Study N-203 October 25, 1994

Memorandum 94-54

Judicial Review of Agency Action: Mandamus, Venue, and Stays

BACKGROUND

The Commission began work on judicial review of agency action during 1993, but set it aside temporarily while wrapping up administrative adjudication by state agencies.

The Commission's consultant, Professor Asimow, has prepared three background studies for Commission consideration:

Judicial Review of Administrative Decision: Standing and Timing (September 1992)
The Scope of Judicial Review of Administrative Action (January 1993)
A Modern Judicial Review Statute to Replace Administrative Mandamus (November 1993)

Of these studies, the Commission has made policy decisions concerning the first two, and has reviewed some drafting implementing the policy decisions. The Commission has not yet considered the third study.

The purpose of this memorandum is to present policy issues involved in the third study, with the view to developing a complete draft on the subject of judicial review of agency action.

A MODERN JUDICIAL REVIEW STATUTE TO REPLACE ADMINISTRATIVE MANDAMUS

A copy of the third study, A Modern Judicial Review Statute to Replace Administrative Mandamus (November 1993), is attached to this memorandum. The study proposes that California's administrative mandamus statute (Code of Civil Procedure Section 1094.5) and traditional mandamus statutes be replaced by straightforward judicial review procedures based on the normal rules of civil practice. The study further suggests that judicial review of state agency decisions under the Administrative Procedure Act be lodged with the court of appeal

rather than the superior court (or Supreme Court). Venue in these cases would be in the appellate district of the petitioner's residence or principal place of business (or, if review authority is left in the superior court, in Sacramento or another county where the Attorney General has an office). The standard by which the reviewing court may grant a stay would be similar to the standard for granting a preliminary injunction.

This study was circulated for comment in November 1993, with a four month comment period. The Commission has received three comments on the study:

> State Bar of California, Environmental Law Section (Exhibit pp. 1-2)
> State Board of Equalization (Exhibit pp. 3-4)
> California Academy of Attorneys for Health Care Professionals (Exhibit pp. 5-9)

REPLACEMENT OF ADMINISTRATIVE MANDAMUS AND TRADITIONAL MANDAMUS WITH AN APPEAL PROCEDURE

Environmental Issues

The State Bar Environmental Law Section has prepared an extensive review of the California Environmental Quality Act. One of its recommendations is that the procedural and substantive standards for administrative mandamus and traditional mandamus should be revised and combined into one new set of standards. CEQA Review Committee, *The California Environmental Quality Act: Assessment and Recommendations* at p. 98 (March 3, 1994). In this connection, the Committee's letter to the Commission notes that:

> Problems often occur as a result of the complexity and confusion in the rules governing judicial review of administrative action. Some of the Section's recommendations on CEQA litigation may also have applicability to other areas of administrative law. In some instances the Section concluded an issue should be addressed as part of a comprehensive review of administrative law. In particular, the Environmental Law Section endorses the concept that the statutory provisions governing judicial review of administrative decisions be revised and consolidated into a single judicial review statute.
> Exhibit pp. 1-2.

Taxation Issues

The State Board of Equalization points out that judicial review of sales and use taxes, other excise taxes, and state assessed property taxes is not obtained

through administrative mandamus but through a de novo proceeding in superior court pursuant to a lawsuit for a refund of taxes. The Board objects to any revision of the law that would have the effect of denying a taxpayer a full evidentiary hearing de novo in the superior court on a tax refund claim. Exhibit p.3.

Health Care Issues

The California Academy of Attorneys for Health Care Professionals does not believe the background study justifies replacement of the current judicial review scheme. Their position is that the administrative mandamus procedures are easy to learn and use and are familiar to practitioners; the choice between alternative and peremptory writs is useful and serves an important purpose; the statute is straightforward and easy to use; practitioners are not dissatisfied with it; and there is no reason to make everyone practicing in the field start from scratch with an entirely new procedure (the Oregon procedures offered as an alternative are no model). Exhibit pp. 5-6.

The Academy also believes the focus of the background study on review of agency decisions is too narrow, since the administrative mandamus statute governs review of quasi-judicial decisions of private bodies as well (e.g., hospital decisions). If administrative mandamus is to be abolished, something must be done with the non-agency cases that are currently reviewed under the statute. Exhibit pp. 8-9.

> There are certainly improvements that might be made in the administrative process, but our position is that the wholesale junking of Code of Civil Procedure section 1094.5 without a perceived need by the bench or bar for such a drastic step, would be a tragic mistake.
> Exhibit p. 9.

TRANSFER OF REVIEW JURISDICTION FROM SUPERIOR COURT TO COURT OF APPEAL

Health Care Issues

The California Academy of Attorneys for Health Care Professionals strongly opposes transfer of review authority to the Court of Appeal. The Court of Appeal is not equipped to take new evidence; in cases involving constitutionality, proceedings in superior court are necessary to create an evidentiary record; and

transfer to the Court of Appeal will lose the statement of decision written by superior court judges in independent judgment cases. Exhibit p. 6.

STANDARD OF REVIEW

The standard of review on judicial review of agency action is not the subject of this background study. However, the background study does note that Professor Asimow has recommended and the Commission is considering elimination of "independent judgment" review.

The California Academy of Attorneys for Health Care Professionals vigorously opposes further restriction of the independent judgment test. Exhibit pp. 7-8. The staff will bring their concerns to the Commission's attention when this matter is again before the Commission in the near future.

