

Memorandum 92-71

Subject: Study N-201 - Judicial Review of Administrative Decision
(Standing and Timing--consultant's background study)

Attached to this memorandum is a copy of the first installment of Professor Asimow's background study on judicial review of the administrative decision. The first installment discusses issues relating to standing and timing. We plan to review the background study and make initial policy decisions concerning standing and timing at the October 30, 1992, Commission meeting in Sacramento.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

JUDICIAL REVIEW OF ADMINISTRATIVE DECISION:

Standing and Timing*

by

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SEPTEMBER 1992

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Copies of this study are provided to interested persons solely for the purpose of giving the Commission the benefit of their views, and the study should not be used for any other purpose at this time.

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JUDICIAL REVIEW: STANDING AND TIMING

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September 28, 1992

TABLE OF CONTENTS

Introduction	1
I. STANDING TO SEEK JUDICIAL REVIEW	4
A. Existing Law	4
1. Private interest	6
a. Over and above test	6
b. Associational standing	9
c. Party status as prerequisite	10
d. Victim standing	12
e. Local government standing	13
f. Comparison to federal law	13
2. Public actions	15
3. Taxpayer actions	19
4. Jus tertii	22
B. Recommendations	24
1. Private interest	25
2. Public interest and taxpayer suits	27
II. TIMING OF JUDICIAL REVIEW	30
A. Exhaustion of administrative remedies	30
1. Existing California law	30
a. Purposes of exhaustion rule	33
b. Doctrine is jurisdictional	34
c. The "exact issue" rule	37
d. Exceptions to exhaustion	39
i. Futility	39
ii. Inadequate remedies	42
iii. Constitutional issues	45
iv. Lack of notice	49
v. Irreparable injury	50
vi. Local tax issues	52
2. Recommendations	52
a. Jurisdictional or discretionary	52
b. Reconsideration	56
c. Continuances and discovery	57
d. Model Act	60
i. General rule	60
ii. Who exhausted the remedy	62
iii. Exception for inadequate remedies	62
iv. Exception for irreparable injury	63
e. The exact issue rule	63
B. Primary jurisdiction	66
1. Distinguishing primary jurisdiction from exhaustion of remedies	66
2. When primary jurisdiction applies under federal law	70
3. California law	71
a. Cumulative remedy doctrine	72
b. Right result for wrong reason	73

c. When primary jurisdiction applies: technical issues	75
d. When primary jurisdiction applies: legislative intent	77
e. Exigent circumstances	78
f. Incorrect results under California law	79
4. Recommendation	81
C. Ripeness	83
D. Statute of limitations on seeking review of adjudicatory action	88
1. Present law	88
2. Recommendations	92
a. When period starts running	92
b. The limitation period	96
c. Statutes of limitation for judicial review of non-adjudicatory action	97
d. Extension of time if agency delays providing record	100
e. Notice to parties of limitation period	101
f. No extension because notice mailed	103
g. Other issues	103

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by Michael Asimow*

The present California law relating to judicial review of the actions of state and local government agencies is a bewildering patchwork. This study discusses the existing statutory and decisional law relating to judicial review and suggests adoption of modernized code sections. This portion of the study will consider matters relating to standing to seek review and timing of review. The next portion of the study will consider abolition of the writ system in favor of a unified judicial review statute; it will also consider the proper court in which to seek review and the scope of judicial review.

The Commission's administrative law project has, up until this point, concentrated solely on adjudication by state agencies; it made no effort to prescribe the rules for local government adjudication. This made sense since there are major differences between adjudication by state government agencies and that performed by the myriad of local government entities. However, the Commission should consider a different approach when considering judicial review. The existing code sections and precedents draw little or no distinction between the review of

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state action and local government action. Therefore, I propose that the Commission's recommendations relating to judicial review extend to agencies of local government as well as state government. Otherwise, the vast body of existing law must be left in place to regulate review of local government action and there would be sharp differences between the review of state and local action. Since this study will show that existing law is unnecessarily confusing and often of dubious merit, it seems appropriate that all of it be modernized.

In addition, the Commission's previous recommendations concerned adjudication, not rulemaking. It has determined to put off recommendations relating to rulemaking until the future. However, the studies relating to judicial review will include material relating to the judicial review of rules and other non-adjudicatory agency action. Again, if this is not done, the corpus of existing judicial review law would have to be preserved for review of non-adjudicatory action. There would be sharp differences in the provisions relating to the review of adjudicatory and non-adjudicatory action. Again, that seems like an unwise result.

The overall goal of the Commission's recommendations should be to supersede the existing antiquated writ system with a single unified judicial review statute. Such a statute would replace the existing writs of ordinary mandate,¹ "certiorarified"

¹ Code of Civil Procedure (hereinafter CCP) §§1084-1097.

mandate,² certiorari,³, and declaratory relief⁴ insofar as these remedies apply to the review of state or local agency action. Each of these remedies is weighted down by the barnacles of decades or centuries. A modern statute would unify the provisions relating to review of agency action and would codify all of the various doctrines relating to review (such as standing and timing doctrines) which now lurk in the case law.

² CCP §1094.5.

³ CCP §1067-77. The writ of certiorari is called the "writ of review" by these sections.

⁴ CCP § 1060.

I. STANDING TO SEEK JUDICIAL REVIEW

Among the most fundamental judicial review issues is that of standing: who can seek judicial review of agency action? Surprisingly, California law on standing, although mostly uncodified, works well. It is almost completely free of the result-oriented, confusing, and perverse limitations imposed on standing in the federal courts.⁵ Thus the Commission should build on strength by codifying the principles that the courts have already worked out.

A. Existing law

Existing law relating to standing breaks down conveniently into four categories: private interest, public interest, taxpayer suits, and third-party standing. Essentially, plaintiffs are allowed into court to challenge state or local government action if they can satisfy the criteria for any one of these categories.

As will be discussed in greater detail in the second judicial review study, persons seeking judicial review under present law must decide under which writ to proceed. In most cases, they seek a writ of mandate (called mandamus at common law). In California, mandate is used to review two very different sorts of agency action. Ordinary or traditional mandate is used when plaintiff claims that a government body has failed to perform a non-discretionary act that the law requires

⁵This is one area where California should not follow the 1981 Model Act which has incorporated the unsatisfactory federal approach.

it to perform.⁶ So-called "certiorarified" mandate⁷ reviews an agency decision resulting from a trial type hearing. In some circumstances, a taxpayer action is appropriate.⁸ Under other circumstances, declaratory judgment⁹ or the writ of review (called certiorari at common law)¹⁰ is used.

In each case, the statute states a standing requirement. In the case of mandate and review, a plaintiff must be "beneficially interested."¹¹ A taxpayer plaintiff must be a citizen of the local jurisdiction involved in the suit.¹² In the case of declaratory judgment, a plaintiff must be "interested" under a written instrument or contract or desire a declaration of his rights or duties.¹³ In general, these provisions mirror the

⁶CP §1085.

⁷CCP §1094.5. The "certiorarified" adjective has long been used to describe the §1094.5 procedure because it adapted mandamus to cover matters historically reviewed under the writ of certiorari. The bizarre historical evolution of §1094.5 will be discussed in the second phase of this study.

⁸CCP §526a.

⁹CCP §1060 et. seq.

¹⁰CCP §1068.

¹¹CCP §§1069, 1086.

¹²CCP §526a. If plaintiff is a corporation, it must have paid a tax to the local jurisdiction that is the subject of the suit. Id.

¹³CCP §1060.

general California rule relating to appeals from trial court judgments: a party seeking review must be "aggrieved."¹⁴

There is a large body of caselaw that fills out (and indeed expands beyond all recognition) the meaning of these delphic phrases. Despite occasional detours, the courts have worked out a scheme of judicial review that seems to allow the right plaintiffs to challenge agency action without at the same time creating a vast body of confusion (as the federal courts have done in trying to solve the same problem).

1. Private interest

Most persons seeking judicial review of agency action unquestionably have standing to do so. The action is directed at them; it deprives them of a legal interest or requires them to take action or prohibits them from doing so. Standing is never an issue in such situations because the plaintiff's private interests are directly and adversely affected. Consequently, they meet the "beneficial interest" test contained in the mandate provision or the "interested" test in the declaratory judgment statute.

a. "Over and above" test.

The beneficial interest test is also satisfied where plaintiff incurs some sort of practical harm even if an order is

¹⁴CCP §902. See Ass'n of Psychology Providers v. Rank, 51 Cal.3d 1, 270 Cal.Rptr. 796 (1990) (psychiatrists are "aggrieved" and thus have standing to appeal from a trial court decision striking down a regulation that might shift income or responsibility from psychiatrists to psychologists).

not directed at him and does not deprive him of a legal right. According to the cases, a plaintiff's private interest is sufficient to confer standing where that interest is "over and above" that of the members of the general public.¹⁵ The cases have been generous in granting standing to persons with quite attenuated pecuniary interests who, nevertheless, can claim some actual or potential harm that distinguishes them from the general public.¹⁶ Earlier cases that imposed stricter standards are no longer followed.¹⁷

¹⁵Carsten v. Psychology Examining Committee, 27 Cal.3d 793, 796, 166 Cal.Rptr. 844 (1980). See Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal.2d 276, 284-85, 384 P.2d 158 (1963) (union president has standing in both representative and personal capacities to litigate discrimination against union members even though he has not personally been victim of discrimination).

¹⁶For example, see Ass'n of Psychology Providers v. Rank, 51 Cal.3d 1, 270 Cal.Rptr. 796 (1990) (psychiatrists can challenge regulation that diminished sphere of responsibility of psychiatrists vis a vis psychologists); Chas. L. Harney, Inc. v. Contractors' State License Board, 39 Cal.2d 561, 247 P.2d 913 (1952) (contractor can challenge regulations preventing it from bidding on certain jobs even though it has no plans to bid on any such jobs); Pacific Legal Foundation v. UIAB, 74 Cal.App.3d 150, 141 Cal.Rptr. 474 (1977) (plaintiff has employees--thus can challenge UIAB precedent decision that might someday adversely affect it); Sperry & Hutchinson v. State Board of Pharmacy, 241 Cal.App.2d 229, 50 Cal.Rptr. 489 (1966) (stamp company can challenge regulation banning pharmacists from giving trading stamps); Gowens v. City of Bakersfield, 179 Cal.App.2d 282, 3 Cal.Rptr. 746 (1960) (hotel required to collect tax from lodgers has standing to challenge tax).

¹⁷See, e.g., United States v. Superior Court, 19 Cal.2d 189, 197-98, 120 P.2d 26 (1941) (since statute is directed at agricultural handlers, growers have no standing even though the order in question will prevent handlers from purchasing their oranges).

In addition, the courts treat non-pecuniary injuries, such as environmental or aesthetic claims, as sufficient to meet the private interest test.¹⁸ Moreover, persons who were made parties to an administrative proceeding automatically have standing to appeal from it, regardless of any other interest.¹⁹ However, if the plaintiff cannot establish that he has suffered some kind of harm from the decision in question, he lacks standing to seek review of the decision.²⁰

¹⁸See, e.g., *Bozung v. Local Agency Formation Comm'n*, 13 Cal.3d 263, 272, 118 Cal.Rptr. 249 (1975) (opposition to environmental effects of annexation--plaintiff lives outside area to be annexed); *Albion River Watershed Protection Ass'n v. Dep't of Forestry*, 235 Cal.App.3d 358, 286 Cal.Rptr. 573, 580-88 (1991) (opponents of logging); *Kane v. Redev. Ag. of Hidden Hills*, 179 Cal.App.3d 899, 224 Cal.Rptr. 922 (1986) (resident of county interested in slower growth); *Citizens Ass'n for Sensible Development v. County of Inyo*, 172 Cal.App.3d 151, 159, 217 Cal.Rptr. 893 (1985) (geographic nexus with site of challenged project--can be "attenuated").

¹⁹*Temescal Water Co. v. Dep't of Public Works*, 44 Cal.2d 90, 107, 279 P.2d 963 (1955); *Covert v. State Bd. of Equalization*, 29 Cal.2d 125, 130, 173 P.2d 545 (1946) (complainant against licensee who was party to administrative proceeding can seek review of decision denying relief); *Beverly Hills Fed. S & L Ass'n v. Superior Court*, 259 Cal.App.2d 306, 316 n.7, 66 Cal.Rptr. 183 (1968) (bank resisting grant of license to competitor). But see *Madruza v. Borden Co.*, 63 Cal.App.2d 116, 121, 146 P.2d 273 (1944) (participant in administrative hearing denied right of review--probably explainable because plaintiff had adequate remedy at law).

²⁰*Parker v. Bowron*, 40 Cal.2d 344, 254 P.2d 6 (1953) (secretary of union has no standing to challenge city's failure to pay prevailing wages to its employees); *Grant v. Bd. of Medical Examiners*, 232 Cal.App.2d 820, 43 Cal.Rptr. 270 (1965) (no standing to challenge agency action favorable to plaintiff despite presence of language in hearing officer's decision derogatory to him); *Silva v. City of Cypress*, 204 Cal.App.2d 374, 22 Cal.Rptr. 453 (1962) (challenger of zoning variance fails to allege that he was detrimentally affected by the decision).

b. Associational standing

Present law generously allows standing to associations, including unions, trade associations, or political associations, whether or not incorporated. Such associations can sue on behalf of their members. The only requirements are that a member or members could have met the private interest standard had they sued individually, the interests the association seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires the participation of the individual members.²¹ Earlier cases had placed this issue in doubt.²²

The ability of associations to sue on behalf of their members is extremely important. Associations often have much greater resources to pursue litigation than do individuals. Moreover, the association is already in place; it need not be

²¹County of Alameda v. Carleson, 5 Cal.3d 730, 737 n.6, 97 Cal.Rptr. 385 (1971) (unincorporated association of welfare recipients has standing to appeal trial court decision invalidating welfare regulations); Brotherhood of Teamsters v. UIAB, 190 Cal.App.3d 1515, 1521-24, 236 Cal.Rptr. 78 (1987) (union can challenge denial of unemployment benefits to its members because of a lockout); Residents of Beverly Glen, Inc. v. City of Los Angeles, 34 Cal.App.3d 117, 109 Cal.Rptr. 724 (1973) (environmental concerns of canyon residents).

²²Parker v. Bowron, 40 Cal.2d 344, 254 P.2d 6 (1953) (union cannot challenge city's failure to pay prevailing wages to its employees whether or not some employees were members of the union); Associated Boat Industries of No. Calif. v. Marshall, 104 Cal.App.2d 21, 230 P.2d 379 (1951) (trade association is not "interested" in a regulation even though its members are). See Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal.2d 276, 283-85, 384 P.2d 158 (1963), which effectively disapproves Parker.

organized for purposes of pursuing a particular case, thus limiting transaction costs. Finally, associational standing avoids the free rider problem inherent in individual litigation where a number of people are affected: each such person hopes that others will bear the costs of litigation and therefore nobody does anything (or one individual unfairly has to absorb the costs of litigation that benefit many people).

c. Party status as prerequisite to standing.

Must the person seeking judicial review have been a party to the agency proceeding? This issue combines elements of standing and exhaustion of remedies and has caused difficulty. The exhaustion of remedies requirement is that the particular ground on which agency action is claimed to be invalid must have been raised before the agency.²³ The related standing rule is that the particular plaintiff now seeking review of agency action must have objected to the agency action orally or in writing, although not necessary on the grounds which are now the basis for review.²⁴ However, the courts have drawn exceptions to the rule²⁵ and also have not applied it consistently.²⁶ These

²³The "exact issue" rule is discussed under exhaustion of remedies.

²⁴See *Friends of Mammoth v. Bd. of Supervisors*, 8 Cal.3d 247, 267-68, 104 Cal.Rptr. 761 (1972).

²⁵The Friends of Mammoth decision established an exception to the general rule: an association or a class formed after the agency proceeding can sue so long as at least one of its members participated in the agency proceeding. The general rule, and the Friends of Mammoth exception, have been codified for CEQA cases in

rather tortured exceptions and inconsistent treatment raise doubts about whether the rule is worth maintaining.

I believe the exhaustion rule is sound but that the standing rule is not.²⁷ The standing rule forces litigants to jump through unnecessary hoops trying to involve as parties to an appeal persons who were active in protesting something before the agency at an earlier time but are not personally interested in securing review of it. So long as the precise issue on which review is now being sought was considered at the agency level,

Pub. Res. C. §21177. See Albion River Watershed Protection Ass'n v. Dep't of Forestry, 235 Cal.App.3d 358, 286 Cal.Rptr. 573, 580-88 (1991), which suggests the problems raised by the Friends of Mammoth exception; Leff v. City of Monterey Park, 218 Cal.App.3d 682, 267 Cal.Rptr. 343 (1990) (exception applied even though not a class action).

Another exception to the standing rule was established in Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal.App.3d 105, 122 Cal.Rptr. 282 (1975). In a case involving public rights (see discussion infra), plaintiff was permitted to seek review of a decision by a local planning commission despite having failed to appear at the administrative proceeding. Later cases have limited the Corte Madera exception to cases of public as opposed to private right and only where the members of the public failed to receive notice of the proceeding in which they failed to appear. Resource Def. Fund v. Local Agency Formation Comm'n, 191 Cal.App.3d 886, 894-95, 236 Cal.Rptr. 794 (1987); Mountain View Chamber of Commerce v. City of Mountain View, 77 Cal.App.3d 82, 143 Cal.Rptr. 441 (1977).

²⁶Peery v. Superior Court, 29 Cal.3d 837, 841, 176 Cal.Rptr. 533 (1981); Employees Service Ass'n v. Grady, 243 Cal.App.2d 817, 827, 52 Cal.Rptr. 831 (1966); Brotherhood of Teamsters v. UIAB, 190 Cal.App.3d 1515, 1521, 236 Cal.Rptr. 78 (1987).

²⁷Model Act §5-107(1) provides that a petitioner for judicial review of a rule need not have participated in the rulemaking proceeding on which the rule is based. I believe this is the correct resolution of the issue.

why should it matter whether the particular plaintiff (or someone in the plaintiff's group) was personally involved in raising that or other issues before the agency?²⁸

d. Victim standing.

A related issue is whether a person who has complained to an agency about a professional licensee should be allowed to challenge an agency decision in favor of the licensee. In some cases, at least, a victim might claim private interest standing on the grounds that the administrative decision will have a bearing on some related litigation (such as a malpractice case). I would deny standing to such a person (unless that person had been made a party at the administrative level). The Commission has already decided in the adjudication phase of its study of administrative law that there should be no right of private prosecution. It would be consistent with that approach to deny standing to seek judicial review to a complainant against a licensee who has not been made a party to the administrative

²⁸A comparable rule requires that a person seeking to appeal a judicial decision have been a party to that case at the trial level. CCP §902. However, this has not proved to be a problem, at least in administrative law cases, since persons aggrieved by trial court decisions to which they were not previously parties have been allowed to become parties by moving to vacate the judgment. See *Ass'n of Psychology Providers v. Rank*, 51 Cal.3d 1, 270 Cal.Rptr. 796 (1990); *County of Alameda v. Carleson*, 5 Cal.3d 730, 737 n.6, 97 Cal.Rptr. 385 (1971); *Simac Design, Inc. v. Alciati*, 92 Cal.App.3d 146, 153, 154 Cal.Rptr. 676 (1979). In other cases, parties whose interest appeared on the face of the record were allowed to appeal even though not parties to the trial court decision. *Harris v. Alcoholic Beverage Control Appeals Bd.*, 245 Cal.App.2d 919, 923, 54 Cal.Rptr. 346 (1966). Consequently, I see no need to recommend modification of CCP §902.

proceeding and who had no right to become a party under a statute specific to the agency.²⁹

e. Local government standing

One confusing group of standing cases concerns the issue of whether a unit of local government can sue the state on the basis that a state statute is unconstitutional. It seems that local government can sue based on the commerce or supremacy clauses but not due process, equal protection, or the contract clause.³⁰

These distinctions seem difficult to justify.³¹ Local government should have standing to sue the state.³²

f. Comparison to federal law

The California rules on private interest are blessedly free of the complications that have arisen in federal cases where the

²⁹If the complainant has been made a party to the administrative proceeding, or has a statutory right to become a party, the complainant should have standing to appeal from the decision. *Covert v. State Board of Equalization*, 29 Cal.2d 125, 173 P.2d 545 (1946).

³⁰See *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal.3d 1, 227 Cal.Rptr. 391 (1986).

