. § 1094.6.
- Decision of Public Employment Relations Board, now 30 days after issuance. Gov’t Code § 3542.

- Various state personnel decisions, including decisions of State Personnel Board, now one year, but remedies are limited unless the challenge is made within 90 days. Gov't Code § 19630.
- Decision of local zoning appeals boards, now 90 days. Gov't Code § 65907.
- Decision of the Agricultural Labor Relations Board, now 30 days after issuance. Lab. Code § 1160.8.
- Decision of Workers' Compensation Appeals Board, now 45 days after order or denial of petition for reconsideration. Lab. Code § 5950.
- Appeal of decision of Unemployment Insurance Appeals Board, now six months. Unemp. Ins. Code § 410.
- Drivers' license order, now 90 days after notice. Veh. Code § 14401(a).
- Welfare decision of Department of Social Services, now one year after notice. Welf. & Inst. Code § 10962.

The attached draft preserves the various time limits for judicial review of action under the California Environmental Quality Act. Proceedings under CEQA have limitations periods for judicial review of 30 days, 35 days, or 180 days after various specified events, depending on nature of the challenge. Pub. Res. Code § 21167. When an agency determines a project is or is not subject to CEQA, the agency must file a notice of the determination with the Office of Planning and Research, and a list of these notices is posted each week. *Id.* § 21108. The notice triggers the short limitations period of 30 or 35 days. The short limitations period is to avoid delay and ensure prompt resolution of CEQA challenges. If the agency does not give notice, the long limitations period of 180 days applies. *Id.* § 21167; see generally 2 Practice Under the California Environmental Quality Act §§ 23.17-23.25, at 932-41 (Cal. Cont. Ed. Bar 1995). The 180-day period is analogous to the 180-day period in the draft statute, applicable where the agency fails to give notice of the period for filing a notice of review. Under CEQA, the events from which the limitations period runs are the agency decision, commencement of the project, or filing or mailing the notice. These measuring events do not seem to fit well under the scheme of the draft statute, which measures the running of the limitations period from the date the decision is effective or notice is given by the agency.

The staff is concerned that 30 days may be too short for review of many adjudicatory actions, especially where parties are unlikely to be represented by counsel — drivers' license, welfare, and unemployment cases. **The staff suggests we might increase the 30-day period in the draft statute to 45 or 60 days.**

## Rules of Pleading and Practice

At the April meeting, the Commission asked the staff to consider how the court obtains jurisdiction over the party not seeking judicial review, whether something like a summons is needed, and whether there should be a document such as a response or notice of appearance for the other party to file. The Commission also thought a briefing schedule should be provided, and that rules of court are probably preferable to statute for this purpose if uniform statewide.

Under existing law, judicial review is commenced either by alternative writ of administrative mandamus or by noticed motion for a peremptory writ. See Code Civ. Proc. § 1088; California Administrative Mandamus, *supra*, § 9.1, at 307. A summons is not required in either case. California Administrative Mandamus, *supra*, §§ 9.8, 9.21, at 315, 324. The alternative writ or notice of motion serves the purpose of a summons in a civil action, and is served in the same manner. *Id.* §§ 8.48, 9.17, 9.23, at 298-99, 320, 326.

Service of an alternative writ or notice of motion on a public entity is effectuated by personally serving the clerk, secretary, president, presiding officer, or other head of its governing body. Code Civ. Proc. § 416.50; California Administrative Mandamus, *supra*, § 8.48, at 298. Service on a board or commission may also be made on a majority of the members. Code Civ. Proc. § 1107. Some special statutes apply to service on particular agencies. See, e.g., Gov't Code § 19632 (State Personnel Board may be served by serving office of its chief counsel); Veh. Code § 24.5 (DMV may be served by serving director or appointed representative at DMV headquarters).

Professor Asimow recommended that service of process should continue to be according to normal practice. But he thought perhaps all agencies should be required to designate by rule an employee on whom process could be served. The staff did not do this. Existing provisions for service on the clerk, secretary, or agency head seem sufficient, and make service easier by providing a choice among several possible officers who may be served.

Except as provided in the administrative mandamus provisions, the rules of pleading and practice for civil actions generally apply to administrative mandamus. Code Civ. Proc. § 1109; California Administrative Mandamus, *supra*, § 8.14, at 268. Thus the respondent may file a demurrer, a motion to dismiss, or an answer as in civil practice. California Administrative Mandamus, *supra*, § 10.1, at 338. The time for filing these pleadings is prescribed by the mandamus statutes. *Id.* § 10.3, at 340-41. Discovery is available in administrative mandamus,

but by case law discovery is tailored to the limited admissibility of evidence in the mandamus proceeding. *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 774-75, 537 P.2d 375, 122 Cal. Rptr. 543 (1975). The rules are the same, whether in superior court or the Court of Appeal. See 2 G. Ogden, *supra*, § 53.05[1][a].

As in trial practice generally, legal argument is presented by points and authorities. California Administrative Mandamus, *supra*, § 8.41, at 293. This is required by court rule for the Supreme Court and courts of appeal. There is no similar provision in superior court rules, so a petition in superior court for administrative mandamus need not be accompanied by points and authorities, although counsel sometimes do so. *Id.*

Professor Asimow recommended generally continuing these rules. Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus* 18 n.63 (Nov. 1993). The staff did so by adding the following to the draft statute:

(1) A provision in Section 1123.610 that the notice of review is served in same manner as summons.

(2) A statement in the Comment to Section 1123.610 that a summons is not required.

(3) A new Section 1123.620 providing that, except as provided in the draft statute or by Judicial Council rule, the rules of pleading and practice for civil actions generally apply to judicial review proceedings, and that discovery is available only to yield evidence that in the exercise of reasonable diligence could not have been produced in the administrative proceeding.

Section 1123.620 is responsive to the Attorney General's suggestion that it be made clear a respondent may file a demurrer, and that an answer is permitted but not required. Under existing law, it is unclear whether an answer is required or merely permitted. See Code Civ. Proc. §§ 1089, 1089.5; California Administrative Mandamus § 10.7, at 346 (Cal. Cont. Ed. Bar, 2d ed. 1989). The draft statute contemplates that this will be addressed by Judicial Council rule.

### **Briefing Schedule**

Section 1123.645 in the draft statute specifies the time for filing the opening brief. **The staff recommends deleting this section.** The timetable for filing documents after the notice of review should be provided by Judicial Council rule. The briefing schedule for civil appeals, for example, is wholly governed by court rule. See Code Civ. Proc. § 901; Cal. Ct. R. 16. If Section 1123.645 is deleted, the authority for Judicial Council rules in Section 1123.620 will achieve this result.

On the other hand, the Attorney General recommends codifying the entire briefing schedule, using appellate rules as the guide. However, it is unclear why the briefing schedule needs to be codified for judicial review when the briefing schedule for civil appeals is provided by court rule.

### **Trial Preference**

A few statutes for judicial review of particular agency actions give the matter a hearing preference. See, e.g., Code Civ. Proc. § 526a (proceeding to enjoin public improvement project); Gov't Code § 65907 (zoning administration), Welf. & Inst. Code § 10962 (welfare decision). **We have not disturbed these provisions in the draft, nor tried to generalize them.** It may be a question whether these provisions are appropriate in cases where the review is not in the nature of a trial and is limited to a determination based on the agency record.

## PREPARATION OF THE RECORD

### **Time to Prepare the Record**

As suggested by Karl Engeman at the April meeting, Section 1123.730 in the draft statute requires the administrative record to be delivered within 60 days after the request for an adjudicative proceeding involving evidentiary hearings of more than 10 days, and within 30 days after the request for an adjudicative proceeding involving evidentiary hearings of 10 days or less and for a non-adjudicative proceeding. Are these time periods too short for adjudicative proceedings of local agencies now subject to the 190-day time period of Code of Civil Procedure Section 1094.6, or for non-adjudicative proceedings?

Under existing law, the record must be prepared within 190 days after the request for review of a decision of a local agency suspending, demoting, or dismissing an officer or employee, revoking or denying an application for a permit, license, or other entitlement, or denying an application for a retirement benefit or allowance. Code Civ. Proc. § 1094.6. Before 1993, the time period for a local agency to prepare the record was 90 days, but the Legislature increased the period to 190 days in 1993. So the 60-day or 30-day period of Section 1123.730 will be a drastic shortening of time for these local agency adjudications, especially problematic since the Legislature recently more than doubled the period. **The staff recommends that Section 1123.730 be revised to provide a longer time period for local agency adjudications.**

The Code of Civil Procedure prescribes no time period for preparation of the record in non-adjudicative proceedings. By court rule in administrative mandamus cases, the record must be lodged with the court at least five days before the hearing, Cal. Ct. R. 347, but this is petitioner's responsibility and puts no obligation on the agency. The Model Act (Section 5-115) applies to review both of adjudicative and non-adjudicative proceedings, but the time is indicated in brackets with no number recommended. **We could increase the time to prepare the record in non-adjudicative proceedings to 60 days.** The justification for doing this would be that there is less likely to be an orderly record kept for non-adjudicative decisions than for adjudications. We could do this by further revising subdivision (c) of Section 1123.730 as follows:

1123.730. . . .

(c) Except as provided by statute, the administrative record shall be delivered to the person seeking judicial review as follows:

(1) Within 60 days after the request for an adjudicative proceeding involving evidentiary hearings of more than 10 days, and for nonadjudicative proceedings.

(2) Within 30 days after the request for an adjudicative proceeding involving evidentiary hearings of 10 days or less, ~~and for nonadjudicative proceedings.~~

(d) The time limits provided in subdivision (c) shall be extended by the court for good cause shown.

### **Cost of Preparing the Record**

The cost of preparing the administrative record is usually the major cost item in administrative mandamus proceedings. California Administrative Mandamus, *supra*, § 13.29, at 430. Rules for paying for and recovering the cost of preparing the administrative record are in three sections, Government Code Section 11523 (proceedings under the APA) and Code of Civil Procedure Sections 1094.5 (non-APA proceedings of state agencies) and 1094.6 (local agency proceedings). These three sections are set out in conforming revisions in the attached draft.

The rules for costs in these three types of proceedings are generally consistent with each other and with the Model Act (Section 5-115). In APA proceedings, the person seeking judicial review initially pays for the cost of preparing the transcript and other portions of the record, and the cost of certifying the record. If the person seeking review prevails in overturning the administrative decision, the agency must reimburse the person for the cost of preparing, compiling, and

certifying the administrative record. Gov't Code § 11523. Other costs, such as the filing fee and fees for service of documents, appear to be recoverable in the court's discretion. California Administrative Mandamus, *supra*, § 13.28, at 430. It is unclear whether the provisions for waiver of costs when the person seeking review proceeds in forma pauperis apply in APA proceedings.

In non-APA proceedings of state agencies, the cost of preparing the record is borne by the person seeking review, except for proceedings in forma pauperis where costs may be waived. The prevailing party is entitled to recover the expense of preparing the administrative record as a cost of suit. Code Civ. Proc. § 1094.5; California Administrative Mandamus, *supra*, § 13.28, at 430. Other costs, such as the filing fee and fees for service of documents, are recoverable by the prevailing party in the court's discretion. *Id.*

In local agency proceedings, the agency prepares the record on request, and may recover from the person seeking review the actual costs of transcribing or otherwise preparing the record. Code Civ. Proc. § 1094.6(c). The statute does not say when the local agency may recover these costs, but most local agencies construe it to mean the cost must be paid before preparation of the record. California Administrative Mandamus, *supra*, § 8.9, at 263. It is unclear whether the in forma pauperis provisions apply to preparation of the record by a local agency. *Id.* at 264. The awarding to the prevailing party against a local agency of the cost of preparing the administrative record and other costs appears to be discretionary with the court. See *id.* § 13.28, at 430.

The foregoing rules for recovery of costs may be summarized as follows:

	<u>Cost of record</u>	<u>Filing &amp; service fees</u>
APA proceedings:	As of right	Court's discretion
Non-APA, state agency:	As of right	Court's discretion
Local agency:	Court's discretion	Court's discretion

There appears to be no policy reason for different rules on costs depending on whether judicial review is of proceedings under the APA, of non-APA proceedings of a state agency, or of proceedings of a local agency. The authority for waiver of costs when the person seeking review proceeds in forma pauperis should apply equally in all three types of proceedings. Similarly, whether the cost of the administrative record and other costs are recoverable as a matter of right or in the court's discretion, the rule should be the same in all three types of proceedings.

In superior court, the recoverability of costs in civil actions generally depends on the nature of the action or proceeding. In some types of cases, costs are recoverable as a matter of right. In other cases, recoverability is for the court to determine in its discretion. 2 B. Witkin, *California Procedure Judgment* §§ 98-101, at 530-34 (3d ed. 1985). Appellate rules for the Court of Appeal say the prevailing party on appeal is entitled to recover costs. Cal. Ct. R. 26(a). The rules for original mandamus proceedings in the Court of Appeal do not deal with the recoverability of costs. See Cal. R. Ct. 56-60.

**The staff recommends a general provision that, except as otherwise provided by Judicial Council rule, the prevailing party on judicial review is entitled to recover costs of suit (not including attorney's fees) as a matter of right.** This would apply equally to the cost of preparing the administrative record and other costs, such as filing and service fees, and would apply equally to review of APA proceedings, non-APA proceedings of state agencies, and proceedings of local agencies. Section 1123.740 in the draft statute does this.

#### ATTORNEY GENERAL'S LETTER

Points raised in the Attorney General's letter (Exhibit pp. 7-14) that are not discussed above are discussed below.

#### **Revisions Accomplished by Staff**

**Definition of adjudicative proceeding.** The definition of "adjudicative proceeding" in Section 1121.220 uses the term "decision," which is defined three sections later. The Attorney General suggests the definition of "adjudicative proceeding" be self-contained. The staff prefers to make a cross-reference in the Comment to Section 1121.220 to Section 1121.250 defining "decision." The staff has done this.

**Stay.** The Attorney General comments on Section 1123.650 (stays), but the section has been revised since the draft to which his comments are directed in a way that addresses some of his concerns. Section 1123.650 now requires an "application" for a stay, and a showing that the "applicant is likely to prevail ultimately on the merits." The staff added to the Comment the two cases cited by the Attorney General construing what "likely to prevail ultimately on the merits" means.

**New Evidence.** Section 1123.760 permits new evidence on judicial review that could not have been produced in the administrative proceeding in the exercise of

reasonable diligence. This continues Section 1094.5(e) of the Code of Civil Procedure. The Attorney General wants to preserve case law saying this exception to the closed record requirement should be narrowly construed, and that extra-record evidence is admissible under this exception only in rare instances. See *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 578, 38 Cal. Rptr. 2d 139, 149 (1995). The staff added this language and case citation to the Comment to Section 1123.760.

### **Revisions on Which the Staff Is Neutral**

**Finality.** The Attorney General wants to delete the second sentence in Section 1123.120. The section says:

A person may not obtain judicial review of agency action unless the agency action is final. Agency action is not final if the agency intends that the action is preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency.

The Attorney General is concerned the second sentence may be inconsistent with case law and could lead uncertainty in some Water Resources Control Board matters. The second sentence comes from Section 5-102(b)(2) of the 1981 Model State APA. It defines "non-final agency action" as "the whole or a part of an agency determination, investigation, proceeding, hearing, conference, or other process that the agency intends or is reasonably believed to intend to be preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency." This language appears to be a useful gloss on the meaning of "finality" as the term is used in the statute. It also appears to protect an agency such as the Water Board, because it limits judicial review. **If the Attorney General still thinks the second sentence causes a problem, the staff is willing to delete it, but in that case it probably should be preserved in the Comment.**

**Exact issue rule.** Section 1123.350 says a person may not obtain judicial review of an issue not raised before the agency unless, in an adjudicative proceeding, the person was not adequately notified of the proceeding. The Attorney General wants to say notice to a person's address of record is sufficient notice for this purpose. If the adjudication is under the APA, our administrative adjudication bill permits notice to a party's last known address, and provides that if a party is required by statute or regulation to maintain an address with an

agency, the party's last known address is the address maintained by the agency. We could expand this to apply to non-APA adjudications by adding the following to Section 1123.350:

1123.350. . . . .

(a) The court may permit judicial review of an issue that was not raised before the agency if any of the following conditions is satisfied:

. . . . .

(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 regulation requires the person to maintain an address with the agency, adequate notice includes notice to the address maintained with the agency.

#### **Revisions Not Recommended by Staff**

**Concurrent jurisdiction.** The Attorney General suggests the term "concurrent jurisdiction" used in Section 1122.030 is unclear. But this term is taken from case law. See, e.g., *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 449, 658 P.2d 709, 189 Cal. Rptr. 419 (1983) (a "long line of decisions indicates that remedies before the Water Board are not exclusive, but that the courts have concurrent original jurisdiction").

**Standing.** The draft statute preserves taxpayer actions to enjoin wasteful expenditure of public funds (Code Civ. Proc. § 526a), but replaces existing standing rules for taxpayer actions with general public interest standing rules of the draft statute (Section 11234.230). The Attorney General is concerned about this. He says the new rules may be too broad and encourage excessive litigation. However, its effect is exactly the opposite. Under existing law, the plaintiff must merely be a resident of the jurisdiction and liable to it for taxes. The extreme liberality of existing standing rules for taxpayer actions gives cause for concern. The draft statute should be an improvement, and should solve the problem the Attorney General is concerned about.

The Attorney General is also concerned more broadly about the public interest standing provision, fearing it may be too broad. Although it is consistent with existing California law, he is concerned that existing law perhaps ought not to allow public interest standing, and instead conform to federal law which does not recognize public interest standing. The Commission concluded that it is politically necessary not to restrict existing law on this issue.

**Exceptions to exhaustion.** Section 1123.340 continues existing law by providing an exception to the exhaustion of remedies requirement if the person seeking review lacked notice of the availability of a remedy. This exception has often been applied in local land use planning cases where persons affected by an application were not given notice. The Attorney General says this improperly avoids administrative review, and that it would be "better practice" for the court to remand the matter back to the agency. This is addressed in Section 1123.660(b) which gives the court general authority to remand a case to the agency for further proceedings.

**Review of agency interpretation or application of law.** The Attorney General suggests Section 1123.420 (independent judgment review of agency interpretation or application of law) be revised as follows to make it simple and to avoid possibly expanding independent judgment review:

1123.420. (a) This section applies to a determination by the court of any of the following issues:

(1) Whether the agency action, or the statute or regulation on which the agency action is based, is unconstitutional on its face or as applied.

~~(2) Whether the agency acted beyond the jurisdiction conferred by the constitution, a statute, or a regulation.~~

~~(3) Whether the agency has decided all issues requiring resolution.~~

~~(4) Whether the agency has erroneously interpreted the law.~~

~~(5) Whether the agency has erroneously applied the law to the facts.~~

(2) Considerations of questions of law.

The staff recommends against this change. Paragraphs (2) to (4) are much clearer and less likely to expand independent judgment review than the suggested language. The Attorney General is concerned about the application provision of paragraph (5), saying it "could subsume an entire case, and thereby undermine appropriate deference to the administrative determination" But Section 1123.420 does require appropriate deference to the administrative determination in application questions as well as in pure questions of law, and we do need an express provision on how application questions are to be treated.

**Joining causes of action.** The Attorney General believes that joinder of causes is allowed under existing law, and should continue to be allowed. Otherwise, in order to preserve a fair hearing right, parties would have to file a separate

lawsuit. "That would be inefficient and disjointed. Parties should be allowed to join all related claims in one lawsuit."

The Attorney General also recommends a provision permitting appeal of the superior court decision on judicial review before a joined claim is tried. The staff believes a better approach is not to give the person seeking judicial review a right to join other causes of action, but rather the court should have discretion to order consolidation of related litigation as in other cases. See generally 4 B. Witkin, *California Procedure Pleading* §§ 298-304, at 351-57 (3d ed. 1985).

**Type of relief.** Section 1123.660 permits the court to

grant other appropriate relief, whether mandatory, injunctive, or declaratory, preliminary or final, temporary or permanent, equitable or legal. In granting relief, the court may order agency action required by law, order agency exercise of discretion required by law, set aside or modify agency action, enjoin or stay the effectiveness of agency action, remand the matter for further proceedings, render a declaratory judgment, or take any other action that is authorized and appropriate.

The Attorney General thinks this language is vague, overbroad, and gives the court too much authority. He prefers a provision more like existing Section 1094.5(f) of the Code of Civil Procedure, which provides:

(f) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

The staff recommends against doing this. Section 1094.5(f) is tailored to judicial review of adjudication, while the draft statute provides for judicial review of all forms of agency action and replaces declaratory and other forms of relief, so broad judicial authority is needed in Section 1123.660.

#### CIVIL ENFORCEMENT OF AGENCY RULE OR ORDER

Professor Asimow recommended the draft statute provide that an agency can seek enforcement of a rule or order, including a subpoena, by a petition to the

court for civil enforcement. Asimow, *supra*, 21. The Model Act has a whole chapter with five sections on civil enforcement. It permits an agency to seek enforcement of its rule or order by filing with the court a petition for civil enforcement. The agency may request declaratory relief, temporary or permanent injunctive relief, and any other civil remedy provided by law. If the agency fails to seek civil enforcement, any person with standing may file the petition for civil enforcement after notice to the agency. The contents, preparation, and transmittal of the agency record are the same as for judicial review generally under the Model Act.

There are many provisions in existing law for enforcement of agency orders and regulations. The APA authorizes the contempt sanction to enforce subpoenas and other orders of the presiding officer in an adjudicative proceeding. The Commission's administrative adjudication recommendation (SB 532) would broaden this authority to apply to all adjudicative hearings of state agencies.

Regulations are enforced in several ways. An agency may enforce a regulation by disciplinary action against a licensee after administrative adjudication. Statutes may authorize an agency to apply to a court for a temporary restraining order or preliminary injunction. See, e.g., Bus. & Prof. Code §§ 125.7, 125.8, 6561(j); Gov't Code §§ 12973, 12974. Statutes may authorize an agency to make cease and desist orders. See, e.g., Bus. & Prof. Code § 149; Gov't Code § 12970. An agency may have statutory authority to adopt administrative regulations enforceable criminally by the district attorney. See, e.g., Bus. & Prof. Code § 556; see generally 1 G. Ogden, *supra*, §§ 41.06, 22.01, 22.02[c], 22.07.

It is unclear whether new statutory authority for enforcement of agency rules and orders is needed. The Model Act provisions were drawn from a Florida statute. Of the three states that have enacted the 1981 Model Act (Arizona, New Hampshire, and Washington), only Washington has enacted the civil enforcement provisions. The staff is concerned that the Model Act provision for an interested individual to obtain civil enforcement of an agency order (but not a regulation) when the agency itself chooses not to enforce it may interfere with agency discretion and encourage needless litigation. Herb Bolz of the Office of Administrative Law is not sure this provision is needed. If new statutory authority is needed, we could add a new chapter to the draft statute as follows:

#### Chapter 4. Civil Enforcement

**§ 1124.110. Petition by agency for civil enforcement of rule or order**

1124.110. (a) In addition to other remedies provided by law, an agency may seek enforcement of its rule or order by filing a petition for civil enforcement in the superior court.

(b) The petition shall name as defendants each alleged violator against whom the agency seeks civil enforcement.

(c) Venue is determined as in other civil cases.

(d) A petition for civil enforcement filed by an agency may request, and the court may grant, declaratory relief, temporary or permanent injunctive relief, and any other civil remedy provided by law, or any combination of the foregoing.

**Comment.** Section 1124.110 is drawn from 1981 Model State APA Section 5-201. The section authorizes an agency to seek civil enforcement of its rule or order.

**§ 1124.120. Petition by interested person for civil enforcement of agency's order**

1124.120. (a) Any interested person may file a petition in the superior court for civil enforcement of an agency's order.

(b) An action for civil enforcement may not be commenced under this section until at least 60 days after the petitioner has given notice of the alleged violation and of the petitioner's intent to seek civil enforcement to all of the following:

(1) The head of the agency concerned.

(2) The Attorney General.

(3) Each alleged violator against whom the petitioner seeks civil enforcement.

(c) An action for civil enforcement may not be commenced under this section if either of the following conditions exist:

(1) The agency has filed and is diligently prosecuting a petition for civil enforcement of the same order against the same defendant.

(2) A notice of review of the same order has been filed and is pending in court.

(b) The petition shall name as defendants the agency whose order is sought to be enforced and each alleged violator against whom the petitioner seeks civil enforcement.

(c) The agency whose order is sought to be enforced may move to dismiss on the grounds that the petition fails to qualify under this section or that enforcement would be contrary to the policy of the agency. The court shall grant the motion to dismiss unless the petitioner demonstrates that the petition qualifies under this section and the agency's failure to enforce its order is based on an exercise of discretion that is improper on one or more of the following grounds:

can be raised, and the authority of the court to consider issues and take evidence.

Subdivision (b)(3) clarifies that a party who admits a past violation and demonstrates subsequent compliance is not necessarily relieved from any sanction provided by law for the past violation.

**§ 1124.140. Incorporation of certain provisions on judicial review**

1124.140. Proceedings under this chapter are governed by the following provisions of this title on judicial review, as modified where necessary to adapt them to those proceedings:

(a) Ancillary procedural matters, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material.

(b) Sections 1123.720, 1123.730, and 1123.735 (agency record for judicial review — contents, preparation, transmittal, cost).

**Comment.** Section 1124.140 is drawn from 1981 Model State APA Section 5-204.

**§ 1124.150. Review by higher court**

1124.150. Decisions on petitions under this chapter are reviewable by the court of appeal as in other civil cases.

**Comment.** Section 1124.150 is drawn from 1981 Model State APA Section 5-204.

**OPERATIVE DATE; TRANSITIONAL PROVISION**

The draft statute (Section 1121.120) has an operative date of January 1, 1998 — a delay of one year if the bill is enacted in 1996. The draft statute provides that it does not apply to pending proceedings for judicial review. It authorizes the Judicial Council to provide by rule for the orderly transition of proceedings for judicial review pending on the operative date. Section 1121.130.

**CONFORMING REVISIONS**

The attached draft includes many conforming revisions, but the staff must make a comprehensive search for other sections that need to be conformed.

Respectfully submitted,

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Staff Counsel

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April 27, 1995

Law Revision Commission  
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Colin Wied, Chair  
 California Law Revision Commission  
 4000 Middlefield Rd. D-2  
 Palo Alto, CA 94303

Dear Colin,

This letter addresses several issues that have arisen concerning the scope of review sections of the proposed judicial review statute.

1. PERB--clearly erroneous standard: Mr. McMonigle's letter of April 6, 1995, argues that the "clearly erroneous" standard should apply to PERB's legal interpretations.

a. Dealing with PERB and ALRB under the statute. I believe it would be a serious error to create a different standard for the labor agencies from all the others. The same standard should apply to all agencies. If "clearly erroneous" applied to PERB and ALRB, and weak deference to everybody else, there would be immediate and unending confusion about what the difference was between the two standards. In general, there is no justification for treating these two labor agencies differently or more deferentially than any other agency that renders a legal interpretation.

I also disagree with the position taken by staff in the first supplement to Memorandum 95-21--treating legal interpretations by PERB and ALRB as if they are exercising delegated interpretive power. There is no evidence that the legislature intended to delegate interpretive power with respect to all of the words in PERB's or ALRB's statutes. You need some additional showing to find a delegation--either something explicit

(like "as defined by the agency") or the use of a term so vague that obviously delegation was intended ("public interest"). If PERB has delegated interpretive power for every word in its statute, so does every other agency with respect to every word in their statutes.

b. Applying weak deference to the labor agencies. Instead the weak deference standard should be applied to PERB and ALRB. Normally these two agencies will enjoy great judicial deference from the courts for their legal interpretations. Generally, these interpretations fall within weak deference factor 5: "the degree to which the legal text is technical, obscure, or complex, and the agency has interpretive qualifications superior to the court's."

Therefore, I suggest that the various PERB "clearly erroneous" cases be included in the comment under 1123.420(b) (the weak deference standard) rather than (c) (the delegation standard). These cases are good examples of substantial deference being given to agency interpretations in an area where the agency clearly has interpretive qualifications superior to the court's. And that really should solve PERB's problem without creating major problems in drafting the statute.

c. Derivation of "clearly erroneous" standard in PERB cases. The "clearly erroneous" standard found in several California cases applicable to PERB is not drawn from federal law. The "clearly erroneous" standard is never used by federal courts with respect to judicial review of questions of law. In federal cases, that test applies only to review of factual determinations made by trial judges.

The "clearly erroneous" test for reviewing questions of law is found in numerous California cases applying to several agencies, not just PERB. In my forthcoming article on scope of judicial review, I treat the clearly erroneous test as just another way of expressing the general California "weak deference" rule--that if various factors are present, a court should give deference to an agency's interpretation. One of my footnotes tries to prove this point as follows:

...the Supreme Court said: "We have generally accorded respect to administrative interpretations of a law and, unless clearly erroneous, have deemed them significant factors in ascertaining statutory meaning and purpose." Nipper v. Calif. Automobile Assigned Risk Plan, 19 Cal.3d 35, 45, 136 Cal.Rptr. 854 (1977) (emphasis added). This language indicates that the Court sees the "clearly erroneous" test as simply another way to state the "deference" test. Similarly, see San Lorenzo Education Ass'n v. Wilson, 32 Cal.3d

841, 850, 187 Cal.Rptr. 432 (1982); Coca Cola Co. v. State Bd. of Equalization, 25 Cal.2d 918, 921, 156 P.2d 1 (1945); City of Anaheim v. Workers' Comp. Appeals Bd., 124 Cal.App.3d 609, 613, 177 Cal.Rptr. 441 (1981).

In an early and often quoted decision, the Court seemed to equate the "clearly erroneous" and "weak deference" approaches. *Bodinson Mfg. Co. v. Calif. Employment Comm'n*, 17 Cal.2d 321, 325-26, 109 P.2d 935 (1941). A number of cases stating the "clearly erroneous" test rely on Bodinson or on intervening cases that relied on Bodinson and thus presumably endorse the reasoning in that case. See *Banning Teachers Ass'n v. Public Empl. Rel. Bd.*, 44 Cal.3d 799, 804-05, 244 Cal.Rptr. 671 (1988); *Judson Steel Corp. v. Workers Comp. Appeals Bd.*, 22 Cal.3d 658, 668-69, 150 Cal.Rptr. 250 (1978).

To flesh out this footnote a bit more, the seminal *Bodinson* case (on which many of the PERB cases rely) said: "...the administrative interpretation of a statute will be accorded great respect by the courts and will be followed if not clearly erroneous...But such a tentative administrative interpretation makes no pretense at finality and it is the duty of this court, when such a question of law is properly presented, to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction...The ultimate interpretation of a statute is an exercise of the judicial power...The judicial power is conferred upon the courts by the Constitution, and in the absence of a constitutional provision, cannot be exercised by any other body..." 17 Cal.2d at 325-26. In other words-- "clearly erroneous" is just another way of stating the idea of independent judgment with weak deference.

e. NLRB cases. Mr. McMonigle argues that PERB should receive the same deference as does the NLRB in federal cases since its statutes were modelled on federal labor law.

The U. S. Supreme Court sometimes reviews the NLRB's legal interpretations by using an abuse of discretion standard and upholding them if they are "reasonable." This tends to occur with respect to vague, open-ended provisions of the NLRA where it can be argued that Congress meant to delegate authority to the agency to construe the law.

However, I had no difficulty after a few minutes in the library finding Supreme Court cases involving the NLRB which used independent judgment in reviewing NLRB legal interpretations. I'll set forth a few here and I'm sure I could

a. NLRB v. Highland Park Mfg. CO., 341 U.S. 322 (1951): The Court decided that "in the speech of the people" the CIO is a "national or international labor organization." It ignored the dissenters who claimed that the Court should defer to the Board's reasonable contrary interpretation.

b. NLRB v. Yeshiva Univ., 444 U.S. 672, 682-90 (1980) independently decides that professors are managerial employees so that they aren't subject to the requirement that the University recognize their union. The dissenters complained about the lack of deference.

c. DeBartolo Corp. v. Fla. Gulf Coast Trades Council, 485 U.S. 568, 575 (1988): The Court independently decided that the secondary boycott provisions of the Act are inapplicable to the leafletting activity involved in the case. The normal rule of deference to the NLRB's statutory construction did not apply because of the constitutional overtones in the case.

d. NLRB v. Int'l Bro. of Electrical Workers, 481 U.S. 573 (1987) independently rejects the Board's construction of §8(b)(1)(B) of the Act. The dissenters complained about the absence of deference.

e. NLRB v. Food & Commercial Workers, 484 U.S. 112, 123 (1987) illustrates the application of the currently prevailing two-step Chevron doctrine to the Board. The Court upheld the validity of the Board's regulation but decided the matter independently. However, if the statute were silent or ambiguous, then it would follow a rational Board decision. Chevron Step 1 decisions are without deference to the Board's view.

All of which indicates that the NLRB isn't special; it's like other federal agencies when its legal interpretations get reviewed by the Supreme Court. The Court's NLRB cases use all sorts of different formulations. There is no clear signal here that should be followed in California. And, I repeat, the "clearly erroneous" test is never used for this purpose by the federal cases.

2. PERB--applications of law to fact. §1123.420 treats applications of law to fact (so called ultimate or mixed questions) as questions of law subject to weak deference. Normally, applications by the labor agencies of vague statutes to complex factual patterns are entitled to significant deference under factor (5), as discussed above.

Interestingly, we seem to have a statutory delegation to PERB with respect to applications of law to fact. Gov't

C. §3564(c) requires that courts review PERB's fact findings and ultimate fact findings under the substantial evidence test. The substantial test here means courts must uphold reasonable agency applications of law to fact. This, in effect, is the same as a formal delegation of the power to apply law to fact. Therefore, these applications would fall within §1123.420(c). I didn't research the other PERB and ALRB statutes to see whether there is a similar delegation. Presumably our comment should recognize the presence of an explicit delegation in these cases (or, if you prefer, that the legislature has required that the ultimate fact findings of PERB be treated as fact, not law, which leads to about the same result).

3. Local ordinances. Sandy Skaggs argued that local city councils always have delegated power to interpret the words in local ordinances they have enacted. As a theoretical matter, this is troubling. There is no separation of powers at the local level; the same people are the legislators, executives, and often adjudicators. But just the same, they should have no greater power when they interpret their own laws as executives or adjudicators than another agency has when it interprets the legislature's laws.

Instead, a local agency interpreting its own ordinance should be in the same situation as an agency interpreting its own regulations. Agencies are given substantial deference in this situation (factor (1) of §1123.420(b)), but not delegated power.