STAYS DURING JUDICIAL REVIEW

Taxation Issues

The State Board of Equalization believes it is fundamental that payment of the tax be required before judicial review. Exhibit p. 4. The Board calls the Commission's attention to Cal. Const. Art. XIII, § 32:

> No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

ENVIRONMENTAL LAW SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

February 25, 1994

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

BACKGROUND STUDY: JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

The Environmental Law Section of the State Bar of California appreciates the opportunity to comment on the background study: "A Modern Judicial Review Statute to Replace Administrative Mandamus." The background study is thought provoking and well researched. We look forward to the Commission's recommendations.

The Environmental Law Section has recently conducted a thorough review of the California Environmental Quality Act (CEQA). The Section completed a draft report in October 1993, and circulated the draft report for comment by Section members and CEQA practitioners. After reviewing the comments on the draft, the Section has prepared a final draft report, "The California Environmental Quality Act: Assessment and Recommendations." On February 25, 1994, the State Bar's Committee on Courts and Legislation approved release of the report for public review before the report is considered by the State Bar Board of Governors. I will send you a copy of the report under separate cover.

Of particular interest is Section N of the CEQA report, which addresses CEQA litigation. Lawsuits raising CEQA issues are filed as actions to review the decisions of public agencies. The Environmental Law Section urges the Law Revision Commission to take into consideration the analysis and recommendations of the CEQA report when the Commission makes its recommendations on judicial review of administrative decisions.

In preparing its report, the Environmental Law Section devoted a great deal of attention to CEQA litigation issues. Many of the issues raised in connection with the CEQA litigation are not unique to CEQA. Problems often occur as a result of the complexity and confusion in the rules governing judicial review of administrative action. Some of the Section's recommendations on CEQA litigation may also have applicability to other areas of administrative law. In some instances the Section concluded an issue should be addressed as

part of a comprehensive review of administrative law. In particular, the Environmental Law Section endorses the concept that the statutory provisions governing judicial review of administrative decisions be revised and consolidated into a single judicial review statute.

If you have any questions or would like further information please feel free to contact me at (916) 657-0662 or contact Section Vice-Chair Tim Taylor, who also chairs the committee which prepared the CEQA report, at (916) 447-8899.

Sincerely,

Andrew H. Sawyer, Chair
Environmental Law Section

cc: Tim Taylor
Balfrey & Abbott
1801 "I" St., Suite 200
Sacramento, CA 95814

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
450 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 327-4975

File:_____

February 28, 1994

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Commissioners:

This is in response to your request for comment with respect to the background study regarding "A Modern Judicial Review Statute to Replace Administrative Mandamus," prepared for you by Professor Michael Asimow, dated November 1993.

The State Board of Equalization would like to reiterate its position previously communicated to you with respect to your study re "Centralization of Administrative Law Judges" and your study "Administrative Adjudication by State Agencies," that the Commission and its consultant have not given proper consideration to the distinction between the power of the State to regulate (police power) and the power of the State to tax (revenue raising).

Insofar as administrative mandamus and taxation is concerned, the Commission's study misses the point entirely. The State Board of Equalization administers the California Sales and Use Tax Law and other excise tax laws. Judicial review in these matters is not obtained by means of the administrative mandamus provisions of Code of Civil Procedure section 6094.5. Administrative review is a *de novo* proceeding in the superior court pursuant to a statutorily authorized suit for refund of sales tax. Rev. & Tax. Code § 6933. *Marchica v. State Board of Equalization* (1951) 107 Cal.App.2d 501. Since 1984, the scope of judicial review has been similarly broad in regard to suits for refund of state assessed property taxes. Rev. & Tax. Code § 5170.

The Board objects to any revision of the Code of Civil Procedure which would have the effect of denying a taxpayer a full evidentiary hearing *de novo* in the superior court on a tax refund claim.

The difference between regulation and taxation is further evident in regard to "stays" during judicial review. It is fundamental that payment of the tax may be required prior to judicial review. We call your attention to California Constitution, Art. XIII, § 32, which provides as follows:

> "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

Sincerely,

Burton W. Oliver
Executive Director

BWO:sr

cc: Honorable Brad Sherman
Honorable Matthew K. Fong
Member, First District
Honorable Ernest J. Dronenburg, Jr.
Honorable Gray Davis

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February 28, 1994

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Comment on Professor Asimow's Background Study "A Modern Judicial Mandamus Statute To Replace Administrative Mandamus"

Dear Sir or Madam:

I am submitting the following comments on behalf of myself and the California Academy of Attorneys for Health Care Professionals. All of the members of this Academy are involved almost daily in proceedings which culminate in judicial review of administrative hearings under Code of Civil Procedure section 1094.5. We submit the following criticisms of Professor Asimow's study:

A. The Proposed New Statute

We do not believe that Professor Asimow's study justifies the wholesale replacement of the current administrative mandamus statute with an entirely new procedure under which everyone practicing in the field must start over from scratch. Professor Asimow's criticism of the technicalities of traditional mandamus is not a justifiable basis for an attack on section 1094.5. Professor Asimov's reference to this statute as "antiquated" hardly advances his position. There may be newer statutes in other states, but are they in fact better? Statutes borrowed from other states do not reflect California constitutional or administrative considerations which have led to our particular brand of judicial review of administrative action.

The procedures under section 1094.5 are not difficult to learn and are familiar to those of us who actually practice in the field. California Continuing Education of the Bar publishes an excellent practice book, entitled California Administrative Mandamus. This book is more than sufficient to cover practice under this straightforward and easy to use statute.