³¹In general, units of local government have standing to sue the state under the private interest test. See, e.g., *County of Contra Costa v. Social Welfare Bd.*, 199 Cal.App.2d 468, 18 Cal.Rptr. 573 (1962) (county ordered to pay welfare by state board). There is no apparent reason to treat certain constitutional claims differently for standing purposes.

³²Of course, granting standing is not equivalent to a ruling that the plaintiff has a cause of action. If the constitutional provision in question does not, as a matter of substantive law, protect local government, the suit should be dismissed on the merits, not on the basis of a lack of standing. *Star-Kist Foods*, *supra*.

courts seem bent on restricting standing as far as possible to limit the caseload of the federal courts and prevent judges from meddling in matters that do not concern them.³³ For example, judicial review under federal law requires not only that the plaintiff have been "injured in fact," it also requires that the plaintiff be within the "zone of interests" arguably protected or regulated by the statute or constitutional provision in question.³⁴ The courts have found the "zone of interest" test extremely difficult to apply; in my opinion there is no persuasive rationale for it. Even more important, federal courts impose strict requirements of causation and remediability;³⁵ the agency action must have caused the injury to the plaintiff (without the intermediate actions of some third party) and judicial action against the defendant must be likely to remedy that injury. These requirements have been quite strictly applied, yet the tests remain unpredictable in practice.³⁶

³³The reader will be grateful that the author considers an extended discussion of the federal standing cases beyond the scope of this study.

³⁴The Supreme Court strongly endorsed the zone of interest test in *Air Courier Conference of America v. American Postal Workers Union*, 111 S. Ct. 913 (1991) (postal employees not within zone of interest of statute giving post office a monopoly).

³⁵These tests are constitutional, as opposed to prudential rules like the zone of interest test. Congress can alter the zone of interest test but cannot abolish the causation and remediability tests.

³⁶See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984).

Again, in my opinion, there is no need for these tests. Unfortunately, the zone of interest test, as well as the causation and remediability tests, were built into the Model Act's standing provision.³⁷ California should not follow the Model Act's lead on this point.

2. Public actions.

California cases arising under the ordinary mandamus remedy of section 1085 have been extremely forthcoming in allowing plaintiffs who lack any private injury as described above to sue to vindicate the public interest.³⁸ In a recent Supreme Court case, for example, plaintiffs were given standing simply in their role as citizens to sue a county for failing to implement state law by not deputizing county employees as voting registrars.³⁹ While some earlier cases cast doubt on the public interest rule,⁴⁰ the newer cases emphatically endorse it.⁴¹

³⁷Model Act §5-106(a)(5)(ii) and (iii).

³⁸Since §1086 requires that a mandate plaintiff be "beneficially interested," these cases are dramatic examples of judicial lawmaking.

³⁹Common Cause of California v. Bd. of Supervisors, 49 Cal.3d 432, 261 Cal.App.3d 574 (1989) (plaintiff can seek mandate as well as provisional relief).

⁴⁰Carsten v. Psychology Examining Committee, 27 Cal.3d 793, 166 Cal.App.3d 844 (1980), refused to allow a member of an agency to obtain judicial review of the actions of that very agency. The case contains language which would undercut the public interest exception. Later cases limit Carsten to its facts--for policy reasons, an agency member should not be allowed to sue her own agency. Green v. Obledo, 29 Cal.3d 126, 143-45, 172 Cal.App.3d 206 (1981). Parker v. Bowron, 40 Cal.2d 344, 254 P.2d 6 (1953), refusing to allow an individual or unions standing to compel a city

The rationale for this rule has been stated several times:
"[W]here the question is one of public right and the object of mandamus is to procure enforcement of a public duty, the relator need not show he has any legal or special interest in the result since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced."⁴²
Public interest standing "promotes the policy of guaranteeing citizens the opportunity to ensure that no government body

to comply with a requirement that it pay prevailing wages, also casts doubt on the public interest rule, but must be considered obsolete.

⁴¹See *Green v. Obledo*, supra (plaintiff can attack regulation denying welfare benefits including both the portion that denies her benefits and other portions that have no effect on her); *Pitts v. Perluss*, 58 Cal.2d 824, 829, 27 Cal.Rptr. 19 (1962) (citizen urging enforcement of department's duty to adopt regulations); *Hollman v. Warren*, 32 Cal.2d 351, 196 P.2d 562 (1948) (constitutionality of statute limiting number of notaries that can be appointed); *Board of Social Welfare v. County of Los Angeles*, 27 Cal.2d 98, 162 P.2d 627 (1945) (replacement of expired welfare checks); *Frank v. Kizer*, 213 Cal.App.3d 926, 261 Cal.Rptr. 882 (1989) (patients have standing to compel compliance with federal Medicaid regulations even though their particular cases have already been settled); *American Friends Serv. Comm. v. Procunier*, 33 Cal.App.3d 252, 255-56, 109 Cal.Rptr. 22 (1973) (action to force agency to comply with state rulemaking requirements); *Newland v. Kizer*, 209 Cal.App.3d 647, 257 Cal.Rptr. 450 (1989) (action to force agency to adopt regulations); *Madera Community Hosp. v. County of Madera*, 155 Cal.App.3d 136, 201 Cal.Rptr. 768 (1984) (same); *Environmental Law Fund, Inc. v. Town of Corte Madera*, 49 Cal.App.3d 105, 122 Cal.Rptr. 282 (1975) (environmental group challenging approval of development); *McDonald v. Stockton Metro. Transit Dist.*, 36 Cal.App.3d 436, 440, 111 Cal.Rptr. 637 (1973) (action to compel city to build bus shelters under its contract with DOT); *In re Veterans' Industries, Inc.*, 8 Cal.App.3d 902, 88 Cal.Rptr. 303 (1970) (compelling court to exercise cy pres discretion).

⁴²*Board of Social Welfare v. County of Los Angeles*, 27 Cal.2d 98, 101, 162 P.2d 627 (1945).

impairs or defeats the purpose of legislation establishing a public right."⁴³

Apparently, this rule applies only to mandate, not to actions for declaratory judgment.⁴⁴ There seems to be little reason for the distinction and a new statute should generalize the public injury test to all actions for judicial review of agency action.

In my view, the public interest rule works well. It has no counterpart on the federal level where a plaintiff must always demonstrate both "palpable" and "particularized" injury in fact.⁴⁵ I believe that plaintiffs who wish to incur the expense and bother of litigating public interest questions, such as the illegality of government action, should be allowed to do so. There is no reason to believe that the existing California public interest rule, or the generous provision for taxpayer suits discussed below, has caused any significant problems by way

⁴³Green v. Obledo, *supra* at 144.

⁴⁴Sherwyn v. Dep't of Social Services, 173 Cal.App.3d 52, 218 Cal.Rptr. 778 (1985) (a case decided primarily on ripeness grounds); American Friends Serv. Comm. v. Procter, 33 Cal.App.3d 252, 255-56, 109 Cal.Rptr. 22 (1973).

⁴⁵See, e.g. Schlesinger v. Reservists' Committee, 418 U.S. 208 (1974) (challenge to practice of members of Congress holding military positions); Sierra Club v. Morton, 405 U.S. 727 (1972) (Sierra Club lacks standing to challenge development program despite its historic commitment to protection of the Sierras).

of harassing agencies or flooding the courts.⁴⁶ Nevertheless, the Commission may wish to consider some limitations on public interest or taxpayer suits, such as a bond requirement⁴⁷ or a requirement that the Attorney General or local law enforcement authority be first notified and given an opportunity to sue before the public interest or taxpayer suit is filed.⁴⁸ I do not recommend either of these measures, absent some empirically based showing that public interest suits are posing a serious problem of harassment or obstruction of public programs.

Aside from the risk of harassment or obstruction, the problem with the public interest rule is definitional. It may be far from self evident whether a particular claim really meets the standards of public right-public duty. So far, at least, this has not proved difficult; the courts have stated that where the

⁴⁶See *Carsten v. Psychology Examining Committee*, supra, 27 Cal.3d at 805-06 (dissenting opinion). Justice Richardson's dissent in this 4-3 decision persuasively attacked the majority's rule which precludes a member of an agency from suing her own agency. The dissent thought this was a perfectly appropriate citizen suit and asserted (admittedly without statistical support) that the existing law had caused no problems for government or the courts.

⁴⁷ In the court's discretion, plaintiff might be compelled to post a bond to cover the defendant's costs. See Comment, "Taxpayers' Suits: Standing Barriers and Pecuniary Restraints," 59 Temple L.Q. 951, 974-76 (1986). Such a requirement would be akin to that imposed on plaintiffs in stockholder derivative suits. See Corp.C. §800(c) to (f).

⁴⁸Cf. *Keith v. Hammel*, 29 Cal.App. 131, 154 Pac. 871 (1915) (taxpayer's action against sheriff should have first been presented to proper county officers to give them a chance to sue).

public duty is sharp and the public need weighty, a plaintiff needs to show no personal need; but if the public need is less pointed, courts require plaintiff to show his personal need for relief.⁴⁹ While vague, this test seems serviceable. As discussed below, it is probably not possible to draft anything very specific on this point.⁵⁰

3. Taxpayer actions

Historically California has been extremely receptive to actions brought by taxpayers to restrain illegal or wasteful expenditures.⁵¹ In 1906, the enactment of Code of Civil Procedure section 526a formalized the existing case law on the

⁴⁹*McDonald v. Stockton Metro. Transit Dist.*, 36 Cal.App.3d 436, 440, 111 Cal.Rptr. 637 (1973).

⁵⁰This study does not discuss the recovery of attorney's fees by a successful plaintiff. However, under CCP §1021.5, a court may award fees to a successful plaintiff in any action which has resulted in the enforcement of "an important right affecting the public interest if (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any..." If the Commission wanted a definition of public interest standing, it could adapt the test in §1021.5(a).

⁵¹See generally Myers, "Standing in Public Interest Litigation: Removing the Procedural Barriers," 15 Loyola L.A. L. Rev. 1 (1981); Note, "California Taxpayer Suits: Suing State Officers under Section 526a of the Code of Civil Procedure," 28 *Hast. L. Rev.* 477 (1976). Non-California discussions of taxpayer actions include Comment, "Taxpayers' Suits: Standing Barriers and Pecuniary Restraints," 59 *Temple L.Q.* 951 (1986) (virtually every state allows taxpayer suits against both state and local government); Note, "Taxpayers' Suits: A Survey and Summary," 69 *Yale L.J.* 895 (1960).

subject. While section 526a applies only to local government entities, the caselaw evolution of the remedy has continued so that taxpayer actions can be brought against state officials⁵² or local government entities not mentioned in section 526a.⁵³

The purpose of taxpayer actions is to "enable a large body of the citizenry to challenge governmental action which otherwise would go unchallenged in the courts because of the standing requirement...California courts have consistently construed section 526a liberally to achieve this remedial purpose."⁵⁴

Taxpayer actions can be brought to enjoin expenditures that are contrary to local or state statutes (so called "ultra vires" expenditures) or are contrary to constitutional restrictions. Taxpayers can enjoin programs which involve spending only trivial sums or even non-spending government activities provided that

⁵²Stanson v. Mott, 17 Cal.3d 204, 222-23, 130 Cal.Rptr. 697, 708-09 (1976); Ahlgren v. Carr, 209 Cal.App.2d 248, 25 Cal.Rptr. 887 (1962).

⁵³Los Altos Property Owners Ass'n v. Hutcheon, 69 Cal.App.3d 22, 137 Cal.Rptr. 775 (1977) (action against school board can be brought under 526a as well as under the common law); Gogerty v. Coachella Valley Jr. Coll. Dist., 57 Cal.2d 727, 371 P.2d 582 (1962).

⁵⁴Blair v. Pitchess, 5 Cal.3d 258, 267-68, 96 Cal.Rptr. 42 (1971). For example, despite the limitation in §526a restricting standing to citizen residents of the jurisdiction whose expenditures are being challenged, the courts have allowed nonresident taxpayers to sue. Irwin v. City of Manhattan Beach, 65 Cal.2d 13, 18-20, 51 Cal.Rptr. 881 (1966) (allowing nonresident corporate but not individual taxpayers to sue violates equal protection).

governmental employees are paid a salary to execute them.⁵⁵ A program can be enjoined even if it does not involve the spending of tax dollars or even if it makes money⁵⁶ or even though there are also individuals whose private interest would have allowed them to sue.⁵⁷ Taxpayer actions cannot be defeated by claims that plaintiff is seeking an advisory opinion or that there is no case or controversy.⁵⁸ And actions for declaratory relief or damages are also permitted, even though section 526a appears limited to injunctions.⁵⁹

Less clear is the degree to which "wasteful" expenditures can be enjoined. Section 526a, but not common law taxpayer actions, allow actions restraining governmental waste;⁶⁰

⁵⁵Regents of Univ. of California v. Superior Court, 3 Cal.3d 529, 542, 91 Cal.Rptr. 57 (1970) (University's refusal to employ Communists); Wirin v. Parker, 48 Cal.2d 890, 894, 313 P.2d 844 (1957) (use of public funds to conduct illegal police surveillance); Wirin v. Horrall, 85 Cal.App.2d 497, 504, 193 P.2d 470 (1948) (use of funds to conduct police blockades).

⁵⁶Blair v. Pitchess, supra.

⁵⁷Van Atta v. Scott, 27 Cal.3d 424, 166 Cal.Rptr. 149 (1980).

⁵⁸Blair v. Pitchess, supra.

⁵⁹Van Atta v. Scott, supra (declaratory relief); Stanson v. Mott, 17 Cal.3d 204, 222-23, 130 Cal.Rptr. 697, 708-09 (1976) (damages if defendant failed to exercise due care in illegally spending state funds). See Keller v. State Bar of Calif., 47 Cal.3d 1152, 255 Cal.Rptr. 542 (no personal liability of Bar governors for spending Bar funds on election since they reasonably believed the expenditure was authorized).

⁶⁰Los Altos Property Owners Ass'n v. Hutcheon, 69 Cal.App.3d 22, 137 Cal.Rptr. 775 (1977).

presumably this means spending which cannot achieve any proper governmental purpose even though it is not ultra vires. The vagueness of the "waste" concept gives rise to concern.⁶¹

California law relating to taxpayer suits is completely at variance with federal law. Federal cases have rejected taxpayer actions⁶² with the single, somewhat anomalous exception of taxpayer actions to enforce the establishment clause which are permitted.⁶³

4. Jus tertii--enforcing rights of third parties. In some situations, a person ("A") would have standing to seek review because of some personal legal or practical harm to its interests. For some reason, however, A does not or cannot actually seek review. Another party ("B"), who might not meet any of the standing criteria on its own, seeks review on A's behalf. Suing to enforce the rights of third parties is often referred to as jus tertii. California cases, like federal cases,

⁶¹Harnett v. County of Sacramento, 195 Cal. 676, 683, 235 Pac. 45 (1925) (court can enjoin a redistricting election which could not achieve desired result); Los Altos Property Owners Ass'n v. Hutcheon, supra (claim that school board's consolidation plan would cost more than plaintiff taxpayer's alternative plan states cause of action for waste); City of Ceres v. City of Modesto, 274 Cal.App.2d 545, 555-56, 79 Cal.Rptr. 168 (1969) (installation of sewer lines--wasteful, improvident, and completely unnecessary public spending can be enjoined by a taxpayer even though done in exercise of lawful power).

⁶²Valley Forge Christian School v. Americans United, 454 U.S. 464 (1982).

⁶³Flast v. Cohen, 392 U.S. 83 (1968).

make provision for jus tertii in appropriate cases.⁶⁴

Two factors have been employed in deciding whether B can sue. First, what is the relationship between B and A? B is likely to have standing if A's rights are inextricably bound up with an activity that B wishes to pursue. Second, is there some practical obstacle to A seeking review itself?⁶⁵

In the California cases that have permitted suit under the jus tertii approach, both factors pointed in the direction of permitting standing. For example, in Selinger v. City Council of

⁶⁴Jus tertii is not automatic, however. For example, B was not allowed to sue on A's behalf where B and A had conflicting interests. Camp Meeker System, Inc. v. PUC, 51 Cal.3d 845, 274 Cal.Rptr. 678 (1990). And in a case primarily decided on ripeness grounds, attorneys were denied standing to sue on behalf of clients who wished to enter into surrogate parenting arrangements to challenge policies of a state agency. Sherwyn v. Dep't of Social Services, 173 Cal.App.3d 52, 218 Cal.Rptr. 778 (1985).

In the venerable case of Parker v. Bowron, 40 Cal.2d 344, 254 P.2d 6 (1953), the question was whether a city was complying with a prevailing wage law; neither unions (that contained some city workers) nor the secretary of those unions was permitted to assert the rights of city employees. The Parker case has clearly been superseded by later cases involving the right of associations to vindicate the rights of their members. See text at notes 21-22. Parker might still be followed, however, on the question of whether the secretary of the union could assert the rights of city workers; however, it is likely that the suit could proceed as a public action under modern cases. The prevailing wage law might be considered as one that created public rights and duties.

⁶⁵This analysis was drawn from federal cases. For example, a physician is permitted to sue on behalf of patients who assert that a state statute denies the patient's right to obtain an abortion; a vendor is permitted to assert the rights of buyers penalized by an unconstitutional statute. Singleton v. Wulff, 428 U.S. 106 (1976); Craig v. Boren, 429 U.S. 190 (1976). See generally Tribe, American Constitutional Law §3-19 (2d ed. 1988).

Redlands,⁶⁶ a state statute required automatic approval of a subdivision application if not denied within one year. Arguably this statute denied due process to adjacent landowners who normally would be entitled to notice and a hearing on the application. But the adjacent landowners were not notified and the subdivision was automatically approved after one year. A city was permitted to sue on behalf of the landowners. The statute interfered with the city's zoning process (although it did not deprive the city of due process); therefore the first criterion of inextricable relationship was met. Secondly, the landowners would have difficulty bringing the suit since they were never notified of the development until it was too late to challenge it.

There may be cases in which B cannot meet these tests. In many such cases, however, B could probably sue under the public rights approach discussed above where the courts require no personal stake at all.

B. Recommendations

A statute should codify standing law which is now mostly in relatively inaccessible and somewhat confusing case law and

⁶⁶216 Cal.App. 3d 271, 264 Cal.Rptr. 499 (1989). Similarly, see *Drum v. Fresno County Dep't of Public Works*, 144 Cal.App.3d 777, 783-84, 192 Cal.Rptr. 782 (1983). See also the leading California case of *Board of Social Welfare v. County of Los Angeles*, 27 Cal.2d 98, 100, 162 P.2d 627 (1945), allowing a state social welfare agency to sue a county on behalf of welfare recipients "who are...ordinarily financially, and often physically, unable to maintain such proceedings on their own behalf".

fragmentary and misleading statutes.⁶⁷ I suggest working with the provision in the Model Act⁶⁸ but adding provisions on public actions and pruning the parts of the statute that incorporate inappropriate and unsatisfactory federal standing rules.

1. Private interest.

The MSAPA section provides standing to a person to whom the agency action is specifically directed and to a person who was a party to the agency proceedings that led to the agency action. It also provides standing to "a person eligible for standing under another provision of law."⁶⁹ These subsections seem appropriate and reflect existing California law.

The MSAPA provides that "if the challenged agency action is a rule, a person subject to that rule" has standing to seek review of the rule.⁷⁰ This would change existing California law which, with some exceptions, requires a person challenging a rule to have been a party to the rulemaking proceeding.⁷¹ As

⁶⁷CCP §526a relating to taxpayer actions appears to cover only actions against local government, yet it has been expanded to cover actions against the state. The mandate statute appears to be limited to private actions yet it has been expanded to cover public ones as well.

⁶⁸1981 MSAPA §5-106.

⁶⁹§5-106(a)(1), (2), (4).

⁷⁰§5-106(a)(3).

⁷¹See text at notes 24-29.

discussed above, I believe that the existing rule is unnecessary. The related exhaustion of remedies rule requiring that the particular issue which is the subject of the challenge be raised at the administrative level makes sense, but there is little reason to require that the particular plaintiff have been involved in the rulemaking proceeding.

The MSAPA then provides that "a person otherwise aggrieved or adversely affected by the agency action" has standing to challenge it. "For purposes of this paragraph, no person has standing as one otherwise aggrieved or adversely affected unless: (i) the agency action has prejudiced or is likely to prejudice that person..."⁷² This adequately states the "private interest" standard which is well developed in existing California law.⁷³ The MSAPA then goes on to add the zone of interests, causation, and remediability requirements of federal law⁷⁴ which I strongly urge that California not adopt.⁷⁵

⁷²MSAPA §5-106(a)(5).