The cases Sandy gave me do not stand for the proposition that a local agency has delegated power in interpreting the language of all local ordinances. See, e.g., Sequoyah Hills Homeowners Assn. v. Oakland, 23 CA4 704, 717-20.

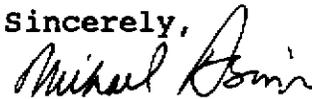
Instead, these cases all concern the following situation: a local agency has adopted a general land use plan. Then it has to decide whether a specific project is consistent with that plan. The courts say that the agency's decision approving the project is reviewed under an abuse of discretion standard. I wholly agree. The question is whether a project is "compatible with the objectives, policies, general land uses, and programs specified in the applicable plan." Obviously, this is a policy question, not a law question. It calls for a huge amount of discretion. It comes under §1123.440, review for abuse of discretion. It does not involve legal interpretation.

But let's say a City Council passes an ordinance prohibiting sleeping on the streets. Later it adopts a regulation stating that the word "sleeping" means an afternoon nap and the word "streets" means the courthouse steps.

Suppose there's a subsequent prosecution for snoozing during the afternoon on the courthouse steps. The court happens to disagree with Council's interpretation of the ordinance. Nevertheless, does the court have to follow the regulation anyhow because the Council had delegated legislative power to interpret its own law? I don't think so. I think the applicable standard of review should be the same rule--weak deference--applicable to all other legal interpretation by state and local agencies. It shouldn't matter that the council is interpreting its own ordinance (although this may be a factor counseling weak deference since the Council is obviously familiar with the circumstances giving rise to adoption of the ordinance).

Thanks for your attention to the foregoing.

Sincerely,



Michael Asimow



Law Revision Commission  
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JUN 28 1995

File: \_\_\_\_\_

State of California  
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Daniel E. Lungren  
Attorney General

California Law Revision Commission  
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Palo Alto, CA 94303-4739

RE: Commission's April 14, 1995 Staff Draft:  
Judicial Review of Agency Action

Dear Commission Members:

The Commission has sought this office's comments on its proposal to restructure the law governing judicial review of agency actions. The following views are offered on the proposals as outlined in the April 14, 1995, staff draft currently before the Commission.

**Definition of Adjudicative Proceeding** (Section 1121.220): Understanding this definition is a bit cumbersome, since the definition requires an understanding of the term "decision," which is defined elsewhere. A self-contained definition of adjudicative proceeding would be preferable.

**Concurrent Jurisdiction** (Section 1122.030): The term concurrent jurisdiction is unclear, and could lead to abuse. Where a contractor has allegedly performed incompetent work, for example, he may be sued by a dissatisfied client and also face an agency revocation hearing. Are the agency and judicial proceedings considered concurrent under this section? If so, this could lead to an unwarranted usurpation of agency jurisdiction.

**Finality** (Section 1123.120): The term "finality" has been defined by extensive case law. The attempt to redefine it (in the second sentence of section 1123.120) could lead to uncertainty regarding proceedings in which agency jurisdiction is ongoing (e.g., some State Water Resources Control Board matters). The second sentence should therefore be stricken.

California Law Revision Commission  
Page 2

**Standing** (Section 1123.210, et seq.): Our office is concerned that the Commission's proposal, especially the replacement of "taxpayer suit" standing to review non-adjudicative actions with "public interest standing," may be too broad and may encourage excessive litigation. The proposal appears to expand standing beyond current law. Moreover, current law may be too broad; the federal approach to standing may be more appropriate. I have asked my staff to further analyze this issue, and will let you know when a firm conclusion has been reached. In the meantime, I wanted to alert you to my concern.

**Exceptions to Exhaustion** (Section 1123.340): Under subdivision (d), where a person lacked notice of the availability of a remedy, the court can review the matter even though it has not been reviewed by the agency. This approach, however, improperly avoids administrative review. The better course would be to remand the matter back to the agency for its review.

**Exact Issue Rule** (Section 1123.350): Paragraph (4) of subdivision (b) permits judicial review of an issue that was not raised before the agency where a person was not adequately notified of an adjudicative proceeding. To avoid unnecessary disputes, the term "adequately notified" should be defined as including the sending of a notice to a person's address of record.

**Review of agency interpretation or application of law** (Section 1123.420): This office suggests that issues (2) through (5) under subdivision (a) be replaced with "considerations of questions of law." This is both simple, and avoids a possible expansion of independent judgment review which some of the listed issues could create. Questions such as whether an agency erroneously applied the law to the facts (issue [5]), for example, could subsume an entire case, and thereby undermine appropriate deference to the administrative determination.

**Substantial Evidence/Independent Judgment** (Section 1123.430): Questions of fact should be decided under the substantial evidence test. This would provide for uniform judicial review of decisions from constitutional as well as non-constitutional agencies.

The current system is also demonstrably less than rational. Since the independent judgment test applies only to nonconstitutional agencies, the same type of decision is sometimes reviewed under different standards. (For example, Public Employee Relations System disability decisions are reviewed under the independent judgment test, while workers compensation disability decisions are reviewed under the substantial evidence test.) Further, the concept of a "fundamental vested right" (which triggers independent judgment) is a frequent subject of litigation, since the phrase's definition is both shifting and rather blurred. The term "vested," for example, has been expanded beyond its usual meaning to include denials of applications for various benefits. The term "fundamental" is generally understood to be more likely to apply to personal interests than to economic interests; thus decisions of like kind, made by the same agency, may be subject to different tests on judicial review, depending upon the outcome before the administrative agency. The decisions yield results impossible to predict and have caused an "incessant litigant's parade" to the courts.

Finally, California is the only jurisdiction in the nation which utilizes the independent judgment test. Although I do not consider uniqueness, in and of itself, to be an objection to continuation of the independent judgment test, it appears that the judicial systems of the other 49 states and the federal government have operated successfully without that test. California's system should likewise operate fairly and effectively without independent judgment review of agency fact-finding.

The draft proposal's retention of the independent judgment test where an agency changes an Office of Administrative Hearings Administrative Law Judge's finding of fact, or has increased a penalty, is unwise. It imprudently transfers authority from agency heads to Administrative Law Judges. Agency heads may be deterred from altering improperly determined findings of fact, or from increasing unduly low penalties, if such modifications to the decision will increase the chances of a judicial reversal. Since agency heads are elected, or appointed by elected officials, they are accountable to the people of the State. Given this accountability, their authority should not be eroded.

**Venue** (Section 1123.510 (b)): The proposal calls for superior court venue in the county where the party seeking review resides or has a principal place of business. Professor Asimow recommended this approach if Administrative Procedure Act adjudicative hearing decisions are directly reviewed in the court of appeal; otherwise, he recommended that state agency decisions be reviewed in Sacramento, or, where representation is provided by my office, in counties where such an office is located.

If the direct appellate review proposal is rejected, Professor Asimow's alternative venue suggestion is a wise approach. This will insure that review is by courts which are familiar with the often difficult area of administrative law and with state agency practices. Moreover, since these court proceedings are usually very short, and generally limited to the administrative record, any inconvenience to private parties should be minor. It would be far outweighed by the advantage of having courts with specialized expertise hearing these cases.

**Expansion of Direct Appellate Review (Section 1123.520):** Under current law, most agency decisions are reviewed by the superior courts. A handful are directly reviewed by appellate courts. The proposal recommends that most state agency quasi-judicial decisions be directly reviewed by the courts of appeal. Exceptions are suggested for high volume, relatively low-stakes, fact-oriented appeals.

This is an imprudent idea for two reasons. First, data from two of our sections specializing in the area, and the general experience of a number of sections, indicate that a high percentage of cases are resolved at the superior court level. Direct appellate review therefore would be likely to impose a major new burden on the appellate courts of this state.

Second, as discussed later (under "Joining Causes of Action,") it is critical that inverse condemnation and other claims be joined with any hearing review lawsuit. This will be very awkward, however, if actions are directly filed in the appellate courts - these courts are not designed to conduct trials.

The combination of the burden imposed on the appellate courts and the need to join causes of action calls for a rejection of expanded direct appellate review. Accordingly, review should be retained in superior court.

**Procedures for Initiating Review (Section 1123.610):** The Commission has requested my office's input regarding whether review should be initiated by a notice of review or by a petition for review.

The Commission's draft proposal does not contemplate continued use of administrative mandamus as the vehicle for review of administrative adjudication. I believe that review of agencies' adjudicatory decisions by this historically established writ continues to be appropriate, and should not lightly be discarded. My comments under this and the remaining headings of this letter do not, therefore, imply agreement with the

substitution of proposed procedures for the existing form of practice under Code of Civil Procedure section 1094.5. Rather, they should be understood as examining the draft proposal according to its own terms, without an implication that acceptance of the suggestions posited here would necessarily result in support of the draft proposal itself.

As between a notice of review and a petition for review, a petition for review is more appropriate. And, at the very least, the requirements listed in section 1123.630 should be mandatory in a petition for review filed in superior court.

Provisions should be added making clear that a respondent has the right to demur to the petition, and that an answer is permitted but not required. As in civil actions, the right to demur will enable parties to quickly end fatally defective suits, such as actions barred by a statute of limitations. Making an answer optional, rather than obliging the respondent to file an answer along with the demurrer (see Code of Civ. Proc. § 1089), allows a party to forgo the drafting of answers when they are superfluous. Further to this point, it is noted that under the proposal, when the action involves the appeal of an agency hearing decision, a party might be able fully to present its case in its opposition brief. Under the form of review contemplated by the draft proposal, an answer might be of little benefit to the parties.

*Time for filing Briefs* (Section 1123.645): The draft proposal only addresses the time for filing opening briefs (within 60 days after filing the notice of review, or, if a transcript or record is requested, within 60 days after the transcript or record is filed). The filing of opposition and reply briefs also needs to be addressed in any proposal for this form of review. The best approach would probably be to follow Rule 16 of the California Rules of Court. Rule 16 calls for the filing of an opening brief within 30 days of the filing of the record; a respondent's brief is filed within 30 days of the filing of the opening brief and a reply brief is filed within 20 days of that filing. The parties may extend those periods for up to 60 days by stipulation; further extensions require good cause and court approval. If the Commission retains its proposed 60 day period for filing opening briefs (rather than Rule 16's 30 day period), the 30 day period for filing respondent's briefs should also be lengthened, to give the respondent sufficient time to analyze the opening brief's assertions. There is probably no reason to lengthen the 20 day period for filing a reply brief, since the key contentions should already be known by the parties.

**Stay (Section 1123.650):** Where the petitioner seeks a stay of the agency decision, a formal petition for stay order should be pled alleging facts necessary to demonstrate the case meets the requirements of section 1123.620 in addition to compliance with the stay order requirements outlined in section 1123.650(a)(1)-(4). Furthermore, section 1123.650(a)(1) should be rewritten to conform to current law, "that the agency is unlikely to prevail ultimately on the merits." Case law which interprets current stay order requirements should be maintained. (See *Board of Medical Quality Assurance v. Superior Court* (Willis), 114 Cal.App.3d 272 (1980); *Medical Board of California v. The Superior Court* (Elam), 227 Cal.App.3d 1458 (1991).)

**Joining Causes of Action (Sec 1123.660):** Under current law, mandamus actions may be joined with other causes of action. In drafting its judicial review proposal, however, Commission staff assumed that no other causes of action could be joined with its proposed action. This is unwise. In *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, the California Supreme Court held that where an agency's hearing procedure does not provide an adequate opportunity to present an inverse condemnation (constitutional) claim, a party can preserve his right to a full and fair hearing on that claim by joining it to a mandate proceeding. (*Id.* at 16.) Section 1123.660 would negate that approach. To preserve a fair hearing right, parties would therefore have to file a separate lawsuit. That would be inefficient and disjointed. Parties should be allowed to join all related claims in one lawsuit.

Moreover, if claims are joined, there should be a provision permitting (but not requiring) parties to appeal the trial court's decision regarding the review claim before the joined claim is tried. There are two reasons for this.

First, since some agency actions often affect many non-parties, it is important that agencies receive an expedited final statement of the validity of their actions, in order to enable them to consider future actions taken in contemplation of the result of the case.

Second, immediate appeal of the review claim will permit all parties to avoid the significant costs of an inverse condemnation or similar trial by conforming the conduct of the litigation to the result of that review.

**Type of Relief (Sec 1123.660):** This section requires further analysis on the part of the Commission, since it is both vague and overbroad. It appears, for example, to authorize courts reviewing adjudicative proceedings to issue open-ended

orders which could render the administrative adjudication meaningless. At the very least, the areas of inquiry should be enumerated in a provision comparable to Code of Civil Procedure section 1094.5, subdivision (b),<sup>1</sup> and the authority of the court to grant relief should be specified in a provision similar to subdivision (f) of the same section.<sup>2</sup>

**New Evidence** (Section 1123.760): Under existing law, courts reviewing both quasi-judicial and quasi-legislative decisions are not to receive new evidence unless the evidence falls under one of two exceptions. ("Relevant evidence which, in the exercise of reasonable diligence, could not have been produced [at the hearing]" or relevant evidence "which was improperly excluded at the hearing before the respondent ...." [Code Civ. Proc. Section 1094.5(e).; *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 574.]) The California Supreme Court recently held that the first exception is to be "very narrowly construed" and that parties will only be able to meet that condition in "rare instances." (*Id.* at 578.)

Existing law with respect to the reception of new evidence should be retained. First, the provision under which new evidence can be received by a court utilizing independent judgment (assuming that independent judgment is retained) should limit that evidence to evidence which could not have been produced or which was improperly excluded at the agency level. Second, a comment indicating that the statute is not intended to alter existing case law (especially *Western States*) is important. Restricting the ability to introduce new evidence before a court

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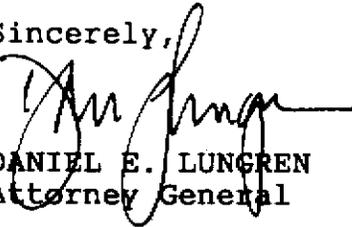
1. "(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

2. "(f) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent."

helps preserve the integrity of the agency process and reduces gamesmanship at the judicial level.

Thank you for considering these views on the present undertaking.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dan Lungren", with a horizontal line extending from the end of the signature.

DANIEL E. LUNGREN  
Attorney General

**AGRICULTURAL LABOR RELATIONS BOARD****OFFICE OF THE EXECUTIVE SECRETARY**

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July 11, 1995

Nathaniel Sterling  
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Dear Mr. Sterling,

This Board has just received a copy of Memorandum 95-30 in which Commission staff now recommends that this Board's interpretations of its statute not be accorded any more than what Professor Asimow characterizes as "weak deference." This position represents a change from that taken in First Supplement to Memorandum 95-21 in which, pursuant to the suggestions of ALRB and PERB, staff was apparently persuaded that the two agencies had been delegated interpretive authority.

The Commission's change of heart was caused by Professor Asimow's letter of April 27, 1995 in which Asimow argued that there should be no "special standard of review for determinations of questions of law" by the labor agencies. As a preliminary matter, the Board does not understand why Professor Asimow characterizes the Board as arguing for a "special" standard when the standard for which it contends is contained in the draft statute: the Board is only asking for recognition that the abuse of discretion standard applies to it.

The Board also cannot understand Professor Asimow's argument that to clearly indicate which standard applies to the Board would create "unending confusion" in light of the fact that the draft statute not only provides two different standards for review of an agency's action [subsections (b) and (c)], but also under subsection (b) the amount of deference due particular agency action varies according to "the circumstances of the . . . action." The Board respectfully submits that the only certain way to avoid "unending confusion" in the matter of judicial review is to avoid Professor Asimow's sliding scale of review.

Professor Asimow also implies that treating the labor agencies differently is unprecedented. ALRB was the first non-constitutional agency whose findings were given the dignity of those of a trial court when the Legislature specifically provided that our decisions be reviewed in the courts of appeal under the

substantial evidence test. This agency has been historically accorded very special treatment by the Legislature.

Professor Asimow's endorsement of a "weak deference" standard is based upon his conclusion that this is the standard used by the courts in reviewing Board decisions. However, the rubrics "strong" or "weak" are not used by the courts in reviewing our cases and they appear to be little more than characterizations of the kind of oversight actually exercised by the courts as opposed to the standards recited by them. As illustrated below, the accepted standard of review is that the Board's interpretations of its statute are accorded great deference and will not be disturbed unless they are unreasonable. Professor's Asimow's substitution of "weak deference" for the current standard of review will not clarify, but change, current law.

As noted in my previous letter, aside from promulgating regulations, the Board typically interprets the ALRA in four different contexts, rulemaking, the certification of representatives, the adjudication of unfair labor practices, and the fashioning of remedies. Because my previous letter specifically addressed the deference due the Board in rulemaking, I will not repeat any of that discussion here, but will content myself with presenting examples of the deference received by the Board in these other contexts.

In the context of the certification of representatives, the court in Ruline Nursery Co. v Agricultural Labor Relations Board (1985) 169 Cal. App. 3d 247, 259 stated:

The ALRB is the agency entrusted with the enforcement of this Act and its interpretation of the Act is to be accorded 'great respect by the courts and will be followed unless clearly erroneous.' [Cite] The United States Supreme Court is in accord: 'We are unprepared to hold that this is an impermissible construction of the Act. The Board's construction here, while it may not be required by the Act, is at least permissible under it . . . ' and in these circumstances its position is entitled to deference.' [Cite] NLRB v Transportation Management Corp. (1983) 462 U.S. 393, 402-403.

Accepting a reasonable construction of the Act is not "weak" deference.

Similarly, in the area of unfair labor practices, the Board is also accorded a great deal of deference. In Montebello Rose Company v. Agricultural Labor Relations Board (1981) 119 Cal. App. 3d 1, for example, the Court upholds what it describes as the Board's "strained" construction of the Act because it is compelled to defer to the Board's interpretation of the Act; accepting a strained construction of the Act because it must, is not "weak" deference.

In the area of the Board's fashioning of remedies, our Supreme Court has stated: "In general, the board's remedial order 'should stand unless it can be shown that it is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act.'" Carian v. Agricultural Labor Relations Board (1984) 36 Cal 3d. 654, 674 Requiring an objecting party to demonstrate that the Board's remedy is clearly outside the boundaries of its remedial power can hardly be said to constitute "weak" deference.

Even if there are cases from which Professor Asimow could plausibly argue that, despite what the courts have said about their constraints, they have substituted their judgment for the Board, their existence does not require the standard of review to be changed to conform to them.

Before closing, I would like to take the opportunity to reply to Professor Asimow's argument that he had no difficulty finding Supreme Court cases involving the NLRB which used "independent judgment" in reviewing NLRB legal interpretations. . . ." The five cases are: NLRB v Highland Park Manufacturing Co (1951) 341 U.S. 322; NLRB v Yeshiva University (1980) 444 U.S. 672; DeBartolo Corp v. Florida Gulf Trades Council (1988) 485 U.S. 568; NLRB v. Int'l Bro. of Electrical Workers (1987) 481 U.S. 573; and NLRB v Food and Commercial Workers (1987) 484 U.S. 112. In none of them does the Court say: "We recognize that what the NLRB says is reasonable, but we have the power to declare to the contrary and we will do so."

Thus, in De Bartolo, Justice White begins his opinion by explaining that

The Board, the agency entrusted by the Congress with the authority to administer the NLRA, has "the special function of applying the general provisions of the Act to the complexities of industrial life." [Cite] \* \*  
\* That statutory interpretation by the Board would normally be entitled to deference unless that construction were clearly contrary to the intent of Congress.

Another rule of statutory construction, however, is pertinent here: where an otherwise acceptable construction of the a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.

What Justice White is saying is that, because of constitutional considerations, the "normal rule of deference" does not apply.

Highland Park also says nothing contrary to a rule of reasonableness since the question in that case was whether or not the NLRB could reasonably interpret the language of Section 9(h)

in the way that it did; a majority of the Court said it could not:

The definition of "labor union" in the statute concededly includes the C.I.O. It is further conceded that the phrase "labor organization national and international in scope as found in [sec.] 10(C) refers to the A.F.L. and C.I.O. But it is claimed that when the adjectives "national" or "international" are alone added, they exclude the C.I.O. because it is regarded in labor circles as a federation rather than a national or international union. We think, however, that the use of geographic terms to reach nation-wide or more than nation-wide unions does not exclude those of some particular technical structure. The C.I.O., being admittedly a labor union and one of nationwide jurisdiction, operation and influence, is certainly in the speech of the people a national union, whatever its internal composition. If Congress intended geographic adjectives to have a structural connotation or to have other than their ordinarily accepted meaning, it would and should have given them a special meaning by definition.

Justice Douglas' argument in dissent that the Board reasonably interpreted the Act does not mean that the majority of the Court applied some test other than "reasonableness" when it concluded otherwise; rather, it means only that Douglas failed to persuade a majority of the Court.

Reliance on Yeshiva University is misleading for similar reasons. The question in Yeshiva was whether or not its faculty members were managerial or supervisory employees and, therefore, not employees under the NLRA. Evidence taken before the national Board indicated that faculty participated in a wide-range of what would ordinarily be denominated "administrative" concerns, such as University wide governance, the adjustment of grievances, educational policy, negotiation of salaries, and personnel decisions. Instead of making findings of fact as to whether or not the particular functions of faculty made them managerial or not, the Board held the entire faculty professional.

A majority of the Court held that the Board had completely failed to articulate a reasoned basis for treating, as employees entitled to the protection of the Act, people who, in any other context, plainly performed managerial functions. Thus, in the majority's view, the Board's decision was "unreasonable." Yeshiva does not do violence to a rule of strong deference.

Electrical Workers is another case in which a majority of the Court was convinced that the NLRB strayed beyond the plain meaning of the statute. Indeed, Justice Scalia baldly states in

his concurring opinion that the words of the statute tell against the Board's interpretation.

Finally, as Professor Asimow candidly admits, Food and Commercial Workers does not argue against a rule of strong deference so long as an agency regulation is not inconsistent with its enabling statute.

Once again, I thank you for the opportunity to comment on your draft and I hope the Commission reconsiders its conclusion contained in Memorandum 95-30 with respect to this agency.

Very truly yours,

A handwritten signature in black ink, appearing to read "Thomas Sobel", with a stylized flourish at the end.

THOMAS SOBEL  
Chief Administrative Law Judge

## PUBLIC EMPLOYMENT RELATIONS BOARD



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JUN 22 1995

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June 22, 1995

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Dear Commissioners:

This letter addresses issues concerning the scope of review of the proposed judicial review statute discussed during the Commission's meeting of April 24, 1995 and in Professor Asimow's letter to the Commission dated April 27, 1995. In my April 6, 1995 letter to the Commission I reviewed the relationship between the Public Employment Relations Board (PERB or Board) and the reviewing courts with regard to questions of law and questions of fact.

When reviewing PERB's statutory construction, or other questions of law regarding the statutes in PERB's jurisdiction, a court of appeal will generally defer to PERB's interpretation unless it is "clearly erroneous." This standard is clearly described in the State Bar of California's California Public Sector Labor Relations (Labor and Employment Law Section) 1994 in Section 43.01(2)(b) which states in pertinent part:

(2) Standards of Review

(b) Questions of Law-Deference Standard

It is ultimately the duty of the courts to construe the statutes administered by PERB. Nevertheless, when an appellate court reviews statutory construction or other questions of law within PERB's expertise, the court ordinarily defers to PERB's construction unless it is "clearly erroneous."

PERB requests that your judicial review draft permit the court to continue to use this standard.

Professor Asimow's letter states that "there would be immediate and unending confusion" if the courts continued to apply the current standards of deference to the Agricultural Labor Relations Board and PERB. I am unaware of any reason why such confusion would result. The courts, PERB, and practitioners before the Board have functioned for close to 20 years under the "clearly erroneous" standard without confusion.

The professor appears to argue either to maintain the "clearly erroneous" standard under a different description or require a new standard. Neither position is defensible. If the standard is to remain "clearly erroneous" then why change the description of the standard. If a new standard is to be required, what evidence supports a finding that the present standard is unworkable.

Professor Asimow also makes the statement that there is "no justification" for allowing the current standard of deference for PERB and ALRB cases continue. He appears to cast aside the justifications given by the U.S. Supreme Court and appellate courts in California, but does not explain why the courts are wrong.

Another area in which the courts of California and Professor Asimow are in direct contradiction is in Professor Asimow's statement that "the 'clearly erroneous' standard found in several California cases applicable to PERB is not drawn from federal law." In Moreno Valley Unified School District v. Public Employment Relations Board (1983) 142 Cal.App.3d 191 at 196 the court stated:

Second, the relationship of a reviewing court to an agency such as PERB, whose primary responsibility is to determine the scope of the statutory duty to bargain and resolve charges of unfair refusal to bargain, is generally one of deference (*Ford Motor Co. v. NLRB* (1979) 441 U.S. 488, 495 [60 L.Ed.2d 420, 426-427, 99 S.Ct. 1842]). The Supreme Court stated in *Ford* that the delegation of those duties to agencies such as the NLRB was the intent of Congress, and thus deference to their findings is entirely appropriate since they are 'tasks lying at the heart of the Board's function' (*id.*, at p. 497 [60 L.Ed.2d at p. 428]). The Court noted that the board's view should be accepted if it is 'not an unreasonable or unprincipled construction of the statute' (*id.*). Even though the board's judgment is subject to judicial review . . . if its construction of the statute is reasonable defensible, it should not be rejected merely because the courts might prefer another 'view of the statute' (*id.*)" (*Oakland Unified School Dist. v. Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007, 1012 [175 Cal.Rptr. 105].)

A similar reliance on federal cases is found in Oakland USD, supra, and South Bay Union School District v. PERB (1991) 228 Cal.App.3d 502 at 506.

Professor Asimow incorrectly states in his letter that I argue that PERB should receive the same deference as does the NLRB in federal cases. Rather, I make two arguments. First, that the deference given to PERB cases should continue to be the "clearly erroneous" standard which the California courts have traditionally applied to PERB cases. Second, that the federal courts apply a similar standard to review questions of law with regard to the NLRB.<sup>1</sup> The standard applied by the federal courts is at least as deferential and is probably more accurately

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<sup>1</sup> The American Bar Association Section of Labor and Employment Law's treatise - The Developing Labor Law 3rd Edition, at page 189, states:

The Supreme Court has indicated, however, that the Board is entitled to a greater degree of deference on questions of law involving interpretations of the Act. In Beth Israel Hospital v. NLRB the Court stressed that such judicial review must be "limited," for "[it] is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy . . . The function of striking [the balance between competing interests] to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [Board], subject to limited judicial review." The Court reaffirmed this approach most recently in Curtin-Matheson Scientific v. NLRB, saying that it would uphold the Board's construction of the Act when it is "rational and consistent with the Act . . . even if we would have formulated a different rule had we sat on the Board." As a general rule, courts also defer to the Board's expertise when the Board changes substantive rules of decision regarding the administration or application of the Act.

When issues of law arise outside the Act (thus outside the Board's area of expertise), the courts are less likely to defer to the Board's judgment. Furthermore, when the Board fails to articulate its rationale, courts are less likely to defer to the Board's expertise.

described as the rational basis test. As stated by the U.S. Supreme Court in NLRB v. Curtin-Matheson Scientific (1990) 494 U.S. 775, "We will uphold a board rule as long as it is rational and consistent with the Act, Fall River, supra at 42 even if we would have formulated a different rule had we sat on the board." Clearly, this test does not reflect the "weak deference," independent judgment review advocated by Professor Asimow.

In Professor Asimow's letter, he states that he found Supreme Court cases involving the NLRB "which used independent judgement in reviewing NLRB legal interpretations." I found that in these cases the Court did not undermine the rational basis test as the appropriate standard for review. In the Highland Park, Yeshiva University and International Brotherhood of Electrical Workers cases the standard for deference was discussed by the minority, and the majority did not dispute the standard for review.

Rather, the cases stand for the proposition that the Supreme Court found no rational basis for the NLRB decision. As the Court stated in Ford Motor Co. v. NLRB (1979) 444 U.S. 488, 497:

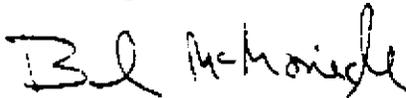
Of course, the judgment of the Board is subject to judicial review; but if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute. NLRB v. Iron Workers, 434 U.S. 335, 350 (1978). In the past we have refused enforcement of Board orders where they had "no reasonable basis in law," either because the proper legal standard was not applied or because the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning. Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 166 (1971). We have also parted company with the Board's interpretation where it was "fundamentally inconsistent with the structure of the Act" and an attempt to usurp "major policy decisions properly made by Congress." American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965). Similarly, in NLRB v. Insurance Agents, supra, at 499, we could not accept the Board's application of the Act where we were convinced that the Board was moving "into a new area of regulation which Congress had not committed to it."

In the De Bartolo Corporation case discussed by Professor Asimow, he correctly states that at page 575, the U.S. Supreme Court

determined that the normal rule of deference to NLRB statutory construction was not applicable because of constitutional overtones. However, on page 574 the majority stated "that statutory interpretation [of the National Labor Relations Act] by the board would normally be entitled to deference unless that construction were clearly contrary to the intent of Congress."<sup>2</sup> (emphasis added.) Certainly, such a standard is much more similar to the "clearly erroneous" standard applied by California courts than to Professor Asimow's preferred "independent judgment" with "weak deference."

In addition to questions of law, the Judicial Review Draft of June 16, 1995 would make numerous other changes in review of PERB cases. These changes are presently being considered by PERB and I will address these modifications in the future.

Sincerely,



Bernard McMonigle  
Senior PER Counsel

cc: Professor Asimow

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<sup>2</sup> The Food and Commercial Workers case cited by Professor Asimow is inapposite. It is not a final decision of the NLRB in an unfair practice case. Rather, it deals with rulemaking and the validity of administrative regulations. PERB has never taken the position that it is not subject to the same rules as every other agency with regard to rulemaking under the APA. The current discussion addresses court review of PERB's adjudicatory decisions.

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

**Staff Draft**

TENTATIVE RECOMMENDATION

## Judicial Review of Agency Action

July 1995

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

**COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN October 10, 1995.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission  
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## SUMMARY OF TENTATIVE RECOMMENDATION

This recommendation would replace the various existing forms of judicial review of agency action with a single, straightforward statute for judicial review of all forms of state and local agency action, whether quasi-adjudicative, quasi-legislative, or otherwise. It would clarify the standard of review and the rules for standing, exhaustion of administrative remedies, limitations periods, and other procedural provisions.

# JUDICIAL REVIEW OF AGENCY ACTION

## CONTENTS

BACKGROUND .....	3
REPLACING MANDAMUS AND OTHER FORMS OF JUDICIAL REVIEW .....	3
STANDING TO SEEK JUDICIAL REVIEW .....	5
Private Interest Standing .....	5
Public Interest Standing .....	6
EXHAUSTION OF ADMINISTRATIVE REMEDIES .....	7
PRIMARY JURISDICTION .....	7
RIPENESS .....	8
STATUTE OF LIMITATIONS FOR REVIEW OF ADJUDICATORY ACTION .....	8
STANDARD OF REVIEW .....	9
Review of Agency Fact-Finding .....	9
Review of Agency Interpretation of Law .....	10
Review of Agency Application of Law to Fact .....	11
Review of Agency Exercise of Discretion .....	12
Review of Agency Procedure .....	13
CLOSED RECORD .....	14
PROPER COURT FOR REVIEW .....	14
VENUE .....	14
STAYS PENDING REVIEW .....	15
COSTS .....	15



## JUDICIAL REVIEW OF AGENCY ACTION

### BACKGROUND

This recommendation is submitted as part of the Commission's continuing study of administrative law. The Commission's recommendation on administrative adjudication by state agencies<sup>1</sup> has been introduced in bill form<sup>2</sup> and is pending in the Legislature.

This recommendation on judicial review is the second phase of the Commission's study of administrative law.<sup>3</sup> This recommendation proposes that California's antiquated provisions for judicial review of agency action by administrative mandamus be replaced by a single, straightforward statute for judicial review of all forms of state and local agency action.

The proposed law provides some procedural rules for judicial review and, where specific rules do not apply, provides that the normal rules of civil procedure apply to judicial review. The goal is to allow litigants and courts to resolve swiftly the substantive issues in dispute, rather than wasting resources disputing tangential procedural issues.

### REPLACING MANDAMUS AND OTHER FORMS OF JUDICIAL REVIEW

Under existing law, on-the-record adjudicatory decisions of state and local government are reviewed by superior courts under the administrative mandamus provisions of Code of Civil Procedure Section 1094.5.<sup>4</sup> Regulations adopted by state agencies are reviewed by superior courts through actions for declaratory judgment.<sup>5</sup> Various other agency actions are reviewed by traditional mandamus under Code of Civil Procedure Section 1085<sup>6</sup> or by declaratory judgment.<sup>7</sup> Many

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1. *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55 (1995).

2. Senate Bill 523 (1995-96 regular session).

3. The Commission retained Professor Michael Asimow of the UCLA Law School to serve as consultant and prepare background studies. Professor Asimow prepared three studies on judicial review of agency action for the Commission. These are: *Judicial Review: Standing and Timing* (Sept. 1992), [hereinafter Asimow I], *The Scope of Judicial Review of Decisions of California Administrative Agencies* (1995) [to be published in the UCLA Law Review, hereinafter Asimow II], and *A Modern Judicial Review Statute to Replace Administrative Mandamus* (Nov. 1993) [hereinafter Asimow III].

4. The discussion under this heading is drawn from Asimow III, *supra* note 3, at 3-12.

5. Gov't Code § 11350(a); Code Civ. Proc. § 1060.

6. See, e.g., *Vernon Fire Fighters v. City of Vernon*, 107 Cal. App. 3d 802, 165 Cal. Rptr. 908 (1980); *Shuffer v. Board of Trustees*, 67 Cal. App. 3d 208, 136 Cal. Rptr. 527 (1977).

7. See, e.g., *Californians for Native Salmon Ass'n v. Department of Forestry*, 221 Cal. App. 3d 1419, 271 Cal. Rptr. 270 (1990).

statutes set forth special review procedures for different agencies.<sup>8</sup> Agency action can also be reviewed in the context of enforcement actions or criminal actions brought against individuals for violation of regulatory statutes or rules.

There are many problems with this patchwork scheme. First, it is often unclear whether judicial review should be sought by administrative mandamus, traditional mandamus, or declaratory relief. If an action for administrative mandamus can be brought, it must be brought under those provisions. Parties regularly file under the wrong provisions. Some cases hold that if the trial court uses the wrong writ, the case must be reversed on appeal so it can be retried under the proper procedure, even if no one objects.

Trial courts must distinguish between administrative and traditional mandamus because there are many differences between them, including use of juries, statutes of limitations, exhaustion of remedies, stays, open or closed record, whether the agency must make findings, and scope of review of factual issues. Administrative mandamus is proper to review quasi-judicial action, while traditional mandamus or declaratory relief is proper to review quasi-legislative action. It is often difficult to determine whether the action to be reviewed is quasi-judicial or quasi-legislative.