There does not appear to be any upwelling of popular support for section 1094.5. It should be noted that present section 1094.5 is about two or three printed pages long in total. Replacing it with the 13-page Oregon monster proposed by Professor Asimow is frankly daunting.

Oregon is hardly the state upon which to model California procedure. My experience with judicial review of administrative procedure in Oregon is that Oregon simply has not had such review. See Patrick v. Burget (1988) 486 U.S. 94, 104-105, 100 L.Ed.2d, 108 S.Ct. 1658, 1665 (no judicial review of hospital peer review proceedings).

Finally, the choice between seeking an alternative writ or filing a motion for a peremptory writ should be maintained. A motion for a peremptory writ is utilized by experienced practitioners when the time of the hearing is not particularly critical. An alternative writ is sought to obtain faster action and an earlier hearing date than could be obtained for setting a motion for peremptory writ.

B. Transfer of These Cases To the Court of Appeal

We strongly oppose transfer of administrative mandamus review to the Courts of Appeal in the first instance. The study does not discuss subsection (e) of section 1094.5, which permits the trial court to receive new evidence and, where the independent judgment test is applicable, to ". . . admit the evidence at the hearing on the writ without remanding the case." A Court of Appeal is not equipped for the taking of new evidence. While the taking of new evidence occurs infrequently, in the cases where it is important to the petitioner, the right to offer such new evidence should not be lost in the revision process.

Professor Asimov's study does not appear to cover the operation of section 3.5 of Article III of the California Constitution which provides that an administrative agency has no power to rule on the constitutionality of statutes and regulations or to rule on other constitutional issues. The evidentiary record for constitutional issues is now made in superior court in conjunction with subsection (e).

The fact that attorney discipline cases and Public Utilities Commission cases are now heard in the California Supreme Court does not justify that the transfer of these cases to the Courts of Appeal as opposed to the trial courts on administrative mandamus. If a physician's or psychologist's professional license must be reviewed in a trial court proceeding, there is no good reason why similar review for an attorney cannot start at the superior court level. A similar observation can be made about P.U.C. cases.

A transfer of section 1094.5 proceedings to the Court of Appeal loses the statements of decision written by superior court judges in independent judgment cases.

C. The Substantial Evidence Rule

We vigorously oppose further restriction of the "independent judgment" test in administrative mandamus cases. At present, administrative law judges can only make proposed decisions -- even though administrative law judges, and not the Boards, are the only ones who hear the live testimony of witnesses. Until the administrative procedure act, the Boards have 100 days within which to adopt or non-adopt a proposed decision. If the decision is against the position advocated by the staff of the Board, usually the decision is non-adopted. A transcript is then prepared of the administrative hearing.

Written argument is permitted by some boards, but usually with simultaneous briefing so that the party being disciplined does not have an opportunity to reply to the written arguments of the Attorney General.

Oral argument is permitted by some Boards, such as the Medical Board. The Board of Psychology, for example, never permits oral argument.

The Boards are supposed to read the transcripts of the administrative hearing. In practice, those of us practicing in the area suspect that the members of the Boards never read the transcripts because they are occupied with other matters they deem more important than an individual doctor's livelihood. They just vote their gut reactions to the case, emotionally influenced by their staffs who lost before the administrative law judge. The Board's in-house attorney is then directed to draft findings and a decision that supports the way the members of the Board want it to come out. Such findings are accorded the presumption of regularity.

Compare the injustice of what happens in the administrative process with what happens when a new trial is granted in a civil action in superior court. If a new trial is granted in a civil action, the old verdict is vacated and the parties start over. Not so in administrative proceedings. The proposed decision of the administrative law judge becomes a nullity. Under the substantial evidence rule, every witness believed by the ALJ (the only fact-finder who actually heard live witnesses) is now to be disbelieved. Every witness who was disbelieved by the ALJ is now to be believed (no matter how incredible he or she was before the ALJ). The testimony of the disbelieved witnesses is now "substantial evidence" which supports the new "decision" of Board members who probably never opened the transcripts to read any of the evidence. All of the presumptions on administrative mandamus favor the "decision" of the Board.

Professor Asimow's study would best be tempered by some practical experience in representing a client who proceeds down the present "Royal Road to Revocation," which is my termination to the stacked-deck process which currently exists in our administrative system. The "independent judgment" test, where it exists, permits a good lawyer to place before a sensitive judge the case for not revoking his client's license. If the judge reads the record and agrees with the findings of the ALJ (rather than a result-oriented Board), there is a chance that justice will be done. With the substantial evidence test, our clients are virtually doomed by administrative boards that do not have any vaunted administrative expertise, but are political appointees and public members. These Boards do not decide these quasi-adjudicative cases on a fair basis.

In the landmark case of Bixby v. Pierno (1971) 4 Cal.3d 130, 144, the California Supreme Court concluded that if ". . . the right has been acquired by the individual and if the right is fundamental, the courts have held that the loss of it is sufficiently vital to the individual to compel a full and independent review. The abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction."

Professor Asimow's study may reflect a prejudice against the independent judgment test when he cites only to the dissenting opinion in Bixby. The substantial evidence rule is fine if one truly believes that the underlying process is a fair one. It dooms litigants to endure injustice if the administrative process is fundamentally unfair.

Finally, the Asimow study does not discuss the constitutional issues which led to the Bixby decision. There are important separation of powers concerns as well as other constitutional issues that need to be addressed before the "independent judgment" test is junked. Adoption of a statutory scheme that will be subject to immediate constitutional attack would be unwise.