⁷³Note again that the MSAPA does not require that the person have been a party to the action below, whether it is quasi-legislative or quasi-judicial. I believe this change is appropriate.

⁷⁴§5-106(a)(5)(ii), (iii).

⁷⁵Probably the section can be simplified by leaving out the language about "otherwise aggrieved or adversely affected," leaving only a residual section on private interest for agency action that "prejudiced or is likely to prejudice" the plaintiff. This seems adequate to capture any sort of practical or legal harm and thus meets the California standards that the plaintiff be hurt in some way that distinguishes him from the general public.

The statute should make clear that it preserves existing law about the right of associations to sue on behalf of any of their members who can meet the private interest standard.⁷⁶ This idea should be expressed in statutory language.

The statute should also preserve the *jus tertii* rule--the right of third parties to assert the rights of persons who meet the private interest standard.⁷⁷ Here the standard is so vague that it might be difficult to write a statute on it. Perhaps the *jus tertii* rule can be the subject of a comment to the section stating that prior law is preserved, together with a few citations to existing cases that articulate that law. Finally, the statute or a comment should make clear the local government has standing to sue the state on any legal theory.⁷⁸

2. Public interest and taxpayer suits

Because it seems to be based on federal law, the MSAPA standing provision does not allow standing to taxpayers or to persons asserting public interest claims. I believe California law on these points is working well and should be preserved.

However, it seems to me that taxpayer actions should be dispensed with. If there is a generous public interest type standard, what is the need for the separate taxpayer action? The case law has expanded taxpayer actions to the point that their

⁷⁶See text at notes 21-22.

⁷⁷See text at notes 64-66.

⁷⁸See text at notes 30-32.

conceptual basis (arising out of harm to the long-suffering taxpayer) seems rather silly. As we have seen, a taxpayer can seek to enjoin any action by government whether it involves spending funds or not, or even if the activity is a money-maker. Any action which involves paid staff to implement falls within the domain of taxpayer standing--and obviously this includes every possible action by government. Who cares, at this point, whether the plaintiff is a taxpayer or not?

Besides, some aspects of taxpayer standing under existing law seem dubious. I do not believe that there should be an action for "waste" of taxpayer funds; if there is no basis for claiming illegality of the action or expenditure, the courts should not intervene. An action for "waste" provides too great an inducement for harassing lawsuits that raise essentially political issues. Moreover, I do not believe that there should be personal liability of government officials for administrative action which proves to be invalid, whether or not such action meets the due care standard developed in existing law.⁷⁹ Such liability runs contrary to the policies behind the tort claims act.⁸⁰

⁷⁹See note 61.

⁸⁰See CEB, California Government Liability Tort Practice §§2.89-2.91, 6.143-6.156 (3d ed. 1992). In general, in all but very unusual cases, a public entity must provide a defense for public employees and must indemnify such employees against any liability for job-related acts. Thus the legislature is committed to a regime in which public employees are not subject to personal liability.

Instead, it seems sensible to fold the taxpayer action into a generic public interest standard.⁸¹ Such a standard would allow a plaintiff to challenge action of state or local government on the ground that such action is contrary to law. Such law could be expressed in the state or federal constitution, a statute, a regulation, or even in judicial decisions. However, the law in question must be one that a court believes was intended to benefit the general public or a large segment of the general public, as opposed to a narrow private interest. The law might, for example, be one that imposes environmental controls or controls on the political process. It might be a tax law which is being erroneously interpreted to create a loophole. It might be a benefit statute intended to relieve poverty. The bounds of the public interest statute cannot be expressed by any statutory formula and must evolve case by case. I leave it to the staff to figure out exactly how such a provision should be drafted.⁸² Perhaps a comment stating that the legislature approves of existing law (illustrated by a few citations) would be sufficient.

⁸¹Taxpayer suits have functionally become citizen suits. Note, 69 Yale L. J. 895, 906 (1960).

⁸²See note 50 suggesting use of language in CCP §1021.5.

II. TIMING OF JUDICIAL REVIEW

Various doctrines control the timing of judicial review; if applicable, these doctrines require a delay of judicial involvement in resolving the dispute. At present, none of the doctrines are statutory and several overlap. In many respects, the caselaw is confusing and inconsistent. Codification and clarification of these doctrines and their various exceptions would be helpful.

A. Exhaustion of administrative remedies

1. Existing California law

The requirement that a party exhaust administrative remedies before seeking judicial review has been heavily litigated in California.⁸³

Unless an exception to the rule is applicable, a litigant must fully complete all federal,⁸⁴ state and local administrative remedies before coming to court or defending

⁸³For general treatments of exhaustion under California law, see Comment, "Exhaustion of Administrative Remedies in California," 56 Calif. L. Rev. 1061 (1968); Continuing Education of the Bar, California Administrative Mandamus ch. 2 (1989, 1991 Supp.) (hereinafter "CEB"); 3 B. Witkin, California Procedure §§234-246 (3d ed. 1985, 1991 Supp.); 2 G. Ogden, California Public Agency Practice §51.02 (1992).

This section of the study does not consider the rule that a failure to exhaust judicial remedies under CCP §1094.5 establishes the propriety of the administrative action under the doctrine of administrative res judicata. See, e.g., Sanders v. City & County of San Francisco, -- Cal.App.4th--, 8 Cal.Rptr.2d 170 (1992); Knickerbocker v. City of Stockton, 199 Cal.App.3d 235, 244 Cal.Rptr. 764 (1988). This section concerns only exhaustion of administrative remedies.

⁸⁴Acme Fill Corp. v. San Francisco Bay Conservation & Dev. Comm'n, 187 Cal.App.3d 1056, 1064, 232 Cal.Rptr. 348 (1986) (exhaustion of federal remedy before suing in state court).

against administrative enforcement.⁸⁵ The doctrine applies even though a litigant contends that an agency has made a legal error, for example by wrongfully taking jurisdiction over the case or by denying benefits to the litigant or by failing to follow its own procedural rules.⁸⁶

The exhaustion rule applies whenever a process exists whereby an unfavorable agency decision might be challenged within that agency or another agency.⁸⁷ The rule applies to the review of state or local agency actions that might be deemed quasi-legislative, quasi-administrative or ministerial, as well as quasi-judicial.⁸⁸ It requires not only that every

⁸⁵South Coast Regional Comm'n v. Gordon, 18 Cal.3d 832, 135 Cal.Rptr. 781 (1977) (failure to exhaust remedies precludes raising defenses against enforcement); People v. Coit Ranch, Inc., 204 Cal.App.2d 52, 57-58, 21 Cal.Rptr. 875 (1962) (same).

⁸⁶Bollengier v. Doctors Medical Center, 222 Cal.App.3d 1115, 1126-32, 272 Cal.Rptr. 273 (1990).

⁸⁷However, that process must be one provided by regulation or statute that furnishes clearly defined machinery for submission, evaluation, and resolution of the dispute. See text at note 116, *infra*.

⁸⁸Redevelopment Agency of the County of Riverside v. Superior Court, 228 Cal.App.3d 1487, 1492, 279 Cal.Rptr. 558 (1991) (whether adoption of redevelopment plan is quasi-legislative or quasi-administrative, exhaustion rule applies); Lopez v. Civil Serv. Comm'n, 232 Cal.App.3d 312, 283 Cal.Rptr. 447 (1991) (exhaustion applies to all forms of mandate and applies even though plaintiff seeks ministerial rather than quasi-judicial action by agency).

But see City of Coachella v. Riverside County Airport Land Use Comm'n, 210 Cal.App.3d 1277, 1287-88, 258 Cal.Rptr. 795 (1989), involving objections to a land use plan adopted by a local agency. The objector failed to appear at a legally required public hearing. The court held that appearance at the hearing was not a remedy that must be exhausted, since the agency was not required to do anything in response to submissions at the hearing. I regard the latter decision as probably incorrect; the public hearing was obviously intended for the purpose of allowing the public to raise questions about the planning decision and for the agency to

procedural avenue be completely exhausted,⁸⁹ but also that the exact issue that the litigant wants the court to consider have been raised before the agency.⁹⁰ It applies even though the administrative remedy is no longer available; in such cases, of course, dismissal because of a failure to exhaust is equivalent to denying judicial review altogether.

In California, unlike federal law, there is no separate "final order" rule.⁹¹ If the decision being challenged is not final, the court will dismiss under the exhaustion of remedies

consider and respond to such questions.

⁸⁹Lopez v. Civil Serv. Comm'n, 232 Cal.App.3d 312, 283 Cal.Rptr. 447 (1991) (must raise issue at every stage of the administrative process); Edgren v. Regents of Univ. of California, 158 Cal.App.3d 515, 205 Cal.Rptr. 6 (1984) (litigant who withdrew during a hearing, complaining of due process violations in the way the hearing was being conducted, failed to exhaust remedies).

There appears to be an exception to the requirement that the objection be raised at every possible stage in the case of land use planning; it is sufficient to raise an objection before the "lead agency" but not before the planning commission. Browning-Ferris Ind. v. San Jose City Council, 181 Cal.App.3d 860, 226 Cal.Rptr. 575 (1986).

⁹⁰The exact issue rule is discussed in text at notes 100-03.

⁹¹CCP §1094.5 provides for review of any "final administrative order or decision" arising out of a hearing. Most decisions have dismissed applications for mandamus to review non-final orders because of a failure to exhaust remedies (as distinguished from a separate final order rule). Some cases have treated finality as a distinct reason to dismiss applications under section 1094.5. Kumar v. National Medical Enterprises, 218 Cal.App.3d 1050, 267 Cal.Rptr. 452 (1990) (only final order from appellate body of hospital can be appealed under §1094.5); Bd. of Medical Quality Assurance v. Superior Court (Aengst), 73 Cal.App.3d 860, 141 Cal.Rptr. 83 (1977) (§1094.5 action filed for purpose of taking deposition in a pending administrative action dismissed because of the lack of a final order).

rule, unless an exception to the exhaustion doctrine applies.⁹² I have not suggested any change in this practice since the analysis of whether a decision is a "final order" and whether a litigant has "exhausted administrative remedies" are so similar. It would probably create more confusion than clarity to try to separate them.

a. Purposes and costs of the exhaustion doctrine

The purposes of the exhaustion requirement have often been spelled out.⁹³ Essentially, there are two rationales for the exhaustion rule.

The first rationale for exhaustion arises out of a pragmatic concern for judicial efficiency. Judicial proceedings are more efficient if piecemeal review can be avoided. The quality of review is enhanced if a court can start with a complete factual record produced at the agency level. Moreover, it is helpful to a court if an expert agency has resolved the same issue that the court must deal with. Finally, a litigant may succeed before the agency or the case may be settled; thus the court can avoid ever having to decide the case at all.

The second purpose of exhaustion is based on separation of powers; the agencies of state and local government are a separate branch of government and their autonomy must be respected. This

⁹² *Bollengier v. Doctors Medical Center*, 222 Cal.App.3d 1115, 1125, 272 Cal.Rptr. 273 (1990).

⁹³ See, e.g., *McCarthy v. Madigan*, 112 S.Ct. 1081, 1086-87 (1992); *Rojo v. Klieger*, 52 Cal.3d 65, 82-85, 276 Cal.Rptr. 130 (1990).

purpose is furthered by allowing an agency to apply its expertise to the problem and to correct its own mistakes before it is haled into court. Moreover, if exhaustion were not required, litigants would have an incentive to short-circuit agency processes and avoid an agency decision to which a court would give deference. Such end runs are contrary to the legislature's intention in creating those agencies.

While the exhaustion doctrine serves valuable public purposes, the requirement can be very costly to litigants. The exhaustion doctrine requires them to resort to agency remedies which they believe are almost certainly useless. Where a private litigant ultimately prevails in court, but has first been required to exhaust administrative remedies, the effect of the doctrine is to delay ultimate resolution of the case, perhaps for years. It also requires the expenditure of substantial, perhaps crushing, professional fees. Indeed, exhaustion of remedies often means exhaustion of litigants. In many cases, the remedy in question is no longer available by the time the case comes to court; in such cases, requiring exhaustion means that the case is over and the private litigant has lost.

b. Doctrine is jurisdictional.

One notable aspect of the California exhaustion rule is that it is jurisdictional, not discretionary. At the federal level and in most states, exhaustion of remedies is discretionary unless a specific statute requires exhaustion, in which case it

is treated as jurisdictional.⁹⁴

The rule that exhaustion is jurisdictional derives from the leading California case, Abelleira v. District Court of Appeal.⁹⁵ In Abelleira, an administrative judge held that employees were entitled to unemployment benefits despite a statutory rule precluding payment of benefits in cases where unemployment was caused by a strike. The employer appealed to higher agency authority. While that appeal was pending, the employer sought judicial review of the ALJ's decision. The employer argued that immediate review should be available, notwithstanding its failure to exhaust remedies, because the statute required payment of benefits to the employees pending the administrative appeal. The employer claimed that such immediate and unlawful payments would deplete the benefit fund. The court of appeals held that immediate judicial review was available.⁹⁶

⁹⁴See McCarthy v. Madigan, 112 S.Ct. 1081 (1992).

⁹⁵17 Cal.2d 280, 102 P.2d 329 (1941).

⁹⁶A federal court would not have treated Abelleira as an exhaustion case but as a final order case. In Abelleira, the employer was protesting against the immediate payment of benefits to the employee which occurred after the initial decision. Insofar as preventing that payment was concerned, the employer had exhausted its remedy when it lost at the initial hearing. The appeal to the agency heads was not a remedy that could have prevented immediate payment of benefits.

However, the order in question was not final and would not be final until the agency heads had acted on the employer's appeal. See FTC v. Standard Oil Co. of California, 449 U.S. 232 (1980) (litigant had exhausted remedy with respect to particular issue but still could not appeal a non-final order). Abelleira would have been a weak case for an exception to the final order rule. The employer was not seriously harmed by the immediate payment of benefits since its reserve account would be credited if it were

An employee sought a writ of prohibition in the California Supreme Court.

The Court granted the writ. In order to do so, it had to label the exhaustion requirement as jurisdictional since prohibition would not lie to correct an abuse of discretion by the lower court. Its sweeping opinion emphatically endorsed the exhaustion doctrine, and its peremptory rejection of possible exceptions committed California courts to a policy of relatively rigid enforcement of the doctrine.

Since Abelleira, both the Supreme Court and lower courts have often countenanced exceptions to the exhaustion requirement. However, the rule that exhaustion is jurisdictional constrains the ability of lower courts to recognize new exceptions or broaden the existing ones or to excuse a lack of exhaustion based on a balancing of factors.⁹⁷ In contrast, federal cases often excuse exhaustion by determining whether the purposes of the exhaustion rule would be frustrated if an exception were to be

ultimately successful in the case. On the other hand, the unemployed workers obviously needed their payments immediately, not at the end of protracted litigation.

California law has no separate final order rule for administrative action. As in Abelleira, the exhaustion doctrine is used to preclude appeals of non-final orders.

⁹⁷A few California cases use a flexible, balancing analysis to decide whether to excuse a failure to exhaust remedies. See Doster v. County of San Diego, 203 Cal.App.3d 257, 251 Cal.Rptr. 507 (1988); Hull v. Cason, 114 Cal.App.3d 344, 359, 171 Cal.Rptr. 14 (1981) (public interest demands court take case which had already been litigated for several years despite failure to exhaust remedies); Hollon v. Pierce, 257 Cal.App.2d 468, 64 Cal.Rptr. 808 (1964); Greenblatt v. Munro, 161 Cal.App.2d 596, 605-07, 326 P.2d 929 (1958). This approach is probably contrary to Abelleira.

allowed in the particular case in light of the costs that exhaustion would impose on the particular litigant.

In addition, according to some cases, the rule that exhaustion is jurisdictional means that the exhaustion objection cannot be waived by agreement⁹⁸ or by failure to make the objection at the appropriate time; instead, it can be initially raised at any time, even on appeal.⁹⁹

c. The "exact issue" rule.

One important corollary to the exhaustion of remedies rule requires that the exact issue to be considered by a reviewing court have been presented to the agency during the course of its consideration of the matter.¹⁰⁰ Thus a person can be precluded

⁹⁸Noonan v. Green, 276 Cal.App.2d 25, 80 Cal.Rptr. 513 (1969); Buchwald v. Superior Court, 254 Cal.App.2d 347, 359-60, 62 Cal.Rptr. 364 (1967)

⁹⁹Hittle v. Santa Barbara County Employees Ret. Ass'n, 39 Cal.3d 374, 384, 216 Cal.Rptr. 733 (1985); People v. Coit Ranch, Inc., 204 Cal.App.2d 52, 57, 21 Cal.Rptr. 875 (1962). This rule is in some doubt, however. See Green v. City of Oceanside, 194 Cal.App.3d 212, 219-23, 239 Cal.Rptr. 470 (1987), rejecting an exhaustion defense raised for the first time on appeal. The court pointed out persuasively that it would be grossly unfair for defendant to ignore this procedural defense and put plaintiff to expense of trial, knowing it could assert the exhaustion defense on appeal if it lost at trial.

¹⁰⁰See, e.g., Resource Defense Fund v. Local Agency Formation Comm'n, 191 Cal.App.3d 886, 894, 236 Cal.Rptr. 794, 798 (1987); Coalition for Student Action v. City of Fullerton, 153 Cal.App.3d 1194, 200 Cal.Rptr. 855 (1984). CEB calls this doctrine the requirement of preserving issues at the administrative hearing. CEB, California Administrative Mandamus §§2.2 to 2.24 (1989). The exact issue rule has been codified in cases brought under the California Environmental Quality Act. Pub. Res. Code §21177(a).

The exact issue rule is often quite strictly applied. Thus specific environmental objections to a timber harvesting plan were not raised before the agency by preprinted form objections raising various environmental and political concerns because these related

from raising a particular issue or defense, even though every possible administrative remedy was exhausted, because the particular issue was not pressed before the agency.¹⁰¹ It appears, however, that unlike the exhaustion doctrine, the exact issue doctrine is not jurisdictional;¹⁰² therefore, it probably can be waived by the agency. Apparently the same exceptions that apply to the general exhaustion rule also apply to the exact issue rule.

The exact issue rule makes good sense. In judicial efficiency terms, it is important that the issue be raised below so that a complete record can be created at the agency level and so that the agency can apply its expert judgment to that issue. Particularly in local land use planning, the issues often concern complex urban planning, timber management, and environmental policy problems. Thus preliminary consideration by the agency is very helpful to reviewing courts. In separation of powers terms, it is appropriate that courts require the presentation of issues

to logging generally without being specific to the project under review. *Albion River Watershed Protection Ass'n v. Dep't of Forestry*, 235 Cal.App.3d 358, 286 Cal.Rptr. 573, 580-88 (1991). But see *Citizens Ass'n for Sensible Development v. County of Inyo*, 172 Cal.App.3d 151, 163, 217 Cal.Rptr. 893 (1985) (less specificity required to preserve issue in administrative than in judicial proceeding since parties often not represented by counsel).

¹⁰¹Indeed, a mere perfunctory or "skeleton" presentation is insufficient if it is seen as a ruse for transferring the issue from the agency to the court. See *Dare v. Bd. of Medical Examiners*, 21 Cal.2d 790, 799, 136 P.2d 304 (1943); *City of Walnut Creek v. County of Contra Costa*, 101 Cal.App.3d 1012, 162 Cal.Rptr. 224 (1980).

¹⁰²See *Greenblatt v. Munro*, 161 Cal.App.2d 596, 605-07, 326 P.2d 929 (1958).

to agencies; otherwise litigants would be encouraged to sidestep preliminary agency consideration, to which a court ordinarily owes considerable deference, in the hope of getting a better shake from the court reviewing the issue de novo.¹⁰³

d. Exceptions to exhaustion.

The exceptions to the exhaustion doctrine have been heavily litigated. These exceptions can be grouped under two broad headings: inadequacy of the remedy and irreparable injury. Under inadequacy of the remedy fall the accepted exceptions for futility, inadequate remedy, certain constitutional issues, and lack of notice.¹⁰⁴

i. Futility.