Moreover, if administrative mandamus is unavailable because statutory requirements are not met, and traditional mandamus is unavailable because there has been no deprivation of a clear legal right or an abuse of discretion, the case will be unreviewable by the courts.

Both administrative and traditional mandamus involve complex rules of pleading and procedure. The proceeding may be commenced by a petition for issuance of an alternative writ of mandamus or by a notice of motion for a peremptory writ. The procedures for each are different.

This awkward hybrid is the result of the historical development of judicial review procedures in California. At the time the administrative mandamus concept was devised in 1945, the California Constitution was held to limit the ability of the Legislature to affect the appellate jurisdiction of the courts.<sup>9</sup> Since that time, the Constitution has been amended to delete the reference to the "writ of review", and Constitution has been construed to allow the Legislature greater latitude in

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8. Decisions of the Public Utilities Commission and of the Review Department of the State Bar Court are reviewed on a discretionary basis by the California Supreme Court. Pub. Util. Code § 1756; Cal. R. Ct. 58 (Public Utilities Commission), 952 (State Bar Court). Decisions of Workers' Compensation Appeals Board, Agricultural Labor Relations Board, and Public Employment Relations Board are reviewed initially by the courts of appeal, in some cases as a matter of right and in other cases by discretion only. Cal. R. Ct. 57, 59. Decisions of the State Energy Resources Conservation and Development Commission are reviewed in the same manner as decisions of the Public Utilities Commission. Pub. Res. Code § 25531. Decisions of the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board are reviewed on a discretionary basis either by the Supreme Court or the Court of Appeal. Bus. & Prof. Code §§ 23090, 23090.5.

9. Judicial Council of California, *Tenth Biennial Report* (1944).

prescribing appropriate forms of judicial review, provided the discretion of the judicial branch to deny review is preserved.<sup>10</sup>

The Law Revision Commission recommends that the archaic judicial review system that has evolved over the years now be replaced by a simple and straightforward statute. The proposed law provides that final state or local agency action is reviewable by a notice of review filed with the appropriate court. Normal rules of pleading and practice for the court would apply. For the purpose of judicial review of agency action, common law writs such as mandamus, certiorari, and prohibition, and equitable remedies such as injunction and declaratory judgment, would be replaced by the unified scheme of the proposed law.<sup>11</sup>

Existing statutes draw little or no distinction between judicial review of state and local agency action. The proposed statute on judicial review of agency action applies to local as well as to state government. It applies to review of any type of government action, including review of agency regulations, and not merely to review of adjudicative decisions.<sup>12</sup>

### STANDING TO SEEK JUDICIAL REVIEW

Under existing law, a petitioner in a mandamus proceeding must be beneficially interested in the subject of the proceeding.<sup>13</sup> For declaratory relief, the person must be interested under a written instrument or contract or desire a declaration of his or her rights or duties. Standing may be conferred by private or public interest.<sup>14</sup>

#### **Private Interest Standing**

By case law, a person has sufficient private interest to confer standing if the agency action is directed to that person, or if the person's interest is over and above that of members of the general public. Non-pecuniary interests such as environmental or esthetic claims are sufficient to meet the private interest test. Associations such as unions, trade associations, or political associations have standing to sue on behalf of their members. But if a person has not suffered some kind of harm from the agency action, the person lacks standing to seek judicial review of it. The proposed law codifies these rules.

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10. See, e.g., *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 24 Cal. 3d 335, 156 Cal. Rptr. 1, 595 P. 2d 579 (1979); *Powers v. City of Richmond*, 40 Cal. Rptr. 2d 839 (1995).

11. The proposed law preserves the action to prevent an illegal expenditure by a local governmental entity under Section 526a of the Code of Civil Procedure, but applies its standing provisions to such actions. See generally *Asimow I*, *supra* note 3, at 5; *Asimow III*, *supra* note 3, at 22-23.

12. See proposed Sections 1120, 1121.240.

13. The discussion under this heading is drawn from *Asimow I*, *supra* note 3.

14. The proposed law does not require that the person seeking judicial review have participated in the administrative proceeding, whether adjudication or rulemaking, in order to have standing on either a public interest or private interest basis.

The proposed law provides that, if the challenged action is a regulation, a person subject to that regulation has standing to seek review of it. This would change the rule that a person challenging a regulation must have been a party to the rulemaking proceeding.<sup>15</sup>

The proposed law does not continue the rule that a person seeking review must have objected to the agency action. This rule has the undesirable effect of requiring a person seeking review to associate in the review process another person who was active in making a protest to the agency but is not otherwise interested in the judicial review proceeding.<sup>16</sup>

The proposed law denies a person who complained to an agency about a professional licensee standing to challenge an agency decision in favor of the licensee, unless the person was either a party to the administrative proceeding, or had a right to become a party under a statute specific to that agency.

The proposed law makes clear that a local agency may have private interest standing to seek judicial review of state action, and relaxes the limiting rule that local government has standing for constitutional challenges under the commerce or supremacy clause but not under the due process, equal protection, or contract clauses.<sup>17</sup>

### **Public Interest Standing**

The proposed law codifies case law applicable to mandamus proceedings that a person who lacks private interest standing may nonetheless sue to vindicate the public interest. This promotes the policy of allowing a citizen to ensure that a government body does not impair or defeat the purpose of legislation establishing a public right. The existing rule does not apply to actions for declaratory relief, but the proposed law generalizes the rule to apply regardless of the relief sought in judicial review of agency action.

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15. By comparison, under the proposed law, judicial review of state agency adjudication, unlike judicial review of local agency adjudications and other agency actions, is limited to persons who were parties in the adjudicative proceeding before the agency. With respect to other agency actions, a person who was not present or did not participate could seek judicial review if general standards of private interest standing or public interest standing are satisfied. This will simplify the law by eliminating the need to classify various types of agency action to determine who has standing to seek judicial review. This is consistent with existing law with respect to state agency rulemaking, but would expand existing law with respect to other agency actions, which require prior participation, subject to a number of exceptions. See Asimow I, *supra* note 3, at 10-11.

16. The proposed law preserves the exhaustion of remedies aspect of this rule, which requires that the ground on which agency action is claimed to be invalid must have been raised before the agency. See Asimow I, *supra* note 3 at 10.

17. The proposed law does not adopt the federal or Model Act zone of interest test. See generally Asimow I, *supra* note 3, at 14-15.

## EXHAUSTION OF ADMINISTRATIVE REMEDIES

Under existing law, a litigant must fully complete all federal, state, and local administrative remedies before coming to court or defending against administrative enforcement unless an exception to the exhaustion of remedies rule applies.<sup>18</sup> The proposed law codifies the exhaustion of remedies rule, including the rule that exhaustion of remedies is jurisdictional rather than discretionary with the court. The proposed law provides exceptions to the exhaustion of remedies rule to the extent administrative remedies are inadequate<sup>19</sup> or where requiring their exhaustion would result in irreparable harm disproportionate to the public and private benefit from requiring exhaustion.<sup>20</sup> The proposed law continues the rule of existing statutes that a litigant is not required to request reconsideration from the agency before seeking judicial review.<sup>21</sup>

The proposed law codifies the rule that, in order to be considered by the reviewing court, the exact issue must first have been presented to the agency. The proposed law does not continue the rule that exhaustion of remedies is not required for a local tax assessment alleged to be a nullity. Judicial review of such matters should not occur until after conclusion of administrative proceedings.<sup>22</sup>

The proposed law eliminates the rule that allows immediate judicial review of agency denial of a request for a continuance.<sup>23</sup>

## PRIMARY JURISDICTION

Under the doctrine of primary jurisdiction, a case properly filed in court may be shifted to an administrative agency that also has statutory power to resolve some or all of the issues in the case.<sup>24</sup> Thus the agency makes the initial decision in the case, but the court retains power to review the agency action.

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18. The discussion under this heading is drawn from *Asimow I*, *supra* note 3.

19. The inadequacy requirement includes and accommodates existing California exceptions to the exhaustion of remedies rule for futility, certain constitutional issues, and lack of notice. *Asimow III*, *supra* note 3, at 62, 105-37.

20. This provision was taken from the 1981 Model State Administrative Procedure Act, 15 U.L.A. 1 (1990). The proposed law expands the factors to be considered to include private as well as public benefit.

21. Gov't Code §§ 11523 (Administrative Procedure Act), 19588 (State Personnel Board). However, the common law rule in California may be otherwise. See *Alexander v. State Personnel Board*, 22 Cal. 2d 198, 137 P.2d 433 (1943). This rule would not apply to the Public Utilities Commission or other agencies for which reconsideration is required by statute. E.g., Pub. Util. Code § 1756. Nor would it preclude a litigant from requesting reconsideration or an agency on its own motion from reconsidering.

22. *Cf. Stenocord Corp. v. City and County of San Francisco*, 2 Cal. 3d 984, 88 Cal. Rptr. 165 (1970).

23. Gov't Code § 11524(c). Such a denial will be subject to general rules requiring exhaustion of remedies, and thus will be subject to a possible exception because administrative remedies are inadequate or because to require exhaustion would result in irreparable harm. Similarly, judicial review of discovery orders will be postponed until after conclusion of the administrative proceeding.

24. The discussion under this heading is drawn from *Asimow I*, *supra* note 3.

The proposed law makes clear the doctrine of primary jurisdiction is distinct from exhaustion of remedies. It provides that the court should send an entire case, or one or more issues in the case, to an agency for an initial decision only where the Legislature intended that the agency have exclusive jurisdiction over that type of case or issue, or where the benefits to the court in doing so outweigh the extra delay and cost to the litigants.<sup>25</sup>

### RIPENESS

The ripeness doctrine in administrative law counsels a court to refuse to hear an attack on the validity of an agency rule or policy until the agency takes further action to apply it in a specific fact situation. The ripeness doctrine is well accepted in California law,<sup>26</sup> and the proposed law codifies it.

### STATUTE OF LIMITATIONS FOR REVIEW OF ADJUDICATORY ACTION

Existing statutes of limitations for judicial review of agency adjudications are scattered and inconsistent.<sup>27</sup> The limitations period for judicial review of adjudication under the Administrative Procedure Act is 30 days,<sup>28</sup> and for judicial review of a local agency decision other than by a school district is 90 days.<sup>29</sup> Other sections applicable to particular agencies provide different limitations periods for commencing judicial review. Adjudicatory action not covered by any of these provisions is subject to the three-year or four-year limitations periods for civil actions generally.<sup>30</sup>

The proposed law provides a single, uniform 30-day limitations period for judicial review of all adjudicatory action, whether state or local and whether under the APA or not,<sup>31</sup> except that some special limitations periods for particular

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25. The court in its discretion may ask the agency to file an amicus brief with its views on the matter as an alternative to sending the case to the agency.

26. The discussion under this heading is drawn from *Asimow I*, *supra* note 3.

27. The discussion under this heading is drawn from *Asimow I*, *supra* note 3.

28. Gov't Code § 11523.

29. Code Civ. Proc. § 1094.6(b). This provision applies only if the local agency has adopted an ordinance making it applicable. Some other statutes of limitations applicable to judicial review of administrative proceedings are: Veh. Code § 14401(a) (90-days after notice of driver's license order); Lab. Code §§ 1160.8 (30 days after ALRB decision), 5950 (45 days for decision of Workers' Compensation Appeals Board); Gov't Code §§ 3542 (30 days for PERB decisions), 19630 (one year for various state personnel decisions), 65907 (90 days for decisions of zoning appeals board); Unemp. Ins. Code § 410 (six months for appeal of decision of Unemployment Insurance Appeals Board); Welf. & Inst. Code § 10962 (one year after notice of decision of Department of Social Services). Various rules on tolling apply to these statutes. See *Asimow III*, *supra* note 3, at 91.

30. These actions are also subject to the defense of laches.

31. The period starts to run from the date the agency decision becomes effective, generally 30 days after issuance of the decision. Gov't Code § 11519. The decision will inform the parties of the limitations period

agencies are preserved.<sup>32</sup> Non-adjudicatory action remains subject to the general limitations periods for civil actions.

The proposed law requires the agency to give written notice to the parties of the date by which review must be sought. Failure to do so would toll the running of the limitations period up to a maximum period of 180 days after the decision is effective.<sup>33</sup>

Under the existing APA and the existing statute for judicial review of a local agency decision, when a person seeking judicial review makes a timely request for the agency to prepare the record, the time to petition for review is extended until 30 days after the record is delivered.<sup>34</sup> Both statutes require that the record be requested within ten days after the decision becomes final in order to trigger the extension provision. The proposed law provides that a party's opening brief shall be filed within 60 days after filing the notice of review, or within 60 days after receipt of a record requested within 15 days after filing the notice.

The proposed law preserves the case law rule that an agency may be estopped to plead the statute of limitations if a party's failure to seek review within the prescribed period was due to misconduct of agency employees.

## STANDARD OF REVIEW

### Review of Agency Fact-Finding

Existing law requires California courts to use independent judgment in reviewing an agency's factual determinations that substantially deprive a litigant of a fundamental vested right.<sup>35</sup> California is the only jurisdiction in the United States that uses the independent judgment standard for judicial review of agency action.

The independent judgment test was imposed by a 1936 California Supreme Court decision on the theory that constitutional doctrines of separation of powers or due process required it. The test applied to review of fact-finding by agencies not established by the California Constitution, because it was thought that those agencies could not constitutionally exercise judicial power. But the courts have subsequently rejected any constitutional basis for the independent judgment test, so the Legislature or the courts are now free to abolish it. Nonetheless, the courts

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for judicial review. Failure to do so extends the period to six months. If a transcript is requested within 30 days after the decision becomes effective, the limitations period is tolled until delivery of the transcript. The new statute will also cover judicial review of an agency decision refusing to hold an adjudicatory hearing required by the Administrative Procedure Act or other law.

32. For example, the 30-day PERB and ALRB judicial review periods are preserved, as are the limitation periods under the California Environmental Quality Act. See Gov't Code § 3520 (PERB); Lab. Code § 1160.8 (ALRB); Pub. Res. Code § 21167 (CEQA). [Staff note: This footnote will have to be revised in light of Commission decisions on the general limitations period.]

33. Concerning the effective date of the decision, see note 29 *supra*.

34. Gov't Code § 11523; Code Civ. Proc. § 1094.6(d).

35. The discussion under this heading is drawn from Asimow II, *supra* note 3.

have continued to apply the independent judgment test to decisions of nonconstitutional agencies where fundamental vested rights are involved. Thus the substantial evidence test is applied to review of decisions of constitutional agencies, and to review of decisions of nonconstitutional agencies where fundamental vested rights are not involved. Independent judgment review is applied to nonconstitutional agencies where substantial vested rights are involved.

There is no rational policy basis for these distinctions. The proposed law preserves independent judgment review of agency fact-finding in a limited class of cases — where the agency has changed a finding of fact of, or has increased the penalty imposed by, the administrative law judge in an APA proceeding. These are the cases in which prosecutorial overreaching is most likely to have occurred. In all other cases, the proposed law eliminates independent judgment review of agency fact-finding, and instead requires the court to uphold agency findings if supported by substantial evidence in the record as a whole.<sup>36</sup>

The proposed law codifies the existing rule<sup>37</sup> that a person challenging agency action has the burden of persuasion on the propriety of the agency action.

### **Review of Agency Interpretation of Law**

Under existing law, courts exercise independent judgment when reviewing an agency interpretation of law. This is qualified by the rule that, depending on the context, courts should give great weight to a consistent construction of a statute by the agency responsible for its implementation. Deference is given to the agency's interpretation if the court finds it appropriate to do so based on a number of factors. These factors are generally of two kinds — factors indicating that the agency has a comparative interpretive advantage over the courts, and factors indicating that the interpretation in question is probably correct.

In the comparative advantage category are factors that assume the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another. A court is more likely to defer to an agency's interpretation of a statute that the agency enforces than to its interpretation of some other statute, the common law, the constitution, or judicial precedent.

Factors indicating that the interpretation in question is probably correct include the degree to which the agency's interpretation appears to have been carefully considered by responsible agency officials. For example, an interpretation of a

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36. An important benefit of the substantial evidence test is that it greatly broadens the power of the appellate court in appeals from trial court decisions reviewing administrative action. *Asimow II*, *supra* note 3, at 15-16.

37. See California Administrative Mandamus §§ 4.157, 12.7 (Cal. Cont. Ed. Bar 2d ed. 1989).

statute contained in a regulation adopted after public notice and comment is more deserving of deference than an interpretation contained in an advice letter prepared by a single staff member. Deference is called for if the agency has consistently maintained the interpretation in question, especially if the interpretation is long-standing. A vacillating position, however, is entitled to no deference. An interpretation is more worthy of deference if it first occurred contemporaneously with enactment of the statute being interpreted. Deference may also be appropriate if the Legislature reenacted the statute in question with knowledge of the agency's prior interpretation.

If the Legislature has demonstrably delegated authority to an agency to interpret the law, the court must accept a reasonable agency interpretation using the abuse of discretion standard. A delegation typically occurs where a statute empowers an agency to adopt a rule defining language in the statute.<sup>38</sup> Courts may also find that the Legislature intended to delegate interpretive power when it deliberately wrote unusually vague and open-ended statutory language that an agency must apply, or when an issue of interpretation involves policy choices which the agency is empowered to make.<sup>39</sup>

When a court reviews a regulation, it normally separates the issues, exercising independent judgment with appropriate deference on interpretive issues, such as whether the regulation conflicts with the governing statute, but applying the abuse of discretion standard on whether the regulation is reasonably necessary to effectuate the purpose of the statute.

The Commission finds existing law on the standard of review of agency interpretation of law to be generally satisfactory, although some clarification is needed. The proposed law continues independent judgment review of agency interpretation of law, with appropriate deference to the agency's interpretation. The proposed law makes clear that mere authority for an agency to make regulations generally or to implement a statute is not in itself a delegation of authority to construe the meaning of words in a statute.

### **Review of Agency Application of Law to Fact**

In nearly every adjudicatory decision, the agency must apply a legal standard to basic facts, sometimes called mixed questions of law and fact. Under existing law, an application question is reviewed as a question of fact if the basic facts of the case are disputed, whether the dispute concerns matters of direct testimony or matters of inference from circumstantial evidence. If there is no dispute of basic

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38. Delegation does not occur merely because the Legislature gives legislative rulemaking authority to an agency, or because the statute is somewhat ambiguous. This principle applies only when a statute demonstrably delegates to the agency the power to interpret particular statutory language. *Asimow II*, *supra* note 3, at 60.

39. There is a possibly inconsistent line of cases. *Asimow II*, *supra* note 3, at 62.

facts (whether established by direct or circumstantial evidence) but the application question is disputed, the agency's determination is reviewed as a question of law.<sup>40</sup>

The Commission believes the standard of review of application questions should not turn on whether the basic facts are disputed. It invites manipulation, since a party can control the standard of review by either disputing or stipulating to basic facts.

Application decisions are often treated as precedents for future cases, thus resembling issues of law more than fact. The proposed law treats application questions as questions of law. Reviewing courts would thus exercise independent judgment with appropriate deference for application decisions by administrative agencies.<sup>41</sup> Treating application questions as questions of law avoids having to distinguish between pure questions of law and questions of application, because it is often difficult to know which is which.<sup>42</sup>

### **Review of Agency Exercise of Discretion**

An agency has discretion when the law allows it to choose between several alternative policies or other courses of action. Examples include an agency's power to choose a severe or lenient penalty, whether there is good cause to deny a license, whether to grant permission for various sorts of land uses, or to approve a corporate reorganization as fair. An agency might have power to prescribe the permitted level of a toxin in drinking water, to decide whether to favor the environment at the expense of economic development or vice versa, or to decide whom to investigate or charge when resources are limited.

Existing law is replete with conflicting doctrines on these important issues. California courts may review agency discretionary decisions on grounds of legality, procedural irregularity, or abuse of discretion despite broad statutory delegations of discretionary authority. Existing law is unclear whether the court reviews the discretionary action on an open or closed record, but most California decisions preclude introduction of new evidence in such cases. The agency must give reasons for the discretionary action in the case of review of adjudicatory action, but not in the case of quasi-legislative action unless required by statute.

In reviewing discretionary action, a court first decides whether the agency's choice was legally permissible and whether the agency followed legally required procedures, using independent judgment with appropriate deference. Within these

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40. Some cases are inconsistent. *Asimow II*, *supra* note 3, at 85-86.

41. If the Legislature demonstrably delegated primary responsibility to the agency to apply law to facts, the agency's application would be reviewed only for reasonableness, not independently.

42. This approach might create the opposite problem of distinguishing application questions from questions of fact, but this distinction should not usually be problematic. Fact questions can be answered without knowing anything of the applicable law. Application questions should not be treated as questions of fact, because it would strip courts of the responsibility for applying the law in every case, and would require the courts to ignore important public policy reasons for judicial rather than agency responsibility for applying law to fact, a formula of rigidity. Treating them as questions of law with appropriate deference to the agency decision is a formula for flexibility. *Asimow II*, *supra* note 3, at 100-101.

legal limits, the agency has power to choose between alternatives, and a court must not substitute its judgment for the agency's, since the Legislature delegated discretionary power to the agency, not the court. But the court should reverse if the agency's choice was an abuse of discretion. Review for abuse of discretion consists of two distinct inquiries: the adequacy of the factual underpinning of the discretionary decision, and the rationality of the choice.

In reviewing the adequacy of the factual underpinning, it is not clear whether the abuse of discretion test is merely another way to state the substantial evidence test, or whether the substantial evidence test gives the court greater leeway in reviewing the agency decision, but the prevailing view is that they are synonymous. Legislative history of a recent enactment also suggests that substantial evidence is the appropriate test whenever the issue is the factual basis for agency discretionary action.<sup>43</sup>

The proposed law requires the factual underpinnings of a discretionary decision to be supported by substantial evidence on the whole record, whether the decision arose out of formal or informal adjudication, quasi-legislative action such as rulemaking, or some other function.<sup>44</sup> The proposed law provides for review of agency exercise of discretion on a closed record.

### **Review of Agency Procedure**

Under existing law, California courts use independent judgment on the question of whether agency action complied with the procedural requirements of statutes or the constitution. California courts have occasionally mandated administrative procedures not required by any statute, either in the interest of fair procedures or to facilitate judicial review.

The Commission believes that California courts should retain the power to impose administrative procedures not found in a statute. This power is necessary to prevent procedural unfairness to parties. However, while courts should continue to use independent judgment on procedural issues, they should normally accord considerable deference to agency decisions about how to implement procedural provisions in statutes. Agency expertise is just as relevant in establishing procedure as in fact-finding and determining or applying law and policy.

The proposed law permits the court to exercise independent judgment in reviewing agency procedures, with deference to the agency's determination of what procedures are appropriate.<sup>45</sup>

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43. There are cases to the contrary. *Asimow II*, *supra* note 3, at 113.

44. The proposed law rejects case law indicating that an exercise of agency discretion can be disturbed only if evidentiary support is "entirely lacking" or that review is less intensive in abuse of discretion cases than in other cases. See generally *Asimow II*, *supra* note 3, at 127.

45. An agency's procedural choices under a general statute applicable to a variety of agencies, such as the APA, should be entitled to less deference than a choice made under a statute unique to that agency. *Asimow II*, *supra* note 3, at 138.

### CLOSED RECORD

Under existing law,<sup>46</sup> whether judicial review is of a closed record with no additional evidence on review, or whether additional evidence may be received on review, depends on whether the court is using the substantial evidence test or is exercising independent judgment. In substantial evidence cases, the superior court receives no additional evidence. Where independent judgment applies, the court can either remand to the agency for reconsideration of the evidence, or may admit the evidence itself.<sup>47</sup>

The proposed law requires that, if the evidence is insufficient for review, the matter is remanded to the agency for additional fact-finding.<sup>48</sup> The proposed law requires the agency to provide a brief explanation of the reasons for its action where necessary for proper judicial review.<sup>49</sup>

### PROPER COURT FOR REVIEW

Under existing law, most judicial review of agency action is in superior court.<sup>50</sup> The Supreme Court reviews decisions of the Public Utilities Commission, California Energy Conservation and Development Commission, and State Bar Court. The court of appeal reviews decisions of the Workers' Compensation Appeals Board, the Agricultural Labor Relations Board, and the Alcoholic Beverage Control Appeals Board. The proposed law does not alter this scheme.

### VENUE

Under existing law, mandamus proceedings in superior court seeking judicial review of state or local agency action are filed in the county in which the cause of action arose.<sup>51</sup> In licensing and personnel cases, this means the petitioner's principal place of business. In non-licensing cases, it means the place where the injury occurred. Review of a driver's license suspension is in the county of the licensee's residence. Review of a decision of the Medical Board of California occurs only in Sacramento, Los Angeles, San Diego, or San Francisco. Depending on particular statutes, cases reviewable by the court of appeal are filed in the

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46. Code Civ. Proc. § 1094.5.

47. Code Civ. Proc. § 1094.5(e).

48. The proposed law also permits the court to require the agency to prepare a table of contents of the record in an appropriate case.

49. This would limit the scope of the *Topanga* case for agencies other than state agencies. State agencies will be governed by the requirement that the decision include "a statement of the factual and legal basis and reasons for the decision."

50. The discussion under this heading is drawn from Asimow III, *supra* note 3, at 23-35.

51. The discussion under this heading is drawn from Asimow II, *supra* note 3, at 35-39.

appellate district where the cause of action arose or where the petitioner resides. The proposed law generally continues these venue rules.

### STAYS PENDING REVIEW

Under the existing APA, an agency has power to stay its own decision.<sup>52</sup> Whether or not the agency does so, the superior court has discretion to stay the agency action, but should not impose or continue a stay if to do so would be against the public interest.<sup>53</sup>

A stricter standard applies in medical, osteopathic, or chiropractic cases in which a hearing was provided under the APA. The stricter standard also applies to non-health care APA cases in which the agency head adopts the proposed decision of the administrative law judge in its entirety or adopts the decision and reduces the penalty. Under the stricter standard, a stay should not be granted unless the court is satisfied that the public interest will not suffer and the agency is unlikely to prevail ultimately on the merits. The court may condition a stay order on the posting of a bond.

If the trial court denies the writ of mandamus and a stay is in effect, the appellate court can continue the stay.<sup>54</sup> If the trial court grants the writ, the agency action is stayed pending appeal unless the appellate court orders otherwise.<sup>55</sup>

The proposed law simplifies this scheme by providing one standard regardless of the type of agency action being reviewed. Under the proposed law, the factors to be considered by the court in determining whether to grant a stay include, in addition to the public interest and the likelihood of success on the merits, the degree to which the applicant for a stay will suffer irreparable injury from denial of a stay and the degree to which the grant of a stay would harm third parties.<sup>56</sup>

### COSTS

The proposed law consolidates into one general provision various provisions on the fee for preparing a transcript and other portions of the record, recovering costs of suit by the prevailing party, and proceeding in forma pauperis.<sup>57</sup>

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52. Gov't Code § 11519(b). The discussion under this heading is drawn from Asimow III, *supra* note 3, at 39-42.

53. Code Civ. Proc. § 1094.5(g).

54. If a stay is in effect when a notice of appeal is filed, the stay is continued in effect by operation of law for 20 days from the filing of the notice. Code Civ. Proc. § 1094.5(g).

55. In cases not arising under the administrative mandamus statute, the trial and appellate courts presumably have their usual power to grant a stay by using a preliminary injunction. Asimow III, *supra* note 3, at 40.

56. These revisions will make the standard for granting a stay similar to the standard for granting a preliminary injunction. Asimow III, *supra* note 3, at 41.

57. See Code Civ. Proc. §§ 1094.5(a), 1094.6(c); Gov't Code § 11523.

## JUDICIAL REVIEW OF AGENCY ACTION

### OUTLINE

CHAPTER 1. GENERAL PROVISIONS .....	20
Article 1. Preliminary Provisions .....	20
§ 1120. Application of title .....	20
§ 1121.110. Conflicting or inconsistent statute controls .....	20
§ 1121.130. Operative date .....	20
Article 2. Definitions .....	21
§ 1121.210. Application of definitions .....	21
§ 1121.220. Adjudicative proceeding .....	21
§ 1121.230. Agency .....	21
§ 1121.240. Agency action .....	21
§ 1121.250. Decision .....	22
§ 1121.255. Local agency .....	22
§ 1121.260. Party .....	22
§ 1121.270. Person .....	22
§ 1121.280. Rule .....	23
§ 1121.290. Rulemaking .....	23
CHAPTER 2. PRIMARY JURISDICTION .....	23
§ 1122.010. Application of chapter .....	23
§ 1122.020. Exclusive agency jurisdiction .....	23
§ 1122.030. Concurrent agency jurisdiction .....	24
§ 1122.040. Judicial review following agency action .....	24
CHAPTER 3. JUDICIAL REVIEW .....	25
Article 1. General Provisions .....	25
§ 1123.110. Requirements for judicial review .....	25
§ 1123.120. Finality .....	25
§ 1123.130. Ripeness .....	25
§ 1123.140. Exception to finality and ripeness requirements .....	25
§ 1123.150. Proceeding not moot because penalty completed .....	26
Article 2. Standing .....	26
§ 1123.210. No standing unless authorized by statute .....	26
§ 1123.220. Private interest standing .....	26
§ 1123.230. Public interest standing .....	27
§ 1123.240. Standing for review of decision in adjudicative proceeding .....	28
Article 3. Exhaustion of Administrative Remedies .....	29
§ 1123.310. Exhaustion required .....	29
§ 1123.320. Administrative review of adjudicative proceeding .....	29
§ 1123.330. Judicial review of rulemaking .....	30
§ 1123.340. Exceptions to exhaustion of administrative remedies .....	30
§ 1123.350. Exact issue rule .....	31
Article 4. Standards of Review .....	32
§ 1123.410. Standards of review of agency action .....	32
§ 1123.420. Review of agency interpretation or application of law .....	32
§ 1123.430. Review of agency fact finding .....	34
§ 1123.440. Review of agency exercise of discretion .....	35
§ 1123.450. Review of agency procedure .....	36
§ 1123.460. Review involving hospital board .....	36
§ 1123.470. Burden of persuasion .....	37

Outline — Judicial Review Tentative Recommendation (7/20/95)

Article 5. Superior Court Jurisdiction And Venue	37
§ 1123.510. Superior court proper court for judicial review	37
§ 1123.520. Superior court venue	37
Article 6. Review Procedure	38
§ 1123.610. Notice of review	38
§ 1123.620. Applicability of rules of practice for civil actions	39
§ 1123.630. Contents of notice of review	39
§ 1123.640. Time for filing notice of review in adjudicative proceeding	39
§ 1123.645. Time for filing opening brief	40
§ 1123.650. Stay of agency action	40
§ 1123.660. Type of relief	41
§ 1123.670. Attorney fees in action to review administrative proceeding	42
Article 7. Record for Judicial Review	42
§ 1123.710. Administrative record exclusive basis for judicial review	42
§ 1123.720. Contents of administrative record	43
§ 1123.730. Preparation of record	44
§ 1123.740. Cost of preparing record and other costs	45
§ 1123.750. Disposal of administrative record	46
§ 1123.760. New evidence on judicial review	46
CONFORMING REVISIONS	48
MEDICAL BOARD OF CALIFORNIA	48
Bus. & Prof. Code § 2019 (amended). Office of the board	48
Bus. & Prof. Code § 2337 (amended). (Second of two, operative 1/1/96, repealed 1/1/99)	
Judicial review	48
ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD	49
Bus. & Prof. Code § 23090 (amended). Jurisdiction	49
Bus. & Prof. Code § 23090.1 (repealed). Writ of review	49
Bus. & Prof. Code § 23090.2 (repealed). Scope of review	49
Bus. & Prof. Code § 23090.3 (amended). Right to appear in judicial review proceeding	50
Bus. & Prof. Code § 23090.4 (amended). Judicial review	50
Bus. & Prof. Code § 23090.5 (repealed). Courts having jurisdiction	50
Bus. & Prof. Code § 23090.6 (repealed). Stay of order	50
Bus. & Prof. Code § 23090.7 (technical amendment). Effectiveness of order	51
TAXPAYER ACTIONS	51
Code Civ. Proc. § 526a (amended). Taxpayer actions	51
WRIT OF MANDATE	52
Code Civ. Proc. § 1085 (amended). Courts which may issue writ of mandate	52
Code Civ. Proc. § 1085.5 (repealed). Review of action of Director of Food and Agriculture	
	52
Code Civ. Proc. § 1094.5 (repealed). Administrative mandamus	52
Code Civ. Proc. § 1094.6 (repealed). Review of local agency decision	56
COMMISSION ON PROFESSIONAL COMPETENCE	57
Educ. Code § 44945 (amended). Judicial review	57
BOARD OF GOVERNORS OF CALIFORNIA COMMUNITY COLLEGES	58
Educ. Code § 87682 (amended). Judicial review	58
COSTS IN CIVIL ACTIONS RESULTING FROM ADMINISTRATIVE PROCEEDINGS	58
Gov't Code § 800 (repealed). Costs in action to review administrative proceeding	58
PUBLIC EMPLOYMENT RELATIONS BOARD	59
Gov't Code § 3520 (amended). Judicial review of unit determination or unfair practice case	
	59
Gov't Code § 3542 (amended). Review of unit determination	60
Gov't Code § 3564 (amended). Judicial review of unit determination or unfair practice case	
	61

Outline — Judicial Review Tentative Recommendation (7/20/95)

ADMINISTRATIVE PROCEDURE ACT — RULEMAKING .....	62
Gov't Code § 11350 (amended). Judicial declaration on validity of regulation .....	62
ADMINISTRATIVE PROCEDURE ACT — ADJUDICATION .....	63
Gov't Code § 11523 (repealed). Judicial review .....	63
Gov't Code § 11524 (amended). Continuances .....	64
STATE PERSONNEL BOARD .....	65
Gov't Code § 19630 (amended). When action barred .....	65
LOCAL AGENCIES .....	65
Gov't Code § 54962 (added). Decision .....	65
ZONING ADMINISTRATION .....	66
Gov't Code § 65907 (amended). Time for attacking administrative determination .....	66
AGRICULTURAL LABOR RELATIONS BOARD .....	67
Lab. Code § 1160.8 (amended). Review of final order of board .....	67
WORKERS' COMPENSATION APPEALS BOARD .....	67
Lab. Code § 5950 (amended). Judicial review .....	67
Lab. Code § 5951 (repealed). Writ of review .....	68
Lab. Code § 5952 (repealed). Scope of review .....	68
Lab. Code § 5953 (amended). Right to appear in judicial review proceeding .....	69
Lab. Code § 5954 (amended). Judicial review .....	69
Lab. Code § 5955 (repealed). Courts having jurisdiction .....	69
Lab. Code § 5956 (repealed). Stay of order .....	69
Lab. Code § 6000 (amended). Undertaking on stay order .....	70
CALIFORNIA ENVIRONMENTAL QUALITY ACT .....	70
Pub. Res. Code § 21167 (amended). Review of acts or decisions of public agency .....	70
CALIFORNIA ENERGY COMMISSION .....	71
Pub. Res. Code § 25531 (amended). Judicial review .....	71
PUBLIC UTILITIES COMMISSION .....	72
Pub. Util. Code § 1756 (amended). Review of commission decisions .....	72
Pub. Util. Code § 1757 (repealed). New evidence .....	73
Pub. Util. Code § 1758 (amended). Parties .....	73
Pub. Util. Code § 1760 (repealed). Independent judgment .....	74
Pub. Util. Code § 1762 (amended). Order of stay or suspension .....	74
Pub. Util. Code § 1763 (amended). Temporary stay .....	75
Pub. Util. Code § 1765 (amended). Conditional stay .....	75
Pub. Util. Code § 5251 (amended). Procedures .....	75
UNEMPLOYMENT INSURANCE APPEALS BOARD .....	76
Unemp. Ins. Code § 410 (amended). Finality of decisions .....	76
DEPARTMENT OF MOTOR VEHICLES .....	76
Veh. Code § 13559 (amended). Petition for review .....	76
Veh. Code § 14401 (amended). Statute of limitations on review .....	77
DEPARTMENT OF SOCIAL SERVICES .....	77
Welf. & Inst. Code § 10962 (amended). Judicial review .....	77
BILL PROVISIONS .....	78
Uncodified (added). Severability .....	78
Uncodified (added). Operative date .....	78

1 Title 2 (commencing with Section 1120) is added to Part 3 of the Code of Civil  
2 Procedure to read:

3 TITLE 2. JUDICIAL REVIEW OF AGENCY ACTION

4 CHAPTER 1. GENERAL PROVISIONS

5 Article 1. Preliminary Provisions

6 § 1120. Application of title

7 1120. This title governs judicial review of agency action of any of the following  
8 entities:

9 (a) The state, including any agency or instrumentality of the state, whether in  
10 the executive department or otherwise.