D. Focus Only on Agency Review

Professor Asimow's study is flawed by its focus on Code of Civil Procedure section 1094.5 only as a mechanism for reviewing decisions of state and local governmental boards. It is also the key statute for judicial review of quasi-judicial decisions of private bodies, such as hospitals. E.g., Anton v. San Antonio Community Hospital (1977) 19 Cal.3d 802, 813-825. Compare Lewin v. St. Joseph Hospital of Orange (1978) 82 Cal.App.3d 368, 383-386 (quasi-legislative decision of hospital reviewable on ordinary mandamus). Quasi-judicial cases from hospitals typically require review of hospital charts, reviewed by non-lawyers sitting on peer review committees and hospital boards of directors.

If Professor Asimow's proposed new statute is to replace Code of Civil Procedure section 1094.5, then his study should address all of the types of cases which are currently reviewed under the statute. To do otherwise would invite the Legislature to "throw out the baby with the dishes," paraphrasing late President Lyndon Johnson's fractured metaphor.

There are certainly improvements that might be made in the administrative process, but our position is that the wholesale junking of Code of Civil Procedure section 1094.5 without a perceived need by the bench or bar for such a drastic step, would be a tragic mistake.

Very truly yours,

Russell Iungerich

RI:sae
cc: Professor Asimow

Study N-203

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

BACKGROUND STUDY

A Modern Judicial Review Statute To Replace Administrative Mandamus

Professor Michael Asimow
UCLA Law School

November 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

A MODERN JUDICIAL REVIEW STATUTE TO REPLACE ADMINISTRATIVE MANDAMUS

By Michael Asimow

EXECUTIVE SUMMARY

This report is the seventh and last in a series of studies by the author relating to California administrative adjudication and judicial review of agency action. It focuses on the vehicle by which judicial review is obtained. It recommends abolishing California's antiquated administrative mandamus statute, Code of Civil Procedure section 1094.5. That procedure (as well as traditional mandate under section 1085) would be replaced with a petition for judicial review. That petition would be the vehicle to review both quasi-legislative and quasi-judicial agency action without the complexities of traditional mandate practice.

At present, most judicial review of agency action occurs in the superior court. The report suggests that certain agency action (adjudication and rulemaking governed by the Administrative Procedure Act) be initially reviewed in the court of appeal.

The report also contains recommendations for modernizing the provisions relating to venue for judicial review and to stays pending judicial review.

TABLE OF CONTENTS

A MODERN JUDICIAL REVIEW STATUTE TO REPLACE ADMINISTRATIVE MANDAMUS

By Michael Asimow[1]

This is the seventh report prepared by the author for the California Law Revision Commission on revising the adjudication provisions of California's Administrative Procedure Act (APA) and modernizing the system of judicial review of state and local administrative agency action.[2] This report is the last one in the series.[3]

This report proposes that California's antiquated provision for administrative mandamus, Code of Civil Procedure (CCP) section 1094.5, be replaced. It also recommends dispensing with ordinary mandamus as a method of judicial review of agency action and repealing as well numerous other general and special

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[1]Professor of Law, UCLA Law School, Los Angeles, CA 90024-1476. Phone (310) 825-8204. The suggestions of William C. Heath, Stephen L. Kostka, Gregory Ogden, and Fredric D. Woocher are deeply appreciated.

[2]Previous reports are:
Administrative Adjudication: Structural Issues (1989)
Appeals Within the Agency (1990)
Administrative Impartiality (1991)
The Adjudication Process (1991)
Judicial Review: Standing and Timing (1992)
The Scope of Judicial Review (1993).
Copies of these reports are available from the California Law Revision Commission, 4000 Middlefield Rd. Ste. D-2, Palo Alto, CA 94303-4739. The Commission's phone number is (415) 494-1335.

The first three of these reports were revised and published in Asimow, "Toward a New California Administrative Procedure Act: Adjudication Fundamentals," 39 UCLA L. Rev. 1067 (1992).

[3]The Commission has not yet decided whether to continue its administrative law project by evaluating the provisions relating to rulemaking and non-judicial controls over agencies.

provisions for obtaining review. The goal is to produce a single, straightforward statute providing the ground rules for judicial review of all forms of state and local agency action. Wherever possible, the normal rules of civil procedure should apply to judicial review. The underlying objective is to allow litigants and courts to reach and resolve swiftly the substantive issues in dispute, rather than to waste resources disputing tangential procedural issues.

A. Replacing mandamus

1. Existing California law

Under existing law, on-the-record adjudicatory decisions of state and local government are reviewed by superior courts under the administrative mandamus provision of CCP section 1094.5. Regulations adopted by state agencies are reviewed by superior courts through actions for declaratory judgment.[4] A range of miscellaneous agency action is reviewed by traditional mandamus under section 1085[5] or by declaratory judgment.[6]

Special review procedures are set forth in the statutes creating many agencies. Decisions of the PUC and of the Review

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[4]Gov't C. §11,350(a); CCP §1060.

[5]See, e.g., Vernon Fire Fighters v. City of Vernon, 107 Cal.App.3d 802, 165 Cal.Rptr. 908 (1980) (§1085 mandate to review whether a local rule was an abuse of discretion); Shuffer v. Bd. of Trustees, 67 Cal.App.3d 208, 136 Cal.Rptr. 527 (1977) (§1085 to review non-record adjudicatory academic decision of state college system).