If it is positively clear that the agency will not grant the requested relief, the remedy would be considered inadequate because it is futile.¹⁰⁵ However, the exhaustion requirement is not excused merely because favorable agency action is unlikely. If courts excused exhaustion merely because favorable agency action is unlikely, the exhaustion requirement would practically disappear, since litigants usually go to court

¹⁰³City of Walnut Creek v. County of Contra Costa, supra.

¹⁰⁴The exception for local tax assessments alleged to be a nullity is anomalous. See text at notes xx. In addition, the existing APA contains a questionable exception for denial of continuances. See text at note 142. The Supreme Court also decided to hear a case despite a failure to raise the exact issue where public policy required that the issue be immediately resolved. *Lindeleaf v. ALRB*, 41 Cal.3d 861, 870-71, 226 Cal.Rptr. 119 (1986).

¹⁰⁵Ogo Assoc. v. City of Torrance, 157 Cal.App.3d 830, 112 Cal.Rptr. 761 (1974).

prematurely only when they feel there is little chance that they will prevail at the agency level.¹⁰⁶ Moreover, the exception is not applicable even though the remedy is no longer available at the time a litigant seeks judicial review, unless the litigant can establish positively that the remedy would have been useless if it had been availed of.¹⁰⁷

The futility exception is based upon a balance of the purposes of the exhaustion rule against the costs of enforcing it. Forcing a litigant to pursue the remedy serves judicial efficiency and recognizes the agency's role under the separation of powers. Yet it becomes difficult to justify imposing the costs of exhaustion on a litigant when it is certain that those costs will be wasted. Therefore, litigants must pursue probably unavailing remedies but need not pursue certainly unavailing ones.

In the leading case on the futility exception, a developer was excused from applying for a variance from a zoning scheme when that scheme was enacted for the purpose of blocking the very project which the developer wanted to build.¹⁰⁸ Similarly, if

¹⁰⁶Doyle v. City of Chino, 117 Cal.App.3d 673, 683, 172 Cal.Rptr. 844 (1981).

¹⁰⁷George Arakelian Farms v. Agricultural Labor Relations Board, 40 Cal.3d 654, 662-63, 221 Cal.Rptr. 488, 493 (1985) (failure to make timely request for agency review precludes judicial review--inadequate showing that review would be futile).

¹⁰⁸Ogo Assoc. v. City of Torrance, supra.

agency memoranda¹⁰⁹ or a prior decision involving the same litigant¹¹⁰ indicate that the decision in the particular case is absolutely certain to go against the litigant, he need not exhaust remedies. However, the fact that an agency has previously decided a string of cases on the same legal issue in a way adverse to the litigant's position is not sufficient;¹¹¹ the agency might be willing to distinguish its prior cases.¹¹²

Some cases have stretched the futility doctrine. They have

¹⁰⁹Truta v. Avis Rent a Car Systems, Inc., 193 Cal.App.3d 802, 812, 238 Cal.Rptr. 806, 811 (1987); In re Thompson, 52 Cal.App.3d 780, 125 Cal.Rptr. 261, 263 (1975).

¹¹⁰Elevator Operators Union v. Newman, 30 Cal.2d 799, 811, 186 P.2d 1, 7 (1947) (discharge of employee--union board had already rejected appeal from discharge decision--would certainly reject a damage claim based on same discharge); Breaux v. ALRB, 217 Cal.App.2d 730, 743, 265 Cal.Rptr. 904, 910 (1990) (futile to question settlement before agency that had already approved it).

¹¹¹Gantner & Mattern Co. v. California Employment Comm'n, 17 Cal.2d 314, 317, 104 P.2d 932, 934 (1947); Westinghouse Elec. Corp. v. County of Los Angeles, 42 Cal.App.3d 32, 39-40, 116 Cal.Rptr. 742, 747 (1974); City of Los Angeles v. California Towel & Linen Supply, 217 Cal.App.2d 410, 420, 31 Cal.Rptr. 832 (1963); Virtue Bros. v. County of Los Angeles, 239 Cal.App.2d 220, 232, 48 Cal.Rptr. 505 (1966).

¹¹²See Yamaha Motor Corp. U.S.A. v. Superior Court, 185 Cal.App.3d 1232, 1242, 230 Cal.Rptr. 382, 387 (1986). This case concerned the breach of a franchise agreement by refusing to supply a dealer with a new product line offered to other dealers. The agency had decided a case involving the identical product line but a different dealer. The court required exhaustion since the Board might distinguish the prior case for reasons specific to this particular dealer, like the size of the dealership and financial impact.

Similarly, the fact that the agency previously decided other issues in the same case in a way contrary to the plaintiff's position does not mean that it would not fairly consider the issues currently presented. See & Sage Audubon Society, Inc. v. Planning Comm'n of Anaheim, 34 Cal.3d 412, 418-19, 194 Cal. Rptr. 357 (1983).

excused a failure to exhaust where the agency's initial response seemed hostile and unyielding,¹¹³ where the agency disclaimed jurisdiction,¹¹⁴ or where it seemed unlikely the decisionmaker would change his mind.¹¹⁵ It would seem that the more flexible futility test in these cases runs afoul of the stern Abelleira rule that exhaustion is jurisdictional, not a matter of judicial discretion.

ii. Inadequate remedies.

In addition to cases in which the administrative remedy is considered futile, remedies can be considered inadequate for other reasons and thus need not be exhausted. Thus a procedure that provides no clearly defined machinery for the submission, evaluation, and resolution of complaints is inadequate.¹¹⁶ One

¹¹³Grier v. Kizer, 219 Cal.App.3d 422, 432, 268 Cal.Rptr. 244, 249 (1990) (unyielding position that regulation was validly adopted); Jacobs v. State Bd. of Optometry, 81 Cal.App.3d 1022, 1030, 147 Cal.Rptr. 225, 229 (1978) (dismissive reply to inquiry); Police Officers Ass'n v. Huntington Beach, 58 Cal.App.3d 492, 498-99, 126 Cal.Rptr. 893, 897-98 (1976) (hostile response to grievance plus position in lower court); In re Faucette, 253 Cal.App.2d 338, 343, 61 Cal.Rptr. 97, 99 (1967) (failure to fully consider initial application means further administrative recourse is futile).

¹¹⁴Department of Personnel Administration v. Superior Court, 5 Cal.App.4th 155, 6 Cal.Rptr.2d 714, 721-22 (1992).

¹¹⁵Doster v. County of San Diego, 203 Cal.App.3d 257, 26162, 257 Cal.Rptr. 507, 509-10 (1988). This case employs a flexible balancing analysis in order to decide whether to excuse a deputy sheriff's failure to request a hearing within the five-day time period allowed by local ordinance. One factor in favor of excusing it was that a factual record compiled at an earlier hearing already existed. Considering the unlikelihood that the sheriff would change his mind and the existence of a factual record, the court decided that it should reach the narrow legal question involved.

¹¹⁶Common Cause of Calif. v. Bd. of Supervisors, 49 Cal.3d 432, 443, 261 Cal.Rptr. 574 (1989) (plaintiff not required to petition Secretary of State to adopt regulations); Endler v. Schutzbank, 68

rather problematic application of this doctrine occurs where the subject matter of the controversy lies outside the agency's jurisdiction.¹¹⁷ This subject matter rule applies to cases in which the jurisdictional error appears clearly and positively on the face of the pleadings and does not depend on any disputed factual matters.¹¹⁸ Unless cautiously applied, this exception could be broadened to cover any alleged agency error of law.

Similarly, a remedy might be inadequate because of a lack of minimally adequate notice¹¹⁹ or other necessary procedure.¹²⁰

Cal.2d 162, 168, 65 Cal. Rptr. 297 (1968) (where agency retained discretion to ignore decision, procedure was inadequate--heads-I-win-tails-you-lose); *Rosenfield v. Malcolm*, 65 Cal.2d 559, 55 Cal.Rptr. 595 (1967) (remedy of instituting an investigation not adequate to deal with plaintiff's claim of illegal discharge).

¹¹⁷*County of Contra Costa v. State of California*, 177 Cal.App.3d 62, 73, 222 Cal.Rptr. 750, 758 (1986) (dictum). The problem of an agency lacking subject matter jurisdiction is more likely to arise in a primary jurisdiction case. See *County of Alpine v. County of Tuolumne*, 49 Cal.2d 787, 322 P.2d 449 (1958).

This rule was misapplied in *Richman v. Santa Monica Rent Control Bd.*, -- Cal.App.4th --, 9 Cal.Rptr.2d 690, 693 (1992) to excuse a litigant's failure to comply with the exact issue rule by failing to raise a question of law before the agency. The court thought that the agency had no jurisdiction to deal with a question of law since this was a matter for the courts. While the courts may have power to independently decide a question of law, it does not at all follow that an agency lacks jurisdiction to make the initial call on such a question. Consequently, it is inappropriate to excuse a failure to raise the issue before the agency.

¹¹⁸See, under federal law, *Leedom v. Kyne*, 358 U.S. 184 (1958) (agency lacked jurisdiction to order inclusion of non-professionals in bargaining unit of professionals--error apparent on face of pleadings).

¹¹⁹*Horn v. County of Ventura*, 24 Cal.3d 605, 156 Cal. Rptr. 718 (1979).

¹²⁰*Superior Strut & Hanger Co. v. Port of Oakland*, 72 Cal.App.3d 987, 1002, 140 Cal.Rptr. 515 (1977) (procedure provided for no testimony, no fact-finding determination, no opportunity to be heard); *Bollengier v. Doctors Medical Center*, 222 Cal.App.3d

If the procedure in question cannot furnish any of the relief sought by plaintiff, or an acceptable substitute for that relief, it is not adequate.¹²¹ If agency action has ground to a halt or the agency is unreasonably delaying resolution of the issue or has refused to take jurisdiction over it, is unfair to expect a

1115, 1128-29, 272 Cal. Rptr. 273, 279 (1990) (hospital's procedure provided adequate notice and minimal standards of fair procedure); *Tiholiz v. Northridge Hospital Foundation*, 151 Cal.App.3d 1197, 199 Cal. Rptr. 338 (1984) (same).

¹²¹*Ramos v. County of Madera*, 4 Cal.3d 685, 691, 94 Cal.Rptr. 421, 425 (1971) (welfare fair hearings not equipped to deal with class actions or provide money damages); *Tiernan v. Trustees of CSUC*, 33 Cal.3d 211, 217, 188 Cal. Rptr. 115, 119 (1982) (procedure adequate to deal with claim of discharge infringing first amendment rights but not for claim that university must enact new regulations); *Glendale City Employees' Ass'n, Inc. v. City of Glendale*, 15 Cal.3d 328, 342, 124 Cal. Rptr. 513, 523 (1975) (procedure handles individual cases, not complex dispute involving interpretation of memorandum of agreement); *Horsemen's Benevolent & Prof. Ass'n v. Valley Racing Ass'n*, -- Cal.App.4th--, 6 Cal.Rptr.2d 698 (1992) (Board cannot award money damages-remedy inadequate); *Mounger v. Gates*, 193 Cal.App.3d 1248, 1256, 239 Cal.Rptr. 18, 23 (1987) (administrative appeal cannot remedy violation of procedural rights). At the federal level, see *McCarthy v. Madigan*, 112 S.Ct. 1081, 1091 (1992) (plaintiff sought only money damages which administrative procedure could not provide).

However, other California cases do require exhaustion of remedies even if the administrative procedure may not resolve all issues or provide the precise relief requested. *Acme Fill Corp. v. San Francisco Bay Conservation & Dev. Comm'n*, 187 Cal.App.3d 1056, 1064, 232 Cal.Rptr. 348 (1986) (agency could not provide declaration that statute inapplicable to plaintiff); *Edgren v. Regents of Univ. of Calif.*, 158 Cal.App.3d 515, 520, 205 Cal.Rptr. 6, 9 (1984) (exhaustion of University's personnel remedies required even though plaintiff seeks damages in tort). These cases are questionable after *Rojo v. Klieger*, 52 Cal.3d 65, 276 Cal.Rptr. 130 (1990) (exhaustion not required where agency cannot provide compensatory damages), overruling *Westlake Community Hospital v. Superior Court*, 17 Cal.3d 465, 131 Cal.Rptr. 90 (1976). However, Rojo involves primary jurisdiction rather than exhaustion of remedies.

It is difficult to generalize about the problem of misfitting remedies; sometimes exhaustion is required, sometimes not.

litigant to resort to that remedy.¹²² It is possible that an excessive fee for invoking a remedy could render the remedy inadequate, but plaintiff has the burden to establish that it sought a fee waiver and, if waiver is denied, that the fee is unreasonable.¹²³

iii. Constitutional issues.

Certain types of constitutional claims can be raised in court without first exhausting administrative remedies. For example, exhaustion is generally excused in cases of an on-the-face constitutional challenge to a provision of the statute that creates the agency¹²⁴ or to the procedures which the agency

¹²²See *McCarthy v. Madigan*, 112 S.Ct. 1081, 1087 (1992); *Kirkpatrick v. City of Oceanside*, 232 Cal.App.3d 267, 277, 283 Cal.Rptr. 191, 197 (1991) (stonewalling); *Dep't of Personnel Administration v. Superior Court (Greene)*, 5 Cal.App.4th 155, 6 Cal.Rptr.2d 714, 718-22 (1992) (agency declined to take jurisdiction); *Los Angeles County Employees Ass'n v. County of Los Angeles*, 168 Cal.App.3d 683, 686, 214 Cal.Rptr. 350 (1985) (procedure cannot furnish remedy in time to prevent injury to employees); *Hollon v. Pierce*, 257 Cal.App.2d 468, 64 Cal.Rptr. 808 (1964).

¹²³*Sea and Sage Audubon Society, Inc. v. Planning Comm'n*, 34 Cal.3d 412, 421-22, 194 Cal. Rptr. 357 (1983) (4-3 decision--dissent would place burden to establish reasonableness on agency).

¹²⁴As the Supreme Court remarked, "It would be heroic indeed to compel a party to appear before an administrative body to challenge its very existence and to expect a dispassionate hearing before its preponderantly lay membership on the constitutionality of the statute establishing its status and functions." *State of California v. Superior Court*, 12 Cal.3d 237, 251, 115 Cal.Rptr. 497 (1974). See also *Sail'er Inn v. Kirby*, 5 Cal.3d 1, 6, 95 Cal.Rptr. 329, 332 (1971); *United States v. Superior Court*, 19 Cal.2d 189, 195-96, 120 P.2d 26 (1941) (dictum); *Lund v. CSEA*, 222 Cal.App.3d 174, 183, 271 Cal.Rptr. 425 (1990); *Chrysler Corp. v. New Motor Vehicle Bd.*, 89 Cal.App.3d 1034, 1038-39, 153 Cal.Rptr. 135, 138 (1979).

provides.¹²⁵ Probably the constitutional excuse should also apply to on-the-face constitutional challenges to agency regulations or to statutes that the agency is applying.¹²⁶

The constitutional excuse makes sense, since an agency is extremely unlikely to uphold such challenges. Indeed, a provision of the California constitution adopted in 1978 explicitly prohibits agencies from holding statutes

¹²⁵Horn v. County of Ventura, 24 Cal.2d 605, 611, 156 Cal.Rptr. 718 (1979) (one need not exhaust defective remedies to challenge their sufficiency); Chevrolet Motor Division v. New Motor Vehicle Bd., 146 Cal.App.3d 533, 539, 194 Cal.Rptr. 270 (1983) (compliance with exact issue rule excused because attack is on constitutionality of board's procedures).

It also appears that a litigant need not exhaust local remedies if those remedies are invalid under a state statute. See Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal.2d 276, 287, 32 Cal.Rptr. 830 (1963) (no need to exhaust local remedies where those remedies are rendered inapplicable to plaintiff because of state statutes); Friends of Lake Arrowhead v. San Bernardino County Board of Supervisors, 38 Cal.App.3d 497, 505-08, 113 Cal.Rptr. 539 (1974) (state statute preempts remedy provision of local ordinance).

¹²⁶See Vogulkin v. State Bd. of Educ., 194 Cal.App.2d 424, 434-35, 15 Cal.Rptr. 194 (1961) (exhaustion not required for constitutional attack on statutes that agency is applying). This decision is correct. No distinction should be drawn between a challenge to the constitutionality of the statute that created the agency and a challenge to the constitutionality of statutes that the agency is enforcing.

However, this distinction (i.e. requiring exhaustion for constitutional attacks on statutes the agency is applying but not to attacks on the statute creating the agency) is supported by dictum from older cases. See United States v. Superior Court, 19 Cal.2d 189, 195, 120 P.2d 26 (1941); Walker v. Munro, 178 Cal.App.2d 67, 2 Cal.Rptr. 737 (1960); Tushner v. Griesinger, 171 Cal.App.2d 599, 341 P.2d 416 (1959). As discussed in the text, since 1978 the California constitution has prohibited an agency from invalidating any statute on constitutional grounds. Consequently, it is futile to ask an agency to consider the constitutionality of any statute and the pre-1978 cases requiring exhaustion in cases challenging constitutionality of statutes the agency is applying should not be followed.

unconstitutional.¹²⁷ Thus the constitutional exception really is a subset of the inadequate-remedy exception: agency procedures are not adequate to deal with an on-the-face constitutional challenge to statutes, regulations, or procedures.

The constitutional exception should not be broadened very far since many legal claims can be stated in constitutional terms.¹²⁸ For example, a litigant might argue that agency action is "irrational" or "unreasonable" so that it denies substantive due process. Similarly, a claim that a regulation is ultra vires could be articulated in terms of the constitutional separation of powers. Or a claimed defect in notice or an allegedly biased decisionmaker might be a violation of procedural due process.¹²⁹ If by making such claims litigant could avoid

¹²⁷Calif. Constit. Art. III, §3.5 provides that no administrative agency (whether or not created by the California constitution) can declare a statute unconstitutional or unenforceable on the basis of its being unconstitutional (unless an appellate court has already determined that the statute is unconstitutional). Similarly, an agency cannot declare a statute unenforceable on the basis that a federal statute or regulation prohibits its enforcement unless an appellate court has already so determined.

¹²⁸Some cases state restrictions on the constitutional exception that seem unnecessary. For example, a litigant should be able to get to court even though the litigant has already begun the administrative process; some cases indicate that the excuse is only available to people who have not begun availing themselves of that process. *Eye Dog Foundation v. State Bd. of Guide Dogs for the Blind*, 67 Cal.2d 536, 544, 63 Cal.Rptr. 21, 27 (1967).

¹²⁹The constitutional exception does not apply to a claim that the agency has misapplied otherwise valid procedural rules, even though the misapplication could be stated in constitutional terms. *Bollengier v. Doctors Medical Center*, 222 Cal.App.3d 1115, 1127-28, 272 Cal.Rptr. 273 (1990). See *Ass'n of National Advertisers v. Federal Trade Comm'n*, 627 F.2d 1151 (D.C.Cir. 1979), cert. den. 447 U.S. 921 (1980) (Leventhal, J. concurring) (improper to review bias

exhausting remedies, the requirement would nearly disappear. Therefore, these sorts of contrived constitutional claims are not sufficient to excuse a failure to exhaust.

The constitutional exception does not apply to constitutional attacks on statutes or regulations based on their application to the particular facts (as distinguished from an on-the-face attack).¹³⁰ In many as-applied challenges, the agency remedy is adequate, since some sort of variance or waiver procedure is available to avoid harsh or unreasonable application of the law.¹³¹ By the same token, the constitutional exception

claim absent final agency action).

Another example of an attempt to turn a statutory claim into a constitutional one in order to avoid the exhaustion requirement occurred in *County of Contra Costa v. State of California*, 177 Cal.App.3d 62, 74-75, 222 Cal.Rptr. 750, 758-59 (1986). This case involved the issue of whether statutes complied with the constitutional requirement that they reimburse local government for new state mandates. An agency (Board of Control) was created to adjudicate claims by local government that the legislature had filed to comply with this mandate. The court correctly held that this remedy had to be exhausted, even though the local government plaintiffs stated their claim in constitutional terms. Clearly, the administrative remedy was wholly adequate for the purpose of dealing with plaintiff's claims.

¹³⁰*Security-First Nat. Bank v. County of Los Angeles*, 35 Cal.2d 319, 217 P.2d 946 (1950) (exhaustion requirement); *Griswold v. Mt. Diablo Unified School Dist.*, 63 Cal.App.3d 648, 134 Cal.Rptr. 3 (1976) (exact issue requirement).