11 (b) A local agency, including a county, city, district, public authority, public  
12 agency, or other political subdivision or public corporation in the state.

13 **Comment.** Section 1120 makes clear that the judicial review provisions of this title apply to  
14 actions of local agencies as well as state government. The term "local agency" is defined in  
15 Government Code Section 54951. See Section 1121.255 & Comment.

16 References in section Comments in this title to the "1981 Model State APA" mean the  
17 Model State Administrative Procedure Act (1981) promulgated by the National Conference  
18 of Commissioners on Uniform State Laws. See 15 U.L.A. 1 (1990). References to the  
19 "Federal APA" mean the Federal Administrative Procedure Act, 5 U.S.C. §§ 551-583, 701-  
20 706, 1305, 3105, 3344, 5372, 7521 (1988 & Supp. V 1993), and related sections (originally  
21 enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237).

22 § 1121.110. Conflicting or inconsistent statute controls

23 1121.110. A statute applicable to a particular entity or a particular agency action  
24 prevails over a conflicting or inconsistent provision of this title.

25 **Comment.** Section 1121.110 is drawn from the first sentence of former Government Code  
26 Section 11523 (judicial review in accordance with provisions of Code of Civil Procedure  
27 "subject, however, to the statutes relating to the particular agency").

28 § 1121.130. Operative date; application to pending proceedings

29 1121.130. (a) Except as provided in this section, this title becomes operative on  
30 January 1, 1998.

31 (b) This title does not apply to a proceeding for judicial review of agency action  
32 pending on the operative date, and the applicable law in effect continues to apply  
33 to the proceeding.

34 (c) On and after January 1, 1997, the Judicial Council may adopt any rules of  
35 court necessary so that this title may become operative on January 1, 1998.

36 **Comment.** Section 1121.130 provides a deferred operative date to enable the courts,  
37 Judicial Council, and parties to make any necessary preparations for operation under this title.

38 Subdivision (b) is drawn from a portion of 1981 Model State APA § 1-108. Pending  
39 proceedings for administrative mandamus, declaratory relief, and other proceedings for

1 judicial review of agency action are not governed by this title but should be completed under  
2 the applicable provisions other than this title.

3 **Article 2. Definitions**

4 **§ 1121.210. Application of definitions**

5 1121.210. Unless the provision or context requires otherwise, the definitions in  
6 this article govern the construction of this title.

7 **Comment.** Section 1121.210 limits these definitions to judicial review of agency action.  
8 Some parallel provisions may be found in the statutes governing adjudicative proceedings by  
9 state agencies. See Gov't Code §§ 11405.10-11405.80.

10 **§ 1121.220. Adjudicative proceeding**

11 1121.220. "Adjudicative proceeding" means an evidentiary hearing for  
12 determination of facts pursuant to which an agency formulates and issues a  
13 decision.

14 **Comment.** Section 1121.220 is drawn from the Administrative Procedure Act. See Gov't  
15 Code § 11405.20 & Comment ("adjudicative proceeding" defined). See also Sections  
16 1121.230 ("agency" defined), 1121.250 ("decision" defined).

17 **§ 1121.230. Agency**

18 1121.230. "Agency" means a board, bureau, commission, department, division,  
19 governmental subdivision or unit of a governmental subdivision, office, officer, or  
20 other administrative unit, including the agency head, and one or more members of  
21 the agency head or agency employees or other persons directly or indirectly  
22 purporting to act on behalf of or under the authority of the agency head.

23 **Comment.** Section 1121.230 is drawn from the Administrative Procedure Act. See Gov't  
24 Code § 11405.30 & Comment ("agency" defined). The intent of the definition is to subject  
25 as many governmental units as possible to this title.

26 **§ 1121.240. Agency action**

27 1121.240. "Agency action" means any of the following:

28 (a) The whole or a part of a rule or a decision.

29 (b) The failure to issue a rule or a decision.

30 (c) An agency's performance of, or failure to perform, any other duty, function,  
31 or activity, discretionary or otherwise.

32 **Comment.** Section 1121.240 is drawn from 1981 Model State APA Section 1-102(2). The  
33 term "agency action" includes a "rule" and a "decision" defined in Sections 1121.280  
34 (rule) and 1121.250 (decision), and an agency's failure to issue a rule or decision. It goes  
35 further, however. Subdivision (c) makes clear that "agency action" includes everything and  
36 anything else that an agency does or does not do, whether its action or inaction is  
37 discretionary or otherwise. There are no exclusions from that all encompassing definition. As  
38 a consequence, there is a category of "agency action" that is neither a "decision" nor a  
39 "rule" because it neither establishes the legal rights of any particular person nor establishes  
40 law or policy of general applicability.

41 The principal effect of the broad definition of "agency action" is that everything an  
42 agency does or does not do is subject to judicial review if the limitations provided in Chapter

1 3 (commencing with Section 1123.110) are satisfied. See Section 1123.110 (requirements for  
2 judicial review). Success on the merits in such cases, however, is another thing. In this statute,  
3 the standards of review used by the courts in judicial review proceedings (see Article 4  
4 (commencing with Section 1123.410)) are relied on to discourage frivolous litigation, rather  
5 than the preclusion of judicial review entirely in whole classes of potential cases.

6 See also Sections 1121.230 ("agency" defined), 1121.250 ("decision" defined).

7 **§ 1121.250. Decision**

8 1121.250. "Decision" means an agency action of specific application that  
9 determines a legal right, duty, privilege, immunity, or other legal interest of a  
10 particular person.

11 **Comment.** Section 1121.250 is drawn from the Administrative Procedure Act. See also  
12 Sections 1121.230 ("agency" defined), 1121.250 ("decision" defined).

13 **§ 1121.255. Local agency**

14 1121.255. "Local agency" means "local agency" as defined in Section 54951  
15 of the Government Code.

16 **Comment.** Section 1121.255 is drawn from former Section 1094.6, and is broadened to  
17 include school districts. See also Section 1121.230 ("agency" defined).

18 **§ 1121.260. Party**

19 1121.260. "Party":

20 (a) As it relates to agency proceedings, means the agency that is taking action,  
21 the person to which the agency action is directed, and any other person named as  
22 a party or allowed to appear or intervene in the agency proceedings.

23 (b) As it relates to judicial review proceedings, means the person seeking  
24 judicial review of agency action and any other person named as a party or  
25 allowed to participate as a party in the judicial review proceedings.

26 **Comment.** Subdivision (a) of Section 1121.260 is drawn from the Administrative  
27 Procedure Act. This section is not intended to address the question of whether a person is  
28 entitled to judicial review. Standing to obtain judicial review is dealt with in Article 2  
29 (commencing with Section 1123.210) of Chapter 3. See also Sections 1121.230 ("agency"  
30 defined), 1121.250 ("decision" defined), 1121.260 ("party" defined).

31 **§ 1121.270. Person**

32 1121.270. "Person" includes an individual, partnership, corporation,  
33 governmental subdivision or unit of a governmental subdivision, or public or  
34 private organization or entity of any character.

35 **Comment.** Section 1121.270 is drawn from the Administrative Procedure Act. See Gov't  
36 Code § 11405.70 & Comment ("person" defined). It supplements the definition in Section  
37 17 and is broader in its application to a governmental subdivision or unit; this would include  
38 an agency other than the agency against which rights under this title are asserted by the  
39 person. Inclusion of such agencies and units of government insures, therefore, that other  
40 agencies or other governmental bodies will be accorded all the rights that a person has under  
41 this title.

1    **§ 1121.280. Rule**

2    1121.280. "Rule" means both of the following:

3    (a) "Regulation" as defined in Section 11342 of the Government Code.

4    (b) The whole or a part of an agency statement, regulation, order, or standard of  
5 general applicability that implements, interprets, makes specific, or prescribes law  
6 or policy, or the organization, procedure, or practice requirements of an agency,  
7 except one that relates only to the internal management of the agency. The term  
8 includes the amendment, supplement, repeal, or suspension of an existing rule.

9    **Comment.** Subdivision (b) of Section 1121.280 is drawn from 1981 Model State APA § 1-  
10 102(10) and Government Code Section 11342(g). The definition includes all agency  
11 statements of general applicability that implement, interpret, or prescribe law or policy,  
12 without regard to the terminology used by the issuing agency to describe them. The  
13 exception in subdivision (b) for an agency statement that relates only to the internal  
14 management of the agency is drawn from Government Code Section 11342(g), and is  
15 generalized to apply to local agencies. See also Section 1121.230 ("agency" defined).

16    This title applies to an agency rule whether or not the rule is a "regulation" to which the  
17 rulemaking provisions of the Administrative Procedure Act apply.

18    **§ 1121.290. Rulemaking**

19    1121.290. "Rulemaking" means the process for formulation and adoption of a  
20 rule.

21    **Comment.** Section 1121.290 is drawn from 1981 Model State APA § 1-102(11).

22                                    **CHAPTER 2. PRIMARY JURISDICTION**

23    **§ 1122.010. Application of chapter**

24    1122.010. This chapter applies if a judicial proceeding is pending and the court  
25 determines that an agency has exclusive or concurrent jurisdiction over the  
26 subject matter of the proceeding or an issue in the proceeding.

27    **Comment.** Section 1122.010 makes clear that the provisions governing primary  
28 jurisdiction come into play only when there is exclusive or concurrent jurisdiction in an  
29 agency over a matter that is the subject of a pending judicial proceeding. The term "judicial  
30 proceeding" is used to mean any proceeding in court, including a civil action or a special  
31 proceeding.

32    This chapter deals with original jurisdiction over a matter, rather than with judicial review of  
33 previous agency action on the matter. If the matter has previously been the subject of agency  
34 action and is currently the subject of judicial review, the governing provisions relating to the  
35 court's jurisdiction are found in Chapter 3 (commencing with Section 1123.110) (judicial  
36 review) rather than in this chapter.

37    **§ 1122.020. Exclusive agency jurisdiction**

38    1122.020. If an agency has exclusive jurisdiction over the subject matter of the  
39 proceeding or an issue in the proceeding, the court shall decline to exercise  
40 jurisdiction over the subject matter or the issue. The court may dismiss the  
41 proceeding or retain jurisdiction pending agency action on the matter or issue.

42    **Comment.** Section 1122.020 requires the court to yield primary jurisdiction to an agency  
43 in the case of a legislative scheme to vest the determination in the agency. Adverse agency

1 action is subject to judicial review. Section 1122.040 (judicial review following agency  
2 action).

3 **§ 1122.030. Concurrent agency jurisdiction**

4 1122.030. If an agency has concurrent jurisdiction over the subject matter of  
5 the proceeding or an issue in the proceeding, the court shall exercise jurisdiction  
6 over the subject matter or issue unless the court in its discretion refers the matter  
7 or issue for agency action. The court may exercise its discretion to refer the matter  
8 or issue for agency action only if the court determines the reference is clearly  
9 appropriate taking into consideration all relevant factors including, but not limited  
10 to, the following:

11 (a) Whether agency expertise is important for proper resolution of a highly  
12 technical matter or issue.

13 (b) Whether the area is so pervasively regulated by the agency that the  
14 regulatory scheme should not be subject to judicial interference.

15 (c) Whether there is a need for uniformity that would be jeopardized by the  
16 possibility of conflicting judicial decisions.

17 (d) Whether there is a need for immediate resolution of the matter, and any  
18 delay that would be caused by referral for agency action.

19 (e) The costs to the parties of additional administrative proceedings.

20 (f) Whether agency remedies are adequate and whether any delay for agency  
21 action would limit judicial remedies, either practically or due to running of statutes  
22 of limitation or otherwise.

23 (g) Any legislative intent to prefer cumulative remedies or to prefer  
24 administrative resolution.

25 **Comment.** Section 1122.030 codifies the case law preference for judicial rather than  
26 administrative action in the case of concurrent jurisdiction, subject to court discretion in  
27 appropriate circumstances. See Asimow, *Judicial Review: Standing and Timing* 65-82 (Sept.  
28 1992).

29 Court retention of jurisdiction does not preclude agency involvement. For example, the  
30 court in its discretion may request that the agency file an amicus brief setting forth its views  
31 on the matter as an alternative to actually referring the matter to the agency.

32 If the matter is referred to the agency, the agency action remains subject to judicial review.  
33 Section 1122.040 (judicial review following agency action).

34 **§ 1122.040. Judicial review following agency action**

35 1122.040. If an agency has exclusive or concurrent jurisdiction over the subject  
36 matter of the proceeding or an issue in the proceeding, agency action on the  
37 matter or issue is subject to judicial review to the extent provided in Chapter 3  
38 (commencing with Section 1123.110).

39 **Comment.** Section 1122.040 makes clear that judicial review principles apply to agency  
40 action even though an agency has exclusive jurisdiction or the court refers a matter of  
41 concurrent jurisdiction to the agency for action under this chapter.

1 CHAPTER 3. JUDICIAL REVIEW

2 Article 1. General Provisions

3 § 1123.110. Requirements for judicial review

4 1123.110. A person who qualifies under this chapter regarding standing and  
5 who satisfies other applicable provisions of law regarding exhaustion of  
6 administrative remedies, ripeness, time for filing, and other pre-conditions is  
7 entitled to judicial review of final agency action.

8 **Comment.** Section 1123.110 is drawn from 1981 Model State APA Section 5-102(a). It  
9 ties together the threshold requirements for obtaining judicial review of final agency action,  
10 and guarantees the right to judicial review if these requirements are met. See, e.g., Sections  
11 1123.120 (finality), 1123.130 (ripeness), 1123.210 (standing), 1123.310 (exhaustion of  
12 administrative remedies), 1123.630 (time for filing notice of review of decision in  
13 adjudicative proceeding).

14 The term "agency action" is defined in Section 1121.240. The term includes rules,  
15 decisions, and other types of agency action. This chapter contains provisions for judicial  
16 review of all types of agency action.

17 § 1123.120. Finality

18 1123.120. A person may not obtain judicial review of agency action unless the  
19 agency action is final. Agency action is not final if the agency intends that the  
20 action is preliminary, preparatory, procedural, or intermediate with regard to  
21 subsequent agency action of that agency or another agency.

22 **Comment.** Section 1123.120 continues the finality requirement of former Section  
23 1094.5(a) in language drawn from 1981 Model State APA Section 5-102(b)(2). This  
24 requirement is crucial, since Section 1123.110 (requirements for judicial review) guarantees  
25 the right to judicial review of agency action if the stated requirements are met. For an  
26 exception to the requirement of finality, see Section 1123.140 (exception to finality and  
27 ripeness requirements).

28 § 1123.130. Ripeness

29 1123.130. A person may not obtain judicial review of an agency rule until the  
30 rule has been applied by the agency.

31 **Comment.** Section 1123.130 codifies the case law ripeness requirement for judicial review  
32 of an agency rule. See, e.g., *Pacific Legal Foundation v. Coastal Commission*, 33 Cal. 3d 158,  
33 188 Cal. Rptr. 104 (1982). A rule includes an agency statement of law or policy. Section  
34 1121.280 ("rule" defined). For an exception to the requirement of ripeness, see Section  
35 1123.140 (exception to finality and ripeness requirements).

36 § 1123.140. Exception to finality and ripeness requirements

37 1123.140. A person may obtain judicial review of agency action that is not final  
38 or, in the case of an agency rule, that has not been applied by the agency, if all of  
39 the following conditions are satisfied:

40 (a) It appears likely that the person will be able to obtain judicial review of the  
41 agency action when it becomes final or, in the case of an agency rule, when it has  
42 been applied by the agency.

1 (b) The issue is fit for immediate judicial review.

2 (c) Postponement of judicial review would result in an inadequate remedy or  
3 irreparable harm disproportionate to the public benefit derived from  
4 postponement.

5 **Comment.** Section 1123.140 codifies an exception to the finality and ripeness  
6 requirements in language drawn from 1981 Model State APA Section 5-103. For this  
7 purpose, issues are fit for immediate judicial review if they are primarily legal rather than  
8 factual in nature and can be adequately reviewed in the absence of a concrete application by  
9 the agency. Under this language the court must assess and balance the fitness of the issues for  
10 immediate judicial review against the hardship to the person from deferral of review. See, e.g.,  
11 *BKHN, Inc. v. Department of Health Services*, 3 Cal. App. 4th 301, 4 Cal. Rptr. 2d 188  
12 (1992); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

13 **§ 1123.150. Proceeding not moot because penalty completed**

14 1123.150. A proceeding under this title commenced while a penalty imposed by  
15 agency action is in full force and effect shall not be considered to have become  
16 moot where the penalty has been completed or complied with during the  
17 pendency of the proceeding.

18 **Comment.** Section 1123.150 continues the substance of the seventh sentence of former  
19 Section 1094.5(g), and the fourth sentence of former Section 1094.5(h)(3).

20 **Article 2. Standing**

21 **§ 1123.210. No standing unless authorized by statute**

22 1123.210. A person does not have standing to obtain judicial review of agency  
23 action unless standing is conferred by this article or is otherwise expressly  
24 provided by statute.

25 **Comment.** Section 1123.210 states the intent of this article to override existing case law  
26 standing principles and to replace them with the statutory standards prescribed in this article.  
27 Other statutes conferring standing include Public Resources Code Section 30801 (judicial  
28 review of decision of Coastal Commission by "any aggrieved person").

29 This title provides a single judicial review procedure for all types of agency action. See  
30 Section 1123.110 & Comment. The provisions on standing therefore accommodate persons  
31 who seek judicial review of the entire range of agency actions, including rules, decisions, and  
32 other actions. See Section 1121.240 ("agency action" defined).

33 **§ 1123.220. Private interest standing**

34 1123.220. (a) An interested person has standing to obtain judicial review of  
35 agency action.

36 (b) An organization that does not otherwise have standing under subdivision  
37 (a) has standing if an interested person is a member of the organization, or a  
38 nonmember the organization is required to represent, and the agency action is  
39 germane to the purposes of the organization.

40 **Comment.** Section 1123.220 governs private interest standing for judicial review of agency  
41 action other than adjudication. For special rules governing standing for judicial review of a  
42 decision in an adjudicative proceeding, see Section 1123.240. *Cf.* Section 1121.240  
43 ("agency action" defined).

1 The provision of subdivision (a) that an "interested" person has standing is drawn from  
 2 the law governing writs of mandate, and from the law governing judicial review of state  
 3 agency regulations. See, e.g., Code Civ. Proc. §§ 1060 (interested person may obtain  
 4 declaratory relief), 1069 (party beneficially interested may obtain writ of review), 1086 (party  
 5 beneficially interested may obtain writ of mandate); Gov't Code § 11350(a) (interested  
 6 person may obtain judicial declaration on validity of state agency regulation); cf. Code Civ.  
 7 Proc. § 902 (appeal by party aggrieved). This requirement continues case law that a person  
 8 must suffer some harm from the agency action in order to have standing to obtain judicial  
 9 review of the action on a private interest, as opposed to a public interest, basis. See, e.g.,  
 10 *Sperry & Hutchinson v. State Board of Pharmacy*, 241 Cal. App. 2d 229, 50 Cal. Rptr. 489  
 11 (1965); *Silva v. City of Cypress*, 204 Cal. App. 2d 374, 43 Cal. Rptr. 270 (1965). A  
 12 plaintiff's private interest is sufficient to confer standing if that interest is over and above that  
 13 of members of the general public. *Carsten v. Psychology Examining Committee*, 27 Cal. 3d  
 14 793, 796, 166 Cal. Rptr. 844 (1980); see generally Asimow, *Judicial Review: Standing and*  
 15 *Timing* 6-8 (Sept. 1992).

16 Subdivision (b) codifies case law giving an incorporated or unincorporated association such  
 17 as a trade union or neighborhood association standing to obtain judicial review on behalf of  
 18 its members. See, e.g., *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276,  
 19 384 P. 2d 158 (1963); *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal. App.  
 20 3d 117, 109 Cal. Rptr. 724 (1973). This principle extends as well to standing of the  
 21 organization to obtain judicial review where a nonmember is adversely affected, as in a case  
 22 where a trade union is required to represent the interests of nonmembers. For an organization  
 23 to have standing under this subdivision, there must be an adverse affect on an actual member  
 24 or other represented person; discovery would be appropriate to ascertain this fact.

25 It should be noted that the standing of a person to obtain judicial review under this section  
 26 is not limited to private persons, but extends to public entities as well, whether state or local.  
 27 See Section 1121.270 ("person" includes governmental subdivision). This reverses a  
 28 contrary case law implication. See *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal. 3d  
 29 1, 227 Cal. Rptr. 391 (1986); cf. *County of Contra Costa v. Social Welfare Bd.*, 199 Cal. App.  
 30 2d 468, 18 Cal. Rptr. 573 (1962).

31 **§ 1123.230. Public interest standing**

32 **1123.230.** A person has standing to obtain judicial review of agency action that  
 33 concerns an important right affecting the public interest if all of the following  
 34 conditions are satisfied:

35 (a) The person resides or conducts business in the jurisdiction of the agency, or  
 36 is an organization that has a member that resides or conducts business in the  
 37 jurisdiction of the agency if the agency action is germane to the purposes of the  
 38 organization.

39 (b) The person is a proper representative of the public and will adequately  
 40 protect the public interest.

41 (c) The person has previously served on the agency a written request to correct  
 42 the agency action and the agency has not, within a reasonable time, done so.

43 **Comment.** Section 1123.230 governs public interest standing for judicial review of agency  
 44 action other than adjudication. For special rules governing standing for judicial review of a  
 45 decision in an adjudicative proceeding, see Section 1123.240. Cf. Section 1121.240  
 46 ("agency action" defined).

47 Section 1123.230 codifies the California case law doctrine that a member of the public may  
 48 obtain judicial review of agency action (or inaction) to implement the public right to enforce  
 49 a public duty. See, e.g., *Green v. Obledo*, 29 Cal. 3d 126, 172 Cal. Rptr. 206 (1981); *Hollman*

1 v. Warren, 32 Cal. 2d 351, 196 P.2d 562 (1948); Board of Social Welfare v. County of Los  
2 Angeles, 27 Cal. 2d 98, 162 P.2d 627 (1945); California Homeless & Housing Coalition, 31  
3 Cal. App. 4th 450, 37 Cal. Rptr. 2d 639 (1995); Environmental Law Fund, Inc. v. Town of  
4 Corte Madera, 49 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1975); American Friends Service  
5 Committee v. Procnier, 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (1973).

6 Section 1123.230 supersedes the standing rules of Section 526a (taxpayer actions). Under  
7 Section 1123.230 a person, whether or not a taxpayer within the jurisdiction, has standing to  
8 obtain judicial review, including restraining and preventing illegal expenditure or injury by  
9 an officer, agent, or other person acting on behalf of an entity, provided the general public  
10 interest requirements of this section are satisfied.

11 Section 1123.230 applies to all types of relief sought, whether pecuniary or nonpecuniary,  
12 injunctive or declaratory, or otherwise. The test of standing under this section is whether there  
13 is a duty owed to the general public or a large class of persons. A person may have standing  
14 under the section, regardless of any private interest or personal adverse effect, in order to have  
15 the law enforced in the public interest.

16 The limitations in subdivisions (a)-(c) are drawn loosely from other provisions of state and  
17 federal law. See, e.g., Section 1021.5 (attorney fees in public interest litigation); Section  
18 1123.220 & Comment (private interest standing); first portion of Section 526a (taxpayer  
19 within jurisdiction); Corp. Code § 800(b)(2) (allegation in shareholder derivative action of  
20 efforts to secure action from board); Fed. R. Civ. Proc. 23(a) (representative must fairly and  
21 adequately protect interests of class).

22 **§ 1123.240. Standing for review of decision in adjudicative proceeding**

23 1123.240. (a) This section governs judicial review of a decision in an  
24 adjudicative proceeding notwithstanding any other provision of this article,

25 (b) The following persons have standing to obtain judicial review of a decision  
26 in an adjudicative proceeding:

27 (1) A party to a proceeding under Chapter 4.5 (commencing with Section  
28 11400) of Part 1 of Division 3 of Title 2 of the Government Code.

29 (2) A participant in a proceeding other than a proceeding described in  
30 paragraph (1), if the participant also satisfies Section 1123.220 or Section  
31 1123.230.

32 **Comment.** Section 1123.240 provides special rules for standing to obtain judicial review of  
33 a decision in an adjudicative proceeding. Standing to obtain judicial review of other agency  
34 actions is governed by Sections 1123.220 (private interest standing) and 1123.230 (public  
35 interest standing). Special statutes governing standing requirements for judicial review of an  
36 agency decision prevail over this section. Section 1123.210 (standing expressly provided by  
37 statute); see, e.g., Pub. Res. Code § 30801 (judicial review of decision of Coastal Commission  
38 by "any aggrieved person").

39 Subdivision (b)(1) governs standing to challenge a decision in an adjudicative proceeding  
40 under the Administrative Procedure Act. The provision is thus limited primarily to a state  
41 agency adjudication where an evidentiary hearing for determination of facts is statutorily or  
42 constitutionally required for formulation and issuance of a decision. See Gov't Code §§  
43 11410.10-11410.50 (application of administrative adjudication provisions of Administrative  
44 Procedure Act).

45 A party to an adjudicative proceeding under the Administrative Procedure Act includes the  
46 person to whom the agency action is directed and any other person named as a party or  
47 allowed to intervene in the proceeding. Section 1121.260 ("party" defined). This codifies  
48 existing law. See, e.g., Temescal Water Co. v. Department of Public Works, 44 Cal. 2d 90, 279  
49 P. 2d 963 (1955); Covert v. State Bd. of Equalization, 29 Cal. 2d 125, 173 P. 2d 545 (1946).  
50 Under this test, a complainant or victim who is not made a party does not have standing. A

1 nonparty who might otherwise have private or public interest standing under Section  
2 1123.220 or 1123.230 would not have standing to obtain judicial review of a decision under  
3 the Administrative Procedure Act.

4 Subdivision (b)(2) applies to a decision in an adjudicative proceeding other than a  
5 proceeding subject to the Administrative Procedure Act. Under this provision, a person does  
6 not have standing to obtain judicial review unless the person both (1) was a participant in the  
7 proceeding and (2) satisfies the requirements of either Section 1123.220 (private interest  
8 standing) or Section 1123.230 (public interest standing). Participation may include appearing  
9 and testifying, submitting written comments, or other appropriate activity that indicates a  
10 direct involvement in the agency action.

### 11 Article 3. Exhaustion of Administrative Remedies

#### 12 § 1123.310. Exhaustion required

13 1123.310. A person may obtain judicial review of agency action only after  
14 exhausting all administrative remedies available within the agency whose action  
15 is to be reviewed and within any other agency authorized to exercise  
16 administrative review, unless judicial review before that time is permitted by this  
17 article or otherwise expressly provided by statute.

18 **Comment.** Section 1123.310 codifies the exhaustion of remedies doctrine of existing law.  
19 See, e.g., *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 102 P. 2d 329 (1941)  
20 (exhaustion requirement jurisdictional). Exceptions to the exhaustion requirement are stated  
21 in other provisions of this article.

22 This chapter does not provide an exception from the exhaustion requirement for judicial  
23 review of an administrative law judge's denial of a continuance. *Cf.* former subdivision (c) of  
24 Gov't Code § 11524. Nor does it provide an exception for discovery decisions. *Cf.* *Shively v.*  
25 *Stewart*, 65 Cal. 2d 475, 55 Cal. Rptr. 217 (1965). This chapter does not continue the  
26 exemption found in the cases for a local tax assessment alleged to be a nullity. *Cf.* *Stenocord*  
27 *Corp. v. City and County of San Francisco*, 2 Cal. 3d 984, 88 Cal. Rptr. 165 (1970). Judicial  
28 review of such matters should not occur until conclusion of administrative proceedings.

#### 29 § 1123.320. Administrative review of adjudicative proceeding

30 1123.320. If the agency action being challenged is a decision in an adjudicative  
31 proceeding, all administrative remedies available within an agency are deemed  
32 exhausted for the purpose of Section 1123.310 if no higher level of review is  
33 available within the agency, whether or not a rehearing or other lower level of  
34 review is available within the agency, unless a statute or regulation requires a  
35 petition for rehearing or other administrative review.

36 **Comment.** Section 1123.320 restates the existing California rule that a petition for a  
37 rehearing or other lower level administrative review is not a prerequisite to judicial review of a  
38 decision in an adjudicative proceeding. See provisions of former Gov't Code § 11523; Gov't  
39 Code § 19588 (State Personnel Board). This overrules any contrary case law implication. *Cf.*  
40 *Alexander v. State Personnel Bd.*, 22 Cal. 2d 198, 137 P. 2d 433 (1943).

41 A statute may require further administrative review before judicial review is permitted. See,  
42 e.g., Pub. Util. Code § 1756 (Public Utilities Commission).

43 It should be noted that administrative remedies are deemed exhausted under this section  
44 only when no further higher level review is available within the agency issuing the decision.  
45 This does not excuse any requirement of further administrative review by another agency  
46 such as an appeals board.

1   **§ 1123.330. Judicial review of rulemaking**

2   1123.330. A person may obtain judicial review of rulemaking notwithstanding  
3 the person's failure to do either of the following:

4   (a) Petition the agency promulgating the rule for, or otherwise seek, amendment,  
5 repeal, or reconsideration of the rule.

6   (b) Object to a state agency that a rule of that agency was not submitted for  
7 review to the Office of Administrative Law, or that the agency failed to comply  
8 with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title  
9 2 of the Government Code.

10   **Comment.** Subdivision (a) of Section 1123.330 continues the former second sentence of  
11 subdivision (a) of Government Code Section 11350, and generalizes it to apply to local  
12 agencies as well as state agencies. See Sections 1120 (application of title), 1121.230  
13 ("agency" defined), 1121.280 ("rule" defined).

14   Subdivision (b) is new, and makes clear that exhaustion of remedies does not require filing  
15 a complaint with the Office of Administrative Law that an agency rule is an underground  
16 regulation. *Cf.* Gov't Code § 11340.5.

17   **§ 1123.340. Exceptions to exhaustion of administrative remedies**

18   1123.340. The requirement of exhaustion of administrative remedies is  
19 jurisdictional and the court may not relieve a person of the requirement unless  
20 any of the following conditions is satisfied:

21   (a) The remedies would be inadequate.

22   (b) The requirement would be futile.

23   (c) The requirement would result in irreparable harm disproportionate to the  
24 public and private benefit derived from exhaustion.

25   (d) The person lacked notice of the availability of a remedy.

26   (e) The person seeks judicial review on the ground that the agency lacks  
27 subject matter jurisdiction in the proceeding.

28   (f) The person seeks judicial review on the ground that a statute, regulation, or  
29 procedure is facially unconstitutional.

30   **Comment.** Section 1123.340 authorizes the reviewing court to relieve the person seeking  
31 judicial review of the exhaustion requirement in limited circumstances; this enables the court  
32 to exercise some discretion. This section may not be used as a means to avoid compliance  
33 with other requirements for judicial review, however, such as the exact issue rule. See Section  
34 1123.350.

35   The exceptions to the exhaustion of remedies requirement consolidate and codify a  
36 number of existing case law exceptions, including:

37   *Inadequate remedies.* Under subdivision (a), administrative remedies need not be exhausted  
38 if the available administrative review procedure, or the relief available through administrative  
39 review, is insufficient. This codifies case law. See, e.g., *Common Cause of Calif. v. Board of*  
40 *Supervisors*, 49 Cal. 3d 432, 443, 261 Cal. Rptr. 574 (1989); *Endler v. Schutzbank*, 68 Cal.  
41 *2d 162, 168, 65 Cal. Rptr. 297 (1968)*; *Rosenfield v. Malcolm*, 65 Cal. 2d 559, 55 Cal. Rptr.  
42 *595 (1967)*; see generally Asimow, *Judicial Review: Standing and Timing* 42-45 (Sept.  
43 1992).

44   *Futility.* The exhaustion requirement is excused under subdivision (b) if it is certain, not  
45 merely probable, that the agency would deny the requested relief. See Asimow, *supra*, 39-41.

46   *Irreparable harm.* Subdivision (c) codifies the existing narrow case law exception to the  
47 exhaustion of remedies requirement where exhaustion would result in irreparable harm

1 disproportionate to the benefit derived from requiring exhaustion. The standard is drawn  
2 from 1981 Model State APA Section 5-107(3), but expands the factors to be considered to  
3 include private as well as public benefit.

4 *Lack of notice.* Lack of sufficient or timely notice of availability of an administrative  
5 remedy is an excuse under subdivision (d). See Asimow, *supra*, 49-50.