[6]See, e.g., Californians for Native Salmon Ass'n v. Dep't of Forestry, 221 Cal.App.3d 1419, 271 Cal.Rptr.270 (1990) (agency's general failure to observe environmental policies in issuing timber permits)

Department of the State Bar Court are reviewed on a discretionary basis by the Supreme Court.[7] Decisions of several agencies are reviewed initially by courts of appeal (in some cases as a matter of right, in some cases by discretion only).[8] Agency action can also be reviewed in the context of enforcement actions or criminal actions brought against individuals for violation of regulatory statutes or rules. There are numerous problems with this patchwork. Most serious is the antiquated and idiosyncratic nature of the writ of mandamus.[9]

a. Pleading complexities. Mandamus is a world of its own. A petitioner who seeks mandamus begins by serving a petition for issuance of an alternative writ of mandate on the respondent, then filing it in the trial court--the reverse of normal procedure.[10] The judge may summarily deny the petition even though the respondent has not filed an answer or otherwise

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[7]See Pub. Util. C. §1756 and Civil Rule 58 (PUC); Rule 952 (State Bar Court).

[8]See Rule 57 (Workers' Comp. App. Bd.); Rule 59 (Agric. Labor Relations Board and Public Employment Relations Board)

[9]See generally 8 Witkin, California Procedure Chapter XII (3d ed., 1985, & 1993 Supp.) (hereinafter "Witkin"); 2 G. Ogden, Calif. Public Agency Practice chapter 53 (1992) (hereinafter "Ogden") (excellent summary of writ practice in administrative cases); CEB, California Administrative Mandamus (2d ed. 1989 and 1993 Supp.); S. Kostka and G. Robinson, CEB Action Guide--Handling Administrative Mandamus (1993) (51-step process). I will use the terms "mandate" and "mandamus" interchangeably in this report.

[10]CCP §1107; Witkin §§163, 164; Calif. Rules of Court 56(b) (applicable to writs in reviewing courts). For good cause, the court may grant the application ex parte without service on the respondent. CCP §1107.

appeared.[11] The respondent may file points and authorities in opposition to the issuance of an alternative writ; the court can then refuse to issue the alternative writ.[12] Thus mandate contains built-in provision for a court to abort the review process before the hearing.

The court then issues an alternative writ of mandate which is served on the respondent. The alternative writ is an order to the agency to show cause why the requested relief should not be granted.[13] The respondent then files a verified document called a return (which serves the function either of an answer or a demurrer).[14] Petitioner then can file a replication (or "traverse"), which is like an answer to the answer and may be

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[11]Kingston v. Dep't of Motor Vehicles, 271 Cal.App.2d 549, 76 Cal.Rptr. 614 (1969) (such summary denial by trial court is a final order and is appealable). But see Kowis v. Howard, 3 Cal.4th 888, 12 Cal.Rptr.2d 728 (1992) (summary denial of writ by court of appeals is not law of the case). Kowis would suggest that summary denial of a petition for an alternative writ is not a final order and would not preclude a petitioner from filing a motion for a peremptory writ.

[12]CCP §1107; Wine v. City Council of Los Angeles, 177 Cal.App.2d 157, 2 Cal.Rptr. 94 (1960); Patterson v. Bd. of Supervisors, 79 Cal.App.2d 670, 180 P.2d 945 (1947); Kleps, "Certiorarified Mandamus Reviewed: The Courts and California Administrative Decisions-1949-1959," 12 Stanford L. Rev. 554, 574 (1960).

[13]CCP §1087. The agency can moot the petition by complying with the alternative writ. Save Oxnard Shores v. Calif. Coastal Comm'n, 179 Cal.App.3d 140, 150, 224 Cal. Rptr. 425 (1986).

[14]In practice, the return is apparently called an answer or a demurrer. See Witkin §176; G. Ogden §53.10. Failure to file a return admits the factual allegations in the petition but the matter must still be heard by the court; the peremptory writ cannot be granted by default. CCP §1088; Rodriguez v. Municipal Court, 25 Cal.App.3d 527, 102 Cal.Rptr. 45 (1972).

needed to avoid admitting facts alleged in the return.[15] In traditional, but not in administrative mandamus, the statute provides for trial by jury.[16]

In practice, apparently many practitioners skip the alternative writ entirely and begin the case with a motion that a peremptory writ be issued.[17] Whether or not the case begins with issuance of an alternative writ, the court's final judgment is in the form of a peremptory writ of mandate, potentially enforceable against the respondent with a fine or, in the case of persistent disobedience, prison.[18]

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[15]Elliott v. Contractors' State Licensing Bd., 224 Cal.App.3d 1048, 1054, 274 Cal.Rptr. 286 (1990); Witkin §182; G. Ogden §53.12. In Elliott, the agency's return alleged that the licensee had obtained his license by fraud and the licensee failed to allege or prove the contrary. Consequently, the court correctly denied the petition for administrative mandamus on the basis of unclean hands. I believe that it is inappropriate for an agency to raise such arguments at the judicial review stage. I was informed by practitioners that the replication is almost never used in practice.

[16]CCP §1090. Practitioners inform me that jury trials are very rarely used in mandamus proceedings.

[17]The Los Angeles Superior Court encourages this procedure in the absence of a compelling need to appear ex parte. L. A. Superior Court Law and Discovery Manual V-D-2-a. The court can issue a peremptory writ without first issuing an alternative writ where the papers on file adequately address the issues, no factual dispute exists, additional briefing is unnecessary, the opposing party receives ten days notice and an opportunity to oppose this relief, and the court first issues an order that the writ will be issued. If petitioner seeks only a peremptory writ, it need not serve it on the respondent before filing the application. CCP §§1088, 1088.5, 1107; Palma v. U. S. Industrial Fasteners, Inc., 36 Cal.3d 171, 203 Cal. Rptr. 626 (1984) (peremptory writ issued by appellate court). See Ogden §53.01[2][c], 53.08.