¹³¹See *Metcalf v. Los Angeles County*, 24 Cal.2d 267, 148 P.2d 645 (1944); *Mountain View Chamber of Commerce v. City of Mountain View*, 77 Cal.App.3d 82, 143 Cal.Rptr. 441 (1978). Indeed, it has been held that even an on-the-face constitutional attack is premature if the agency has a variance procedure that might solve the plaintiff's problem without reaching the constitutional question. *Smith v. City of Duarte*, 228 Cal.App.2d 267, 39 Cal.Rptr. 524 (1964). However, this decision is questionable; generally a litigant is allowed to go to court with respect to constitutional claims even if he also has nonconstitutional defenses to raise before the agency.

does not apply if material facts are in dispute and such facts must be found in order to resolve the constitutional dispute¹³² nor does it apply to non-constitutional claims involved in the same case.¹³³ Probably, the exception should not apply at all if there are both constitutional and non-constitutional issues in the same case if an agency decision favorable to the litigant on a non-constitutional issue would dispose of the case. Such a decision would avoid the need for the court to reach the constitutional question at all.¹³⁴ And to excuse exhaustion in such a case would prolong the litigation since the petitioner will have to return to the agency to try the non-constitutional issues if he loses in court on the constitutional issues.

iv. Lack of notice.

Where a litigant failed to exhaust a remedy because he was not appropriately notified of its availability in time to use the remedy, the failure to exhaust is excused. This exception to exhaustion has been frequently recognized in local land use planning cases where persons affected by an application were not appropriately notified by either personal or constructive

¹³²Sail'er Inn v. Kirby, 5 Cal.3d 1, 95 Cal.Rptr. 329 (1971) (dictum).

¹³³Flores v. Los Angeles Turf Club, 55 Cal.2d 736, 746-48, 13 Cal.Rptr. 201 (1961).

¹³⁴However, if the objections were to the constitutionality of agency procedure, a litigant probably should not be required to exhaust illegal remedies even if those remedies might furnish substantive relief.

notice.¹³⁵ The exception should apply in such cases whether or not the plaintiff claims to be articulating the public interest or its own private interest.¹³⁶ The exception should also apply whether the defect in question is a failure to have exhausted a remedy or a failure to have raised the exact issue before the agency.

Another variation of this exception has been recognized in adjudicatory cases where the agency failed to call a litigant's attention to an available administrative remedy and, under the facts, the litigant's failure to find out about the remedy is justifiable.¹³⁷

v. Irreparable injury.

Abelleira recognized an irreparable injury exception to the exhaustion requirement but held that it was very narrow. The only situation of irreparable injury it accepted was a rate order

¹³⁵See Environmental Law Fund v. Town of Corte Madera, 49 Cal.App.3d 105, 113, 122 Cal.Rptr. 282, 286 (1975). However, the exception does not apply where the planning authority has given notice to the community by publication as provided by statute. See Sea and Sage Audubon Society, Inc. v. Planning Comm'n, 24 Cal.3d 412, 417, 194 Cal.Rptr. 357, 360 (1983); Redevelopment Agency of Riverside v. Superior Court, 228 Cal.App.3d 1487, 279 Cal.Rptr. 558 (1991).

¹³⁶The court in Corte Madera justified the exception for lack of notice by stating that persons protecting the public interest should not be prevented from litigating land use decisions of which they had not been notified. Of course, in these cases, it is difficult to separate public interest from private interest and it should not matter.

¹³⁷Hittle v. Santa Barbara County Employees Ret. Ass'n, 39 Cal.3d 374, 384, 216 Cal.Rptr. 733 (1985); Westlake Community Hosp. v. Superior Court, 17 Cal.3d 465, 478, 131 Cal.Rptr. 90, 97 (1976).

that allegedly confiscated a utility's property by requiring it to operate unprofitably.¹³⁸ Later the Supreme Court applied the exception to a case in which a litigant claimed that by complying with state law it would violate a federal law and incur the risk of serious penalties.¹³⁹

Subsequent cases have continued to be skeptical of irreparable injury claims¹⁴⁰ although there have been some exceptions.¹⁴¹ At a minimum, a plaintiff seeking an exception

¹³⁸In Abelleira, the dissenters argued that the irreparable injury standard was met because of harm to the public (as opposed to the plaintiffs). The alleged harm was that illegal payments to unemployed workers would drain the compensation fund. However, the majority focussed only on the harm to the plaintiffs which was not compelling. Similarly, United States v. Superior Court, 19 Cal.2d 189, 120 P.2d 26 (1941), held that loss to handlers who were unable to market all oranges they had purchased was not irreparable since they did not allege the order would destroy their business.

¹³⁹Sail'er Inn v. Kirby, 5 Cal.3d 1, 7, 95 Cal.Rptr. 329, 332 (1971) (not clear whether court applied the irreparable harm or the inadequate remedy exception).

¹⁴⁰Mountain View Chamber of Commerce v. City of Mountain View, 77 Cal.App.3d 82, 143 Cal.Rptr. 441 (1978) (plaintiff must apply for variance from sign removal ordinance even though maintenance of nonconforming sign could violate civil and criminal nuisance statutes since no such enforcement action was threatened).

¹⁴¹Department of Personnel Administration v. Superior Court, 5 Cal.App.4th 155, 6 Cal.Rptr.2d 714, 721 (1992) (impact on state budget and layoffs of state employees); Heyenga v. City of San Diego, 94 Cal.App.3d 756, 156 Cal.Rptr. 496 (1979) (preliminary injunction against transfer of police officer pending administrative appeal); Greenblatt v. Munro, 161 Cal.App.2d 596, 605-07, 326 P.2d 929 (1958). Greenblatt applied the irreparable injury exception to a failure to have raised the exact issue before the agency. The injury was revocation of a liquor license. The licensee failed to raise an apparently meritorious legal defense before the Board; of course, by the time the case came to court, it was too late to raise the issue before the Board. The court remanded the case to the Board solely to reassess the penalty. See also Volpicelli v. Jared Sydney Torrance Mem. Hosp., 109 Cal.App.3d 242, 253-54, 167 Cal.Rptr. 610 (1980), which combined the exceptions for futility and irreparable harm.

to a failure to exhaust remedies by reason of irreparable injury should show that the injury is truly irreparable (and goes far beyond the expense and bother of litigation), that the injury is imminent (as opposed to an injury that will occur in the future if the plaintiff loses before the agency), and that the litigant could not have obtained a stay at the administrative level.

vi. Local tax issues.

Where a local tax assessment is alleged to be a "nullity" and there are no outstanding valuation issues, it is not necessary to exhaust the local tax dispute resolution remedy. An assessment might be a nullity, for example, where the property in question is tax exempt, nonexistent, or outside the taxing jurisdiction.¹⁴² This exception seems out of line with the existing structure of exhaustion exceptions; I see no persuasive rationale for it. The local tax appeal process seems the ideal place to obtain at least an initial decision of such disputes; the remedy is adequate and the harm is not irreparable.

2. Recommendations

a. Jurisdictional or discretionary.

As noted above, Abelleira committed California to the position that a failure to exhaust remedies is a jurisdictional defect,¹⁴³ as opposed to a matter of trial court

¹⁴²Stenocord Corp. v. City and County of San Francisco, 2 Cal.3d 984, 987, 88 Cal.Rptr. 166 (1970); CEB, supra note 83, §2.41.

¹⁴³It appears that a failure to comply with the exact issue rule is not a jurisdictional defect but failure to have exhausted an administrative remedy is jurisdictional.

discretion.¹⁴⁴ Under the rule that exhaustion is jurisdictional, the trial court must decide whether a litigant falls within one of the existing narrowly drawn exceptions to exhaustion; if not, the court must dismiss the case.

I suggest that the issue of whether to excuse a failure to exhaust remedies be treated as within the trial court's discretion, as it is in federal law and under the Model Act.¹⁴⁵ The existing approach is simply too rigid; there are many cases in which a litigant comes close to satisfying several of the existing exceptions but does not quite fit any of them; yet requiring exhaustion would be very costly to the litigant and would serve no useful purpose.¹⁴⁶ Similarly, the parameters of some of the exceptions (such as inadequate remedies or constitutional issues) are fuzzy; rather than struggle with

¹⁴⁴A group of Court of Appeal cases treats the doctrine as discretionary despite *Abelleira*. See note 97.

¹⁴⁵ However, if the legislature mandates exhaustion of a specific remedy, exhaustion of that remedy would be treated as jurisdictional as under present law. See *McCarthy v. Madigan*, 112 S.Ct. 1081 (1992).

¹⁴⁶ Several United States Supreme Court cases concerning failure to exhaust remedies within the Selective Service System are illustrative. Judicial review of a draft board's decision on a classification issue could be obtained only by raising the issue as a defense in the criminal proceeding for refusing induction. A failure to exhaust remedies meant that the registrant was stripped of his defense in the criminal case. Where the issue involved was purely one of law, the registrant had not deliberately bypassed Selective Service procedures, and an appeal would probably have been futile, exhaustion was excused. *McKart v. United States*, 395 U.S. 185 (1969). But where the claim was fact-based and excusing exhaustion would have encouraged registrants to bypass Selective Service procedures, exhaustion was required. *McGee v. United States*, 402 U.S. 479 (1971).

applying the rather abstractly stated exceptions to the particular facts, it would be better to decide whether the policies behind the exhaustion doctrine suggest that an exception should be made in the particular case.

Under this approach, courts would no longer be constrained by a few narrow exceptions but could combine several of them or invent new ones if necessary.¹⁴⁷ In a close case, the court should balance the equities,¹⁴⁸ considering such factors as:

i) the likelihood that plaintiff will prevail on the merits (i.e. is plaintiff's legal claim apparently well founded or patently contrived);¹⁴⁹

ii) the relative degree of hardship to plaintiff from being compelled to exhaust remedies;

iii) whether the remedy is still available (if not, dismissal of the case denies any judicial review);

iv) the relative adequacy of agency remedies to deal with the question in dispute;

v) whether it would be important to establish a

¹⁴⁷Thus a court might decide to hear a case despite failure to raise the exact issue where public policy demanded that the issue be resolved. *Lindeleaf v. ALRB*, 41 Cal.3d 861, 870, 226 Cal.Rptr. 119 (1986).

¹⁴⁸See Power, "Help is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution," 1987 U. Ill. L. Rev. 547, advocating a balancing methodology in applying the exhaustion doctrine.

¹⁴⁹This factor is particular important in cases where a litigant is seeking to avoid the exhaustion rule by reason of constitutional claims. A court should examine such claims closely to see whether they seem well-founded or merely contrived.

precedent on the legal issue in dispute;

vi) the reason for failure to exhaust (i.e. was the failure justifiable or was it part of a scheme to avoid an unfavorable agency ruling);

vii) judicial efficiency issues such as the question of whether agency expertise would contribute to solving the problem, whether the process in question would generate a factual record helpful to the court,¹⁵⁰ or whether facts are in dispute and must be found in order to reach the legal questions.

If exhaustion were made a matter of trial court discretion rather than of jurisdiction, it would be less likely that reviewing courts would grant writs aborting a trial court's decision to excuse a failure to exhaust remedies. In general, it seems better to me to let the trial court go ahead and decide a case it wants to decide without premature interruption from appellate courts. In theory, an appellate court could still grant a writ aborting premature judicial review on the basis of abuse of discretion, but this would be a rare occurrence.

Finally, if exhaustion is discretionary rather than jurisdictional, a failure to exhaust would be waived if the agency failed to object at the appropriate time before trial. Thus the failure to exhaust claim would and should be treated

¹⁵⁰See *McCarthy v. Madigan*, 112 S.Ct. 1081, 1090 (1992).

like any other claim or defense--it must be timely raised.¹⁵¹

It could be argued that this recommendation will seriously undercut the exhaustion rule by encouraging many more litigants to attempt to short circuit the administrative process. This might increase the burdens on the courts and thwart the policies behind the exhaustion doctrine. However, I do not believe this will be the case. Generally litigants will exhaust remedies regardless of the existence of a possible exception if there is any hope of a favorable agency outcome. The risk of going to court without exhausting remedies may be quite substantial: the court may dismiss the case on the basis of exhaustion and the administrative remedy may no longer be available. Even if it still remains available, an unsuccessful attempt to obtain premature judicial intervention would be very costly. The recommendation will not significantly change California law; it will be nearly as difficult as ever to circumvent the exhaustion requirement, but making the doctrine discretionary permits slightly more play in the joints. b. Reconsideration.

Both the existing California APA¹⁵² and other statutes¹⁵³ provide that a litigant need not request

¹⁵¹This would change present California law. But see *Green v. City of Oceanside*, 194 Cal.App.3d 212, 219-23, 239 Cal.Rptr. 470 (1987) (failure to exhaust is waivable defect). I believe, however, that a court should be permitted to reject a waiver of exhaustion and to raise the exhaustion defense on its own motion if it believed judicial efficiency would be served by remanding the case to the agency.

¹⁵²Gov't Code §11523.

¹⁵³Gov't Code §19588 (State Personnel Board).

reconsideration from the agency before pursuing judicial review. However, the common law rule in California may be otherwise.¹⁵⁴ A request for reconsideration should never be required as a prerequisite to judicial review¹⁵⁵ unless specifically provided by statute to the contrary.¹⁵⁶

c. Continuances and discovery.

The existing APA permits immediate judicial review of the denial by an administrative law judge of a motion for a continuance.¹⁵⁷ Presumably, outside the APA agencies, a court would refuse to entertain such review because it would violate the exhaustion of remedies requirement and no exception to the exhaustion requirement would normally be applicable.¹⁵⁸ I have previously recommended that the revised APA contain no provision

¹⁵⁴Alexander v. State Personnel Board, 22 Cal.2d 198, 137 P.2d 433 (1943).

¹⁵⁵"Reconsideration" means a request to the agency reviewing authority that it reconsider its own final decision. See draft statute §649.210. The term does not refer to appeals to a higher agency level; normally such appeals are required by the exhaustion doctrine. In some agencies, such as the Workers Compensation Appeals Board, appeal from a presiding officer's decision to the agency heads is referred to as "reconsideration." Such appeals would continue to be required (since they involve appeals to a higher level rather than reconsideration at the same level).

¹⁵⁶By statute, it is necessary to request reconsideration from the PUC before seeking review of a PUC decision in the California Supreme Court. PUC staff have told me that this reconsideration practice is very important to the agency. As a result, I do not suggest that the existing statute be altered.

¹⁵⁷Gov't C. §11524(c), added to the APA in 1979.

¹⁵⁸More precisely, such review would violate the final order rule which, in California, is explicitly stated in section 1094.5 and is generally treated as covered by the exhaustion requirement. See text at notes 91-92.

allowing immediate judicial review of the denial of a continuance. The Law Revision Commission has deferred a decision on this question until it considers all issues relating to the exhaustion of remedies doctrine.

I believe that there is no justification for immediate judicial review of the denial of a continuance by an ALJ; such rulings by trial judges are not immediately appealable and the administrative law rule should be no different. Denial of a request for a continuance should normally be unreviewable unless a court decides that an exception to the exhaustion rule (such as irreparable injury) is applicable.

Denial of a continuance is just one of many possible rulings by an ALJ prior to or at the hearing and there is no immediate review of any others. For example, an ALJ or an agency head might refuse to recuse herself because of bias or might proceed with a hearing despite having received ex parte contacts. She might refuse to hold a pre-hearing conference or exclude a relevant issue in the pre-hearing conference order. An ALJ might make a variety of rulings relating to evidence (such as refusing to uphold a claim of privilege). Indeed, an ALJ may rule that the agency has jurisdiction over a particular transaction on the facts, a proposition that the litigant believes is dead wrong. In all such cases, a party must completely exhaust remedies, all the way through the agency head level, before seeking review of the procedural or substantive ruling. In each of these cases, if the court decides the ALJ or agency heads erred, the case must be

remanded to the agency and reheard. I see no justification for treating continuances differently; indeed, the harm done by denying a continuance and requiring the hearing to go ahead immediately seems trivial compared to the harm done to litigants by other sorts of errors.

Immediate review of the denial of a continuance is contrary to the purposes of the exhaustion doctrine. The timing of the hearing should be something solidly within the discretion of the ALJ; ALJs schedule their hearings (especially at remote locations) carefully and a last-minute request for a continuance can disrupt that schedule and leave an ALJ idle. Repeated requests for continuances by counsel are often used because an attorney is unprepared or because a client wishes to stall off the inevitable as long as possible. It seems inefficient to involve trial courts in this sort of dispute and it undermines the authority of the administrative judge. Moreover, by seeking judicial review, a party can obtain the very continuance that the ALJ has denied--even if the trial court denies the motion, the administrative hearing has been delayed. Thus immediate judicial review provides an easy end-run around the ALJ's decision to deny a continuance.

Another exhaustion issue which has been discussed by the Commission concerns discovery orders. The existing APA lodges all discovery disputes in the trial court,¹⁵⁹ but the

¹⁵⁹Gov't C. §11507.7. A trial court decision on discovery is not subject to appeal but can be reviewed through a writ of mandamus. §11507.7(h).

Commission has decided that they should be settled at the agency level instead. Nevertheless, the current Commission draft preserves the right to seek a writ of mandate in the trial court against an agency discovery decision.¹⁶⁰ Again, this provision would be an exhaustion exception, providing a right of immediate review, regardless of whether a litigant could show some compelling need for immediate review.

For the reasons given above, I would treat discovery orders just like any other agency procedural decision; absent a sufficiently strong claim for an exhaustion exception, there should be no right of immediate review of an order either granting or denying discovery. Both the judicial efficiency and the separation of power rationales for exhaustion counsel against involvement of the court in discovery disputes; the ability to seek review of such rulings provides a handy way for counsel to delay and confuse the administrative proceeding. Just as we have eschewed formal civil discovery in the administrative process because of its potential for hindrance, we should also avoid premature judicial entanglement in discovery disputes.

d. Model Act.

The Model Act provision on exhaustion¹⁶¹ seems satisfactory and should be used as the starting point for drafting a California provision.

i. General rule.

¹⁶⁰Draft statute §645.370.

¹⁶¹1981 MSAPA §5-107.

The Model Act clearly states the general exhaustion of remedies rule. "A person may file a petition for judicial review under this Act only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review..." It would be desirable to have the exhaustion rule stated in the statute in this clear form; under present law, exhaustion is mostly a judicial rather than a statutory doctrine.

The balance of the Model Act provision concerns the exceptions to the general rule. It wraps up all of the exhaustion exceptions¹⁶² into two standards: "the court may relieve a petitioner of the requirement to exhaust any or all administrative remedies, to the extent that the administrative remedies are inadequate, or requiring their exhaustion would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion."¹⁶³ Note that by using the word "may" this provision is designed to make the exhaustion decision a matter of judicial discretion rather than jurisdiction.¹⁶⁴

¹⁶²MSAPA provides for one obvious exception: exhaustion is not required if this Act or another statute provides that it is not required. MSAPA §5-107(2). This was intended to make clear that petitions for reconsideration are not required before seeking review since the provision relating to reconsideration is located elsewhere in the Act. MSAPA §4-218(1).

¹⁶³MSAPA §5-107(3) (emphasis added).

¹⁶⁴The comment makes this clear, contrasting the 1981 Model Act to the 1961 Act which might be read as creating a non-discretionary standard.

ii. Who exhausted the remedy.

The Model Act provides for an exception which has already been discussed in the material relating to standing:¹⁶⁵ "A petitioner for judicial review of a rule need not have participated in the rule-making proceeding upon which that rule is based, or have petitioned for its amendment or repeal..."¹⁶⁶ As already noted, I believe the Model Act is right on this point. Provided that a remedy has been exhausted and the exact issue raised by someone, it should not matter whether the particular litigant has raised the issue or even participated at the agency level, provided that the litigant meets the normal criteria for standing to seek review.

However, this provision should be generalized so that it covers all administrative proceedings, not just rulemaking, since much state or local land use planning decisionmaking is hard to classify as between rulemaking and adjudication.

iii. Exception for inadequate remedies.

Under the Model Act, exhaustion is not required "to the extent that the administrative remedies are inadequate..." This language accommodates the existing California exceptions for futility, inadequate remedies, certain constitutional issues, and lack of notice.¹⁶⁷ Thus the existing law on these points would

¹⁶⁵See text at notes 24-29, 71.

¹⁶⁶MSAPA §5-107(1).