6 *Lack of subject matter jurisdiction.* Subdivision (e) recognizes an exception to the  
7 exhaustion requirement where the challenge is to the agency's subject matter jurisdiction in  
8 the proceeding. See Asimow, *supra*, 43.

9 *Constitutional issues.* Under subdivision (f) administrative remedies need not be exhausted  
10 for a challenge to a statute, regulation, or procedure as unconstitutional on its face; there is no  
11 exception for a challenge to a provision as applied, even though phrased in constitutional  
12 terms. See Asimow, *supra*, 42-49.

13 **§ 1123.350. Exact issue rule**

14 1123.350. (a) Except as provided in subdivision (b), a person may not obtain  
15 judicial review of an issue that was not raised before the agency either by the  
16 person seeking judicial review or by another person.

17 (b) The court may permit judicial review of an issue that was not raised before  
18 the agency if any of the following conditions is satisfied:

19 (1) The agency did not have jurisdiction to grant an adequate remedy based on  
20 a determination of the issue.

21 (2) The person did not know and was under no duty to discover, or did not  
22 know and was under a duty to discover but could not reasonably have  
23 discovered, facts giving rise to the issue.

24 (3) The agency action subject to judicial review is an agency rule and the  
25 person has not been a party in an adjudicative proceeding that provided an  
26 adequate opportunity to raise the issue.

27 (4) The agency action subject to judicial review is a decision in an adjudicative  
28 proceeding and the person was not adequately notified of the adjudicative  
29 proceeding.

30 (5) The interests of justice would be served by judicial resolution of an issue  
31 arising from a change in controlling law occurring after the agency action or from  
32 agency action occurring after the person exhausted the last feasible opportunity  
33 to seek relief from the agency.

34 **Comment.** Subdivision (a) of Section 1123.350 codifies the case law exact issue rule. See  
35 Asimow, *Judicial Review: Standing and Timing* 37-39 (Sept. 1992). It limits the issues that  
36 may be raised and considered in the reviewing court to those that were raised before the  
37 agency. The section makes clear that the person seeking judicial review need not have raised  
38 the issue in the administrative proceeding — the requirement is satisfied if the issue was raised  
39 for agency consideration at all in the proceeding.

40 The exact issue rule is in a sense a variation of the exhaustion of remedies requirement —  
41 the agency must first have had an opportunity to determine the issue that is subject to judicial  
42 review. Under subdivision (b) the court may relieve a person of the exact issue requirement in  
43 circumstances that are in effect an elaboration of the doctrine of exhaustion of administrative  
44 remedies. See also Section 1123.340 & Comment (exceptions to exhaustion of administrative  
45 remedies).

46 The intent of paragraph (1) of subdivision (b) is to permit the court to consider an issue  
47 that was not raised before the agency if the agency did not have jurisdiction to grant an

1 adequate remedy based on a determination of the issue. Examples include: (A) an issue as to  
2 the facial constitutionality of the statute that enables the agency to function to the extent state  
3 law prohibits the agency from passing on the validity of the statute; (B) an issue as to the  
4 amount of compensation due as a result of an agency's breach of contract to the extent state  
5 law prohibits the agency from passing on this type of question.

6 Paragraph (2) permits a party to raise a new issue in the reviewing court if the issue arises  
7 from newly discovered facts that the party excusably did not know at the time of the agency  
8 proceedings.

9 Paragraph (3) permits a party to raise a new issue in the reviewing court if the challenged  
10 agency action is an agency rule and if the person seeking to raise the new issue in court was  
11 not a party in an adjudicative proceeding which provided an opportunity to raise the issue  
12 before the agency.

13 Paragraph (4) permits a new issue to be raised in the reviewing court by a person who was  
14 not properly notified of the adjudicative proceeding which produced the challenged decision.

15 Paragraph (5) permits a new issue to be raised in the reviewing court if the interests of  
16 justice would be served thereby and the new issue arises from a change in controlling law, or  
17 from agency action after the person exhausted the last opportunity for seeking relief from the  
18 agency. See *Lindeleaf v. ALRB*, 41 Cal. 3d 861, 226 Cal. Rptr. 119 (1986).

#### 19 Article 4. Standards of Review

##### 20 § 1123.410. Standards of review of agency action

21 1123.410. Except as otherwise provided by statute, the validity of agency  
22 action shall be determined on judicial review under the standards of review  
23 provided in this article.

24 **Comment.** Section 1123.410 is drawn from 1981 Model State APA Section 5-116(a)(2).  
25 The scope of judicial review provided in this article may be qualified by another statute that  
26 establishes review based on different standards than those in this article. See, e.g., Pub. Util.  
27 Code § 1757; Rev. & Tax. Code §§ 5170, 6931-6937.

##### 28 § 1123.420. Review of agency interpretation or application of law

29 1123.420. (a) This section applies to a determination by the court of any of the  
30 following issues:

31 (1) Whether the agency action, or the statute or regulation on which the agency  
32 action is based, is unconstitutional on its face or as applied.

33 (2) Whether the agency acted beyond the jurisdiction conferred by the  
34 constitution, a statute, or a regulation.

35 (3) Whether the agency has decided all issues requiring resolution.

36 (4) Whether the agency has erroneously interpreted the law.

37 (5) Whether the agency has erroneously applied the law to the facts.

38 (b) Except as provided in subdivision (c), the standard for judicial review under  
39 this section is the independent judgment of the court, giving deference to the  
40 determination of the agency appropriate to the circumstances of the agency  
41 action.

42 (c) If a statute delegates to an agency interpretation of a statute or application  
43 of law to facts, the standard for judicial review of the agency's determination is  
44 abuse of discretion.

1 **Comment.** Section 1123.420 clarifies and codifies existing case law on judicial review of  
 2 agency interpretation of law.

3 Subdivision (a)(2) continues a portion of former Section 1094.5(b) (respondent has  
 4 proceeded without or in excess of jurisdiction).

5 Subdivision (a)(3), providing for judicial relief if the agency has not decided all issues  
 6 requiring resolution, deals with the possibility that the reviewing court may dispose of the case  
 7 on the basis of issues that were not considered by the agency. An example would arise if the  
 8 court had to decide on the facial constitutionality of the agency's enabling statute where an  
 9 agency is precluded from passing on the question. This provision is not intended to authorize  
 10 the reviewing court initially to decide issues that are within the agency's primary jurisdiction  
 11 — such issues should first be decided by the agency, subject to the standards of judicial  
 12 review provided in this article.

13 Subdivision (a)(5) changes case law that an issue of application of law to fact (often  
 14 referred to as a mixed question of law and fact) is treated for purposes of judicial review as an  
 15 issue of fact, if the facts in the case (or inferences to be drawn from the facts) are disputed.  
 16 See *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, 48 Cal. 3d 341, 349, 769 P.2d  
 17 399, 256 Cal. Rptr. 543 (1989). Subdivision (a)(5) broadens and applies to all application  
 18 issues the case law rule that undisputed facts and inferences are treated as issues of law. See  
 19 *Halaco Engineering Co. v. South Central Coast Regional Comm'n*, 42 Cal. 3d 52, 74-77, 720  
 20 P.2d 15, 227 Cal. Rptr. 667 (1986).

21 Subdivision (b) applies the independent judgment test for judicial review of questions of  
 22 law with appropriate deference to the agency's determination. Subdivision (b) codifies the  
 23 case law rule that the final responsibility to decide legal questions belongs to the courts, not to  
 24 administrative agencies. See, e.g., *Association of Psychology Providers v. Rank*, 51 Cal. 3d 1,  
 25 270 Cal. Rptr. 796 (1990). This rule is qualified by the requirement that the courts give  
 26 deference to the agency's interpretation appropriate to the circumstances of the agency  
 27 action. Factors in determining the deference appropriate include such matters as (1) whether  
 28 the agency is interpreting a statute or its own regulation, (2) whether the agency's  
 29 interpretation was contemporaneous with enactment of the law, (3) whether the agency has  
 30 been consistent in its interpretation and the interpretation is long-standing, (4) whether there  
 31 has been a reenactment with knowledge of the existing interpretation, (5) the degree to which  
 32 the legal text is technical, obscure, or complex and the agency has interpretive qualifications  
 33 superior to the court's, and (6) the degree to which the interpretation appears to have been  
 34 carefully considered by responsible agency officials. See Asimow, *The Scope of Review of*  
 35 *Administrative Action* 54-55 (Jan. 1993). See also *Jones v. Tracy School Dist.*, 27 Cal. 3d 99,  
 36 108, 611 P.2d 441, 165 Cal. Rptr. 100 (1980) (no deference for statutory interpretation in  
 37 internal memo not subject to notice and hearing process for regulation and written after  
 38 agency became amicus curiae in case at bench); *City of Los Angeles v. Los Olivos Mobile*  
 39 *Home Park*, 213 Cal. App. 3d 1427, 262 Cal. Rptr. 446 (1989) (no deference for  
 40 interpretation of city ordinance in internal memo not adopted as regulation); *Johnston v.*  
 41 *Department of Personnel Administration*, 191 Cal. App. 3d 1218, 1226, 236 Cal. Rptr. 853  
 42 (1987) (no deference for interpretation in inter-departmental communication rather than in  
 43 formal regulation); *California State Employees Ass'n v. State Personnel Board*, 178 Cal. App.  
 44 3d 372, 380, 223 Cal. Rptr. 826 (1986) (formal regulation entitled to deference, informal  
 45 memo prepared for litigation not entitled to deference).

46 Subdivision (b) is consistent with and continues the substance of cases saying courts must  
 47 accept statutory interpretation by an agency within its expertise unless "clearly erroneous" as  
 48 that standard was applied in *Nipper v. California Automobile Assigned Risk Plan*, 19 Cal. 3d  
 49 35, 45, 560 P.2d 743, 136 Cal. Rptr. 854 (1977) (courts respect "administrative  
 50 interpretations of a law and, unless clearly erroneous, have deemed them significant factors in  
 51 ascertaining statutory meaning and purpose"). The "clearly erroneous" standard was  
 52 another way of requiring the courts in exercising independent judgment to give appropriate  
 53 deference to the agency's interpretation of law. See *Bodinson Mfg. Co. v. California*  
 54 *Employment Comm'n*, 17 Cal. 2d 321, 325-26, 109 P.2d 935 (1941). For cases applying the

1 "clearly erroneous" standard in the labor law context, see, e.g., *Agricultural Labor Relations*  
 2 *Bd. v. Superior Court*, 16 Cal. 3d 392, 400, 411, 546 P.2d 687, 128 Cal. Rptr. 183 (1976);  
 3 *Banning Teachers Ass'n v. Public Employment Relations Bd.*, 44 Cal. 3d 799, 804, 750 P.2d  
 4 313, 244 Cal. Rptr. 671 (1988); *San Mateo City School Dist. v. Public Employment Relations*  
 5 *Bd.*, 33 Cal. 3d 850, 856, 663 P.2d 523, 191 Cal. Rptr. 800 (1983); *San Lorenzo Education*  
 6 *Ass'n v. Wilson*, 32 Cal. 3d 841, 850, 654 P.2d 202, 187 Cal. Rptr. 432 (1982). These cases  
 7 should guide the courts in determining the appropriate degree of deference in this context.

8 The deference due the agency's determination does not override the ultimate authority of  
 9 the court to substitute its own judgment for that of the agency under the standard of  
 10 subdivision (b), especially when constitutional questions are involved. See *People v. Louis*, 42  
 11 Cal. 3d 969, 987, 728 P.2d 180, 232 Cal. Rptr. 110 (1986); Cal. Const. Art. III, § 3.5.

12 Subdivision (c) codifies the rule that where the legislature has delegated authority to the  
 13 agency to interpret the law, the court must accept a reasonable agency interpretation under  
 14 the abuse of discretion standard. See, e.g., *Henning v. Division of Occupational Safety &*  
 15 *Health*, 219 Cal. App. 3d 747, 268 Cal. Rptr. 476 (1990). But mere authority for an agency  
 16 to make regulations generally or to implement a statute is not in itself a delegation of  
 17 authority to construe the meaning of words in the statute. And a delegation of authority to  
 18 construe a statute is not to be implied merely because the statute is ambiguous. Subdivision  
 19 (c) applies only when a statute demonstrably delegates to the agency the power to interpret  
 20 particular statutory language. See *Asimow, supra* at 60. For an example of an express  
 21 delegation of authority to apply law to facts (findings of "ultimate facts") and providing a  
 22 more deferential standard of review, see Gov't Code § 3564 (*Public Employment Relations*  
 23 *Board*).

24 **§ 1123.430. Review of agency fact finding**

25 1123.430. (a) This section applies to a determination by the court of whether  
 26 agency action is based on an erroneous determination of fact made or implied by  
 27 the agency.

28 (b) Except as provided in subdivision (c), the standard for judicial review under  
 29 this section is whether the agency's determination is supported by substantial  
 30 evidence in the light of the whole record.

31 (c) The standard for judicial review under this section is the independent  
 32 judgment of the court whether the decision is supported by the weight of the  
 33 evidence if the agency has changed a finding of fact of, or has increased the  
 34 penalty imposed by, the administrative law judge in a proceeding under Chapter  
 35 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the  
 36 Government Code.

37 **Comment.** Section 1123.430 supersedes former Section 1094.5(b)-(c) (abuse of discretion  
 38 if decision not supported by findings or findings not supported by evidence).

39 Subdivision (b) eliminates the rule of former Section 1094.5(c), providing for independent  
 40 judgment review in cases where "authorized by law." The former standard was interpreted to  
 41 provide for independent judgment review where a fundamental vested right is involved. *Bixby*  
 42 *v. Pierno*, 4 Cal. 3d 130, 144, 481 P.2d 242, 93 Cal. Rptr. 234 (1971); see generally *Asimow,*  
 43 *The Scope of Review of Administrative Action* 3-25 (Jan. 1993).

44 The substantial evidence test of subdivision (b) is not a toothless standard which calls for  
 45 the court merely to rubber stamp an agency's finding if there is any evidence to support it.  
 46 The court must examine the evidence in the record both supporting and opposing the  
 47 agency's findings. *Bixby v. Pierno, supra*. If a reasonable person could have made the  
 48 agency's findings, the court must sustain them. But if the agency head comes to a different  
 49 conclusion about credibility than the administrative law judge, the substantiality of the

1 evidence supporting the agency's decision is called into question. *Cf.* Gov't Code § 11425.50  
2 [in SB 532].

3 Subdivision (c) limits independent judgment review to cases under the formal adjudicative  
4 proceeding provisions of the Administrative Procedure Act where the agency changes a  
5 finding of fact or increases the penalty. However, on judicial review, the court must give great  
6 weight to an administrative determination based on credibility of a witness. Gov't Code §  
7 11425.50 [in SB 532]. Subdivision (c) will apply mostly in occupational licensing cases. This  
8 approach addresses the primary area where agency abuse may occur — where the agency  
9 departs from the decision of an independent trier of fact, closer judicial review is necessary.  
10 However, where the agency adopts the presiding officer's proposed decision, less judicial  
11 scrutiny is necessary.

12 **§ 1123.440. Review of agency exercise of discretion**

13 1123.440. (a) This section applies to a determination by the court whether  
14 agency action is a proper exercise of discretion.

15 (b) Except as provided in subdivision (c), the standard for judicial review under  
16 this section is abuse of discretion.

17 (c) To the extent the agency action is based on a determination of fact, made or  
18 implied by the agency, the standard for judicial review under this section is  
19 whether the agency's determination is supported by substantial evidence in the  
20 light of the whole record.

21 **Comment.** Section 1123.440 codifies the existing authority of the court to review agency  
22 action that constitutes an exercise of agency discretion. A court may decline to exercise  
23 review of discretionary action in circumstances where the Legislature so intended or where  
24 there are no standards by which a court can conduct review. *Cf.* Federal APA § 701(a)(2).

25 Subdivision (a) continues a portion of former Section 1094.5(b) (prejudicial abuse of  
26 discretion).

27 Subdivisions (b) and (c) clarify the standards for court determination of abuse of discretion  
28 but do not significantly change existing law. See Code Civ. Proc. § 1094.5(c) (administrative  
29 mandamus); Gov't Code § 11350(b) (review of regulations). The standard for reviewing  
30 agency discretionary action is whether there is abuse of discretion. The analysis consists of  
31 two elements.

32 First, to the extent that the discretionary action is based on factual determinations, there  
33 must be substantial evidence in the light of the whole record in support of those factual  
34 determinations. This is the same standard that a court uses to review agency findings of fact  
35 generally. Section 1123.430 (review of agency fact finding). However, it should be  
36 emphasized that discretionary action such as agency rulemaking is frequently based on  
37 findings of legislative rather than adjudicative facts. Legislative facts are general in nature and  
38 are necessary for making law or policy (as opposed to adjudicative facts which are specific to  
39 the conduct of particular parties). Legislative facts are often scientific, technical, or economic  
40 in nature. Often, the determination of such facts requires specialized expertise and the fact  
41 findings involve a good deal of guesswork or prophecy. A reviewing court must be  
42 appropriately deferential to agency findings of legislative fact and should not demand that  
43 such facts be proved with certainty. Nevertheless, a court can still legitimately review the  
44 rationality of legislative fact finding in light of the evidence in the whole record.

45 Second, discretionary action is based on a choice or judgment. A court reviews this choice  
46 by asking whether there is abuse of discretion in light of the record and the reasons stated by  
47 the agency. See Section 1123.720(d) (agency must supply reasons when necessary for proper  
48 judicial review). This standard is often encompassed by the terms "arbitrary" or  
49 "capricious." The court must not substitute its judgment for that of the agency, but the  
50 agency action must be rational. See Asimow, *The Scope of Review of Administrative Action*

1 75-78 (Jan. 1993). Abuse of discretion is established if it appears from the record viewed as a  
2 whole that the agency action is unreasonable, arbitrary, or capricious. Cf. ABA Section on  
3 Administrative Law, Restatement of Scope of Review Doctrine, 38 Admin. L. Rev. 235 (1986)  
4 (grounds for reversal include policy judgment so unacceptable or reasoning so illogical as to  
5 make agency action arbitrary, or agency's failure in other respects to use reasoned  
6 decisionmaking).

7 Section 1123.440 applies, for example, to a local agency land use decision as to whether a  
8 planned project is consistent with the agency's general plan. E.g., Sequoyah Hills  
9 Homeowners Association v. City of Oakland, 23 Cal. App. 4th 704, 717-20, 29 Cal. Rptr. 2d  
10 182, 189-91 (1993); Dore v. County of Ventura, 23 Cal. App. 4th 320, 328-29, 28 Cal. Rptr.  
11 299, 304 (1994). See also Local and Regional Monitor v. City of Los Angeles, 16 Cal. App.  
12 4th 630, 638, 20 Cal. Rptr. 2d 228, 239 (1993); No Oil, Inc. v. City of Los Angeles, 196 Cal.  
13 App. 3d 223, 243, 242 Cal. Rptr. 37 (1987); Greenebaum v. City of Los Angeles, 153 Cal.  
14 App. 3d 391, 400-02, 200 Cal. Rptr. 237 (1984).

15 **§ 1123.450. Review of agency procedure**

16 1123.450. (a) This section applies to a determination by the court of any of the  
17 following issues:

18 (1) Whether the agency has engaged in an unlawful procedure or decision  
19 making process, or has failed to follow prescribed procedure.

20 (2) Whether the persons taking the agency action were improperly constituted  
21 as a decision making body or subject to disqualification.

22 (b) The standard for judicial review under this section is the independent  
23 judgment of the court, giving deference to the agency's determination of  
24 appropriate procedures.

25 **Comment.** Section 1123.450 codifies existing law concerning the independent judgment of  
26 the court and the deference due agency determination of procedures. Cf. Federal APA §  
27 706(2)(D); Mathews v. Eldridge, 424 U.S. 319 (1976).

28 Subdivision (a) is drawn from 1981 Model State APA Section 5-116(c)(5)-(6). It continues  
29 a portion of former Section 1094.5(b) (inquiry of the court extends to questions whether  
30 there has been a fair trial or the agency has not proceeded in the manner required by law).  
31 One example of an agency's failure to follow prescribed procedure is the agency's failure to  
32 act within the prescribed time upon a matter submitted to the agency. [Relief in such cases is  
33 available under Section 1124.120 (civil enforcement).]

34 **Staff Note.** Concerning the last sentence in the Comment, the Commission has not yet  
35 decided whether to add civil enforcement provisions. See Memorandum 95-38.

36 **§ 1123.460. Review involving hospital board**

37 1123.460. (a) This section applies in a case arising from any of the following:

38 (1) A private hospital board.

39 (2) A board of directors of a district organized pursuant to The Local Hospital  
40 District Law, Division 23 (commencing with Section 32000) of the Health and  
41 Safety Code.

42 (3) A governing body of a municipal hospital formed pursuant to Article 7  
43 (commencing with Section 37600) or Article 8 (commencing with Section 37650)  
44 of Chapter 5 of Division 3 of Title 4 of the Government Code.

1 (b) Except as provided in subdivision (c), the standard for judicial review under  
2 this section is whether the agency action is supported by substantial evidence in  
3 the light of the whole record.

4 (c) If the person seeking judicial review alleges discriminatory action prohibited  
5 by Section 1316 of the Health and Safety Code, and makes a preliminary showing  
6 of substantial evidence in support of that allegation, the standard for judicial  
7 review under this section is the independent judgment of the court whether the  
8 agency action is supported by the weight of the evidence.

9 **Comment.** Section 1123.460 continues the substance of former Section 1094.5(d). It  
10 applies notwithstanding Section 1123.430 (review of agency fact finding).

11 *Staff Note.* The staff recommends this section be deleted. See Memorandum 95-38.

12 **§ 1123.470. Burden of persuasion**

13 1123.470. Except as otherwise provided by statute, the burden of  
14 demonstrating the invalidity of agency action is on the party asserting the  
15 invalidity.

16 **Comment.** Section 1123.470 codifies existing law. See California Administrative  
17 Mandamus §§ 4.157, 12.7 (Cal. Cont. Ed. Bar, 2d ed. 1989). It is drawn from 1981 Model  
18 State APA Section 5-116(a)(1).

19 **Article 5. Superior Court Jurisdiction And Venue**

20 **§ 1123.510. Superior court proper court for judicial review**

21 1123.510. Except as otherwise provided by statute, the superior court is the  
22 proper court for judicial review under this title.

23 **Comment.** Section 1123.510 is drawn from 1981 Model State APA Section 5-104,  
24 alternative A. Under prior law, except where the issues were of great public importance and  
25 had to be resolved promptly or where otherwise provided by statute, the superior court was  
26 the proper court for administrative mandamus proceedings. See *Mooney v. Pickett*, 4 Cal. 3d  
27 669, 674-75, 483 P.2d 1231, 94 Cal. Rptr. 279 (1971). Under Section 1123.510, the superior  
28 court is the proper court for judicial review of agency action whether or not issues of great  
29 public importance are involved.

30 The introductory clause of Section 1123.510 recognizes that statutes applicable to  
31 particular proceedings provide that judicial review is in the court of appeal or Supreme Court.  
32 See Bus. & Prof. Code §§ 6082 (State Bar Court), 23090 (Alcoholic Beverage Control  
33 Appeals Board and Department of Alcoholic Beverage Control); Gov't Code §§ 3520(c),  
34 3542(c), 3564(c) (Public Employment Relations Board); Lab. Code §§ 1160.8 (Agricultural  
35 Labor Relations Board), 5950 (Workers' Compensation Appeals Board); Pub. Res. Code §  
36 25531 (California Energy Conservation and Development Commission); Pub. Util. Code §  
37 1756 (Public Utilities Commission).

38 **§ 1123.520. Superior court venue**

39 1123.520. (a) The proper county for judicial review in the superior court of  
40 agency action under this article is:

41 (1) In the case of a state agency, the county where the cause of action, or some  
42 part thereof, arose.

1 (2) In the case of a local agency, the county of jurisdiction of the agency.

2 (b) A proceeding under this article may be transferred on the grounds and in the  
3 manner provided for transfer of a civil action under Title 4 (commencing with  
4 Section 392) of Part 2.

5 [(c) If the proceeding involves a nongovernmental entity as respondent, the  
6 venue provisions of Title 4 (commencing with Section 392) of Part 2 apply.]

7 **Comment.** Subdivision (a)(1) of Section 1123.520 continues prior law for judicial review  
8 of state agency action. See Code Civ. Proc. § 393(1)(b); California Administrative Mandamus  
9 § 8.16, at 269 (Cal. Cont. Ed. Bar, 2d ed. 1989); *Duval v. Contractors State License Board*,  
10 125 Cal. App. 2d 532, 271 P.2d 194 (1954). Subdivision (a)(2) is new, but is probably not a  
11 substantive change, since the cause of action is likely arise in the county of the local agency's  
12 jurisdiction.

13 Under subdivision (b), a case filed in the wrong county should not be dismissed, but should  
14 be transferred to the proper county.

15 **Article 6. Review Procedure**

16 **§ 1123.610. Notice of review**

17 1123.610. (a) A person seeking judicial review of agency action may initiate  
18 judicial review by filing a notice of review with the court.

19 (b) The person seeking judicial review shall cause a copy of the notice of  
20 review to be served on the other parties in the same manner as service of a  
21 summons in a civil action.

22 **Comment.** Subdivision (a) of Section 1123.610 supersedes the first sentence of former  
23 Section 11523 of the Government Code. Subdivision (b) continues existing practice. See  
24 California Administrative Mandamus §§ 8.48, 9.17, 9.23, at 298-99, 320, 326 (Cal. Cont. Ed.  
25 Bar 1989). Since the notice of review serves the purpose of the alternative writ of mandamus  
26 or notice of motion under prior law, a summons is not required. See California Administrative  
27 Mandamus, *supra*, §§ 9.8, 9.21, at 315, 324.

1 **§ 1123.620. Applicability of rules of practice for civil actions**

2 1123.620. (a) Except as otherwise provided in this title or by rules of court  
3 adopted by the Judicial Council not inconsistent with this title, Part 2  
4 (commencing with Section 307) applies to proceedings under this title.

5 (b) A party may obtain discovery in a proceeding under this title only of matters  
6 reasonably calculated to lead to the discovery of evidence admissible under  
7 Section 1123.760.

8 **Comment.** Subdivision (a) of Section 1123.620 continues the effect of Section 1109 in  
9 proceedings under this title. Subdivision (b) codifies *City of Fairfield v. Superior Court*, 14  
10 Cal. 3d 768, 774-75, 537 P.2d 375, 122 Cal. Rptr. 543 (1975).

11 **§ 1123.630. Contents of notice of review**

12 1123.630. The notice of review shall state all of the following:

13 (a) The name and mailing address of the person seeking judicial review.

14 (b) The name and mailing address of the agency whose action is at issue.

15 (c) Identification of the agency action at issue, together with a duplicate copy,  
16 summary, or brief description of the agency action.

17 (d) Identification of persons who were parties in any adjudicative proceedings  
18 that led to the agency action.

19 (e) Facts to demonstrate that the person seeking judicial review is entitled to it.

20 (f) The reasons why relief should be granted.

21 (g) A request for relief, specifying the type and extent of relief requested.

22 **Comment.** Section 1123.630 is drawn from 1981 Model State APA Section 5-109.

23 **§ 1123.640. Time for filing notice of review in adjudicative proceeding**

24 1123.640. (a) This section applies to a decision in an adjudicative proceeding,  
25 but does not apply to other agency action.

26 (b) The notice of review shall be filed not later than 30 days after the decision is  
27 effective. The time for filing the notice of review is extended as to a party during  
28 any period when the party is seeking reconsideration of the decision pursuant to  
29 express statute or regulation.

30 (c) The agency shall in the decision or otherwise notify the parties of the period  
31 for filing a notice of review. If the agency does not notify a party of the period  
32 before the decision is effective, the party may file the notice within the earlier of  
33 the following times:

34 (1) Thirty days after the agency notifies the party of the period.

35 (2) One hundred eighty days after the decision is effective.

36 **Comment.** Section 1123.640 provides a limitation period for initiating judicial review of  
37 agency adjudicative decisions. See Section 1121.250 ("decision" defined). This preserves  
38 the distinction in existing law between limitation of judicial review of quasi-legislative and  
39 quasi-judicial agency actions. Other types of agency action may be subject to other or no  
40 limitation periods, or to equitable doctrines such as laches.

41 Subdivision (b) supersedes the second sentence of former Government Code Section 11523  
42 (30 days). It also unifies the review periods formerly found in various special statutes. See,

1 e.g., Code Civ. Proc. § 1094.6 (local agency adjudication other than school district); Gov't  
2 Code §§ 3542 (Public Employment Relations Board), 19630 (State Personnel Board), 65907  
3 (local zoning appeals board); Lab. Code §§ 1160.8 (Agricultural Labor Relations Board),  
4 5950 (Workers' Compensation Appeals Board); Unemp. Ins. Code § 410 (Unemployment  
5 Insurance Appeals Board); Veh. Code § 14401(a) (drivers' license order); Welf. & Inst. Code  
6 § 10962 (welfare decision of Department of Social Services).

7 Section 1123.640 does not override special limitations periods statutorily preserved for  
8 policy reasons, such as the California Environmental Quality Act. Pub. Res. Code § 21167.

9 The time within which judicial review must be initiated under subdivision (b) begins to run  
10 on the date the decision is effective. A decision under the formal hearing procedure of the  
11 Administrative Procedure Act generally is effective 30 days after it becomes final, unless the  
12 agency head makes it effective sooner or stays its effective date. See Gov't Code § 11519.  
13 Judicial review may only be had of a final decision. Section 1123.120 (finality).

14 Nothing in this section overrides standard restrictions on application of statutes of  
15 limitations, such as estoppel to plead the statute (see, e.g., *Ginns v. Savage*, 61 Cal. 2d 520, 39  
16 Cal. Rptr. 377 (1964)), correction of technical defects (see, e.g., *United Farm Workers of*  
17 *America v. ALRB*, 37 Cal. 3d 912, 21 Cal. Rptr. 453 (1985)), computation of time (see Gov't  
18 Code §§ 6800-6807), and application of due process principles to notice of decision (see,  
19 e.g., *State Farm Fire & Casualty v. Workers' Compensation Appeals Bd.*, 119 Cal. App. 3d  
20 193, 173 Cal. Rptr. 778 (1981)).

21 Subdivision (c) extends the judicial review period to ensure that affected parties receive  
22 notice of it. The notification requirement is generalized from former Section 1094.6(f)  
23 (review of local agency decision). See also Unemp. Ins. Code § 410; Veh. Code § 14401(b).

24 **§ 1123.645. Time for filing opening brief**

25 1123.645. A party that files a notice of review shall file its opening brief with  
26 the court within 60 days after filing the notice, or if the party ordered a transcript  
27 or other record of the proceedings within 15 days after filing the notice, within 60  
28 days after receipt of the transcript or other record.

29 **Comment.** Section 1123.645 supersedes the eighth sentence of former Government Code  
30 Section 11523.

31 *Staff Note.* The staff recommends deleting Section 1123.645. The timetable for filing  
32 documents should be provided by Judicial Council rule under Section 1123.620(a). The  
33 briefing schedule for civil appeals, for example, is wholly governed by the Rules of Court. See  
34 Code Civ. Proc. § 901; Cal. Ct. R. 16.

35 **§ 1123.650. Stay of agency action**

36 1123.650. (a) The filing of a notice of review under this title does not of itself  
37 stay or suspend the operation of any agency action.

38 (b) On application of the person seeking judicial review, the reviewing court  
39 may grant a stay of the agency action pending the judgment of the court if it  
40 finds that all of the following conditions are satisfied:

41 (1) The applicant is likely to prevail ultimately on the merits.

42 (2) Without a stay the applicant will suffer irreparable injury.

43 (3) The grant of a stay to the applicant will not cause substantial harm to others.

44 (4) The grant of a stay to the applicant will not substantially threaten the public  
45 health, safety, or welfare.

1 (c) The application for a stay shall be accompanied by proof of service of a  
2 copy of the application on the agency. Service shall be made in the same manner  
3 as service of a summons in a civil action.

4 (d) The court may condition a stay on appropriate terms, including the giving of  
5 security for the protection of third parties.

6 (e) If an appeal is taken from a denial of relief by the superior court, the decision  
7 of the agency shall not be further stayed except on order of the court to which  
8 the appeal is taken. However, in cases where a stay is in effect at the time of filing  
9 the notice of appeal, the stay is continued by operation of law for a period of 20  
10 days after the filing of the notice.

11 (f) If an appeal is taken from a granting of relief by the superior court, the  
12 decision of the agency is stayed pending the determination of the appeal unless  
13 the court to which the appeal is taken orders otherwise.

14 **Comment.** Section 1123.650 is drawn from 1981 Model State APA Section 5-111, and  
15 supersedes former Section 1094.5(g)-(h).

16 Subdivision (b)(1) generalizes the requirement of former Section 1094.5(h)(1) that a stay  
17 may not be granted unless the applicant is likely to prevail on the merits. The former  
18 provision applied only to a decision of a licensed hospital or state agency made after a  
19 hearing under the formal hearing provisions of the Administrative Procedure Act.

20 Subdivision (b)(1) requires more than a conclusion that a possible viable defense exists.  
21 The court must make a preliminary assessment of the merits of the judicial review proceeding  
22 and conclude that the applicant is likely to obtain relief in that proceeding. *Medical Bd. of*  
23 *California v. Superior Court*, 227 Cal. App. 3d 1458, 1461, 278 Cal. Rptr. 247 (1991); *Board*  
24 *of Medical Quality Assurance v. Superior Court*, 114 Cal. App. 3d 272, 276, 170 Cal. Rptr.  
25 468 (1980).

26 Subdivision (c) continues a portion of the second sentence and all of the third sentence of  
27 former Section 1094.5(g), and a portion of the second sentence and all of the third sentence  
28 of former Section 1094.5(h)(1).

29 Subdivision (d) codifies case law. See *Venice Canals Resident Home Owners Ass'n v.*  
30 *Superior Court*, 72 Cal. App. 3d 675, 140 Cal. Rptr. 361 (1977) (stay conditioned on posting  
31 bond).

32 Subdivision (e) continues the fourth and fifth sentences of former Section 1094.5(g) and  
33 the first and second sentences of former Section 1094.5(h)(3).

34 Subdivision (f) continues the sixth sentence of former Section 1094.5(g) and the third  
35 sentence of former Section 1094.5(h)(3).

36 A decision in an adjudicative proceeding under the Administrative Procedure Act may also  
37 be stayed by the agency. Gov't Code § 11519(b).

38 **§ 1123.660. Type of relief; jury trial**

39 1123.660. (a) The court may award damages or compensation only to the  
40 extent expressly authorized by statute.