[18]CCP §1097 ($1000 fine); Witkin §192.

b. Limitations on traditional mandamus. Traditional (as opposed to administrative) mandamus is limited by an arcane set of rules. It issues where the plaintiff seeks to enforce a ministerial (i.e. non-discretionary) duty owed by the defendant to the plaintiff[19] and to which plaintiff has a "clear" and "present" right;[20] it also can issue for abuse of discretion which sometimes is limited to "clear" abuse.[21] The writ cannot be issued where there is a plain, speedy, and adequate remedy at law.[22] These esoteric rules give rise to many difficulties when traditional mandamus is used for the purpose of reviewing agency action.[23]

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[19]Gilbert v. State of California 218 Cal.App.3d 234, 241, 266 Cal.Rptr.891 (1990); Harbach v. El Pueblo de Los Angeles State Historical Monument Comm'n, 14 Cal.App.3d 828, 92 Cal.Rptr. 757 (1971) (agency had ministerial duty to relocate building within monument after approving resolution and soliciting funds to do so).

[20]Wasko v. Calif. Dep't of Corrections, 211 Cal. App.3d 996, 1000, 259 Cal.Rptr. 764 (1989); Witkin §65 et. seq.

[21]Better Alternatives for Neighborhoods v. Heyman, 212 Cal.App.3d 663, 671, 260 Cal.Rptr. 758 (1989); Thelander v. City of El Monte, 147 Cal.App.3d 736, 748, 195 Cal.Rptr. 318 (1983). A local agency rule not reasonably based on the rulemaking record could be invalidated under §1085 apparently because adoption of such a rule is an abuse of discretion.

[22]CCP §1086; ABI, Inc. v. City of Los Angeles, 153 Cal.App.3d 669, 688, 200 Cal.Rptr. 563 (1984) (mandate unavailable where contract action would lie, but exception for cases where there is a dispute as to interpretation of statute); Culver City v. State Bd. of Equalization, 29 Cal.App.3d 602, 105 Cal.Rptr. 602 (1972) (mandamus denied--quasi-contract available); Wenzler v. Municipal Court, 235 Cal.App. 2d 128, 45 Cal.Rptr. 54 (1965) (same).

[23]See Moskovitz, "Spinning Gold Into Straw: The Ordinary Use of the Extraordinary Writ of Mandamus to Review Quasi-Legislative Actions of California Administrative Agencies," 20 Santa Clara L. Rev. 351 (1980). This is a forceful and persuasive argument that mandamus is the wrong remedy for the review of quasi-legislative administrative action.

c. Distinctions between traditional and administrative mandamus. In many cases, it is uncertain whether an action should be brought under administrative mandamus (section 1094.5) or traditional mandamus (section 1085) or declaratory judgment (section 1060). An action that could be brought under section 1094.5 must be brought under that section. People persistently file under the wrong section. Normally, after a skirmish between the parties about which writ was proper, the trial court excuses the error and allows petitioner to proceed under the proper writ.[24] On appeal, however, at least according to some cases, if the trial court used the wrong writ the case must be reversed so the case can be retried under the proper procedure--even if nobody objected![25]

Trial courts must distinguish between the writs, since there are numerous differences between section 1085 and 1094.5 procedure. As already mentioned, juries might be used in traditional mandamus but are not used in administrative mandamus. The statute of limitations is different.[26] The rule about ex-

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[24]See, e.g., Scott v. City of Indian Wells, 6 Cal.3d 541, 546, 99 Cal.Rptr. 745 (1972) (P sought declaratory judgment to review grant of conditional use permit, §1094.5 was correct remedy).

[25]Eureka Teachers Ass'n v. Bd. of Educ. of Eureka, 199 Cal.App.3d 353, 244 Cal.Rptr. 240 (1988) (citing conflicting cases on whether the error can be waived).

[26]See, e.g., Griffin Homes, Inc. v. Superior Court, 229 Cal.App.3d 991, 1003-07, 280 Cal.Rptr. 792 (1991). Sections 1094.5 and 1094.6 have thirty and ninety day limitation periods; other review statutes have different limitation periods. However, there is no statute of limitations on a §1085 mandate proceeding other than the normally applicable three- or four-year statutes or laches. Unfortunately, this difference will remain under the revised statute.

haustion of remedies is different.[27] Section 1094.5 has a clear provision concerning stays;[28] the availability of a stay is unclear under section 1085.[29] Section 1094.5 clearly specifies that the administrative decision is reviewed on the record made before the agency.[30] Section 1085 is unclear about whether the court should make a new record[31] or whether it should be limited to the record made before the agency or whether it should start with that record and then permit it to be supplemented by new evidence. Probably a declaratory judgment action is tried on a new record. The requirement that an agency make findings is not the same under the two writ sections.[32] Of particular importance, the scope of review of fac-

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

[28]CCP §1094.5(g), (h).

[29]Presumably a petitioner who seeks a stay as part of a section 1085 action must request a preliminary injunction.

[30]In independent judgment cases, the court can admit new evidence if with reasonable diligence it could not have been produced at the administrative hearing or if it was improperly excluded at the administrative hearing. CCP §1094.5(e).