¹⁶⁷See text at notes 105-37.

be substantially preserved, subject to the caveat that the exhaustion would be a matter of trial court discretion so that a court could excuse a failure to exhaust in an appropriate case that does not quite fit one of the existing exceptions

iv. Exception for irreparable injury.

The Model Act allows a court to excuse a failure to exhaust remedies if exhaustion "would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion." Here a balance is clearly called for. On the one hand, the harm to the litigant from being required to exhaust remedies must be evaluated. The existing California irreparable injury standard is extremely narrow; it should be broadened.¹⁶⁸ In appropriate circumstances, the court should be allowed to consider the cost of exhausting remedies and the particular litigant's ability to bear that cost as well as such harms as business disruption, delay, bad publicity, and the like. Surely a factor worth considering is whether the remedy is still available. Against the harm must be weighed the benefits from requiring exhaustion, both in terms of judicial efficiency and separation of powers. Here a highly relevant factor would be the reason for the failure to exhaust remedies and whether it might be an attempted end-run around the agency to avoid an unfavorable agency decision.

e. The exact issue rule.

¹⁶⁸See text at notes 137-40. Some cases have been more lenient. See note 141.

I favor retaining the exact issue rule, with the understanding that the plaintiff need not have raised the issue below if somebody else did,¹⁶⁹ and with the further understanding that the courts can excuse a failure to have raised the exact issue if a litigant qualifies for an exception to the exhaustion rule. Probably the exact error rule and the exhaustion of remedies rule should be combined into a single provision.

The Model Act states an exact issue rule separately from its exhaustion rule. The exact issue provision states: "A person may obtain judicial review of an issue that was not raised before the agency only to the extent that..."¹⁷⁰ The Act then states a series of exceptions to the exact issue rule. However, they seem superfluous if the same exceptions applicable to exhaustion also apply to the exact issue rule.¹⁷¹

¹⁶⁹See text at notes 165-66.

¹⁷⁰MSAPA §5-112.

¹⁷¹The Act excuses compliance with the exact issue rule "to the extent that (1) the agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue..." That provision is unnecessary since the remedy would be inadequate in such a case.

Similarly, the Act excuses compliance with the exact issue rule "to the extent that ... (2) the person did not know and was under no duty to discover, or did not know and was under a duty to discover, but could not reasonably have discovered, facts giving rise to the issue..." Here again, the remedy would probably be considered inadequate.

The exact error rule is excused where "(5) the interests of justice would be served by judicial resolution of an issue arising from: (i) a change in controlling law occurring after the agency action; or (ii) agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency." Again, this seems adequately covered by the inadequate remedies

exception and by existing law. See *Lindeleaf v. ALRB*, 41 Cal.3d 861, 870, 226 Cal.Rptr. 119 (1986) (excusing failure to raise the exact issue in a case in which a change in law occurring after the agency action suggested an argument for the first time).

The Model Act excuses compliance with the exact error rule "to the extent that...the agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in substantial compliance with this Act..." Model Act §5-112(4). This provision would be superfluous since an exception to the exhaustion rule would normally apply: a remedy is inadequate to the extent that a litigant lacked actual or constructive notice of the adjudication or the procedure.

One Model Act exception seems questionable. The Model Act would excuse compliance with the exact error rule "to the extent that...the agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings which provided an adequate opportunity to raise the issue..." Model Act §5-112(3). I disagree with this exception. First, it requires the drawing of a line between rulemaking and adjudication, but that line is difficult to draw with respect to various kinds of local land use planning decisions. Second, this provision would change existing California law which does require presentation of the exact issue in connection with state or local decisions that, like rulemaking, require public participation. By not stating any exceptions to the exact issue rule (but simply incorporating the exhaustion exceptions), this exception should disappear since it is contrary to existing law.

B. Primary jurisdiction

1. Distinguishing primary jurisdiction from exhaustion of remedies.

Under the doctrine of primary jurisdiction,¹⁷² a case properly filed in court, that asserts a right of action based on statute, common law or the constitution, may be shifted to an administrative agency that also has statutory power to resolve the issues in that case. Thus the agency, rather than the court, makes the initial decision in the case, but normally that court (or a different one) retains the power to judicially review the agency action.

The primary jurisdiction doctrine is inapplicable if the plaintiff is seeking judicial review of the validity of a rule or of a prior decision of the agency that has power to resolve the issue in the case. In such situations, the applicable doctrine is exhaustion of administrative remedies, as discussed above. Generally, primary jurisdiction issues arise when the lawsuit takes the form of A v. B but agency C has an administrative process that might resolve all or part of the A v. B dispute. In contrast, exhaustion of remedies, not primary jurisdiction,

¹⁷²See generally 4 K. Davis, *Administrative Law Treatise*, ch. 22 (2d ed. 1978 and Supp. 1989); B. Schwartz, *Administrative Law* 523-41 (3d ed. 1991); P. Verkuil, S. Shapiro, R. Pierce, *Administrative Law and Process* 190-200 (2d ed. 1991); Botein, "Primary Jurisdiction: The Need for Better Court/Agency Interaction," 29 Rutgers L. Rev. 867 (1976); Jaffe, "Primary Jurisdiction," 77 Harv. L. Rev. 1037 (1964).

applies when the lawsuit is A v. Agency C.¹⁷³

If the primary jurisdiction doctrine applies, the court has two choices:

(i) if the agency is found to have exclusive jurisdiction over the case, or is empowered to deal with all of the issues in the case and the plaintiff would not be prejudiced thereby, the court should dismiss the case; or

(ii) if the agency does not have exclusive jurisdiction and is not empowered to deal with all of the issues in the case, or provide all possible remedies, or the plaintiff might otherwise be prejudiced by dismissal,¹⁷⁴ the court should issue a stay, send the appropriate issues to the agency, but retain the case on its docket until the agency has finished its processes. If

¹⁷³Sometimes it may be unclear which doctrine is applicable since agency C may have some connection to B (which might be a different government agency). In such cases, the court should apply whichever doctrine seems appropriate; essentially the question is whether the lawsuit is fundamentally judicial review of the action of the defendant unit of government (in which case it is an exhaustion case) as opposed to an independent lawsuit, the issues in which are within the remedial power of a government agency (in which case it is a primary jurisdiction issue). Because there may be a band of cases in which it is difficult to tell which is which, it is important that the exhaustion doctrine be made a matter of discretion rather than jurisdiction, see text at notes 143-151, so that the court has the latitude to do what makes sense in the context of the given case.

¹⁷⁴See Jaffe, *supra* note 177 at 1054-59, arguing that a court should retain jurisdiction even if all issues have been shifted to agency, if plaintiff might be prejudiced by dismissal. For example, if the agency remedy is no longer available or the agency might dismiss the case after the judicial statute of limitations has run, the plaintiff could be prejudiced by dismissal. In such cases, the court should retain the case on its docket. Here again, the contrast with exhaustion of remedy rules is apparent.

the entire case has been shifted to the agency, the agency makes the initial decision. The case returns to court only for the purpose of providing judicial review of the agency's decision.¹⁷⁵ If one or more issues, but not the entire case, has been shifted to the agency, the agency would resolve those issues. Then the court would decide the remaining issues, having the benefit of the agency's decision on some of the issues; it could judicially review the agency's resolution of those issues but not redecide them.

The federal courts have decided a vast number of primary jurisdiction cases; at least at a high level of generality, these decisions form a consistent pattern.¹⁷⁶ In general, where a litigant brings a case to court stating a claim for which relief can be granted, the court normally decides the case, even though

¹⁷⁵A good example of the doctrine at work is provided by a recent Supreme Court decision. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759 (1990). A trucking company sued a shipper in federal district court for undercharges. Since the defense centered on the reasonableness of the rates, the court correctly shifted the case to the ICC. The ICC held that the rates were reasonable even though they were less than the filed rates. On judicial review, the Supreme Court held that the ICC had failed to abide by the "filed rate" doctrine and reversed its decision. Thus the agency had the initial call, but the courts had the final call. For an earlier set of cases establishing the same pattern, see *Far East Conference v. United States*, 342 U.S. 570 (1952); *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958).

¹⁷⁶Of course, there is a good deal of confusion among the federal cases in actually applying these standards, particularly in cases where there is a conflict between antitrust and regulatory regimes and legislative intention is unclear. See Botein, *supra* note 177.

an agency also has jurisdiction to decide one or more or all of the issues in the case.¹⁷⁷

This is the critical difference between primary jurisdiction and exhaustion of remedies: in exhaustion cases, the plaintiff must satisfy a burden of justifying immediate judicial review before administrative remedies have been exhausted. Immediate judicial review is provided only in exceptional circumstances. On the contrary, however, in cases involving competing claims for jurisdiction to try the case (i.e. there is a primary jurisdiction issue), the case should be shifted to the agency only if the defendant satisfies the burden of justifying this result.

In fact, primary jurisdiction problems are quite different from exhaustion problems and should be treated differently. Exhaustion relates solely to the timing of judicial review, whereas in primary jurisdiction cases a court and an agency have competing, concurrent claims to initially decide the case. In cases of competing trial jurisdiction, the plaintiff's case is legitimately in court; as a result, there is no separation of

¹⁷⁷An important Supreme Court case that illustrates this observation is *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). In this case, plaintiff's damage action for misrepresentation by the airline (failure to disclose overbooking) was allowed to proceed in court, despite the fact that the agency could have provided remedies for the same offense. Typical recent cases rejecting claims of primary jurisdiction are *Taffet v. Southern Co.*, 920 F.2d 847 (11th Cir. 1991) (action by utility customers complaining that rates were increased by utility's fraudulent concealment of accounting practices); *Marshall v. El Paso Nat. Gas Co.*, 874 F.2d 1373 (10th Cir. 1989) (defendant negligently plugged plaintiff's wells).

powers rationale for sending the case to an agency for decision.¹⁷⁸ Of course, there may be reasons of judicial efficiency for doing so; but the defendant must persuade the court that these efficiency claims outweigh the costs, complexities, and delays inherent in shifting a case legitimately in court to an agency where plaintiff must start all over again. Consequently, the presumption in a primary jurisdiction case is that the court should keep the case; in exhaustion cases, the presumption is that the court should dismiss the case.

2. When primary jurisdiction applies under federal law

In general, federal courts apply the primary jurisdiction doctrine, sending the case or the issue to the agency, in one of several situations: i) the matter is highly technical and agency expertise would be helpful to the court in resolving the issue;¹⁷⁹ ii) the industry is so pervasively regulated by the agency that the regulatory scheme would be jeopardized by judicial interference; iii) there is a need for uniformity that would be jeopardized by the possibility of conflicting court decisions;¹⁸⁰ iv) there is evidence that the legislature

¹⁷⁸Of course, if the legislature has "preempted" judicial jurisdiction by lodging exclusive trial jurisdiction in the agency, that legislative decision must be respected. Such cases are the clearest ones for applying primary jurisdiction.

¹⁷⁹United States v. Western Pacific R. Co., 352 U.S. 59 (1959).

¹⁸⁰Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

intended the issue to be resolved exclusively by the agency rather than a court.¹⁸¹ Even where the first three of those situations arise, the court has discretion to retain and decide the case, rather than sending it back to the agency, if there are persuasive reasons for doing so.¹⁸²

3. California law

The doctrine of primary jurisdiction has not been well developed in California. Most of the cases in which the problem arises describe the issue incorrectly as a problem of exhaustion of remedies and struggle to apply the exhaustion exceptions.¹⁸³

¹⁸¹Where the agency has statutory power to exempt the practice in question from liability (whether from tort damages, antitrust damages or any other right enforced in court), the legislature obviously intended that the agency have the power to pass on the practice before it could be dealt with by a court. For discussion of the complexities in balancing regulatory power with the antitrust laws, see Jaffe, *supra* note 177, at 1060-70; Davis, *supra* note 177 at §§22.6 to 22.10.

¹⁸²Jaffe at 1050.

¹⁸³See, e.g. *Department of Personnel Administration v. Superior Court*, 5 Cal.App.4th 155, 6 Cal.Rptr.2d 714, 718-22 (1992); *Hollon v. Pierce*, 257 Cal.App.2d 468, 64 Cal.Rptr. 808 (1967) (applies exhaustion exceptions). Infrequently, the court refers correctly to the issue as one of primary jurisdiction. See *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 448-51, 189 Cal.Rptr. 346, 366-68 (1983) (identifying issue as primary jurisdiction); *County of Alpine v. County of Tuolumne*, 49 Cal.2d 787, 322 P.2d 449, 452, 455 (1958) (same); *E. B. Ackerman Importing Co v. City of Los Angeles*, 61 Cal.2d 595, 39 Cal.Rptr. 726 (1964) (court stays action while parties obtain determination from Federal Maritime Commission). Even less often, a case will recognize that there is a difference between the doctrines. *Common Cause of Calif. v. Board of Supervisors of Los Angeles County*, 49 Cal.3d 432, 441 n.6, 261 Cal.Rptr. 574, 579 n.6 (1989) (primary jurisdiction is not jurisdictional so that failure to raise the defense in the trial court waives it).

Yet the courts often sense that somehow the problem is different from the conventional exhaustion problem and the exhaustion exceptions seem to be applied more leniently. The result is a jumbled mass of cases. To clear up this confusion, California badly needs a statutory provision on primary jurisdiction.

a. Cumulative remedy doctrine.

In a few rather narrowly defined classes of cases, courts can proceed despite the presence of an administrative remedy. Where a single statute (or perhaps a single California code) provides a litigant with a choice of administrative or judicial remedies, the litigant can choose the judicial one.¹⁸⁴

Similarly, where a statute provides a new remedy that enforces an already existing common law right, the remedy is cumulative rather than exclusive. Whereas, if the new remedy does not codify an existing common law right, it is exclusive.¹⁸⁵

Finally, in cases involving water rights, a system of concurrent jurisdiction exists--plaintiffs can choose to go to the Water

¹⁸⁴City of Susanville v. Lee C. Hess Co., 45 Cal.2d 684, 290 P.2d 520, 523 (1955); Scripps Mem. Hosp. v. Calif. Employment Comm'n, 24 Cal.2d 669, 673, 151 P.2d 109, 112 (1944) (an exhaustion rather than a primary jurisdiction case); Lachman v. Cabrillo Pacific Univ., 123 Cal.App.3d 941, 177 Cal.Rptr. 21 (1981); In re Steinberg, 197 Cal.App.2d 264, 17 Cal.Rptr. 431, 434 (1962) (remedy cumulative).

¹⁸⁵See Flores v. Los Angeles Turf Club, 55 Cal.2d 736, 13 Cal.Rptr. 201 (1961) (new remedy exclusive); McKee v. Bell-Carter Olive Co., 186 Cal.App.3d 1230, 1239-1246, 231 Cal.Rptr. 304, 310-14 (1986) (new remedy cumulative); Karlin v. Zalta, 154 Cal.App.3d 953, 201 Cal.Rptr. 379 (1984) (new remedy exclusive).

Board or to court.¹⁸⁶

These rules are confusing and seem ad hoc. Essentially they ask the wrong question. Normally, persons should be allowed to pursue judicial rights, despite existence of an administrative remedy (whether in the same code or elsewhere, and whether or not it codifies a common law right), unless the legislature intended to make the administrative remedy exclusive or there is some other good reason to shift the case to the agency.

b. Reaching right result for wrong reason.

While treating the primary jurisdiction problem as a problem of exhaustion of remedies, California courts have often reached results that in fact reflect primary jurisdiction theory while twisting exhaustion theory. In a recent Supreme Court case, Rojo v. Klieger,¹⁸⁷ the issue was whether a damage action in tort by an employee against her employer for sexual harassment should be dismissed by reason of plaintiff's failure to exhaust the investigation and conciliation remedy under the Fair Employment

¹⁸⁶National Audubon Society v. Superior Court, 33 Cal.3d 419, 448-51, 189 Cal.Rptr. 346, 366-68 (1983). The Court indicated that because of the highly technical nature of the issues and the Board's expertise, it would be better to give exclusive jurisdiction to the agency. However, it felt constrained by contrary precedent. Instead, the Court interpreted relevant statutes to provide that a court can refer any issues to the water board as a referee or a master. This solution is wholly consistent with a system of primary jurisdiction that permits one or more of the issues in the case to be referred to an agency while the court retains the matter on its docket.

¹⁸⁷52 Cal.3d 73, 276 Cal.Rptr. 130 (1990).

and Housing Act (FEHA).¹⁸⁸ For the reasons that plaintiff's claim was based on common law, rather than on violation of the FEHA, and because the FEHC lacked power to award tort damages (as opposed to make-whole relief), the Supreme Court held that the remedy need not be exhausted and her suit could proceed.¹⁸⁹

As an exhaustion of remedies case, the Court's decision in Rojo is unpersuasive. The case did not clearly fit any of the established exhaustion exceptions and the Supreme Court did not claim that it did.¹⁹⁰ In fact, a better analysis would be to

¹⁸⁸Under FEHA, the Department of Fair Employment and Housing (Department) investigates a discrimination claim and attempts to conciliate the dispute. If this is unsuccessful, on request is issues a "right to sue" letter permitting the complainant to file in court. Alternatively, the complainant can allow the Department to pursue her claim before the Fair Employment and Housing Commission (FEHC). However, because FEHC lacks power to award compensatory and punitive damages, most complainants request right to sue letters and go to court. The issue in Rojo was whether the court could hear a common law tort case (as opposed to a claim based on the civil rights statute) where this administrative investigation and conciliation remedy had not been resorted to.

¹⁸⁹Similarly, see Horsemen's Benevolent & Prof. Ass'n v. Valley Racing Ass'n, -- Cal.App.3d--, 6 Cal.Rptr.2d 698 (1992) (exhaustion not required in contract dispute between horse owners and track operators since Horse Racing Board not empowered to grant contract damages).

¹⁹⁰Because FEHC could not award the damages plaintiff was seeking, it could be argued that the administrative remedy was inadequate. However, it could also be argued that the administrative remedy was adequate or at least useful, in that the Department's investigation could turn up useful evidence and the Department might have successfully settled the dispute, thus keeping it out of court. See Acme Fill Corp. v. San Francisco Bay Conservation & Dev. Comm'n, 187 Cal.App.3d 1056, 1064, 232 Cal.Rptr. 348 (1986) (exhaustion required even though remedy could not provide all of the desired relief); Edgren v. Regents of Univ. of Calif., 158 Cal.App.3d 515, 520, 205 Cal.Rptr. 6, 9 (1984) (exhaustion of University's personnel remedies required even though

treat the case as one involving a primary jurisdiction claim. The court had original jurisdiction over the employee's tort claim.¹⁹¹ That lawsuit did not seek judicial review of administrative action; it sought tort damages against an employer. None of the reasons for applying primary jurisdiction applied: i) the case was not technical and the agency had no real expertise to contribute, ii) the industry was not pervasively regulated, iii) there was no risk of conflicting court decisions, iv) there was no evidence that the legislature intended such cases to be sent to the agency.¹⁹² Thus the Supreme Court reached the correct result, although for the wrong reason.¹⁹³

c. When primary jurisdiction applies: technical issues.

plaintiff seeks damages in tort).

¹⁹¹A key part of the Rojo decision was the Court's determination that the legislature had not preempted the common law tort action for damages for discrimination or sexual harassment. Rojo, 52 Cal.2d at 73-82, 276 Cal.Rptr. at 133-40

¹⁹²The Court held that the legislature did intend that FEHA remedies be exhausted when plaintiff makes a claim for violation of the FEHA itself as opposed to a common law tort claim.

¹⁹³In the process it limited the reach of an earlier case, Westlake Community Hospital v. Superior Court, 17 Cal.3d 465, 131 Cal.Rptr. 90 (1976) in which a doctor seeking damages against a hospital that had expelled him from the staff was required to exhaust internal hospital remedies, even though those remedies did not include damages. This case was limited to remedies provided by private associations as distinguished from public agencies, as in Rojo. A more persuasive distinction of Westlake would be that it was an exhaustion case; the doctor was suing the hospital that provided the remedy in question, not a third party. Normally, in exhaustion cases, the remedy should be exhausted even though it is not completely adequate to satisfy all of the plaintiff's needs.

As stated above, federal courts apply primary jurisdiction when a case involves difficult technical problems that require application of agency expertise. California cases have done the same while purporting to apply exhaustion of remedies.¹⁹⁴

Karlin v. Zalta¹⁹⁵ was a class action alleging a conspiracy to fix medical malpractice insurance rates in violation of state antitrust laws and seeking money damages. Insurance rate-fixing conspiracies are within the supervision of the Insurance Commissioner and are exempt from the antitrust laws. However the Commissioner has no power to award damages. The court dismissed the case under the exhaustion doctrine.