41 (b) The court may grant other appropriate relief, whether mandatory, injunctive,  
42 or declaratory, preliminary or final, temporary or permanent, equitable or legal. In  
43 granting relief, the court may order agency action required by law, order agency  
44 exercise of discretion required by law, set aside or modify agency action, enjoin or  
45 stay the effectiveness of agency action, remand the matter for further  
46 proceedings, render a declaratory judgment, or take any other action that is  
47 authorized and appropriate.

1 (c) The court may grant necessary ancillary relief to redress the effects of official  
2 action wrongfully taken or withheld, but the court may award attorney's fees or  
3 witness fees only to the extent expressly authorized by statute.

4 (d) If the court sets aside or modifies agency action or remands the matter for  
5 further proceedings, the court may make any interlocutory order necessary to  
6 preserve the interests of the parties and the public pending further proceedings or  
7 agency action.

8 (e) All proceedings shall be heard by the court sitting without a jury.

9 **Comment.** Section 1123.660 is drawn from 1981 Model State APA Section 5-117, and  
10 supersedes former Section 1094.5(f). Section 1123.660 makes clear that the single form of  
11 action established by Section 1123.610 encompasses any appropriate type of relief, with the  
12 exceptions indicated.

13 Subdivision (e) is drawn from the first sentence of subdivision (a) of former Section  
14 1094.5(a) of the Code of Civil Procedure, and generalizes it to apply to all cases other than  
15 those covered by subdivision (f).

16 For statutes authorizing an award of attorney's fees, see Sections 1028.5, 1123.590. See  
17 also Gov't Code §§ 68092.5 (expert witness fees), 68093 (mileage and fees in civil cases in  
18 superior court), 68096.1-68097.10 (witness fees of public officers and employees). Cf. Gov't  
19 Code § 11450.40 (fees for witness appearing in APA proceeding pursuant to subpoena).

20 **§ 1123.670. Attorney fees in action to review administrative proceeding**

21 1123.670. (a) In judicial review of a decision, award, finding, or other  
22 determination in an administrative proceeding under any provision of state law,  
23 where it is shown that the decision, award, finding, or other determination was the  
24 result of arbitrary or capricious action or conduct by an agency or officer in an  
25 official capacity, the complainant if the complainant prevails on judicial review  
26 may collect reasonable attorney's fees, computed at one hundred dollars (\$100)  
27 per hour, but not to exceed seven thousand five hundred dollars (\$7,500), where  
28 the complainant is personally obligated to pay the fees, from the agency, in  
29 addition to any other relief granted or other costs awarded.

30 (b) This section is ancillary only, and does not create a new cause of action.

31 (c) Refusal by an agency or officer to admit liability pursuant to a contract of  
32 insurance is not arbitrary or capricious action or conduct within the meaning of  
33 this section.

34 (d) This section does not apply to judicial review of actions of the State Board  
35 of Control.

36 **Comment.** Section 1123.670 continues former Government Code Section 800.

37 **Article 7. Record for Judicial Review**

38 **§ 1123.710. Administrative record exclusive basis for judicial review**

39 1123.710. Except as provided in Section 1123.760 or as otherwise provided by  
40 statute, the administrative record is the exclusive basis for judicial review of  
41 agency action.

1 **Comment.** Section 1123.710 codifies existing practice. See, e.g., *Beverly Hills Fed. Sav. &*  
2 *Loan Ass'n v. Superior Court*, 259 Cal. App. 2d 306, 324, 66 Cal. Rptr. 183, 192 (1968). For  
3 authority to augment the administrative record for judicial review, see Section 1123.760 (new  
4 evidence on judicial review). For other statutes providing exceptions to Section 1123.710, see  
5 *Rev. & Tax. Code §§ 5170, 6931-6937* (State Board of Equalization).

6 **Staff Note.** *The Commission tentatively decided to keep de novo review for the State Board*  
7 *of Equalization, but not to provide de novo review generally for other agencies that now have*  
8 *de novo review.*

9 **§ 1123.720. Contents of administrative record**

10 1123.720. (a) Except as provided in subdivision (b), the administrative record  
11 for judicial review of agency action consists of all of the following:

12 (1) Any agency documents expressing the agency action.

13 (2) Other documents identified by the agency as having been considered by it  
14 before its action and used as a basis for its action.

15 (3) All material submitted to the agency in connection with the agency action.

16 (4) A transcript of any hearing, if one was maintained, or minutes of the  
17 proceeding. In case of electronic reporting of proceedings, the transcript or a  
18 copy of the electronic reporting shall be part of the administrative record in  
19 accordance with the rules applicable to the record on appeal in judicial  
20 proceedings.

21 (5) Any other material described by statute as the administrative record for the  
22 type of agency action at issue.

23 (6) A table of contents that identifies each item contained in the record and  
24 includes an affidavit of the agency official who has compiled the administrative  
25 record for judicial review specifying the date on which the record was closed and  
26 that the record is complete.

27 (b) The administrative record for judicial review of rulemaking under Chapter  
28 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the  
29 Government Code is the file of the rulemaking proceeding prescribed by Section  
30 11347.3 of the Government Code.

31 (c) By stipulation of all parties to judicial review proceedings, the administrative  
32 record for judicial review may be shortened, summarized, or organized, or may be  
33 an agreed or settled statement of the parties, in accordance with the rules  
34 applicable to the record on appeal in judicial proceedings.

35 (d) If an explanation of reasons for the agency action is not otherwise included  
36 in the administrative record, the court may require the agency to add to the  
37 administrative record for judicial review a brief explanation of the reasons for the  
38 agency action to the extent necessary for proper judicial review.

39 **Comment.** Section 1123.720 is drawn from 1981 Model State APA Section 5-115(a), (d),  
40 (f), (g). For authority to augment the administrative record for judicial review, see Section  
41 1123.760 (new evidence on judicial review). The administrative record for judicial review is  
42 related but not necessarily identical to the record of agency proceedings that is prepared and  
43 maintained by the agency. The administrative record for judicial review specified in this  
44 section is subject to the provisions of this section on shortening, summarizing, or organizing

1 the record, or stipulation to an agreed or settled statement of the parties. Subdivision (c). See  
2 Cal. Ct. R. 4-12 (record on appeal).

3 Subdivision (a) supersedes the seventh sentence of former Government Code Section  
4 11523 (judicial review of formal adjudicative proceedings under Administrative Procedure  
5 Act). In the case of an adjudicative proceeding, the record will include the final decision and  
6 all notices and orders issued by the agency (subdivision (a)(1)), any proposed decision by an  
7 administrative law judge (subdivision (a)(2)), the pleadings, the exhibits admitted or rejected,  
8 and the written evidence and any other papers in the case (subdivision (a)(3)), and a transcript  
9 of all proceedings (subdivision (a)(4)).

10 Treatment of the record in the case of electronic reporting of proceedings in subdivision  
11 (a)(4) is derived from Rule 980.5 of the California Rules of Court (electronic recording as  
12 official record of proceedings).

13 The requirement of a table of contents in subdivision (a)(6) is drawn from Government  
14 Code Section 11347.3 (rulemaking). The affidavit requirement may be satisfied by a  
15 declaration under penalty of perjury. Code Civ. Proc. § 2015.5.

16 If there is an issue of completeness of the administrative record, the court may permit  
17 limited discovery of the agency file for the purpose of determining the accuracy of the  
18 affidavit of completeness. It should be noted that a party is not entitled to discovery of  
19 material in the agency file that is privileged. See, e.g., Gov't Code § 6254 (exemptions from  
20 California Public Records Act). Moreover, the administrative record reflects the actual  
21 documents that are the basis of the agency action. Except as provided in subdivision (d), the  
22 agency cannot be ordered to prepare a document that does not exist, such as a summary of an  
23 oral ex parte contact in a case where the contact is permissible and no other documentation  
24 requirement exists. If judicial review reveals that the agency action is not supported by the  
25 record, the court may grant appropriate relief, including setting aside, modifying, enjoining,  
26 or staying the agency action, or remanding for further proceedings. Section 1123.660.

27 Subdivision (d) supersedes the case law requirement of *Topanga Ass'n for a Scenic*  
28 *Community v. County of Los Angeles*, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836  
29 (1974), that adjudicative decisions reviewed under former Section 1094.5 be explained, and  
30 extends it to other agency action such as rulemaking and discretionary action. The court  
31 should not require an explanation of the agency action if it is not necessary for proper  
32 judicial review, for example if the explanation is obvious. A decision in an adjudicative  
33 proceeding under the Administrative Procedure Act must include a statement of the factual  
34 and legal basis for the decision. Gov't Code § 11425.50 (decision) [SB 523].

35 **§ 1123.730. Preparation of record**

36 1123.730. (a) On request of the person seeking judicial review for the  
37 administrative record for judicial review of agency action:

38 (1) If the agency action is a decision in an adjudicative proceeding required to  
39 be conducted under Chapter 5 (commencing with Section 11500) of Part 1 of  
40 Division 3 of Title 2 of the Government Code, the administrative record shall be  
41 prepared by the Office of Administrative Hearings.

42 (2) If the agency action is other than that described in paragraph (1), the  
43 administrative record shall be prepared by the agency.

44 (b) Except as otherwise provided by statute, the administrative record shall be  
45 delivered to the person seeking judicial review within 30 days after the request,  
46 except in the case of an adjudicative proceeding involving an evidentiary hearing  
47 of more than 10 days, in which case the administrative record shall be delivered  
48 within 60 days after the request. The times provided in this subdivision may be  
49 extended by the court for good cause shown.

1 **Comment.** Section 1123.730 supersedes the fourth sentence of former Government Code  
2 Section 11523 and the first sentence of subdivision (c) of former Section 1094.6 of the Code  
3 of Civil Procedure. Under former Section 11523, in judicial review of proceedings under the  
4 Administrative Procedure Act, the record was to be prepared either by the Office of  
5 Administrative Hearings or by the agency. However, in practice the record was prepared by  
6 the Office of Administrative Hearings, consistent with subdivision (a)(1).

7 The introductory clause of subdivision (b) recognizes that some statutes prescribe the time  
8 to prepare the record in particular proceedings. See, e.g., Gov't Code § 3564 (10-day limit  
9 for Public Employment Relations Board).

10 **§ 1123.740. Cost of preparing record and other costs**

11 1123.740. (a) The agency preparing the administrative record for judicial review  
12 shall charge the person seeking judicial review the fee provided in Section 69950  
13 of the Government Code for the transcript, if any, and the reasonable cost of  
14 preparation of other portions of the record and certification of the record.

15 (b) Except as otherwise provided by rules of court adopted by the Judicial  
16 Council, the prevailing party is entitled to recover as a cost of suit the following  
17 costs borne by the party:

18 (1) The cost of preparing the transcript, if any.

19 (2) The cost of compiling and certifying the record.

20 (3) Any filing fee.

21 (4) Fees for service of documents on the other party.

22 (c) If a person seeking judicial review of a decision in an adjudicative  
23 proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of  
24 Division 3 of Title 2 of the Government Code is required to pay the cost of suit  
25 under subdivision (b), no license of the person shall be renewed or reinstated if  
26 the person fails to pay all of the costs.

27 (d) Notwithstanding any other provision of this section, where the person  
28 seeking judicial review has proceeded pursuant to Section 68511.3 of the  
29 Government Code and the Rules of Court implementing that section and where  
30 the transcript is necessary to a proper review of the administrative proceedings,  
31 the cost of preparing the transcript shall be borne by the agency.

32 **Comment.** Subdivision (a) of Section 1123.740 continues the substance of a portion of the  
33 fourth sentence of former Section 11523 of the Government Code, the third sentence of  
34 subdivision (a) of former Section 1094.5, and the second sentence of subdivision (c) of  
35 former Section 1094.6.

36 Subdivision (b) supersedes the sixth sentence of subdivision (a) of former Section 1094.5,  
37 and the fifth and tenth sentences of former Section 11523 of the Government Code.  
38 Subdivision (b) generalizes these provisions to apply to all proceedings for judicial review of  
39 agency action.

40 Subdivision (c) continues the substance of a portion of the sixth sentence of former Section  
41 11523 of the Government Code.

42 Subdivision (d) continues the substance of the fourth sentence of subdivision (a) of former  
43 Section 1094.5 (proceedings in forma pauperis), and generalizes it to apply to all  
44 proceedings for judicial review of agency action.

1    **§ 1123.750. Disposal of administrative record**

2       1123.750. Any administrative record received for filing by the clerk of the court  
3 may be disposed of as provided in Sections 1952, 1952.2, and 1952.3.

4       **Comment.** Section 1123.750 continues former Section 1094.5(i) without change.

5    **§ 1123.760. New evidence on judicial review**

6       1123.760. (a) Where the court finds that there is relevant evidence that, in the  
7 exercise of reasonable diligence, could not have been produced or that was  
8 improperly excluded in the agency proceedings, it may enter judgment remanding  
9 the case for reconsideration in the light of that evidence. Except as provided in  
10 subdivision (b), the court shall not admit the evidence on judicial review without  
11 remanding the case.

12       (b) The court may receive evidence, in addition to that contained in the  
13 administrative record for judicial review, in any of the following circumstances:

14       (1) The evidence relates to the validity of the agency action and is needed to  
15 decide any of the following disputed issues:

16       (i) Improper constitution as a decision making body, or improper motive or  
17 grounds for disqualification, of those taking the agency action.

18       (ii) Unlawfulness of procedure or of decision making process.

19       (2) The agency action is a decision in an adjudicative proceeding and the  
20 standard of review by the court is the independent judgment of the court.

21       (c) If pursuant to statute the proper court for judicial review is the Supreme  
22 Court or court of appeal and evidence is to be received pursuant to this section,  
23 the court shall appoint a referee, master, or trial court judge for this purpose,  
24 having due regard for the convenience of the parties.

25       **Comment.** Subdivision (a) of Section 1123.760 supersedes former Section 1094.5(e),  
26 which permitted the court to admit evidence without remanding the case in cases in which the  
27 court was authorized by law to exercise its independent judgment on the evidence. Under this  
28 section and Section 1123.710, the court is limited to evidence in the administrative record  
29 except under subdivision (b).

30       The provision in subdivision (a) permitting new evidence that could not in the exercise of  
31 reasonable diligence have been produced in the administrative proceeding should be  
32 narrowly construed—such evidence is admissible only in rare instances. See *Western States*  
33 *Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 578, 38 Cal. Rptr. 2d 139, 149 (1995).

34       Subdivision (b)(1) is drawn from 1981 Model State APA Section 5-114(a)(1)-(2). It  
35 permits the court to receive evidence, subject to a number of conditions. First, evidence may  
36 be received only if it is likely to contribute to the court's determination of the validity of  
37 agency action under one or more of the standards set forth in Sections 1123.410-1123.450.  
38 Second, it identifies some specific issues that may be addressed, if necessary, by new evidence.  
39 Since subdivision (b)(1) permits the court to receive disputed evidence only if needed to  
40 decide disputed "issues," this provision is applicable only with regard to "issues" that are  
41 properly before the court. See Section 1123.350 on limitation of new issues.

42       Subdivision (b)(2) applies in the following types of cases, which involve adjudicative  
43 proceedings where the standard of review is the independent judgment of the court: A formal  
44 adjudicative proceeding conducted by an administrative law judge employed by the Office of  
45 Administrative Hearings, or where the question involves application of law to facts (mixed  
46 questions of law and fact). See Sections 1123.420, 1123.430. [This will have to be revised if

1 the Commission narrows independent judgment review under Section 1123.430]. It should be  
2 noted that admission of evidence by the court under this provision is discretionary with the  
3 court.

4 Subdivision (c) is drawn from 1981 Model State APA Section 5-104(c), alternative B.  
5 Statutes that provide for judicial review in the court of appeal or Supreme Court are: Bus. &  
6 Prof. Code §§ 6082 (State Bar Court), 23090 (Alcoholic Beverage Control Appeals Board  
7 and Department of Alcoholic Beverage Control); Gov't Code §§ 3520(c), 3542(c), 3564(c)  
8 (Public Employment Relations Board); Lab. Code §§ 1160.8 (Agricultural Labor Relations  
9 Board), 5950 (Workers' Compensation Appeals Board); Pub. Res. Code § 25531 (California  
10 Energy Conservation and Development Commission); Pub. Util. Code § 1756 (Public Utilities  
11 Commission).

1 CONFORMING REVISIONS

2 MEDICAL BOARD OF CALIFORNIA

3 **Bus. & Prof. Code § 2019 (amended). Office of the board**

4 2019. (a) The office of the board shall be in the City of Sacramento. Suboffices  
5 may be established in the Cities of Los Angeles, San Diego, and San Francisco or  
6 the their environs of such cities. ~~Legal~~ Except as provided in subdivision (b), legal  
7 proceedings against the board shall be instituted in any one of these four cities.  
8 The board may also establish other suboffices as it may deem necessary and such  
9 records as that may be necessary may be transferred temporarily to any  
10 suboffices.

11 (b) Judicial review of actions of the board shall be in accordance with Title 2  
12 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

13 **Comment.** Section 2019 is amended to make judicial review of actions of the Medical  
14 Board subject to the provisions for judicial review in the Code of Civil Procedure. Venue rules  
15 for these proceedings are found in [Section 1123.510] of the Code of Civil Procedure.

16 **Bus. & Prof. Code § 2337 (amended). (Second of two, operative 1/1/96, repealed 1/1/99)**  
17 **Judicial review**

18 2337. Notwithstanding any other provision of law, review of final decisions of  
19 an administrative law judge of the Medical Quality Hearing Panel, or the Division  
20 of Medical Quality or the Board of Podiatric Medicine in the event a review is  
21 ordered pursuant to Section 2335, shall be ~~by writ of mandamus pursuant to~~  
22 Section 1094.5 Title 2 (commencing with Section 1120) of Part 3 of the Code of  
23 Civil Procedure before a district court of appeal. The court of appeal shall exercise  
24 its independent judgment in review of the proceedings below, and, where the  
25 court finds that there is relevant evidence that, in the exercise of reasonable  
26 diligence, could not have been produced, or that was improperly excluded at the  
27 hearing, it may admit the evidence without remanding the case.

28 The Judicial Council may adopt rules to allocate these cases to a particular  
29 panel or panels within each district for consistent and efficient consideration.  
30 Review shall be entitled to calendar priority, and the hearing shall be set no later  
31 than 180 days from the filing of the action.

32 This section shall become operative on January 1, 1996, and shall be repealed as  
33 of January 1, 1999, unless a later enacted statute, which is enacted before January  
34 1, 1999, deletes or extends that date.

35 **Comment.** Section 2337 is amended to make judicial review under this section subject to  
36 the provisions for judicial review in the Code of Civil Procedure. The former second sentence  
37 of Section 2337 is superseded by the standards of review in Sections 1123.410-1123.460 of  
38 the Code of Civil Procedure.

1                   ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

2   **Bus. & Prof. Code § 23090 (amended). Jurisdiction**

3   ~~23090. Any person affected by a final order of the board, including the~~  
4 ~~department, may, within the time limit specified in this section, apply to the~~  
5 ~~Supreme Court or to the court of appeal for the appellate district in which the~~  
6 ~~proceeding arose, for a writ of review of such final order. The application for writ~~  
7 ~~of review shall be made within 30 days after filing of the final order of the board.~~  
8 The court of appeal has jurisdiction of judicial review of a final order of the board.

9   **Comment.** Section 23090 is amended to eliminate the alternative of judicial review in the  
10 Supreme Court. For the applicable judicial review procedure, see Code Civ. Proc. §§ 1120 et  
11 seq. For standing provisions, see Code Civ. Proc. §§ 1123.210-1123.240. For the finality  
12 requirement, see Code Civ. Proc. § 1123.120. For venue provisions, see Code Civ. Proc. §  
13 1123.520. For the time for filing for judicial review, see Code Civ. Proc. § 1123.640.

14 **Bus. & Prof. Code § 23090.1 (repealed). Writ of review**

15 ~~23090.1. The writ of review shall be made returnable at a time and place then or~~  
16 ~~thereafter specified by court order and shall direct the board to certify the whole~~  
17 ~~record of the department in the case to the court within the time specified. No~~  
18 ~~new or additional evidence shall be introduced in such court, but the cause shall~~  
19 ~~be heard on the whole record of the department as certified to by the board.~~

20 **Comment.** Section 23090.1 is repealed because it is superseded by the judicial review  
21 provisions of the Code of Civil Procedure. See Section 23090.4. The provision in the first  
22 sentence for the return of the writ of review is superseded by Section 1123.620 of the Code  
23 of Civil Procedure. The provision in the first sentence for the record of the department is  
24 superseded by Section 1123.720. The second sentence is superseded by Section 1123.710 of  
25 the Code of Civil Procedure.

26 **Bus. & Prof. Code § 23090.2 (repealed). Scope of review**

27 ~~23090.2. The review by the court shall not extend further than to determine,~~  
28 ~~based on the whole record of the department as certified by the board, whether:~~

29     ~~(a) The department has proceeded without or in excess of its jurisdiction.~~

30     ~~(b) The department has proceeded in the manner required by law.~~

31     ~~(c) The decision of the department is supported by the findings.~~

32     ~~(d) The findings in the department's decision are supported by substantial~~  
33 ~~evidence in the light of the whole record.~~

34     ~~(e) There is relevant evidence which, in the exercise of reasonable diligence,~~  
35 ~~could not have been produced at the hearing before the department.~~

36 ~~Nothing in this article shall permit the court to hold a trial de novo, to take~~  
37 ~~evidence, or to exercise its independent judgment on the evidence.~~

38 **Comment.** Subdivisions (a) through (d) of former Section 230090.2 are superseded by  
39 Sections 1123.410-1123.440 of the Code of Civil Procedure. Subdivision (e) is superseded  
40 by Section 1123.750 of the Code of Civil Procedure. The last sentence is superseded by  
41 Sections 1123.420 (interpretation or application of law) and 1123.710 (new evidence) of the  
42 Code of Civil Procedure. Nothing in the Code of Civil Procedure provisions or in this article  
43 permits the court to hold a trial de novo.

1 **Bus. & Prof. Code § 23090.3 (amended). Right to appear in judicial review proceeding**

2 ~~23090.3. The findings and conclusions of the department on questions of fact~~  
3 ~~are conclusive and final and are not subject to review. Such questions of fact~~  
4 ~~shall include ultimate facts and the findings and conclusions of the department.~~  
5 The parties to a judicial review proceeding are the board, the department, and  
6 each party to the action or proceeding before the board shall have the right to  
7 appear in the review proceeding. Following the hearing, the court shall enter  
8 judgment either affirming or reversing the decision of the department, or the court  
9 may remand the case for further proceedings before or reconsideration by the  
10 department whose interest is adverse to the person seeking judicial review.

11 **Comment.** Section 23090.3 is largely superseded by the judicial review provisions of the  
12 Code of Civil Procedure. See Section 23090. The first sentence is superseded by Section  
13 1123.430 of the Code of Civil Procedure. The second sentence is superseded by Section  
14 1123.420 of the Code of Civil Procedure. The fourth sentence is superseded by Section  
15 1123.660 of the Code of Civil Procedure.

16 **Bus. & Prof. Code § 23090.4 (amended). Judicial review**

17 ~~23090.4. The provisions of the Code of Civil Procedure relating to writs of~~  
18 ~~review shall, insofar as applicable, apply to proceedings in the courts as provided~~  
19 ~~by this article. A copy of every pleading filed pursuant to this article shall be~~  
20 ~~served on the board, the department, and on each party who entered an~~  
21 ~~appearance before the board. Judicial review shall be in accordance with Title 2~~  
22 ~~(commencing with Section 1120) of Part 3 of the Code of Civil Procedure.~~

23 **Comment.** Section 23090.4 is amended to delete the first sentence, and to replace it with a  
24 reference to the judicial review provisions of the Code of Civil Procedure. Special provisions  
25 of this article prevail over general provisions of the Code of Civil Procedure governing  
26 judicial review. See Section 1121.110 (conflicting or inconsistent statute controls). Copies of  
27 pleadings in judicial review proceedings must be served on the parties. See. Code Civ. Proc.  
28 §§ 1123.610 (notice of review), 1123.620 (applicability of rules of practice for civil actions).

29 **Bus. & Prof. Code § 23090.5 (repealed). Courts having jurisdiction; mandate**

30 ~~23090.5. No court of this state, except the Supreme Court and the courts of~~  
31 ~~appeal to the extent specified in this article, shall have jurisdiction to review,~~  
32 ~~affirm, reverse, correct, or annul any order, rule, or decision of the department or to~~  
33 ~~suspend, stay, or delay the operation or execution thereof, or to restrain, enjoin, or~~  
34 ~~interfere with the department in the performance of its duties, but a writ of~~  
35 ~~mandate shall lie from the Supreme Court or the courts of appeal in any proper~~  
36 ~~case.~~

37 **Comment.** Section 23090.5 is superseded by Section 1121.120 of the Code of Civil  
38 Procedure (exclusive procedure) [see Memorandum 95-38].

39 **Bus. & Prof. Code § 23090.6 (repealed). Stay of order**

40 ~~23090.6. The filing of a petition for, or the pendency of, a writ of review shall~~  
41 ~~not of itself stay or suspend the operation of any order, rule, or decision of the~~  
42 ~~department, but the court before which the petition is filed may stay or suspend,~~

1 ~~in whole or in part, the operation of the order, rule, or decision of the department~~  
2 ~~subject to review, upon the terms and conditions which it by order directs.~~

3 **Comment.** Former Section 23090.6 is superseded by Code of Civil Procedure Section  
4 1123.650 (stays).

5 **Bus. & Prof. Code § 23090.7 (technical amendment). Effectiveness of order**

6 23097.7. No decision of the department which has been appealed to the board  
7 and no final order of the board shall become effective during the period in which  
8 application may be made for ~~a writ of review, as provided by Section 23090~~  
9 judicial review.

10 **Comment.** Section 23090.7 is amended to recognize that judicial review under the Code of  
11 Civil Procedure has been substituted for a writ of review under this article. See Section  
12 23090.4. The period during which application may be made for judicial review is within 30  
13 days after the decision is effective. See Code Civ. Proc. § 1123.640.

14 **TAXPAYER ACTIONS**

15 **Code Civ. Proc. § 526a (amended). Taxpayer actions**

16 526a. ~~An action to obtain a judgment, restraining and preventing any (a) A~~  
17 proceeding for judicial review of agency action to restrain or prevent illegal  
18 expenditure of, waste of, or injury to the estate, funds, or other property of a  
19 county, town, city or city and county of the state, may be maintained against any  
20 officer thereof, or any agent, or other person, acting in its behalf, ~~either by a~~  
21 ~~citizen resident therein, or by a corporation, who is assessed for and is liable to~~  
22 ~~pay, or, within one year before the commencement of the action, has paid, a tax~~  
23 therein, by a person who has standing to obtain judicial review of agency action  
24 under Article 2 (commencing with Section 1123.210) of Chapter 3 of Title 2 of  
25 Part 3.

26 (b) This section does not affect any right of action in favor of a county, city,  
27 town, or city and county, or any public officer; provided that no injunction shall  
28 be granted restraining the offering for sale, sale, or issuance of any municipal  
29 bonds for public improvements or public utilities.

30 (c) ~~An action~~ A proceeding brought pursuant to this section to enjoin a public  
31 improvement project shall take special precedence over all civil matters on the  
32 calendar of the court except those matters to which equal precedence on the  
33 calendar is granted by law.

34 **Comment.** Section 526a is amended to conform to judicial review provisions. See Sections  
35 1120 (application of title), 1123.210-1123.240 (standing).

WRIT OF MANDATE

1  
2 **Code Civ. Proc. § 1085 (amended). Courts which may issue writ of mandate; parties to**  
3 **whom issued; purpose**

4 1085. It (a) Subject to subdivision (b), a writ of mandate may be issued by any  
5 court, except a municipal or justice court, to any inferior tribunal, corporation,  
6 board, or person, to compel the performance of an act which the law specially  
7 enjoins, as a duty resulting from an office, trust, or station; or to compel the  
8 admission of a party to the use and enjoyment of a right or office to which he the  
9 party is entitled, and from which he the party is unlawfully precluded by such the  
10 inferior tribunal, corporation, board or person.

11 (b) Judicial review of agency action to which Title 2 (commencing with Section  
12 1120) applies shall be pursuant to that title, and not pursuant to this chapter.

13 **Comment.** Section 1085 is amended to add subdivision (b) and to make other technical  
14 revisions. The former reference to a justice court is deleted, because justice courts have been  
15 abolished. See Cal. Const. Art. VI, § 1.

16 **Code Civ. Proc. § 1085.5 (repealed). Review of action of Director of Food and**  
17 **Agriculture**

18 ~~1085.5. Notwithstanding this chapter, in any action or proceeding to attack,~~  
19 ~~review, set aside, void, or annul the activity of the Director of Food and~~  
20 ~~Agriculture under Division 4 (commencing with Section 5001) or Division 5~~  
21 ~~(commencing with Section 9101) of the Food and Agricultural Code, the~~  
22 ~~procedure for issuance of a writ of mandate shall be in accordance with Chapter~~  
23 ~~1.5 (commencing with Section 5051) of Part 1 of Division 4 of that code.~~

24 **Comment.** Section 1085.5 is repealed as obsolete, since Sections 5051-5064 of the Food  
25 and Agricultural Code were repealed in 1987.

26 **Staff Note.** *We have asked the Department of Food and Agriculture to confirm that Section*  
27 *1085.5 is no longer necessary.*

28 **Code Civ. Proc. § 1094.5 (repealed). Administrative mandamus**

29 ~~1094.5. (a) Where the writ is issued for the purpose of inquiring into the validity~~  
30 ~~of any final administrative order or decision made as the result of a proceeding in~~  
31 ~~which by law a hearing is required to be given, evidence is required to be taken,~~  
32 ~~and discretion in the determination of facts is vested in the inferior tribunal,~~  
33 ~~corporation, board, or officer, the case shall be heard by the court sitting without~~  
34 ~~a jury. All or part of the record of the proceedings before the inferior tribunal,~~  
35 ~~corporation, board, or officer may be filed with the petition, may be filed with~~  
36 ~~respondent's points and authorities, or may be ordered to be filed by the court.~~  
37 ~~Except when otherwise prescribed by statute, the cost of preparing the record~~  
38 ~~shall be borne by the petitioner. Where the petitioner has proceeded pursuant to~~  
39 ~~Section 68511.3 of the Government Code and the Rules of Court implementing~~  
40 ~~that section and where the transcript is necessary to a proper review of the~~  
41 ~~administrative proceedings, the cost of preparing the transcript shall be borne by~~

1 the respondent. Where the party seeking the writ has proceeded pursuant to  
2 Section 1088.5, the administrative record shall be filed as expeditiously as  
3 possible, and may be filed with the petition, or by the respondent after payment of  
4 the costs by the petitioner, where required, or as otherwise directed by the court.  
5 If the expense of preparing all or any part of the record has been borne by the  
6 prevailing party, the expense shall be taxable as costs.

7 (b) The inquiry in such a case shall extend to the questions whether the  
8 respondent has proceeded without, or in excess of jurisdiction; whether there was  
9 a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of  
10 discretion is established if the respondent has not proceeded in the manner  
11 required by law, the order or decision is not supported by the findings, or the  
12 findings are not supported by the evidence.

13 (c) Where it is claimed that the findings are not supported by the evidence, in  
14 cases in which the court is authorized by law to exercise its independent  
15 judgment on the evidence, abuse of discretion is established if the court  
16 determines that the findings are not supported by the weight of the evidence. In  
17 all other cases, abuse of discretion is established if the court determines that the  
18 findings are not supported by substantial evidence in the light of the whole  
19 record.

20 (d) Notwithstanding subdivision (c), in cases arising from private hospital  
21 boards or boards of directors of districts organized pursuant to The Local  
22 Hospital District Law, Division 23 (commencing with Section 32000) of the  
23 Health and Safety Code or governing bodies of municipal hospitals formed  
24 pursuant to Article 7 (commencing with Section 37600) or Article 8 (commencing  
25 with Section 37650) of Chapter 5 of Division 3 of Title 4 of the Government  
26 Code, abuse of discretion is established if the court determines that the findings  
27 are not supported by substantial evidence in the light of the whole record.  
28 However, in all cases in which the petition alleges discriminatory actions  
29 prohibited by Section 1316 of the Health and Safety Code, and the plaintiff  
30 makes a preliminary showing of substantial evidence in support of that allegation,  
31 the court shall exercise its independent judgment on the evidence and abuse of  
32 discretion shall be established if the court determines that the findings are not  
33 supported by the weight of the evidence.

34 (e) Where the court finds that there is relevant evidence which, in the exercise  
35 of reasonable diligence, could not have been produced or which was improperly  
36 excluded at the hearing before respondent, it may enter judgment as provided in  
37 subdivision (f) remanding the case to be reconsidered in the light of that  
38 evidence; or, in cases in which the court is authorized by law to exercise its  
39 independent judgment on the evidence, the court may admit the evidence at the  
40 hearing on the writ without remanding the case.

41 (f) The court shall enter judgment either commanding respondent to set aside  
42 the order or decision, or denying the writ. Where the judgment commands that  
43 the order or decision be set aside, it may order the reconsideration of the case in

1 the light of the court's opinion and judgment and may order respondent to take  
2 such further action as is specially enjoined upon it by law, but the judgment shall  
3 not limit or control in any way the discretion legally vested in the respondent.