[31]See discussion in Asimow, "The Scope of Judicial Review of Administrative Action" 90-92 (CA Law Rev. Comm'n Jan. 1993); Del Mar Terrace Conservancy, Inc. v. City Council of San Diego, 10 Cal.App.4th 712, 725-26, 741-44, 12 Cal.Rptr.2d 785 (1992) (trial court should have admitted new evidence in 1085 proceeding but error not prejudicial); Los Angeles Superior Court Law and Discovery Manual V-D-5 (in mandamus proceeding not under §1094.5 evidence can be in form of declarations, deposition or in court's discretion oral testimony).

[32]See, e.g., Calif. Aviation Council v. City of Ceres, 9 Cal.App.4th 1384, 12 Cal.Rptr. 2d 163 (1992) (land use decision adjudicatory so better findings required); Eureka Teachers Ass'n v. Bd. of Educ. of Eureka, 199 Cal.App.3d 353, 244 Cal.Rptr. 240 (1988).

tual issues is different between the two sections; section 1094.5 calls for a choice between independent judgment and substantial evidence.[33] The scope of review of factual determinations under section 1085 is unclear; it might be identical to substantial evidence or it might be a highly deferential "no evidence" standard.[34]

d. When section 1094.5 applies. Whether a particular case falls under section 1094.5 or section 1085 depends on several factors.

First, section 1094.5 applies only where "by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination in the determination of facts is vested in [the agency]..."[35] Where a statute, a regulation,

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[33]The scope of review issue is discussed in Asimow, "The Scope of Judicial Review," Calif. Law Rev. Comm'n (Jan. 1993).

[34]Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal.3d 28, 34 n.2, 112 Cal.Rptr. 805 (1974). See Shapell Industries, Inc. v. Gov. Bd. of Milpitas Unif. Sch. Dist., 1 Cal.App.4th 218, 232-33, 1 Cal.Rptr. 2d 818 (1992) (courts must review evidence in case reviewing legislative action but more deferentially than in case of adjudicatory action); Taylor Bus Serv. v. San Diego Bd. of Educ., 195 Cal.App.3d 1331, 1340, 241 Cal.Rptr. 379 (1988) (scope of review under §1085 mandamus is "entirely lacking in evidence"--which means "substantial evidence"!). My previous study on scope of review recommended unifying the scope of review of factual determinations underlying discretionary decisions. The scope of review should not vary as between adjudicatory and legislative actions, but appropriate deference should be given to factual determinations based on the agency's expertise; for example, courts must be cautious about second-guessing agency factual determinations that are technical in nature or which involve economic or scientific guesswork or predictions. See Asimow, "The Scope of Judicial Review" 70-75, 79-80 (Jan. 1993).

[35]See Civil Serv. Comm'n v. Velez, 14 Cal.App.4th 115, 17 Cal.Rptr.2d 490 (1993) (§1094.5 applicable to claim that agency denied a hearing when one was required).

or the constitution calls only for some agency procedure but not explicitly for a formal hearing, it is unclear whether section 1094.5 is available. Some cases imply a right to a hearing from statutes that provide only for an "administrative appeal" or some such term; others do not.[36] A new judicial

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[36]Statute requires on-the-record hearing, so §1094.5 applies: Eureka Teachers Ass'n v. Bd. of Educ. of Eureka, 199 Cal.App.3d 353, 244 Cal.Rptr. 240 (1988) (teacher's right to appeal a grade change by superintendent was a right to hearing--§1094.5 applies); Chavez v. Civil Serv. Comm'n, 86 Cal.App.3d 324, 150 Cal.Rptr. 197 (1978) (right of "appeal" means a required hearing--§1094.5 available); Jean v. Civil Service Comm'n, 71 Cal.App.3d 101, 139 Cal.Rptr. 303 (1977) (hearing implied from statute that permits dismissal only for cause--§1094.5 applies).

Statute does not require an on-the-record hearing so §1094.5 does not apply: Saleeby v. State Bar, 39 Cal.3d 547, 560-62, 216 Cal.Rptr. 367 (1985) (Bar's failure to provide for hearings in its rules concerning Client Security Fund was quasi-legislative--§1085 applies even though plaintiff seeks a hearing); Keeler v. Superior Court, 46 Cal.2d 596, 297 P.2d 967 (1956) (no hearing required for 10-day suspension); Taylor Bus Serv. v. San Diego Bd. of Educ., 195 Cal.App.3d 1331, 1340, 241 Cal.Rptr. 379 (1988) (in case of bid rejected for non-responsiveness, due process applies but does not require a hearing--review is under §1085--contra for bid rejected for non-responsibility); Wasko v. Dep't of Corrections, 211 Cal.App.3d 996, 1001-02, 259 Cal.Rptr. 764 (1989) (prisoner's right to appeal decision relating to his welfare does not require a hearing--§1094.5 does not apply); Marina County Water Dist. v. State Water Resources Control Bd., 163 Cal.App.3d 132, 209 Cal.Rptr. 212 (1984) (hearing was discretionary, not required); Weary v. Civil Serv. Comm'n, 140 Cal.App.3d 189, 189 Cal.Rptr. 442 (1983) (hearing on employee performance rating was discretionary rather than required--§1094.5 inapplicable); Lightweight Processing Co. v. County of Ventura, 133 Cal.App.3d 1042, 1048, 184 Cal.Rptr. 479 (1982) ("appeal" not equivalent to a hearing--declaratory judgment, not §1094.5, is proper writ to test decision requiring environmental impact statement); Shuffer v. Bd. of Trustees, 67 Cal.App.3d 208, 136 Cal.Rptr. 527 (1977) (§1085 appropriate to review academic decision of state university); Royal Convalescent Hospital v. State Bd. of Control, 99 Cal.App.3d 788, 160 Cal.Rptr. 458 (1979) (Board of Control not required to provide hearing on rejected claim--§1094.5 unavailable); Still unclear is whether the right to an "administrative appeal" in the Public Safety Officers Procedural Bill of Rights triggers §1094.5 review; more than likely, it does. Gov't C. §3304(b)

review statute should eliminate the need to decide whether the statute called for some sort of on-the-record hearing; judicial review of adjudicatory decisions would be the same regardless of whether a formal hearing was provided. However, the adjudication sections of the new APA will probably preserve this distinction, for they apply only if a statute or constitution calls for the sort of on-the-record hearing to which section 1094.5 presently applies.[37]