As a primary jurisdiction case, Karlin reached the right result, for the case required "a searching inquiry into the factual complexities of medical malpractice insurance ratemaking," whereas the statute "comprises a pervasive and self-contained system of administrative procedure for the monitoring both of insurance rates and the anticompetitive conditions that

¹⁹⁴In National Audubon Society v. Superior Court, 33 Cal.3d 419, 448-51, 189 Cal.Rptr. 346, 366-68 (1983), the court held that the courts and Water Board had concurrent jurisdiction over cases involving conflict between appropriative water rights and the public trust doctrine. It also held that courts could refer especially difficult or technical issues to the Board as a referee or master. This is wholly consistent with primary jurisdiction which allows the assignment of one or more issues to an agency while the court retains the case on its docket.

¹⁹⁵ 154 Cal.App.3d 953, 979-87, 201 Cal.Rptr. 379, 394-400 (1984).

might produce such rates."¹⁹⁶ Consequently, Karlin fell within one or perhaps two of the established criteria for application of primary jurisdiction: (i) cases involving highly technical issues where the expertise of the agency would be helpful to courts and (ii) cases where the legislature intended that such cases be tried in the agency.¹⁹⁷

However, appropriate procedure in Karlin would have called for the court to retain the case on its docket while it was being considered by the agency, so that if the agency found that the conspiracy existed and should not be exempted from the antitrust laws, plaintiff would retain its claim for damages without concern that the statute of limitations would run out on it.¹⁹⁸

d. When primary jurisdiction applies: legislative intent. Another type of case in which primary jurisdiction applies is often referred to as "preemption:" the legislature intended this sort of case to be sent to an agency, thus

¹⁹⁶154 Cal.App.3d at 983, 201 Cal.Rptr. at 397.

¹⁹⁷This branch of the caselaw is discussed in text at notes 199.

¹⁹⁸A similar error appears in Wilkinson v. Norcal Mutual Ins. Co., 98 Cal.App.3d 307, 159 Cal.Rptr. 416 (1979), which involved an action by a single doctor claiming that his insurance rates were excessive. The court dismissed for failure to exhaust remedies instead of retaining the case on its docket for computation of damages in the event the agency found the rate to be excessive or illegal. See also Morton v. Hollywood Park, Inc., 73 Cal.App.3d 248, 139 Cal.Rptr. 584 (1977).

preempting judicial remedies. For example, workers' compensation or unemployment compensation disputes between employer and employee must be tried before the appropriate agency, not in court. California cases correctly apply this doctrine, for example, refusing to allow trial courts to entertain cases involving agricultural labor disputes that should be heard before the Agricultural Labor Relations Board.¹⁹⁹

e. Exigent circumstances. Even where a case probably should be sent to the agency because primary jurisdiction is applicable, a court should retain discretion to decide the case immediately because of exigent circumstances. For example, in Department of Personnel Administration v. Superior Court,²⁰⁰

¹⁹⁹United Farm Workers of America v. Superior Court, 72 Cal.App.3d 268, 140 Cal.Rptr. 87 (1977). As that court put it, if unfair labor practice cases could be decided by judicial declaratory judgments, "The Board would be replaced by ad hoc determinations by already overcrowded courts. The legislative effort to bring order and stability to the collective bargaining process would be thwarted. The work of the Board would be effectively impaired, its decisions similar in impression to that of a tinkling triangle practically unnoticed in the triumphant blare of trumpets." 72 Cal.App.3d at 272, 140 Cal.Rptr. at 90. In dictum, the court recognized a possible exception for extremely clear-cut statutory errors by the Board. See *Leedom v. Kyne*, 358 U.S. 184 (1958).

Similarly, see *San Diego Teachers Ass'n v. Superior Court*, 24 Cal.3d 1, 12-14, 154 Cal.Rptr. 893, 900-02 (1979) (legislature intended to make issue of enjoining teacher strike a matter for exclusive initial jurisdiction of PERB); *Calif. School Employees Ass'n v. Travis Unified School Dist.*, 156 Cal.App.3d 242, 250, 202 Cal.Rptr. 699, 703 (1984) (issue not one within PERB's exclusive initial jurisdiction); *Wygant v. Victor Valley Joint Union H.S. Dist.*, 168 Cal.App.3d 319, 323-25, 214 Cal.Rptr. 205, 207-08 (1985) (same).

²⁰⁰5 Cal.App.4th 155, 6 Cal.Rptr.2d 714, 721 (1992).

the issue was whether to send a case properly in the Superior Court for initial decision to the Public Employment Relations Board (PERB), which normally would have been required because of a statutory provision. However, purporting to apply the exhaustion exceptions for futility²⁰¹ and irreparable injury,²⁰² the court retained the case. While the case should have been analyzed as one of primary jurisdiction, the court probably reached the correct result; this was an appropriate case for exercising discretion to retain the case even though normally under primary jurisdiction it would have been sent to the agency.

f. Incorrect results under California law

While courts have usually reached appropriate results despite relying on exhaustion rather than primary jurisdiction theory, this has not always been the case. Sometimes, cases legitimately in court have been dismissed for failure to exhaust administrative remedies because no exhaustion exception was applicable.²⁰³ For example, Yamaha Motor Corp, U.S.A. v.

²⁰¹The basis for the futility exception was the PERB had declined jurisdiction over the case.

²⁰²An immediate judicial decision was needed because the issues involved the state's budget crisis and delay would have cost the jobs of additional state employees.

²⁰³See, e.g., Woodard v. Broadway Fed. Sav. & Loan Ass'n, 111 Cal.App.2d 218, 244 P.2d 267 (1952) (judicial contest over election of directors--remedy before Federal Home Loan Bank Board must be exhausted).

Superior Court,²⁰⁴ was a breach of contract action by a franchisee arising out of failure to supply the franchisee with a new product (RIVA) produced by Yamaha and other related breaches of contract.²⁰⁵ Because the New Motor Vehicle Board has power to prevent modification of franchise contracts, the court held that the franchisee had to exhaust the remedy before the Board.

The Yamaha case seems wrong absent some indication the legislature wished to preempt normal judicial contract remedies in motor vehicle cases. The Board could not provide contractual remedies such as damages.²⁰⁶ Moreover, in another case involving a different franchisee, the Board had declined to provide relief because Yamaha had good cause to modify the contract and because the modification would not substantially affect the franchisee's investment. Yet the Court held the futility exception to exhaustion was not applicable since the Board might distinguish the prior case. This seems like the wrong question to be asking. The franchise contract did not contain a provision allowing the manufacturer to modify it; it

²⁰⁴185 Cal.App.3d 1232, 230 Cal.Rptr. 382 (1986).

²⁰⁵For example, plaintiff alleged Yamaha's bad faith abandonment of advertising of its other products due to emphasis on the new one. It also alleged discrimination against plaintiff in the allocation of motorcycles in retaliation for Van Nuys' objections to Yamaha's policies.

²⁰⁶For that reason, it is arguable that the Yamaha case was overruled by Rojo v. Klieger, discussed above in text at notes 187-93.

would appear that the statute left the franchisee a choice whether to pursue its remedies before the Board or to go to court for breach of the franchise agreement.

Thus Yamaha was a primary jurisdiction, not an exhaustion case. Using primary jurisdiction theory, the court should have kept the case, but using exhaustion theory it required the case to be dismissed. The result of this sort of reasoning was not only to force the franchisee to utilize a misfitting set of remedies but also to probably lose its right to damages entirely, even if the Board sustained its position, since the statute of limitations might well run on the contract claim. In a case of competing trial jurisdiction between court and agency, the presumption should be in favor of retaining the case in court, not dismissing it, absent a strong reason to apply primary jurisdiction and send it to the agency.

4. Recommendation

Because California cases have confused exhaustion of remedies and primary jurisdiction, I suggest that a statutory provision in a new APA should recognize the difference. Because the instances in which primary jurisdiction should apply are difficult to reduce to a simple formula, however, the statute probably should not try to articulate such a formula.

A statute might provide first that a court should send an entire case, or one or more issues in a case, to an agency for an initial decision where the legislature intended that the agency have exclusive jurisdiction over that type of case or issue.

Second, the statute might provide that a court could, in its discretion, also send a case, or one or more issues in the case, to an agency for initial decision where the benefits to the court in doing so outweigh the extra delays and costs to litigants inherent in doing so. The statute, or a comment, should also point out that the court in its discretion could request that the agency file an amicus brief setting forth its views on the case as a less expensive alternative to actually shipping the case over to the agency.²⁰⁷

The comment might then suggest the situations in which the court should exercise this discretionary power.²⁰⁸ These would include i) the matter is highly technical and agency expertise would be helpful to the court in resolving the issue; ii) the industry is so pervasively regulated by the agency that the regulatory scheme would be jeopardized by judicial interference; iii) there is a need for uniformity that would be jeopardized by the possibility of conflicting court decisions.

²⁰⁷ See *Distrigas of Mass., Inc. v. Boston Gas Co.*, 693 F.2d 1113 (1st Cir. 1982) (agency's views are needed but not necessary to have full-fledged agency proceeding to obtain these views).

²⁰⁸A more detailed set of standards for exercising discretion are spelled out in Botein, *supra* note 177 at 878-90.

C. Ripeness

The doctrine of ripeness in administrative law counsels a court to refuse to hear an on-the-face attack on an agency rule or policy until the agency takes further action to apply it in a specific factual situation. Ripeness is distinguishable from exhaustion of remedies because the exhaustion doctrine requires plaintiff to take all possible steps to deal with the problem at the agency level before coming to court. Ripeness, on the other hand, requires a court to stay its hand until the agency (as distinguished from the plaintiff) has taken further steps.

The ripeness doctrine is well accepted in California administrative law,²⁰⁹ often arising as a question of judicial discretion as to whether to issue a declaratory judgment.²¹⁰ Because the judicially defined test appears to be working well, and because it requires a balancing test that is difficult to reduce to statutory form, I believe it is unnecessary to enact statutory provisions codifying the ripeness doctrine. However, there should be a comment to the exhaustion section making it clear that the legislature recognizes the existence of the ripeness doctrine and does not believe there is any necessity to change or codify it.

The leading case applying the ripeness doctrine in the administrative context is Pacific Legal Foundation v. Coastal

²⁰⁹See 2 Ogden, California Public Agency Practice §51.01 (1992).

²¹⁰CCP §1061.

Commission²¹¹ in which plaintiff attacked the Commission's guidelines on coastal access on their face. The Supreme Court ordered the case dismissed because of a lack of ripeness. The Court indicated a preference for adjudicating such cases in the context of an actual set of facts so that the issues could be framed with enough definiteness to allow courts to dispose of the controversy. Yet it also indicated that courts would resolve such disputes if deferral would cause lingering uncertainty, especially where there is widespread public interest in the question. It observed that courts should not issue advisory opinions; the issue must be such that the court's judgment would provide definite and conclusive relief.²¹²

To decide when the courts should address challenges to guidelines before they have been applied to plaintiff, the Pacific Legal Foundation Court adopted the balancing test articulated in the leading federal case, Abbott Laboratories v. Gardner.²¹³ Abbott Laboratories evaluates ripeness claims by assessing and balancing two factors: the fitness of the issues for immediate judicial review and the hardship to the plaintiff from deferral of review.

²¹¹33 Cal.3d 158, 188 Cal.Rptr. 104 (1982).

²¹²See Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 110, 109 Cal.Rptr. 799 (1973) (declaratory judgment on effect of general plan on plaintiff's property calls for advisory opinion as the judgment would not resolve controversy between parties).

²¹³387 U.S. 136 (1967). BKHN v. Dep't of Health Services, 3 Cal.App.4th 301, 4 Cal.Rptr.2d 188 (1992), also employs the Abbott Labs methodology.

Generally issues are considered fit for immediate review if they are part of final agency action (i.e. the agency is not reconsidering the rule and it is issued in formal fashion from a high level within the agency) and the issue is basically legal rather than factually oriented.²¹⁴ In Pacific Legal Foundation, the issues were not fit for immediate review because the court found it difficult to assess the guidelines in the abstract. Everything would turn on the specific factual context in which they would be applied. The guidelines were flexible, general, and not even mandatory. Thus the lack of concreteness mandated a deferral of review.²¹⁵

The hardship to plaintiff from deferral of review often arises from the fact that the rule confronts plaintiff with an immediate and serious dilemma: comply with the rule (abandoning a planned course of conduct) or risk violation of the rule (with serious legal and practical consequences). In Pacific Legal Foundation, there was no such dilemma: nobody would have a problem until they actually applied for a permit. Possibly, the Court conceded, people would be inhibited in their planning (for example, they might hesitate to hire an architect), but that was

²¹⁴A case is ripe where it has reached, but not yet passed, the point where the facts have sufficiently congealed to permit an intelligent and useful decision to be made. *Sherwyn v. Dep't of Social Services*, 173 Cal.App.3d 52, 218 Cal.Rptr. 778 (1985); *California Water & Tel. Co. v. County of Los Angeles*, 253 Cal.App.2d 16, 61 Cal.Rptr. 618 (1967).

²¹⁵Similarly, see *BKHN v. Dep't of Health Services*, supra (issue of whether state law ever provides joint and several liability for cleanup costs too difficult to answer in abstract)

not sufficient hardship.²¹⁶

Undoubtedly, the court would take account of the public interest in evaluating the ripeness equation: the public interest might be served by providing an immediate answer to a difficult question, thus avoiding piecemeal litigation;²¹⁷ or it might be served by deferring review and allowing the administrative or legislative process to run its course.²¹⁸ These factors vary enormously from case to case, which makes it difficult to reduce the ripeness formula to statutory form.

Since California law, exemplified by Pacific Legal Foundation, correctly applies the federal ripeness test, and

²¹⁶See also *BKHN v. Dep't of Health Services*, supra (P not seriously harmed by delay in getting answer to question of whether state law ever provides joint and several liability for cleanup costs); *Newland v. Kizer*, 209 Cal.App.3d 647, 659, 257 Cal.Rptr. 450, 457 (1989) (no immediate need to construe statute providing time for patient at decertified nursing home to find a new home because no immediate threat of decertification); *Teed v. State Bd. of Equalization*, 12 Cal.App.2d 162, 55 P.2d 267 (1936) (letter from Board contains no threats, merely informs P that current practice will be continued).

²¹⁷See *Californians for Native Salmon v. Dep't of Forestry*, 221 Cal.App.3d 1419, 271 Cal.Rptr. 270 (1990) (agency policy of ignoring laws regarding timber harvest plans--declaratory judgment would avoid piecemeal litigation); *Selinger v. City Council of Redlands*, 216 Cal.App.3d 259, 264 Cal.Rptr. 499 (1989) (public interest requires that court reach issue of interpretation of state law deeming application approved after one year); *Regents of Univ. of California v. State Bd. of Equalization*, 73 Cal.App.3d 660, 140 Cal.Rptr. 857 (1977) (public interest in answering question about taxability of university property); *California Water & Tel. Co. v. County of Los Angeles*, 253 Cal.App.2d 16, 61 Cal.Rptr. 618 (1967) (whether county ordinance regulating water company is preempted by state law).

²¹⁸See *Zetterberg v. Dep't of Public Health*, 43 Cal.App.3d 657, 118 Cal.Rptr. 100 (1975) (review would interfere with political process).

because of the highly abstract and case-specific nature of the ripeness equation, I see little reason to try to reduce the test to statutory form. However, it should be made clear in a comment that the new legislation (including specific provisions on exhaustion and primary jurisdiction) is not intended to disapprove the prevailing judicial approach.

D. Statute of limitations on seeking review of adjudicatory action

A new judicial review statute should impose a uniform limitations period. Present law has scattered and inconsistent provisions.

1. Present law

Under present law, two generic statutes provide the limitations period for large numbers of agency adjudicatory actions. Under Government Code section 11523, adjudicatory decisions under the existing APA are subject to a 30 day limitation period.²¹⁹ The 30-day period runs from the last day on which reconsideration can be ordered.²²⁰ Petitioner must

²¹⁹This provision puts considerable weight on the distinction between adjudicatory action, reviewable under CCP §1094.5, and other agency action reviewable under traditional mandamus, as to which no special statute of limitation applies. See *Morton v. Board of Registered Nursing*, 235 Cal.App.3d 1560, 1 Cal.Rptr.2d 502 (1991) (Board's action reviewable under §1094.5 so 30-day period applies).

The 30-day period of section 11523 is a statute of limitations, not a jurisdictional provision, and therefore is subject to the same rules applicable to any statute of limitations. As a result, the agency can be estopped to plead the statute if its representations resulted in a petitioner's failure to meet the deadline. *Ginns v. Savage*, 61 Cal.2d 520, 39 Cal.Rptr. 377 (1964).

²²⁰The power to order reconsideration expires 30 days after delivery or mailing of a decision, or on the date set by the agency as the effective date of the decision if that occurs prior to expiration of the 30 day period, or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. CCP §11521. See *De Cordoba v. Gov. Bd. Whittier Union High School Dist.*, 71 Cal.App.3d 155, 139 Cal.Rptr. 312 (1977); *Koons v. Placer Hills Union School Dist.*, 61 Cal.App.3d 484, 132 Cal.Rptr. 243 (1976). Both cases hold that where an agency makes its decision effective immediately, thus precluding reconsideration, the 30-day period runs from the

request the agency to prepare the record (including a transcript), and the agency must supply it within 30 days after request. If the petitioner requests the agency to prepare the record within 10 days after the last day on which reconsideration can be ordered, the time for filing a petition for writ of mandate is extended until 30 days after delivery of the record.

Code of Civil Procedure section 1094.6 applies to judicial review of local adjudicatory agency action (other than school districts).²²¹ The limitation period is 90 days following the date on which the decision becomes final. If there is no provision for reconsideration of the decision, the decision is final on the date it is made. If there is provision for reconsideration, the decision is final on the expiration of the period for which reconsideration can be sought. If reconsideration is sought, the decision is final on the date reconsideration is rejected.²²²

Section 1094.6 provides that the agency must deliver the record to the petitioner within 90 days after it is requested; if

date of delivery or mailing of the formal agency decision.

²²¹This provision, enacted in 1976, applies only if the local agency has adopted an ordinance making it applicable. If the local government agency has failed to do so, the applicable period of limitations is provided by the fallback limitations provisions of the Code of Civil Procedure. The section applies only to decisions made, after hearing, that suspend, demote, or dismiss an officer or employee; revoke or deny an application for a permit, license, or other entitlement; or deny an application for a retirement benefit or allowance. All other local adjudications, such as land use planning decisions, are not subject to the 90-day rule of §1094.6.

²²²CCP §1094.6(b).

such request is filed within 10 days after the decision becomes final, the time for filing a petition is extended to not later than the 30th day following the date on which the record is either personally delivered or mailed to the petitioner or his attorney.²²³ Finally, the agency must provide notice to the party that the time within which judicial review must be sought is governed by section 1094.6;²²⁴ cases have held that the 90-day period is tolled until such notice is provided.²²⁵

The 30 or 90 day periods provided by sections 11523 and 1094.6 are not extended for an additional five days (or ten days outside the state) because the decisions were mailed.²²⁶

Various other sections applicable to particular agencies contain different provisions relating to the timing of review of adjudicatory action that are inconsistent in various ways with the two generic sections already summarized.²²⁷

²²³CCP §1094.6(d).

²²⁴CCP §1094.6(f).

²²⁵El Dorado Palm Springs Ltd. v. Rent Review Comm'n of City of Palm Springs, 230 Cal.App.3d 335, 281 Cal.Rptr. 327 (1991) (notice can be oral or written); Cummings v. City of Vernon, 214 Cal.App.3d 919, 263 Cal.Rptr. 97 (1989).

²²⁶Tielsch v. City of Anaheim, 160 Cal.App.3d 576, 206 Cal.Rptr. 740 (1984). The same is true of the limitations period for appealing a decision of the Agricultural Labor Relations Board in the Court of Appeal. Mario Saikhon, Inc. v. ALRB, 140 Cal.App.3d 581, 189 Cal.Rptr. 632 (1983). But the contrary is true in workers' compensation cases. Villa v. WCAB, 156 Cal.App.3d 1076, 203 Cal.Rptr. 26 (1984).