4 (g) ~~Except as provided in subdivision (h), the court in which proceedings under~~  
5 ~~this section are instituted may stay the operation of the administrative order or~~  
6 ~~decision pending the judgment of the court, or until the filing of a notice of~~  
7 ~~appeal from the judgment or until the expiration of the time for filing the notice,~~  
8 ~~whichever occurs first. However, no such stay shall be imposed or continued if~~  
9 ~~the court is satisfied that it is against the public interest; provided that the~~  
10 ~~application for the stay shall be accompanied by proof of service of a copy of the~~  
11 ~~application on the respondent. Service shall be made in the manner provided by~~  
12 ~~Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with~~  
13 ~~Section 1010) of Title 14 of Part 2. If an appeal is taken from a denial of the writ,~~  
14 ~~the order or decision of the agency shall not be stayed except upon the order of~~  
15 ~~the court to which the appeal is taken. However, in cases where a stay is in effect~~  
16 ~~at the time of filing the notice of appeal, the stay shall be continued by operation~~  
17 ~~of law for a period of 20 days from the filing of the notice. If an appeal is taken~~  
18 ~~from the granting of the writ, the order or decision of the agency is stayed~~  
19 ~~pending the determination of the appeal unless the court to which the appeal is~~  
20 ~~taken shall otherwise order. Where any final administrative order or decision is~~  
21 ~~the subject of proceedings under this section, if the petition shall have been filed~~  
22 ~~while the penalty imposed is in full force and effect, the determination shall not be~~  
23 ~~considered to have become moot in cases where the penalty imposed by the~~  
24 ~~administrative agency has been completed or complied with during the pendency~~  
25 ~~of the proceedings.~~

26 (h) (1) ~~The court in which proceedings under this section are instituted may stay~~  
27 ~~the operation of the administrative order or decision of any licensed hospital or~~  
28 ~~any state agency made after a hearing required by statute to be conducted under~~  
29 ~~the provisions of the Administrative Procedure Act, as set forth in Chapter 5~~  
30 ~~(commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the~~  
31 ~~Government Code, conducted by the agency itself or an administrative law judge~~  
32 ~~on the staff of the Office of Administrative Hearings pending the judgment of the~~  
33 ~~court, or until the filing of a notice of appeal from the judgment or until the~~  
34 ~~expiration of the time for filing the notice, whichever occurs first. However, the~~  
35 ~~stay shall not be imposed or continued unless the court is satisfied that the public~~  
36 ~~interest will not suffer and that the licensed hospital or agency is unlikely to~~  
37 ~~prevail ultimately on the merits; and provided further that the application for the~~  
38 ~~stay shall be accompanied by proof of service of a copy of the application on the~~  
39 ~~respondent. Service shall be made in the manner provided by Title 5 (commencing~~  
40 ~~with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title~~  
41 ~~14 of Part 2.~~

42 (2) ~~The standard set forth in this subdivision for obtaining a stay shall apply to~~  
43 ~~any administrative order or decision of an agency which issues licenses pursuant~~

1 to ~~Division 2 (commencing with Section 500) of the Business and Professions~~  
2 ~~Code or pursuant to the Osteopathic Initiative Act or the Chiropractic Initiative~~  
3 ~~Act. With respect to orders or decisions of other state agencies, the standard in~~  
4 ~~this subdivision shall apply only when the agency has adopted the proposed~~  
5 ~~decision of the administrative law judge in its entirety or has adopted the~~  
6 ~~proposed decision but reduced the proposed penalty pursuant to subdivision (b)~~  
7 ~~of Section 11517 of the Government Code; otherwise the standard in subdivision~~  
8 ~~(g) shall apply.~~

9 (3) ~~If an appeal is taken from a denial of the writ, the order or decision of the~~  
10 ~~hospital or agency shall not be stayed except upon the order of the court to~~  
11 ~~which the appeal is taken. However, in cases where a stay is in effect at the time~~  
12 ~~of filing the notice of appeal, the stay shall be continued by operation of law for a~~  
13 ~~period of 20 days from the filing of the notice. If an appeal is taken from the~~  
14 ~~granting of the writ, the order or decision of the hospital or agency is stayed~~  
15 ~~pending the determination of the appeal unless the court to which the appeal is~~  
16 ~~taken shall otherwise order. Where any final administrative order or decision is~~  
17 ~~the subject of proceedings under this section, if the petition shall have been filed~~  
18 ~~while the penalty imposed is in full force and effect, the determination shall not be~~  
19 ~~considered to have become moot in cases where the penalty imposed by the~~  
20 ~~administrative agency has been completed or complied with during the pendency~~  
21 ~~of the proceedings.~~

22 (i) ~~Any administrative record received for filing by the clerk of the court may be~~  
23 ~~disposed of as provided in Sections 1952, 1952.2, and 1952.3.~~

24 **Comment.** The portion of the first sentence of subdivision (a) of former Section 1094.5  
25 relating to finality is superseded by Section 1123.120 (finality). The portion of the first  
26 sentence of former subdivision (a) relating to trial by jury is superseded by subdivision (f) of  
27 Section 1123.660. The second sentence of former subdivision (a) is superseded by Section  
28 1123.615(a) (Judicial Council rules of pleading and practice). See also Sections 1123.730(c)  
29 (delivery of record) and 1123.740 (disposal of record). The third sentence of former  
30 subdivision (a) is superseded by subdivision (a) of Section 1123.740 (cost of preparing  
31 record). The fourth sentence of former subdivision (a) is continued in substance in  
32 subdivision (d) of Section 1123.740 (proceedings in forma pauperis). The fifth sentence of  
33 former subdivision (a) is superseded by Section 1123.615(a) (Judicial Council rules of  
34 pleading and practice). The sixth sentence of former subdivision (a) is superseded by  
35 subdivision (b) of Section 1123.740.

36 The provision of subdivision (b) relating to review of whether the respondent has  
37 proceeded without or in excess of jurisdiction is superseded by Section 1123.420 (review of  
38 agency interpretation or application of law). The provision relating to whether there has been  
39 a fair trial is superseded by Section 1123.450 (review of agency procedure). The provision  
40 relating to whether there has been a prejudicial abuse of discretion is superseded by Section  
41 1123.440 (review of agency exercise of discretion). The provision relating to proceeding in  
42 the manner required by law is superseded by Section 1123.450 (review of agency  
43 procedure). The provision relating to an order or decision not supported by findings or  
44 findings not supported by evidence is superseded by Section 1123.430 (review of agency fact  
45 finding).

46 Subdivision (c) is superseded by Section 1123.430 (review of agency fact finding).

47 Subdivision (d) is continued in Section 1123.460 (review involving hospital board).

48 Subdivision (e) is superseded by Section 1123.760 (new evidence on judicial review).

1 The first through sixth sentences of subdivision (g), and the first, second, and third  
2 sentences of subdivision (h)(3), are superseded by Section 1123.650. The seventh sentence of  
3 subdivision (g) and the fourth sentence of subdivision (h)(3) are continued in Section  
4 1123.150.

5 Subdivision (i) is continued without change in Section 1123.740 (disposal of administrative  
6 record).

7 *Staff Note.* We must search for statutes that refer to Section 1094.5 for conforming  
8 revisions.

9 **Code Civ. Proc. § 1094.6 (repealed). Review of local agency decision**

10 ~~1094.6. (a) Judicial review of any decision of a local agency, other than school~~  
11 ~~district, as the term local agency is defined in Section 54951 of the Government~~  
12 ~~Code, or of any commission, board, officer or agent thereof, may be had pursuant~~  
13 ~~to Section 1094.5 of this code only if the petition for writ of mandate pursuant to~~  
14 ~~such section is filed within the time limits specified in this section.~~

15 ~~(b) Any such petition shall be filed not later than the 90th day following the~~  
16 ~~date on which the decision becomes final. If there is no provision for~~  
17 ~~reconsideration of the decision, or for a written decision or written findings~~  
18 ~~supporting the decision, in any applicable provision of any statute, charter, or rule,~~  
19 ~~for the purposes of this section, the decision is final on the date it is announced. If~~  
20 ~~the decision is not announced at the close of the hearing, the date, time, and place~~  
21 ~~of the announcement of the decision shall be announced at the hearing. If there is~~  
22 ~~a provision for reconsideration, the decision is final for purposes of this section~~  
23 ~~upon the expiration of the period during which such reconsideration can be~~  
24 ~~sought; provided, that if reconsideration is sought pursuant to any such provision~~  
25 ~~the decision is final for the purposes of this section on the date that~~  
26 ~~reconsideration is rejected. If there is a provision for a written decision or written~~  
27 ~~findings, the decision is final for purposes of this section upon the date it is mailed~~  
28 ~~by first-class mail, postage prepaid, including a copy of the affidavit or certificate~~  
29 ~~of mailing, to the party seeking the writ. Subdivision (a) of Section 1013 does not~~  
30 ~~apply to extend the time, following deposit in the mail of the decision or findings,~~  
31 ~~within which a petition shall be filed.~~

32 ~~(c) The complete record of the proceedings shall be prepared by the local~~  
33 ~~agency or its commission, board, officer, or agent which made the decision and~~  
34 ~~shall be delivered to the petitioner within 190 days after he has filed a written~~  
35 ~~request therefor. The local agency may recover from the petitioner its actual costs~~  
36 ~~for transcribing or otherwise preparing the record. Such record shall include the~~  
37 ~~transcript of the proceedings, all pleadings, all notices and orders, any proposed~~  
38 ~~decision by a hearing officer, the final decision, all admitted exhibits, all rejected~~  
39 ~~exhibits in the possession of the local agency or its commission, board, officer, or~~  
40 ~~agent, all written evidence, and any other papers in the case.~~

41 ~~(d) If the petitioner files a request for the record as specified in subdivision (c)~~  
42 ~~within 10 days after the date the decision becomes final as provided in~~  
43 ~~subdivision (b), the time within which a petition pursuant to Section 1094.5 may~~

1 ~~be filed shall be extended to not later than the 30th day following the date on~~  
2 ~~which the record is either personally delivered or mailed to the petitioner or his~~  
3 ~~attorney of record, if he has one.~~

4 ~~(e) As used in this section, decision means a decision subject to review pursuant~~  
5 ~~to Section 1094.5, suspending, demoting, or dismissing an officer or employee,~~  
6 ~~revoking, or denying an application for a permit, license, or other entitlement, or~~  
7 ~~denying an application for any retirement benefit or allowance.~~

8 ~~(f) In making a final decision as defined in subdivision (e), the local agency shall~~  
9 ~~provide notice to the party that the time within which judicial review must be~~  
10 ~~sought is governed by this section.~~

11 ~~As used in this subdivision, "party" means an officer or employee who has~~  
12 ~~been suspended, demoted or dismissed; a person whose permit, license, or other~~  
13 ~~entitlement has been revoked or suspended, or whose application for a permit,~~  
14 ~~license, or other entitlement has been denied; or a person whose application for a~~  
15 ~~retirement benefit or allowance has been denied.~~

16 ~~(g) This section shall prevail over any conflicting provision in any otherwise~~  
17 ~~applicable law relating to the subject matter, unless the conflicting provision is a~~  
18 ~~state or federal law which provides a shorter statute of limitations, in which case~~  
19 ~~the shorter statute of limitations shall apply.~~

20 **Comment.** Subdivision (a) and the first sentence of subdivision (b) of former Section  
21 1094.6 is superseded by Sections 1121.230 ("agency" defined), 1121.255 ("local agency"  
22 defined), 1123.630 (time for filing notice of review), 1123.120 (finality), and 1123.140  
23 (exception to finality requirement). The second, fourth, and fifth sentences of subdivision (b)  
24 are superseded by Section 1123.120. The third sentence of subdivision (b) is continued in  
25 Government Code Section 54962(b).

26 The first sentence of subdivision (c) is superseded by Section 1123.730 (preparation of the  
27 record). The second sentence of subdivision (c) is superseded by Section 1123.740 (cost of  
28 preparing record). The third sentence of subdivision (c) is continued in Government Code  
29 Section 54962(c).

30 Subdivision (d) is superseded by Section 1123.630 (time for filing notice of review). Under  
31 Section 1123.630, the time for filing the notice of review is not dependent on receipt of the  
32 record, which normally will take place after the notice is filed.

33 Subdivision (e) is superseded by Section 1121.250 ("decision" defined). See also Gov't  
34 Code § 54962(a).

35 Subdivision (f) is continued in Sections 1123.630 (time for filing notice of review of  
36 decision in adjudicative proceeding) and 1121.260 ("party" defined). Subdivision (g) is not  
37 continued.

38 *Staff Note.* We must search for statutes that refer to Section 1094.6 for conforming  
39 revisions.

## 40 COMMISSION ON PROFESSIONAL COMPETENCE

### 41 Educ. Code § 44945 (amended). Judicial review

42 44945. The decision of the Commission on Professional Competence may, on  
43 petition of either the governing board or the employee, be reviewed by a court of  
44 competent jurisdiction ~~in the same manner as a decision made by a hearing officer~~

1 ~~under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title~~  
2 ~~2 of the Government Code. The court, on review, shall exercise its independent~~  
3 ~~judgment on the evidence, in accordance with Title 2 (commencing with Section~~  
4 ~~1120) of Part 3 of the Code of Civil Procedure. The proceeding shall be set for~~  
5 ~~hearing at the earliest possible date and shall take precedence over all other cases,~~  
6 ~~except older matters of the same character and matters to which special~~  
7 ~~precedence is given by law.~~

8 **Comment.** Section 44945 is amended to make judicial review under this section subject to  
9 the provisions for judicial review in the Code of Civil Procedure. The former second sentence  
10 of Section 44945 is superseded by the standards of review in Sections 1123.410-1123.460 of  
11 the Code of Civil Procedure.

12 **BOARD OF GOVERNORS OF CALIFORNIA COMMUNITY**  
13 **COLLEGES**

14 **Educ. Code § 87682 (amended). Judicial review**

15 87682. The decision of the arbitrator or administrative law judge, as the case  
16 may be, may, on petition of either the governing board or the employee, be  
17 reviewed by a court of competent jurisdiction ~~in the same manner as a decision~~  
18 ~~made by an administrative law judge under Chapter 5 (commencing with Section~~  
19 ~~11500) of Part 1 of Division 3 of Title 2 of the Government Code. The court, on~~  
20 ~~review, shall exercise its independent judgment on the evidence, in accordance~~  
21 ~~with Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil~~  
22 ~~Procedure. The proceeding shall be set for hearing at the earliest possible date~~  
23 ~~and shall take precedence over all other cases, except older matters of the same~~  
24 ~~character and matters to which special precedence is given by law.~~

25 **Comment.** Section 87682 is amended to make judicial review under this section subject to  
26 the provisions for judicial review in the Code of Civil Procedure. The former second sentence  
27 of Section 87682 is superseded by the standards of review in Sections 1123.410-1123.460 of  
28 the Code of Civil Procedure.

29 **COSTS IN CIVIL ACTIONS RESULTING FROM ADMINISTRATIVE**  
30 **PROCEEDINGS**

31 **Gov't Code § 800 (repealed). Costs in action to review administrative proceeding**

32 ~~800. In any civil action to appeal or review the award, finding, or other~~  
33 ~~determination of any administrative proceeding under this code or under any~~  
34 ~~other provision of state law, except actions resulting from actions of the State~~  
35 ~~Board of Control, where it is shown that the award, finding, or other~~  
36 ~~determination of the proceeding was the result of arbitrary or capricious action or~~  
37 ~~conduct by a public entity or an officer thereof in his or her official capacity, the~~  
38 ~~complainant if he or she prevails in the civil action may collect reasonable~~  
39 ~~attorney's fees, computed at one hundred dollars (\$100) per hour, but not to~~  
40 ~~exceed seven thousand five hundred dollars (\$7,500), where he or she is~~

1 ~~personally obligated to pay the fees, from the public entity, in addition to any~~  
2 ~~other relief granted or other costs awarded.~~

3 ~~This section is ancillary only, and shall not be construed to create a new cause~~  
4 ~~of action.~~

5 ~~Refusal by a public entity or officer thereof to admit liability pursuant to a~~  
6 ~~contract of insurance shall not be considered arbitrary or capricious action or~~  
7 ~~conduct within the meaning of this section.~~

8 **Comment.** Former Section 800 is continued in Code of Civil Procedure Section 1123.670.

9 PUBLIC EMPLOYMENT RELATIONS BOARD

10 **Gov't Code § 3520 (amended). Judicial review of unit determination or unfair practice**  
11 **case**

12 3520. (a) Judicial review of a unit determination shall only be allowed: (1) when  
13 the board, in response to a petition from the state or an employee organization,  
14 agrees that the case is one of special importance and joins in the request for such  
15 review; or (2) when the issue is raised as a defense to an unfair practice complaint.  
16 A board order directing an election shall not be stayed pending judicial review.

17 Upon receipt of a board order joining in the request for judicial review, a party  
18 to the case may ~~petition for a writ of extraordinary relief from~~ file a notice of  
19 review of the unit determination decision or order.

20 (b) Any charging party, respondent, or intervenor aggrieved by a final decision  
21 or order of the board in an unfair practice case, except a decision of the board not  
22 to issue a complaint in such a case, may ~~petition for a writ of extraordinary relief~~  
23 ~~from such~~ file a notice of review of the decision or order.

24 ~~Such petition~~ The notice of review shall be filed in the ~~district~~ court of  
25 appeal in the appellate district where the unit determination or unfair practice  
26 dispute occurred. The ~~petition~~ notice shall be filed within 30 days after issuance  
27 of the board's final order, order denying reconsideration, or order joining in the  
28 request for judicial review, as applicable. Upon the filing of ~~such petition~~ the  
29 notice, the court shall cause notice to be served upon the board and thereupon  
30 shall have jurisdiction of the proceeding. The board shall file in the court the  
31 record of the proceeding, certified by the board, within 10 days after the clerk's  
32 notice unless ~~such~~ the time is extended by the court for good cause shown. The  
33 court shall have jurisdiction to grant to the board ~~such~~ any temporary relief or  
34 restraining order it deems just and proper and in like manner to make and enter a  
35 decree enforcing, modifying, or setting aside the order of the board. ~~The findings~~  
36 ~~of the board with respect to questions of fact, including ultimate facts, if~~  
37 ~~supported by substantial evidence on the record considered as a whole, shall be~~  
38 ~~conclusive.~~ The provisions of Title 1 (~~commencing with Section 1067~~) Title 2  
39 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure ~~relating~~  
40 ~~to writs~~ shall, except where specifically superseded herein, apply to proceedings  
41 pursuant to this section.

1 (d) If the time to ~~petition for extraordinary relief from~~ seek judicial review of a  
2 board decision has expired, the board may seek enforcement of any final decision  
3 or order in a ~~district~~ court of appeal or a superior court in the appellate district  
4 where the unit determination or unfair practice case occurred. If, after hearing, the  
5 court determines that the order was issued pursuant to procedures established by  
6 the board and that the person or entity refuses to comply with the order, the court  
7 shall enforce ~~such the~~ order by writ of mandamus appropriate order. The court  
8 shall not review the merits of the order.

9 **Comment.** Section 3520 is amended to make judicial review of the Public Employment  
10 Relations Board subject to the provisions for judicial review in the Code of Civil Procedure,  
11 except as provided in this section. Under the Code of Civil Procedure, questions of  
12 application of law to facts is treated the same as a pure question of law — the court uses its  
13 independent judgment, but deferring to the agency finding where the facts are technical and  
14 complex and agency expertise is necessary. See Code Civ. Proc. § 1123.420 & Comment.

15 **Gov't Code § 3542 (amended). Review of unit determination**

16 3542. (a) No employer or employee organization shall have the right to judicial  
17 review of a unit determination except: (1) when the board in response to a  
18 petition from an employer or employee organization, agrees that the case is one of  
19 special importance and joins in the request for such review; or (2) when the issue  
20 is raised as a defense to an unfair practice complaint. A board order directing an  
21 election shall not be stayed pending judicial review.

22 Upon receipt of a board order joining in the request for judicial review, a party  
23 to the case may ~~petition for a writ of extraordinary relief from~~ seek judicial review  
24 of the unit determination decision or order.

25 (b) Any charging party, respondent, or intervenor aggrieved by a final decision  
26 or order of the board in an unfair practice case, except a decision of the board not  
27 to issue a complaint in such a case, may ~~petition for a writ of extraordinary relief~~  
28 ~~from such~~ seek judicial review of the decision or order.

29 (c) ~~Such petition shall be filed~~ The notice of review shall be filed in the district  
30 court of appeal in the appellate district where the unit determination or unfair  
31 practice dispute occurred. The ~~petition~~ notice of review shall be filed within 30  
32 days after issuance of the board's final order, order denying reconsideration, or  
33 order joining in the request for judicial review, as applicable. Upon the filing of  
34 ~~such petition~~ the notice of review, the court shall cause notice to be served upon  
35 the board and thereupon shall have jurisdiction of the proceeding. The board  
36 shall file in the court the record of the proceeding, certified by the board, within  
37 10 days after the clerk's notice unless ~~such the~~ time is extended by the court for  
38 good cause shown. The court shall have jurisdiction to grant to the board ~~such~~  
39 any temporary relief or restraining order it deems just and proper and in like  
40 manner to make and enter a decree enforcing, modifying, or setting aside the  
41 order of the board. ~~The findings of the board with respect to questions of fact,~~  
42 ~~including ultimate facts, if supported by substantial evidence on the record~~  
43 ~~considered as a whole, are conclusive.~~ The provisions of Title 1 (commencing with

1 ~~Section 1067)~~ Title 2 (commencing with Section 1120) of Part 3 of the Code of  
2 Civil Procedure ~~relating to writs~~ shall, except where specifically superseded  
3 herein, apply to proceedings pursuant to this section.

4 (d) If the time to ~~petition for extraordinary relief from~~ seek judicial review of a  
5 board decision has expired, the board may seek enforcement of any final decision  
6 or order in a ~~district~~ court of appeal or a superior court in the appellate district  
7 where the unit determination or unfair practice case occurred. The board shall  
8 respond within 10 days to any inquiry from a party to the action as to why the  
9 board has not sought court enforcement of the final decision or order. If the  
10 response does not indicate that there has been compliance with the board's final  
11 decision or order, the board shall seek enforcement of the final decision or order  
12 upon the request of the party. The board shall file in the court the record of the  
13 proceeding, certified by the board, and appropriate evidence disclosing the failure  
14 to comply with the decision or order. If, after hearing, the court determines that  
15 the order was issued pursuant to procedures established by the board and that  
16 the person or entity refuses to comply with the order, the court shall enforce ~~such~~  
17 the order by ~~writ of mandamus~~ appropriate order. The court shall not review the  
18 merits of the order.

19 **Comment.** Section 3542 is amended to make judicial review of the Public Employment  
20 Relations Board subject to the provisions for judicial review in the Code of Civil Procedure,  
21 except as provided in this section. Special provisions of this section prevail over general  
22 provisions of the Code of Civil Procedure governing judicial review. See Section 1121.110  
23 (conflicting or inconsistent statute controls).

24 **Gov't Code § 3564 (amended). Judicial review of unit determination or unfair practice**  
25 **case**

26 3564. (a) No employer or employee organization shall have the right to judicial  
27 review of a unit determination except: (1) when the board in response to a  
28 petition from an employer or employee organization, agrees that the case is one of  
29 special importance and joins in the request for such review; or (2) when the issue  
30 is raised as a defense to an unfair practice complaint. A board order directing an  
31 election shall not be stayed pending judicial review.

32 Upon receipt of a board order joining in the request for judicial review, a party  
33 to the case may ~~petition for a writ of extraordinary relief from~~ seek judicial review  
34 of the unit determination decision or order.

35 (b) Any charging party, respondent, or intervenor aggrieved by a final decision  
36 or order of the board in an unfair practice case, except a decision of the board not  
37 to issue a complaint in such a case, may ~~petition for a writ of extraordinary relief~~  
38 ~~from such~~ seek judicial review of the decision or order.

39 (c) ~~Such petition~~ The notice of review shall be filed in the ~~district~~ court of  
40 appeal in the appellate district where the unit determination or unfair practice  
41 dispute occurred. The ~~petition~~ notice shall be filed within 30 days after issuance  
42 of the board's final order, order denying reconsideration, or order joining in the  
43 request for judicial review, as applicable. Upon the filing of ~~such petition~~ the

1 notice, the court shall cause notice to be served upon the board and thereupon  
2 shall have jurisdiction of the proceeding. The board shall file in the court the  
3 record of the proceeding, certified by the board, within 10 days after the clerk's  
4 notice unless ~~such~~ the time is extended by the court for good cause shown. The  
5 court shall have jurisdiction to grant to the board ~~such~~ any temporary relief or  
6 restraining order it deems just and proper and in like manner to make and enter a  
7 decree enforcing, modifying, or setting aside the order of the board. ~~The findings~~  
8 ~~of the board with respect to questions of fact, including ultimate facts, if~~  
9 ~~supported by substantial evidence on the record considered as a whole, are~~  
10 ~~conclusive.~~ The provisions of Title 1 (~~commencing with Section 1067~~) Title 2  
11 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure ~~relating~~  
12 ~~to writs shall, except where specifically superseded herein, apply to proceedings~~  
13 pursuant to this section.

14 (d) If the time to ~~petition for extraordinary relief from~~ seek judicial review of a  
15 board decision has expired, the board may seek enforcement of any final decision  
16 or order in a ~~district~~ court of appeal or a superior court in the appellate district  
17 where the unit determination or unfair practice case occurred. If, after hearing, the  
18 court determines that the order was issued pursuant to procedures established by  
19 the board and that the person or entity refuses to comply with the order, the court  
20 shall enforce ~~such~~ the order by writ of mandamus appropriate order. The court  
21 shall not review the merits of the order.

22 **Comment.** Section 3564 is amended to make judicial review of the Public Employment  
23 Relations Board subject to the provisions for judicial review in the Code of Civil Procedure.  
24 Special provisions of this section prevail over general provisions of the Code of Civil  
25 Procedure governing judicial review. See Section 1121.110 (conflicting or inconsistent statute  
26 controls).

## 27 ADMINISTRATIVE PROCEDURE ACT — RULEMAKING

### 28 Gov't Code § 11350 (amended). Judicial declaration on validity of regulation

29 11350. (a) Any interested person may obtain a judicial declaration as to the  
30 validity of any regulation ~~by bringing an action for declaratory relief in the~~  
31 ~~superior court in accordance with~~ under Title 2 (commencing with Section 1120)  
32 of Part 3 of the Code of Civil Procedure. ~~The right to a judicial determination shall~~  
33 ~~not be affected either by the failure to petition or to seek reconsideration of a~~  
34 ~~petition filed pursuant to Section 11347.1 before the agency promulgating the~~  
35 ~~regulations.~~ The regulation may be declared to be invalid for a substantial failure  
36 to comply with this chapter, or, in the case of an emergency regulation or order to  
37 repeal, upon the ground that the facts recited in the statement do not constitute  
38 an emergency within the provisions of Section 11346.1.

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

41 (1) The agency's determination that the regulation is reasonably necessary to  
42 effectuate the purpose of the statute, court decision, or other provision of law that

1 is being implemented, interpreted, or made specific by the regulation is not  
2 supported by substantial evidence.

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

5 For purposes of this section, the record shall be deemed to consist of all material  
6 maintained in the file of the rulemaking proceeding as defined in Section 11347.3.

7 (c) The approval of a regulation by the office or the Governor's overruling of a  
8 decision of the office disapproving a regulation shall not be considered by a court  
9 in ~~any action for declaratory relief brought with respect to a proceeding under~~  
10 Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure  
11 for judicial review of a regulation.

12 **Comment.** Section 11350 is amended to recognize that judicial review of agency  
13 regulations is now accomplished under Title 2 of Part 3 of the Code of Civil Procedure. The  
14 former second sentence of subdivision (a) is continued in Section 1123.330 of the Code of  
15 Civil Procedure.

## 16 ADMINISTRATIVE PROCEDURE ACT — ADJUDICATION

### 17 Gov't Code § 11523 (repealed). Judicial review

18 ~~11523. Judicial review may be had by filing a petition for a writ of mandate in~~  
19 ~~accordance with the provisions of the Code of Civil Procedure, subject, however,~~  
20 ~~to the statutes relating to the particular agency. Except as otherwise provided in~~  
21 ~~this section, the petition shall be filed within 30 days after the last day on which~~  
22 ~~reconsideration can be ordered. The right to petition shall not be affected by the~~  
23 ~~failure to seek reconsideration before the agency. On request of the petitioner for~~  
24 ~~a record of the proceedings, the complete record of the proceedings, or the parts~~  
25 ~~thereof as are designated by the petitioner in the request, shall be prepared by the~~  
26 ~~Office of Administrative Hearings or the agency and shall be delivered to~~  
27 ~~petitioner, within 30 days after the request, which time shall be extended for good~~  
28 ~~cause shown, upon the payment of the fee specified in Section 69950 for the~~  
29 ~~transcript, the cost of preparation of other portions of the record and for~~  
30 ~~certification thereof. Thereafter, the remaining balance of any costs or charges for~~  
31 ~~the preparation of the record shall be assessed against the petitioner whenever~~  
32 ~~the agency prevails on judicial review following trial of the cause. These costs or~~  
33 ~~charges constitute a debt of the petitioner which is collectible by the agency in~~  
34 ~~the same manner as in the case of an obligation under a contract, and no license~~  
35 ~~shall be renewed or reinstated where the petitioner has failed to pay all of these~~  
36 ~~costs or charges. The complete record includes the pleadings, all notices and~~  
37 ~~orders issued by the agency, any proposed decision by an administrative law~~  
38 ~~judge, the final decision, a transcript of all proceedings, the exhibits admitted or~~  
39 ~~rejected, the written evidence and any other papers in the case. Where petitioner,~~  
40 ~~within 10 days after the last day on which reconsideration can be ordered,~~  
41 ~~requests the agency to prepare all or any part of the record the time within which~~  
42 ~~a petition may be filed shall be extended until 30 days after its delivery to him or~~

1 ~~her. The agency may file with the court the original of any document in the~~  
2 ~~record in lieu of a copy thereof. In the event that the petitioner prevails in~~  
3 ~~overturning the administrative decision following judicial review, the agency shall~~  
4 ~~reimburse the petitioner for all costs of transcript preparation, compilation of the~~  
5 ~~record, and certification.~~

6 **Comment.** The first sentence of former Section 11523 is continued in Code of Civil  
7 Procedure Sections 1120 (application of title) and 1121.110 (conflicting or inconsistent  
8 statute controls).

9 The second sentence is superseded by Code of Civil Procedure Section 1123.630 (time for  
10 filing notice of review of decision in adjudicative proceeding).

11 The third sentence is restated in Code of Civil Procedure Section 1123.320 (administrative  
12 review of final decision).

13 The first portion of the fourth sentence is continued in Code of Civil Procedure Section  
14 1123.730 (preparation of record). The last portion of the fourth sentence is continued in  
15 substance in Code of Civil Procedure Section 1123.740(a) (cost of preparing record).

16 The fifth sentence is superseded by Code of Civil Procedure Section 1123.740(b).

17 The first portion of the sixth sentence is omitted as unnecessary, since under Section  
18 11243.735(b) the cost of the record is recoverable by the prevailing party, and under general  
19 rules of civil procedure costs of suit are included in the judgment. See Code Civ. Proc. §  
20 1034(a); Cal. Ct. R. 870(b)(4). The last portion of the sixth sentence is continued in Code of  
21 Civil Procedure Section 1123.740(c).

22 The seventh sentence is superseded by Code of Civil Procedure Section 1123.720 (contents  
23 of administrative record).

24 The eighth sentence is superseded by Code of Civil Procedure Section 1123.630 (time for  
25 filing notice of review of decision in adjudicative proceeding).

26 The ninth sentence is continued in substance in Code of Civil Procedure Section  
27 1123.740b).

28 *Staff Note.* Section 11523 is set out here as it would be amended by SB 523.

29 **Gov't Code § 11524 (amended). Continuances; grant time; good cause; denial; notice**  
30 **review**

31 11524. (a) The agency may grant continuances. When an administrative law  
32 judge of the Office of Administrative Hearings has been assigned to the hearing,  
33 no continuance may be granted except by him or her or by the presiding judge of  
34 the appropriate regional office of the Office of Administrative Hearings, for good  
35 cause shown.

36 (b) When seeking a continuance, a party shall apply for the continuance within  
37 10 working days following the time the party discovered or reasonably should  
38 have discovered the event or occurrence which establishes the good cause for  
39 the continuance. A continuance may be granted for good cause after the 10  
40 working days have lapsed if the party seeking the continuance is not responsible  
41 for and has made a good faith effort to prevent the condition or event  
42 establishing the good cause.

43 ~~(c) In the event that an application for a continuance by a party is denied by an~~  
44 ~~administrative law judge of the Office of Administrative Hearings, and the party~~  
45 ~~seeks judicial review thereof, the party shall, within 10 working days of the denial,~~  
46 ~~make application for appropriate judicial relief in the superior court or be barred~~

1 ~~from judicial review thereof as a matter of jurisdiction. A party applying for~~  
2 ~~judicial relief from the denial shall give notice to the agency and other parties.~~  
3 ~~Notwithstanding Section 1010 of the Code of Civil Procedure, the notice may be~~  
4 ~~either oral at the time of the denial of application for a continuance or written at~~  
5 ~~the same time application is made in court for judicial relief. This subdivision does~~  
6 ~~not apply to the Department of Alcoholic Beverage Control.~~

7 **Comment.** Section 11524 is amended to delete the provision for immediate review of  
8 denial of a continuance. Standard principles of finality and exhaustion of administrative  
9 remedies apply to this and other preliminary decisions in adjudicative proceeding. See, e.g.,  
10 Code Civ. Proc. § 1123.310 (exhaustion required).

## 11 STATE PERSONNEL BOARD

12 **Gov't Code § 19630 (amended). When action barred; compensation after cause arose;**  
13 **cause of action after final decision of board**

14 19630. (a) No action or proceeding shall be brought by any person having or  
15 claiming to have a cause of action or complaint or ground for issuance of any  
16 complaint or legal remedy for wrongs or grievances based on or related to any  
17 civil service law in this state, or the administration thereof, unless that action or  
18 proceeding is commenced and served within one year after the cause of action or  
19 complaint or ground for issuance of any writ or legal remedy first arose. The  
20 person shall not be compensated for the time subsequent to the date when the  
21 cause or ground arose unless that action or proceeding is filed and served within  
22 90 days after the cause or ground arose. Where an appeal is taken from a decision  
23 of the board, the cause of action does not arise until the final decision of the  
24 board.

25 (b) Notwithstanding subdivision (a), judicial review of a decision of the board in  
26 an adjudicative proceeding is subject to the time limits specified in Section  
27 1123.630 of the Code of Civil Procedure.

28 (c) This section shall not be applicable to any action or proceeding for the  
29 collection of salary or wage, the amount of which is not disputed by the state  
30 agency owing that salary or wage.

31 **Comment.** Section 19630 is amended to add subdivision (b) to make clear that judicial  
32 review of an adjudicative proceeding of the State Personnel Board is subject to the time limits  
33 in the judicial review provisions in the Code of Civil Procedure.

## 34 LOCAL AGENCIES

35 **Gov't Code § 54962 (added). Decision; record of proceedings**

36 54962. (a) This section applies to a decision of a local agency, other than a  
37 school district, suspending, demoting, or dismissing an officer or employee,  
38 revoking or denying an application for a permit, license, or other entitlement, or  
39 denying an application for any retirement benefit or allowance.

1 (b) If the decision is not announced at the close of the hearing, the date, time,  
2 and place of the announcement of the decision shall be announced at the  
3 hearing.

4 (c) Judicial review of the decision shall be in accordance with Title 2  
5 (commencing with 1120) of Part 3 of the Code of Civil Procedure. In addition to  
6 the matters required by Section 1123.720 of the Code of Civil Procedure, the  
7 record of the proceedings shall include the transcript of the proceedings, all  
8 pleadings, all notices and orders, any proposed decision by a hearing officer, the  
9 final decision, all admitted exhibits, all rejected exhibits in the possession of the  
10 local agency or its commission, board, officer, or agent, all written evidence, and  
11 any other papers in the case.

12 **Comment.** Subdivision (a) of Section 54962 continues subdivision (e) of former Section  
13 1094.6 of the Code of Civil Procedure. Subdivision (b) continues the third sentence of  
14 subdivision (b) of former Section 1094.6 of the Code of Civil Procedure. The first sentence  
15 and the introductory clause of the second sentence of subdivision (c) are new. The remainder  
16 of the second sentence of subdivision (c) continues the third sentence of subdivision (c) of  
17 former Section 1094.6 of the Code of Civil Procedure.

18 **ZONING ADMINISTRATION**

19 **Gov't Code § 65907 (amended). Time for attacking administrative determination**

20 ~~65907. (a) Except as otherwise provided by ordinance, any action or~~  
21 ~~proceeding to attack, review, set aside, void, or annul~~ A proceeding for judicial  
22 review of any decision of matters listed in Sections 65901 and 65903, or  
23 concerning of any of the proceedings, acts, or determinations taken, done, or  
24 made prior to such the decision, or to determine the reasonableness, legality, or  
25 validity of any condition attached thereto, shall not be maintained by any person  
26 unless the action or proceeding is commenced within 90 days and the legislative  
27 body is served within 120 days after the date of the decision is subject to Title 2  
28 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.  
29 Thereafter, all persons are barred from any such action or a proceeding for judicial  
30 review or any defense of invalidity or unreasonableness of that decision or of  
31 these proceedings, acts, or determinations. All actions A proceeding for judicial  
32 review brought pursuant to this section shall be given preference over all other  
33 civil matters before the court, except probate, eminent domain, and forcible entry  
34 and unlawful detainer proceedings.

35 (b) Notwithstanding Section 65803, this section shall apply to charter cities.

36 ~~(c) The amendments to subdivision (a) shall apply to decisions made pursuant to~~  
37 ~~this division on or after January 1, 1984.~~

38 **Comment.** Subdivision (a) of Section 65907 is amended to make proceedings to which it  
39 applies subject to the judicial review provisions in the Code of Civil Procedure. Subdivision  
40 (c) is deleted as no longer necessary.

1 AGRICULTURAL LABOR RELATIONS BOARD

2 **Lab. Code § 1160.8 (amended). Review of final order of board; procedure**

3 1160.8. Any person aggrieved by the final order of the board granting or  
4 denying in whole or in part the relief sought may obtain a review of such the  
5 order in the court of appeal having jurisdiction over the county wherein the  
6 unfair labor practice in question was alleged to have been engaged in, or wherein  
7 such the person resides or transacts business, ~~by filing in such court a written~~  
8 ~~petition requesting that the order of the board be modified or set aside. Such~~  
9 ~~petition shall be filed with the court within 30 days from the date of the issuance~~  
10 ~~of the board's order. in accordance with Title 2 (commencing with Section 1120)~~  
11 of Part 3 of the Code of Civil Procedure. Upon the filing of ~~such petition the~~  
12 notice of review, the court shall cause notice to be served upon the board and  
13 thereupon shall have jurisdiction of the proceeding. The board shall file in the  
14 court the record of the proceeding, certified by the board within 10 days after the  
15 clerk's notice unless such the time is extended by the court for good cause  
16 shown. The court shall have jurisdiction to grant to the board ~~such any~~ temporary  
17 relief or restraining order it deems just and proper and in like manner to make and  
18 enter a decree enforcing, modifying and enforcing as so modified, or setting aside  
19 in whole or in part, the order of the board. ~~The findings of the board with respect~~  
20 ~~to questions of fact if supported by substantial evidence on the record considered~~  
21 ~~as a whole shall in like manner be conclusive.~~

22 An order directing an election shall not be stayed pending review, but such the  
23 order may be reviewed as provided in Section 1158.

24 If the time for review of the board order has lapsed, and the person has not  
25 voluntarily complied with the board's order, the board may apply to the superior  
26 court in any county in which the unfair labor practice occurred or wherein such  
27 the person resides or transacts business for enforcement of its order. If after  
28 hearing, the court determines that the order was issued pursuant to procedures  
29 established by the board and that the person refuses to comply with the order, the  
30 court shall enforce such the order by writ of injunction or other proper process.  
31 The court shall not review the merits of the order.

32 **Comment.** Section 1160.8 is amended to make proceedings to which it applies subject to  
33 the judicial review provisions in the Code of Civil Procedure.

34 WORKERS' COMPENSATION APPEALS BOARD

35 **Lab. Code § 5950 (amended). Judicial review**

36 5950. Any person affected by an order, decision, or award of the appeals board  
37 may, within the time limit specified in this section, ~~apply to the Supreme Court or~~  
38 ~~to the court of appeal for the appellate district in which he resides, for a writ of~~  
39 ~~review, for the purpose of inquiring into and determining the lawfulness of the~~  
40 ~~original order, decision, or award or of the order, decision, or award following~~

1 ~~reconsideration. The application for writ of review must be made within 45 days~~  
2 ~~after a petition for reconsideration is denied, or, if a petition is granted or~~  
3 ~~reconsideration is had on the appeal board's own motion, within 45 days after~~  
4 ~~the filing of the order, decision, or award following reconsideration. The court of~~  
5 appeal has jurisdiction of judicial review of an order, decision, or award of the  
6 appeals board.

7 **Comment.** Section 5950 is amended to eliminate the alternative of judicial review in the  
8 Supreme Court. For the applicable judicial review procedure, see Code Civ. Proc. §§ 1120 et  
9 seq. For standing provisions, see Code Civ. Proc. §§ 1123.210-1123.240. For the finality  
10 requirement, see Code Civ. Proc. § 1123.120. For venue provisions, see Code Civ. Proc. §  
11 1123.520. For the time for filing for judicial review, see Code Civ. Proc. § 1123.640.

12 **Lab. Code § 5951 (repealed). Writ of review**

13 ~~5951. The writ of review shall be made returnable at a time and place then or~~  
14 ~~thereafter specified by court order and shall direct the appeals board to certify its~~  
15 ~~record in the case to the court within the time therein specified. No new or~~  
16 ~~additional evidence shall be introduced in such court, but the cause shall be heard~~  
17 ~~on the record of the appeals board as certified to by it.~~

18 **Comment.** Section 5951 is repealed because it is superseded by the judicial review  
19 provisions of the Code of Civil Procedure. See Section 5954. The provision in the first  
20 sentence for the return of the writ of review is superseded by Section 1123.620 of the Code  
21 of Civil Procedure. The provision in the first sentence for the record of the department is  
22 superseded by Section 1123.720. The second sentence is superseded by Section 1123.710 of  
23 the Code of Civil Procedure.

24 **Lab. Code § 5952 (repealed). Scope of review**

25 ~~5952. The review by the court shall not be extended further than to determine,~~  
26 ~~based upon the entire record which shall be certified by the appeals board,~~  
27 ~~whether:~~

28 ~~(a) The appeals board acted without or in excess of its powers.~~

29 ~~(b) The order, decision, or award was procured by fraud.~~

30 ~~(c) The order, decision, or award was unreasonable.~~

31 ~~(d) The order, decision, or award was not supported by substantial evidence.~~

32 ~~(e) If findings of fact are made, such findings of fact support the order, decision,~~  
33 ~~or award under review.~~

34 ~~Nothing in this section shall permit the court to hold a trial de novo, to take~~  
35 ~~evidence, or to exercise its independent judgment on the evidence.~~

36 **Comment.** Subdivisions (a) through (d) of former Section 5952 are superseded by Sections  
37 1123.410-1123.440 of the Code of Civil Procedure. Subdivision (e) is superseded by Section  
38 1123.750 of the Code of Civil Procedure. The last sentence is superseded by Sections  
39 1123.420 (interpretation or application of law) and 1123.710 (new evidence) of the Code of  
40 Civil Procedure. Nothing in the Code of Civil Procedure provisions or in this article permits  
41 the court to hold a trial de novo.

1 **Lab. Code § 5953 (amended). Right to appear in judicial review proceeding**

2 ~~5953. The findings and conclusions of the appeals board on questions of fact~~  
3 ~~are conclusive and final and are not subject to review. Such questions of fact~~  
4 ~~shall include ultimate facts and the findings and conclusions of the appeals board.~~  
5 The parties to a judicial review proceeding are the appeals board and each party  
6 to the action or proceeding before the appeals board shall have the right to  
7 appear in the review proceeding. Upon the hearing, the court shall enter  
8 judgment either affirming or annulling the order, decision, or award, or the court  
9 may remand the case for further proceedings before the appeals board whose  
10 interest is adverse to the person seeking judicial review.

11 **Comment.** Section 5953 is largely superseded by the judicial review provisions of the Code  
12 of Civil Procedure. See Section 5950. The first sentence is superseded by Section 1123.430  
13 of the Code of Civil Procedure. The second sentence is superseded by Section 1123.420 of  
14 the Code of Civil Procedure. The fourth sentence is superseded by Section 1123.660 of the  
15 Code of Civil Procedure.

16 **Lab. Code § 5954 (amended). Judicial review**

17 ~~5954. The provisions of the Code of Civil Procedure relating to writs of review~~  
18 ~~shall, so far as applicable, apply to proceedings in the courts under the provisions~~  
19 ~~of this article. A copy of every pleading filed pursuant to the terms of this article~~  
20 ~~shall be served on the appeals board and upon every party who entered an~~  
21 ~~appearance in the action before the appeals board and whose interest therein is~~  
22 ~~adverse to the party filing such pleading. Judicial review shall be in accordance~~  
23 ~~with Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil~~  
24 ~~Procedure.~~

25 **Comment.** Section 5954 is amended to delete the first sentence, and to replace it with a  
26 reference to the judicial review provisions of the Code of Civil Procedure. Special provisions  
27 of this article prevail over general provisions of the Code of Civil Procedure governing  
28 judicial review. See Section 1121.110 (conflicting or inconsistent statute controls). Copies of  
29 pleadings in judicial review proceedings must be served on the parties. See. Code Civ. Proc.  
30 §§ 1123.610 (notice of review), 1123.620 (applicability of rules of practice for civil actions).

31 **Lab. Code § 5955 (repealed). Courts having jurisdiction; mandate**

32 ~~5955. No court of this state, except the Supreme Court and the courts of appeal~~  
33 ~~to the extent herein specified, has jurisdiction to review, reverse, correct, or annul~~  
34 ~~any order, rule, decision, or award of the appeals board, or to suspend or delay the~~  
35 ~~operation or execution thereof, or to restrain, enjoin, or interfere with the appeals~~  
36 ~~board in the performance of its duties but a writ of mandate shall lie from the~~  
37 ~~Supreme Court or a court of appeal in all proper cases.~~

38 **Comment.** Section 5955 is superseded by Section 1121.120 of the Code of Civil Procedure  
39 (exclusive procedure) [see Memorandum 95-38].

40 **Lab. Code § 5956 (repealed). Stay of order**

41 ~~5956. The filing of a petition for, or the pendency of, a writ of review shall not~~  
42 ~~of itself stay or suspend the operation of any order, rule, decision, or award of the~~

1 ~~appeals board, but the court before which the petition is filed may stay or~~  
2 ~~suspend, in whole or in part, the operation of the order, decision, or award of the~~  
3 ~~appeals board subject to review, upon the terms and conditions which it by order~~  
4 ~~directs, except as provided in Article 3 of this chapter.~~

5 **Comment.** Former Section 5956 is superseded by Code of Civil Procedure Section  
6 1123.650 (stays). The stay provisions of the Code of Civil Procedure are subject to Article 3  
7 (commencing with Section 6000) (undertaking on stay order). See Section 1121.110  
8 (conflicting or inconsistent statute prevails).

9 **Lab. Code § 6000 (amended). Undertaking on stay order**

10 6000. The operation of any order, decision, or award of the appeals board under  
11 the provisions of this division or any judgment entered thereon, shall not at any  
12 time be stayed by the court ~~to which petition is made for a writ of review in~~  
13 which judicial review is sought, unless an undertaking is executed on the part of  
14 the petitioner person seeking judicial review.

15 **Comment.** Section 6000 is amended reflect replacement of the writ of review by the  
16 judicial review procedure in Title 2 (commencing with Section 1120) of Part 3 of the Code of  
17 Civil Procedure. The stay provisions of the Code of Civil Procedure Section 1123.650 are  
18 subject to this article. See Code Civ. Proc. § 1121.110 (conflicting or inconsistent statute  
19 prevails).

20 **CALIFORNIA ENVIRONMENTAL QUALITY ACT**

21 **Pub. Res. Code § 21167 (amended). Review of acts or decisions of public agency**

22 21167. (a) Any action or proceeding to attack, review, set aside, void, or annul  
23 the following acts or decisions of a public agency on the grounds of  
24 noncompliance with this division shall be commenced as follows:

25 (a) (1) An action or proceeding alleging that a public agency is carrying out or  
26 has approved a project which may have a significant effect on the environment  
27 without having determined whether the project may have a significant effect on  
28 the environment shall be commenced within 180 days of the public agency's  
29 decision to carry out or approve the project, or, if a project is undertaken without  
30 a formal decision by the public agency, within 180 days after commencement of  
31 the project.

32 (b) (2) Any action or proceeding alleging that a public agency has improperly  
33 determined whether a project may have a significant effect on the environment  
34 shall be commenced within 30 days after the filing of the notice required by  
35 subdivision (a) of Section 21108 or subdivision (a) of Section 21152.

36 (e) (3) Any action or proceeding alleging that an environmental impact report  
37 does not comply with the provisions of this division shall be commenced within  
38 30 days after the filing of the notice required by subdivision (a) of Section 21108  
39 or subdivision (a) of Section 21152 by the lead agency.

40 (d) (4) Any action or proceeding alleging that a public agency has improperly  
41 determined that a project is not subject to the provisions of this division pursuant

1 to subdivision (b) of Section 21080 or pursuant to Section 21085 or 21172 shall  
2 be commenced within 35 days after the filing by the public agency, or person  
3 specified in subdivision (b) or (c) of Section 21065, of the notice authorized by  
4 subdivision (b) of Section 21108 or subdivision (b) of Section 21152. If the notice  
5 has not been filed, the action or proceeding shall be commenced within 180 days  
6 of the public agency's decision to carry out or approve the project, or, if a project  
7 is undertaken without a formal decision by the public agency, within 180 days  
8 after commencement of the project.

9 (e) (5) Any action or proceeding alleging that any other act or omission of a  
10 public agency does not comply with the provisions of this division shall be  
11 commenced within 30 days after the filing of the notice required by subdivision  
12 (a) of Section 21108 or subdivision (a) of Section 21152.

13 (f) (6) If a person has made a written request to the public agency for a copy of  
14 the notice specified in Section 21108 or 21152 within the posting periods  
15 specified in Sections 21108 and 21152, the time periods specified in subdivisions  
16 (b), (c), (d), and (e) shall commence from the date that the public agency deposits  
17 a written copy of the notice in the United States mail, first-class postage prepaid.

18 (b) Judicial review of an act or decision of a public agency on the grounds of  
19 noncompliance with this division shall be in accordance with Title 2 (commencing  
20 with Section 1120) of Part 3 of the Code of Civil Procedure.

21 **Comment.** Section 21167 is amended to make judicial review under this section subject to  
22 the judicial review provisions of the Code of Civil Procedure. Special provisions of this  
23 section prevail over general provisions of the Code of Civil Procedure governing judicial  
24 review. See Section 1121.110 (conflicting or inconsistent statute controls).

## 25 CALIFORNIA ENERGY COMMISSION

### 26 **Pub. Res. Code § 25531 (amended). Judicial review**

27 25531. (a) The decisions of the commission on any application of any electric  
28 utility for certification of a site and related facility are subject to judicial review in  
29 the same manner as the decisions of the Public Utilities Commission on the  
30 application for a Certificate of Public Convenience and Necessity for the same  
31 site and related facility.

32 (b) ~~No new or additional evidence may be introduced upon review and the~~  
33 ~~cause shall be heard on the record of the commission as certified to by it. The~~  
34 ~~review shall not be extended further than to determine whether the commission~~  
35 ~~has regularly pursued its authority, including a determination of whether the~~  
36 ~~order or decision under review violates any right of the petitioner under the~~  
37 ~~United States Constitution or the California Constitution. The findings and~~  
38 ~~conclusions of the commission on questions of fact are final and are not subject to~~  
39 ~~review, except as provided in this article. These questions of fact shall include~~  
40 ~~ultimate facts and the findings and conclusions of the commission. A report~~  
41 ~~prepared by, or an approval of, the commission pursuant to Section 25510, 25514,~~

1 25516, or 25516.5, or subdivision (b) of Section 25520.5, shall not constitute a  
2 decision of the commission subject to judicial review.

3 (c) Subject to the right of judicial review of decisions of the commission, no  
4 court in this state has jurisdiction to hear or determine any case or controversy  
5 concerning any matter which was, or could have been, determined in a  
6 proceeding before the commission, or to stop or delay the construction or  
7 operation of any thermal powerplant except to enforce compliance with the  
8 provisions of a decision of the commission.

9 (d) Notwithstanding Section 1250.370 of the Code of Civil Procedure:

10 (1) If the commission requires, pursuant to subdivision (a) of Section 25528, as a  
11 condition of certification of any site and related facility, that the applicant acquire  
12 development rights, that requirement conclusively establishes the matters referred  
13 to in Sections 1240.030 and 1240.220 of the Code of Civil Procedure in any  
14 eminent domain proceeding brought by the applicant to acquire the development  
15 rights.

16 (2) If the commission certifies any site and related facility, that certification  
17 conclusively establishes the matters referred to in Sections 1240.030 and  
18 1240.220 of the Code of Civil Procedure in any eminent domain proceeding  
19 brought to acquire the site and related facility.

20 (e) No decision of the commission pursuant to Section 25516, 25522, or 25523  
21 shall be found to mandate a specific supply plan for any utility as prohibited by  
22 Section 25323.

23 **Comment.** Subdivision (b) of Section 25531 is amended to delete first four sentences  
24 which are superseded by Sections 1123.710, 1123.420, and 1123.430 of the Code of Civil  
25 Procedure. The provisions for judicial review in the Code of Civil Procedure apply to  
26 proceedings of the Energy Commission under subdivision (a), which incorporates provisions  
27 for judicial review of decisions of the Public Utilities Commission. See Pub. Util. Code §  
28 1756.

29 **PUBLIC UTILITIES COMMISSION**

30 **Pub. Util. Code § 1756 (amended). Review of commission decisions**

31 1756. (a) Within 30 days after the commission issues its decision denying the  
32 application for a rehearing, or, if the application was granted, then within 30 days  
33 after the commission issues its decision on rehearing, or at least 120 days after the  
34 application is granted if no decision on rehearing has been issued, any aggrieved  
35 party may petition for a writ of review in the court of appeal or the Supreme  
36 Court for the purpose of having the lawfulness of the original order or decision or  
37 of the order or decision on rehearing inquired into and determined. If the writ  
38 issues, it shall be made returnable at a time and place specified by court order and  
39 shall direct the commission to certify its record in the case to the court within the  
40 time specified.

41 (b) The petition for review shall be served upon the executive director of the  
42 commission either personally or by service at the office of the commission.

1 (c) For purposes of this section, the issuance of a decision or the granting of an  
2 application shall be construed to have occurred on the date when the commission  
3 mails the decision or grant to the parties to the action or proceeding.

4 (d) Except as provided in this article, judicial review of decisions of the  
5 commission shall be in accordance with Title 2 (commencing with Section 1120)  
6 of Part 3 of the Code of Civil Procedure.

7 **Comment.** Section 1756 is amended to add subdivision (d) to make judicial review of  
8 decisions of the Public Utilities Commission subject to general provisions in the Code of Civil  
9 Procedure for review of agency action.

10 *Staff Note.* Section 1756 is set out as amended by SB 1322, which has passed the full  
11 Senate and Assembly policy committee.

12 **Pub. Util. Code § 1757 (repealed). New evidence; finality**

13 ~~1757. (a) No new or additional evidence shall be introduced upon review by~~  
14 ~~the court. The review by the court shall not be extended further than to~~  
15 ~~determine, on the basis of the entire record which shall be certified by the~~  
16 ~~commission, whether any of the following have occurred:~~

17 ~~(1) The commission acted without, or in excess of, its powers or jurisdiction.~~

18 ~~(2) The commission has not proceeded in the manner required by law.~~

19 ~~(3) The decision of the commission is not supported by the findings.~~

20 ~~(4) In a complaint, enforcement, or other adjudicatory proceeding, the findings~~  
21 ~~in the decision of the commission are not supported by substantial evidence in~~  
22 ~~light of the whole record.~~

23 ~~(5) The order or decision of the commission was procured by fraud or was an~~  
24 ~~abuse of discretion.~~

25 ~~(6) The order or decision of the commission violates any right of the petitioner~~  
26 ~~under the Constitution of the United States or the California Constitution.~~

27 ~~(b) Nothing in this section shall be construed to permit the court to hold a trial~~  
28 ~~de novo, to take evidence other than as specified by the California Rules of~~  
29 ~~Court, or to exercise its independent judgment on the evidence.~~

30 **Comment.** Former Section 1757 is superseded by Section 1756. New or additional  
31 evidence may be considered by the Supreme Court to the limited extent provided by Section  
32 1123.760 of the Code of Civil Procedure.

33 *Staff Note.* Section 1757 is set out as amended by SB 1322, which has passed the full  
34 Senate and Assembly policy committee.

35 **Pub. Util. Code § 1758 (amended). Parties; judgment; procedure**

36 ~~1758. (a) The commission and each party to the action or proceeding before the~~  
37 ~~commission may appear in the review proceeding. Upon the hearing the Supreme~~  
38 ~~Court or court of appeal shall enter judgment either affirming or setting aside the~~  
39 ~~order or decision of the commission.~~

40 ~~(b) The provisions of the Code of Civil Procedure relating to writs of review~~  
41 ~~shall, so far as applicable and not in conflict with this part, apply to proceedings~~  
42 ~~instituted in the Supreme Court or court of appeal under this article.~~

1 (e) Under this article, the Supreme Court may review decisions of the court of  
2 appeal in the manner provided for other civil actions.

3 **Comment.** Former subdivisions (a) and (b) of Section 1758 are superseded by Section  
4 1756.

5 *Staff Note.* Section 1758 is set out as amended by SB 1322, which has passed the full  
6 Senate and Assembly policy committee.

7 **Pub. Util. Code § 1760 (repealed). Independent judgment**

8 ~~1760. In any proceeding wherein the validity of any order or decision is~~  
9 ~~challenged on the ground that it violates any right of petitioner under the~~  
10 ~~Constitution of the United States, the Supreme Court or court of appeal shall~~  
11 ~~exercise an independent judgment on the law and the facts, and the findings or~~  
12 ~~conclusions of the commission material to the determination of the constitutional~~  
13 ~~question shall not be final.~~

14 **Comment.** Former Section 1760 is superseded by Section 1756.

15 *Staff Note.* Section 1760 is set out as amended by SB 1322, which has passed the full  
16 Senate and Assembly policy committee.

17 **Pub. Util. Code § 1762 (amended). Order of stay or suspension**

18 1762. (a) Except as provided in this section, no order staying or suspending an  
19 order or decision of the commission shall be made by the Supreme Court or court  
20 of appeal except upon five days' notice and after hearing. If the order or decision  
21 of the commission is stayed or suspended, the order suspending it shall contain a  
22 specific finding, based upon evidence submitted to the court and identified by  
23 reference thereto.

24 (b) The specific finding made pursuant to subdivision (a) shall certify that great  
25 or irreparable damage would otherwise result to the petitioner and specify the  
26 nature of the damage.

27 (c) The Supreme Court or court of appeal may grant a temporary stay  
28 restraining the operation of the commission order or decision, other than an order  
29 or decision authorizing an increase or decrease in rates or changing a rate  
30 classification, at any time before the required hearing and determination of the  
31 application for a stay when, in the opinion of the court, irreparable loss or damage  
32 would result to petitioner unless the temporary stay is granted. The temporary  
33 stay shall remain in force only until the hearing and determination of the  
34 application for a stay upon notice. The hearing of the application for a stay shall  
35 be given precedence and assigned for hearing at the earliest practicable day after  
36 the expiration of the notice.

37 **Comment.** Section 1762 is amended to reflect the amendments to Section 1756.

38 *Staff Note.* Section 1762 is set out as amended by SB 1322, which has passed the full  
39 Senate and Assembly policy committee. The amendments are to be drafted.

1 **Pub. Util. Code § 1763 (amended). Temporary stay**

2 1763. (a) No temporary stay shall be granted by the Supreme Court or court of  
3 appeal unless it clearly appears from specific facts shown by the verified petition  
4 that immediate and irreparable injury, loss, or damage will result to the applicant  
5 before notice can be served and hearing had on a motion for a stay as provided in  
6 this article.

7 (b) Every temporary stay shall be endorsed with the date and hour of issuance,  
8 shall be forthwith filed in the clerk's office and entered of record, shall define the  
9 injury and state why it appears to be irreparable and why the order was granted  
10 without notice, and shall by its terms expire within a time after entry not to  
11 exceed 10 days as the court may fix, unless within the time so fixed the order is  
12 extended for a like period for good cause shown and the reasons for the  
13 extension entered of record.

14 (c) In case a temporary stay is granted without notice, the matter of the issuance  
15 of a stay shall be set down for hearing at the earliest possible time, and when it  
16 comes up for hearing the party obtaining the temporary stay shall proceed with  
17 the application for a stay. If the party does not so proceed, the court shall dissolve  
18 the temporary stay.

19 **Comment.** Section 1763 is amended to reflect the amendments to Section 1756.

20 *Staff Note.* Section 1763 is set out as amended by SB 1322, which has passed the full  
21 Senate and Assembly policy committee. The amendments are to be drafted.

22 **Pub. Util. Code § 1765 (amended). Conditional stay**

23 1765. In case the Supreme Court or court of appeal stays any order or decision  
24 denying to the utility an increase in any rate or classification, the court may  
25 condition the stay or temporary stay so as to permit petitioner to charge a higher  
26 rate pending the determination of the review. The court may attach other  
27 reasonable conditions to the stay or temporary stay.

28 **Comment.** Section 1765 is amended to reflect the amendments to Section 1756.

29 *Staff Note.* Section 1765 is set out as amended by SB 1322, which has passed the full  
30 Senate and Assembly policy committee. The amendments are to be drafted.

31 **Pub. Util. Code § 5251 (amended). Procedures**

32 5251. Except as otherwise expressly provided, in all respects in which the  
33 commission has power and authority under the Constitution of this state or under  
34 this chapter, applications and complaints may be made and filed with the  
35 commission, process issued, hearings held, opinions, orders, and decisions made  
36 and filed, petitions for rehearing filed and acted upon, in regard to the matters  
37 provided for in this chapter, in the same manner, under the same conditions and  
38 subject to the same limitations, and with the same effect specified in the Public  
39 Utilities Act (Part 1 (commencing with Section 201) of Division 1), as far as  
40 applicable.

1 (b) A person aggrieved by a final order of the commission under this chapter  
2 may file an application for a writ of review (Chapter 1 (commencing with Section  
3 1069) of Title 1 of Part 3 of the Code of Civil Procedure) or ~~a writ of mandamus~~  
4 ~~(Chapter 1 (commencing with Section 1084) of~~ commence a proceeding for  
5 judicial review in accordance with Title 2 (commencing with Section 1120) of Part  
6 3 of the Code of Civil Procedure) Procedure in superior court, upon a showing  
7 that the commission has denied rehearing in the matter.

8 **Comment.** Subdivision (b) of Section 5251 is amended to refer to the new provisions for  
9 judicial review in the Code of Civil Procedure.

10 **Staff Note.** Section 5251 is set out as amended by SB 1322, which has passed the full  
11 Senate and Assembly policy committee.

## 12 UNEMPLOYMENT INSURANCE APPEALS BOARD

### 13 Unemp. Ins. Code § 410 (amended). Finality of decisions; judicial review

14 410. A decision of the appeals board is final, except for such action as that may  
15 be taken by a judicial tribunal as permitted or required by law.

16 A decision of the appeals board is binding on the director with respect to the  
17 parties involved in the particular appeal.

18 The director shall have the right to seek judicial review from an appeals board  
19 decision irrespective of whether or not he or she appeared or participated in the  
20 appeal to the administrative law judge or to the appeals board. Judicial review of  
21 an appeals board decision shall be in accordance with Title 2 (commencing with  
22 Section 1120) of Part 3 of the Code of Civil Procedure.

23 Notwithstanding any other provision of law, the right of the director, or of any  
24 other party except as provided by Sections 1241, 1243, and 5313, to seek judicial  
25 review from an appeals board decision shall be exercised ~~not later than six~~  
26 ~~months after the date of the decision of the appeals board~~ within the period  
27 provided in Section 1123.630 of the Code of Civil Procedure or not later than 30  
28 days after the date on which the decision of the appeals board is designated as a  
29 precedent decision, whichever is later.

30 The appeals board shall attach to all of its decisions where a request for review  
31 may be taken, an explanation of the party's right to seek such review.

32 **Comment.** Section 410 is amended to make judicial review under this section subject to the  
33 judicial review provisions of the Code of Civil Procedure. Special provisions of this section  
34 prevail over general provisions of the Code of Civil Procedure governing judicial review. See  
35 Section 1121.110 (conflicting or inconsistent statute controls).

## 36 DEPARTMENT OF MOTOR VEHICLES

### 37 Veh. Code § 13559 (amended). Petition for review

38 13559. (a) ~~Notwithstanding Section 14400 or 14401, within 30 days of the~~  
39 ~~issuance of the notice of determination of the department sustaining an order of~~  
40 ~~suspension or revocation of the person's privilege to operate a motor vehicle~~

1 ~~after the hearing pursuant to Section 13558, the person may file a petition for~~  
2 ~~review of the order in the court of competent jurisdiction in the person's county~~  
3 ~~of residence. The filing of a petition for judicial review shall not stay the order of~~  
4 ~~suspension or revocation. The review shall be on the record of the hearing and~~  
5 ~~the court shall not consider other evidence. If the court finds that the department~~  
6 ~~exceeded its constitutional or statutory authority, made an erroneous~~  
7 ~~interpretation of the law, acted in an arbitrary and capricious manner, or made a~~  
8 ~~determination which is not supported by the evidence in the record, the court~~  
9 ~~may order the department to rescind the order of suspension or revocation and~~  
10 ~~return, or reissue a new license to, the person. Judicial review of a decision of the~~  
11 ~~department shall be in accordance with Title 2 (commencing with Section 1120)~~  
12 ~~of Part 3 of the Code of Civil Procedure.~~

13 (b) A finding by the court after a review pursuant to this section shall have no  
14 collateral estoppel effect on a subsequent criminal prosecution and does not  
15 preclude relitigation of those same facts in the criminal proceeding.

16 **Comment.** Subdivision (a) of Section 13559 is amended to make judicial review under this  
17 section subject to the judicial review provisions of the Code of Civil Procedure.

18 **Veh. Code § 14401 (amended). Statute of limitations on review**

19 14401. (a) ~~Any action brought in a court of competent jurisdiction to review~~  
20 ~~Judicial review of any order of the department refusing, canceling, placing on~~  
21 ~~probation, suspending, or revoking the privilege of a person to operate a motor~~  
22 ~~vehicle shall be commenced within 90 days from the date the order is noticed the~~  
23 ~~period provided in Section 1123.630 of the Code of Civil Procedure.~~

24 (b) Upon final completion of all administrative appeals, the person whose  
25 driving privilege was refused, canceled, placed on probation, suspended, or  
26 revoked shall be given written notice by the department of his or her right to a  
27 review by a court pursuant to subdivision (a).

28 **Comment.** Section 14401 is amended to make judicial review of specified orders of the  
29 Department of Motor Vehicles subject to the time limits for judicial review prescribed in the  
30 Code of Civil Procedure.

31 **DEPARTMENT OF SOCIAL SERVICES**

32 **Welf. & Inst. Code § 10962 (amended). Judicial review**

33 10962. The applicant or recipient or the affected county, ~~within one year after~~  
34 ~~receiving notice of the director's final decision, may file a petition notice of~~  
35 ~~review with the superior court, under the provisions of Section 1094.5 in~~  
36 ~~accordance with Title 2 (commencing with Section 1120) of Part 3 of the Code of~~  
37 ~~Civil Procedure, praying for a review of the entire proceedings in the matter, upon~~  
38 ~~questions of law involved in the case. Such . The review, if granted, shall be the~~  
39 ~~exclusive remedy available to the applicant or recipient or county for review of~~  
40 ~~the director's decision. The director shall be the sole respondent in such the~~  
41 ~~proceedings. Immediately upon being served the director shall serve a copy of the~~

1 petition on the other party entitled to judicial review and ~~such~~ that party shall  
2 have the right to intervene in the proceedings.

3 No filing fee shall be required for the filing of a ~~petition~~ notice of review  
4 pursuant to this section. ~~Any such petition to the superior court~~ The proceeding  
5 for judicial review shall be entitled to a preference in setting a date for hearing ~~on~~  
6 ~~the petition~~. No bond shall be required in the case of any ~~petition for~~ notice of  
7 review, nor in any appeal ~~therefrom~~ from the decision of the superior court. The  
8 applicant or recipient shall be entitled to reasonable attorney's fees and costs, if  
9 ~~he obtains a decision in his favor~~ the applicant or recipient obtains a favorable  
10 decision.

11 **Comment.** Section 10962 is amended to make judicial review of a welfare decision of the  
12 Department of Social Services subject to the judicial review provisions in the Code of Civil  
13 Procedure. Special provisions of this section prevail over general provisions of the Code of  
14 Civil Procedure governing judicial review. See Section 1121.110 (conflicting or inconsistent  
15 statute controls).

16 **BILL PROVISIONS**

17 **Uncodified (added). Severability**

18 **SEC. \_\_\_\_.** The provisions of this act are severable. If any provision of this act or  
19 its application is held invalid, that invalidity shall not affect other provisions or  
20 applications that can be given effect without the invalid provision or application.

21 **Uncodified (added). Operative date; application to pending proceedings**

22 **SEC. \_\_\_\_.** (a) Except as provided in this section, this act becomes operative on  
23 January 1, 1998.

24 (b) This act does not apply to a proceeding for judicial review of agency action  
25 pending on the operative date, and the applicable law in effect continues to apply  
26 to the proceeding.

27 **Comment.** Section 1121.130 provides a deferred operative date to enable the courts,  
28 Judicial Council, and parties to make any necessary preparations for operation under this title.