²²⁷A sampling of such statutes follows: There is a 90-day limitation period from the date a driver's license order is noticed. Vehicle Code §14401(a). There is a 30-day limitation

Finally, a great deal of state and local agency action is not subject to any special limitation period at all. This includes both adjudicatory action that is not under the APA or section 1094.6,²²⁸ as well as a vast array of more generalized agency action. In such cases, the limitations period are those provided by general provisions of the Code of Civil Procedure:

period after issuance of decisions of the Agricultural Labor Relations Board. Labor Code §1160.8. The provision relating to Public Employment Relations Board is similar. Gov't C. §3542. A six month period is provided to appeal decisions of the Unemployment Insurance Appeals Board; it runs from date of decision or from the date the decision is designated as a precedent decision, whichever is later. Unempl. C. §410. Decisions of the Workers' Compensation Appeals Board must be appealed within 45 days after a petition for reconsideration is denied or (if the petition is granted) 45 days after the filing of an order of reconsideration. Labor C. §5950. Welfare decisions of the Department of Social Services can be appealed within one year after notice of decision. Welf. & Inst. C. §10962. One year is allowed to challenge various state personnel decisions, including decisions of the State Personnel Board, although remedies are limited unless the challenge is made within 90 days. Gov't C. §19630. Litigants have 90 days to challenge decisions of zoning appeal boards (and the board must be served within 120 days of its decision). Gov't C. §65,907.

These statutes contain no provision tolling limitations where the agency is late in delivering the record. Probably the court cannot allow equitable tolling in such cases. *California Standardbred Sires Stakes Comm. v. Calif. Horse Racing Board*, 231 Cal.App.3d 751, 282 Cal.Rptr. 656 (1991); *Sinetos v. Dep't of Motor Vehicles*, 160 Cal.App.3d 1172, 207 Cal.Rptr. 207 (1984). *Contra*: *Liberty v. Calif. Coastal Comm'n*, 113 Cal.App.3d 501, 170 Cal.Rptr. 247 (1981) (statute should be tolled to prevent Commission from perpetrating injustice by holding up preparation of the record).

²²⁸*Monroe v. Trustees of California State Colleges*, 6 Cal.3d 399, 99 Cal.Rptr. 129 (1971) (refusal to reinstate professor discharged 16 years before for refusal to sign loyalty oath); *Ragan v. City of Hawthorne*, 212 Cal.App.3d 1368, 261 Cal.Rptr. 219 (1989) (refusal to hold hearing required by APA); *County of San Diego v. Assessment Appeals Board No. 2*, 148 Cal.App.3d 548, 554, 195 Cal.Rptr. 895, 898 (1983) (property tax decision of appeals board); *Aroney v. Calif. Horse Racing Board*, 145 Cal.App.3d 928, 193 Cal.Rptr. 708 (1983) (exclusion order from racetrack).

either the three-year statute for liabilities created by statute²²⁹ or the four-year statute applicable when no other period of limitation applies.²³⁰ Since these limitation periods are far too long for judicial review of agency action,²³¹ courts generally impose shorter limitation periods under the doctrine of laches.²³²

2. Recommendations

A new statute should provide a single limitation period, at least for all adjudicatory action taken by state or local agencies. This section canvasses some of the policy problems that must be considered in drafting such a provision.

a. When period starts running.

The time period provided should run from the effective date of the decision. A petition for judicial review filed before the effective date is premature.²³³

²²⁹CCP §338(a); *Green v. Obledo*, 29 Cal.3d 126, 140 n.10, 172 Cal.Rptr. 206, 214 n.10 (1981) (obligation to pay welfare benefits is liability created by statute).

²³⁰CCP §343. See CEB, California Administrative Mandamus §§7.8 to 7.10 (1989).

²³¹See *Conti v. Board of Civil Service Comm'rs*, 1 Cal.3d 351, 357 n.3, 82 Cal.Rptr. 337, 340 n.3 (1969); *Aroney v. Calif. Horse Racing Board*, supra, 145 Cal.App.3d at 933, 193 Cal.Rptr. at 710; *Cameron v. Cozens*, 30 Cal.App.3d 887, 106 Cal.Rptr. 537 (1973).

²³²See *Conti v. Board of Civil Service Comm'rs*, supra; 2 G. Ogden, California Public Agency Practice §51.11 (1992); CEB, California Administrative Mandamus §§7.14 (1989)

²³³Existing §11523 requires that the petition be filed "within" the 30 day period after the last day on which reconsideration can be ordered.

I can see several possible problems here. A litigant might

Under the Commission's present draft statute, the effective date of an order is 30 days after the decision becomes final unless the agency head orders a different date.²³⁴ A decision should state the date when it is effective so that parties will have no doubt about when the statute of limitations on review starts running.

The provision that a decision is effective 30 days after it is "final" requires that litigants know when a decision becomes final. The draft statute contains a number of provisions relating to finality.

A proposed decision may be summarily adopted as a final decision within 100 days after it is delivered to the agency head (or other period provided by regulation).²³⁵ The date of summary adoption would be the date the decision becomes final. The proposed decision also becomes final immediately upon

file too early and, not realizing the nature of the error, fail to meet the limitations period by filing anew after the effective date. Therefore, I suggest the prematurely filed petition toll the statute of limitations on seeking judicial review.

Another possible problem might arise where an agency decision states an effective date far in the future (i.e. provides for a very long stay of its order). This would delay the time at which a person can seek judicial review. Existing law permits only very short delays. Gov't C. §11521(a). If the Commission considers the possibility of deferral of judicial review through a lengthy stay to be a problem, the statute could provide that a petition for judicial review could be filed at any time after the agency could no longer reconsider its decision. But this may be an unnecessary complication.

²³⁴§650.110(a).

²³⁵§649.140(a).

issuance if it is unreviewable²³⁶ or upon a decision by the reviewing authority in the exercise of discretion to deny review.²³⁷ Finally, a proposed decision becomes a final decision 100 days after delivery of the proposed decision to the reviewing authority if the latter takes no action.²³⁸

A final decision is treated as final when it is "issued," although the agency has ten days to serve it on the parties.²³⁹ However, a final decision can still be altered by the agency. Within 15 days following service of a final decision, any party can apply to the agency head to correct a mistake or clerical error in the final decision; the application is deemed denied if the agency head does not dispose of it within 15 days. The agency head also has 15 days to correct a mistake or clerical error on its own motion.²⁴⁰

Moreover, the agency can give further review to a final

²³⁶§649.150(a), (b).

²³⁷§649.150(c).

²³⁸§649.150. This period can be extended by regulation in non-OAH agencies.

²³⁹ §649.160(a). I am not certain whether the existing draft defines "issued." Existing law defines it as the date that a decision is either delivered to the parties or mailed to the parties. See *Sunnyside Nurseries, Inc. v. ALRB*, 93 Cal.App.3d 922, 929, 156 Cal.Rptr. 152, 155 (1979). But see *Mario Saikhon, Inc. v. ALRB*, 140 Cal.App.3d 581, 189 Cal.Rptr. 632 (1983). But that would make no sense since the statute requires the decision to be delivered or mailed ten days after issuance. The staff should reconsider this provision.

²⁴⁰§649.170.

decision, either by petition or on its own motion.²⁴¹ The power to grant further review to a final decision expires 30 days after service or other time provided by agency regulation.²⁴² Clearly, once an agency has decided to provide further review of a final decision, that decision becomes unsuitable for judicial review until the agency has issued a new final decision.

These provisions relating to correction of mistakes or review of final decisions make it difficult to know whether an apparently final decision is in fact final. As a result, the judicial review statute of limitations should start running not on the date a decision is final but on its effective date which is normally 30 days after the decision is final unless the agency decision provides a different effective date.²⁴³ When the thirty day period after the decision becomes final has expired, it is normally too late for the agency to correct mistakes or clerical errors and too late for it to grant further review of

²⁴¹§649.210(a). The process of giving further review to a final decision is often referred to as "reconsideration" under existing law.

²⁴²§649.220.

²⁴³Cf. *United Farm Workers of America v. Agricultural Labor Relations Board*, 74 Cal.App.3d 347, 141 Cal.Rptr. 437 (1977). The statute relating to the ALRB provided for judicial review within 30 days after issuance of the order. This period could not be extended by seeking reconsideration; the limitation period begins on the date of final order regardless of the pendency of a petition for reconsideration. Under the new statute, the ALRB could continue to maintain the same rule, if it wished to do so, by causing the effective date of its orders to coincide with the date they are issued and disclaiming any power to reconsider them.

the decision.²⁴⁴ And if the agency states an effective date for its decision that is shorter than 30 days after the decision becomes final, it should be clear from the statute that the agency cannot alter its decision after that effective date.²⁴⁵

b. The limitation period.

I believe that the statute should allow a 90 day limitation period for judicial review of adjudicatory action. The 30-day period in the existing APA seems too short, since persons often are not represented by counsel at the agency level and must secure counsel in order to appeal.²⁴⁶ Section 1094.6 was enacted more recently than section 11523 (1976 as opposed to 1945) and its 90 day period probably better represents current

²⁴⁴This is not quite correct, however, since both the provision for correction of mistakes and for review of a final decision provide that the time periods can be extended by regulation. Where an agency has extended these time periods by regulation, it is important that the agency extend the effective date of a final decision so that it occurs after there is no further possibility of change. If the agency has not done this, it should be clear that a petition for judicial review filed after the effective date cuts off the power of the agency to correct mistakes or grant review of a final decision, even if its regulations allow it to do so. See §649.170(f) which cuts off the power to correct mistakes after initiation of administrative or judicial review.

²⁴⁵Such a provision should be added to the provisions relating to correction of errors and review of final decisions.

²⁴⁶For example, see *Kupka v. Board of Administration, Public Employees Retirement System*, 122 Cal.App.3d 791, 176 Cal.Rptr. 214 (1981) (misunderstanding between petitioner and his attorney allowed 30-day period to slip by--court has no power to relieve default on grounds of mistake, inadvertence, or excusable neglect).

thinking about the appropriate limitation period.²⁴⁷ This section would unify a large group of existing statutes that, without any rationale that I can perceive, provide for limitation periods between 30 days and one year.²⁴⁸

I believe that the new 90-day statute should also cover judicial review of an agency decision refusing to hold an adjudicatory hearing required by the APA or other law. Present law places such review under the three-year statute of limitations for actions on a liability created for statute.²⁴⁹ This seems absurd; judicial review of such refusal should come quite quickly after the agency refuses to hold the hearing so that, if plaintiff is successful, the hearing can be held while the facts are still fresh.²⁵⁰

c. Statute of limitations for judicial review of non-

²⁴⁷See *Hittle v. Santa Barbara County Employees Retirement Ass'n*, 39 Cal.3d 374, 216 Cal.Rptr. 733 (1985), which held that the 90-day period of section 1094.6 could not be shortened by local ordinances or retirement plans. The Supreme Court stated that as a matter of policy a 90-day period suffices to keep stale claims out of court, but any shorter period might impede the bringing of meritorious actions.

²⁴⁸See note 227.

²⁴⁹*Ragan v. City of Hawthorne*, 212 Cal.App.3d 1368, 261 Cal.Rptr. 219 (1989). But see *Farmer v. City of Inglewood*, 134 Cal.App.3d 130, 140-41, 185 Cal.Rptr. 9, 15 (1982) which applies the 90-day statute of §1094.6 to a situation in which a hearing was denied; the claim accrued when the hearing should have been granted but was tolled until the time that the agency finally refused to grant one.

²⁵⁰As discussed below, the applicable statute of limitations is tolled until an agency notifies a person of the applicable limitations period. In default of such notice, the limitations period would be six months after the agency's final decision to refuse to provide a hearing.

adjudicatory agency action.

I have suggested that a uniform 90-day period apply for judicial review of all state and local adjudicatory action. This recommendation applies to all situations (whether or not covered by the new APA) in which an on-the-record hearing is provided, whether required by constitution, statute, regulation, or custom. Generally, these are the actions covered by section 1094.5 of existing law.²⁵¹

Should we attempt at this time to prescribe a uniform statute of limitations for all other judicial review of agency action--for the vast array of actions challenged in court that are not adjudicatory in nature? These actions involve both attacks on agency regulations and on the vast array of generalized and individualized actions of agencies that are not required to be taken after provision of a hearing. Normally, judicial review of such actions is obtained through a writ of "traditional" mandamus²⁵² or through declaratory judgment.²⁵³ Under present law, the normal statutes of limitation apply--three

²⁵¹CCP §1094.5 applies to review of proceedings "in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer..."

²⁵²CCP §1085. Traditional or ordinary mandamus applies where the defendant owes a non-discretionary duty to plaintiff (or possibly in cases of abuse of discretion). Judicial review of adjudicatory action under §1094.5, although also styled as mandamus, is in fact much more like the traditional writ of certiorari.

²⁵³CCP 1060. Judicial review of regulations is obtained through declaratory relief. Gov't C. §11,350. No statute of limitations is set forth.

or four years after the right accrues. This really seems far too long a period of time in which to mount a challenge of agency action. In other situations, specific statutes prescribe time limits.²⁵⁴

I am reluctant to try at this time to prescribe a single limitation period for such a vast array of state and local actions. Perhaps it will be possible to do so in connection with a proposal for a single unified judicial review mechanism; I intend to propose one in the next installment of this study.

Just to identify one problem, it would not be good policy to state a uniform 90-day limitation provision for judicial review of regulations, since in many cases people are not even aware of a regulation until long after it has been adopted. Some federal statutes do impose such a limitation on challenging regulations, and they are generally considered as rather draconian since so many potential challengers of the regulation are certain to be barred by the short limitation period. To name another problem, the vast array of agency actions that would be swept under such a uniform procedure lack commonality, so that it would be difficult to write a statute prescribing exactly when the cause of action accrues.²⁵⁵ Thus I will revisit the subject of statutes of

²⁵⁴See Pub. Res. C. §21167, prescribing various limitation periods for different claims relating to environmental impact statements.

²⁵⁵See, e.g., *Monroe v. Trustees of California State Colleges*, 6 Cal.3d 399, 99 Cal.Rptr. 129 (1971) (refusal to reinstate professor discharged 16 years before for refusal to sign loyalty oath--statute starts running from refusal to reinstate, not from initial discharge).

limitation for review of other agency actions in the next phase of this study.

d. Extension of time if agency delays providing record.

Both generic statutes contain provisions extending the statute of limitations if the agency is slow in providing the record, including the transcript.²⁵⁶ I suggest that a new generalized judicial review section contain a tolling provision of this type. Often, counsel must examine the record in order to decide whether it is sensible to seek judicial review; therefore, the record should be available before the decision to pursue review must be made.

Both generic statutes require that the record be requested within 10 days after the decision becomes final in order to trigger the extension provision. This seems too strict. I suggest that the extension provision be triggered if the request for the record is made within 30 days after the effective date of the decision. Then the time to seek review would be extended until the later of the following: i) 90 days after the effective date of the decision or ii) 30 days after the agency supplies the record.

The existing judicial review statutes providing for review

²⁵⁶However, if the material supplied by the agency omits an item which should have been included, the statute of limitations is not tolled until the missing item is supplied--at least where the petitioner is not prejudiced by the omission. *Compton v. Mt. San Antonio Community College Board of Trustees*, 49 Cal.App.3d 150, 122 Cal.Rptr. 493 (1975).

in the Court of Appeals or the Supreme Court, rather than the Superior Court, contain a different provision relating to the record. The agency must supply the record after the court clerk notifies the agency that a petition for review has been filed.²⁵⁷ Thus in cases reviewed in the Courts of Appeal or the Supreme Court, the record is not available to a petitioner at the time the decision to seek review is made.²⁵⁸ I am uncertain whether this different pattern is required by the mechanics of appellate practice or whether the statute should make the same provision for cases reviewed in trial courts and appellate courts. Assuming the Commission decides to preserve the existing provisions that lodge appeals from certain agencies in the Court of Appeals or the Supreme Court,²⁵⁹ it should also decide whether the provisions relating to the record should differ with respect to such appeals.

e. Notice to parties of limitation period

Section 1094.6 requires that the agency decision give notice that the time within which review must be sought is provided by that section.²⁶⁰ Case law holds that such notice is required

²⁵⁷See Pub.Util. C. §1756 (Public Utilities Comm'n); Labor C. §1160.8 (Agricultural Labor Relations Board); Labor C. §5951 (Workers' Compensation Appeals Board).

²⁵⁸Obviously such statutes contain no tolling provision relating to agency delays in furnishing the record, since the petition must be filed before the record is supplied.

²⁵⁹The issue of the proper court in which to obtain review will be considered in the next phase of the study.

²⁶⁰Vehicle C. §14401(b) and Unempl. C. §410 require similar notification.

to start the 90-day period running.²⁶¹ I think that an agency decision should notify parties of the date by which review must be sought and it should actually give the date on which the limitation period runs out.²⁶² The present statutes applicable to judicial review of state agency action impose no duty on the agency to warn litigants of the short limitations period on seeking review.²⁶³ Such statutes can function as a trap. Litigants who are not represented by counsel (and perhaps even some represented by inexperienced counsel) may inadvertently let the short period slip away.

Absent written notice²⁶⁴ of the limitation period on seeking review, the 90-day statute of limitations should be tolled. However, the applicable limitations period, where no notice of the limitation date was given, should be a reasonable period, say six months after the effective date of the decision. It should not be the three or four year periods provided by the default statutes of limitation.

²⁶¹El Dorado Palm Springs Ltd. v. Rent Review Comm'n of City of Palm Springs, 230 Cal.App.3d 335, 281 Cal.Rptr. 327 (1991).

²⁶²The adjudication provisions of the statute should include information about the limitation period among the necessary elements of an agency final decision.

²⁶³See Elliott v. Contractors' State License Board, 224 Cal.App.3d 1048, 274 Cal.Rptr. 286 (1990) (licensee wrote Board asking for information about appeal but it failed to respond--such facts do not estop Board from asserting limitations).

²⁶⁴Case law under section 1094.6 indicates that the notice can be written or oral. El Dorado Palm Springs Ltd. v. Rent Review Comm'n of City of Palm Springs, 230 Cal.App.3d 335, 281 Cal.Rptr. 327 (1991). However, I believe that the notice should be written to avoid credibility disputes about whether oral notice was given.

f. No extension because decision is mailed

In accordance with current law,²⁶⁵ the statute should make clear that the limitation periods are not extended because the agency decision is mailed despite the provision in the Act that service or notice by mail extends any prescribed period of notice and any right or duty to do an act within a prescribed period.²⁶⁶

g. Other issues. The revised statute should confirm existing law (perhaps in a comment) that an agency can be estopped to plead the statute of limitations if a failure to seek review within the limitation period was attributable to misconduct of agency employees.²⁶⁷ And a petition that is timely filed but has a technical defect (whether or not the defect is detected by the court clerk and whether or not the clerk refuses to file the defective petition) should not be dismissed even though the defect is corrected after the

²⁶⁵Tielsch v. City of Anaheim, 160 Cal.App.3d 576, 206 Cal.Rptr. 740 (1984). The workers' compensation rule is to the contrary. Villa v. WCAB, 156 Cal.App.3d 1076, 203 Cal.Rptr. 26 (1984).

²⁶⁶Present APA draft §613.230.

²⁶⁷Ginns v. Savage, 61 Cal.2d 520, 39 Cal.Rptr. 377 (1964); CEB, California Administrative Mandamus §§7.17 (1989). It may be that estoppel is permitted with respect to mandate petitions under §1094.5 in the Superior Court, but not with respect to cases filed in the Court of Appeals or the Supreme Court, since the time limits in the latter cases are jurisdictional. A late-filing petitioner should be able to assert an estoppel defense regardless of the court in which review is sought.

limitations period expires.²⁶⁸ If a person is never notified of an agency decision (for example, because it is lost in the mail), a petition for review should be considered timely if filed within a reasonably short period after the person finally receives notice of the decision.²⁶⁹ Finally, if the limitation period ends on a Sunday or holiday, it should be extended until the next following day.²⁷⁰

²⁶⁸United Farm Workers of America v. ALRB, 37 Cal.3d 912, 210 Cal.Rptr. 453 (1985); CEB, California Administrative Mandamus §§7.18 (1989)

²⁶⁹State Farm Fire & Casualty v. Workers' Compensation Appeals Bd., 119 Cal.App.3d 193, 173 Cal.Rptr. 778 (1981).

²⁷⁰Alford v. Industrial Accident Commission, 28 Cal.2d 198, 169 P.2d 641 (1946).