If section 1094.5 does not apply because no hearing is required and no other remedy is available, a plaintiff must fall back on traditional mandate under section 1085. But then petitioner must confront the barriers to traditional mandamus, such as the requirement that mandamus applies only in the case of deprivation of a clear legal right or an abuse of discretion.[38] If traditional mandate is unavailable for these reasons, the case falls through the cracks and is unreviewable.

A second factor in deciding whether a case falls under section 1094.5 or section 1085 is the problematic distinction

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[37]See §641.110(a). The drafting of this provision remains under consideration by the Commission.

[38]See Wasko v. Dep't of Corrections, note 34 at 1002 (neither §§1094.5 nor 1085 available to review prison decision); Weary v. Civil Serv. Comm'n, note 34; Taylor v. Calif. State Personnel Bd., note 34 (short suspension--statutory procedures do not amount to a required "hearing" so §1094.5 not available and §1085 inapplicable without a "clear" abuse of discretion). Contra: Los Angeles County Dep't of Parks & Recreation v. Civil Serv. Comm'n, 8 Cal.App.4th 273, 278, 10 Cal.Rptr. 150 (1992) (substantial evidence review regardless of whether §1094.5 or 1085 apply); Coelho v. State Personnel Bd., 209 Cal.App.3d 968, 257 Cal.Rptr. 557 (1989) (suspension without substantial evidence is clear abuse of discretion under §1085).

between quasi-legislative and quasi-judicial action. Section 1094.5 applies only to cases that are considered quasi-judicial; quasi-legislative agency action is reviewed under sections 1085 or 1060.[39] While the adjudication/legislation distinction is clear at the poles,[40] there is a large middle ground where the distinction is not clear at all.[41] The cases are muddled, particularly in connection with local land use planning and environmental decisions.[42]

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[39]Brock v. Superior Court, 109 Cal.App.2d 594, 241 P.2d 283 (1952).

[40]Adjudicatory matters affect an individual as determined by facts peculiar to the individual, whereas legislative decisions involve the adoption of a broad, generally applicable rule of conduct on the basis of public policy. San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal.3d 205, 118 Cal.Rptr. 146 (1974) (adoption of general zoning ordinance is legislative); Meridian Ocean Sys., Inc. v. Calif. State Lands Comm'n, 222 Cal.App.3d 153, 271 Cal. Rptr. 445 (1990) (general decision to exempt geophysical research from EIR requirements is legislative even though triggered by particular application). Alternatively, a legislative action is the formulation of a rule to be applied to future cases, while an adjudicatory act involves the application of such a rule to a specific set of existing facts. Strumsky v. San Diego County Employees Ret. Ass'n, 11 Cal.3d 28, 34-35 n.2, 112 Cal.Rptr. 805 (1974).

[41]See, e.g., Calif. Radioactive Materials Management Forum v. Dep't of Health Services, 15 Cal.App.4th 841, 19 Cal.Rptr.2d 357, 371 (1993), which deals with the appropriate administrative procedure for the licensing of a low-level radioactive waste disposal facility. Holding that DHS was not required by the ambiguous statute to hold an APA-type adjudicative hearing, the court declared that the case presented a mixture of quasi-judicial and quasi-legislative functions.

[42]A sampling of decisions considered adjudicative: Horn v. County of Ventura, 24 Cal.3d 605, 613-16, 156 Cal.Rptr. 718 (1979) (adoption of a tentative subdivision map filed by individual developer); Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal.3d 506, 517, 113 Cal.Rptr. 836 (1974) (zoning variance); Calif. Aviation Council v. City of Ceres, 9 Cal.App.4th 1384, 12 Cal.Rptr. 2d 163 (1992) (adoption of ordinance approving road corridor); Pacifica Corp v. City of Camarillo, 149 Cal.App.3d 168, 196 Cal. Rptr. 670 (1983) (allocation of residential development rights to competing applicants); Patterson v. Central Coast Regional Comm'n, 58 Cal.App.3d 833, 130 Cal.Rptr. 169 (1976) (application for coastal development permit);

Decisions considered legislative: Arnel Dev. Co. v.

A new statute should strive to avoid the legislative/adjudicative distinction wherever possible.[43] Unfortunately, my recommendations do not completely avoid the distinction; the statute of limitations on judicial review turns on whether a decision is adjudicatory[44] as does the

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City of Costa Mesa, 28 Cal.3d 511, 169 Cal.Rptr. 904 (1980) (zoning ordinance preventing development of a single property); Del Mar Terrace Conservancy, Inc. v. City Council of San Diego, 10 Cal.App.4th 712, 726-29, 12 Cal.Rptr.2d 785 (1992) (decision to certify environmental impact statement as complete and proceed with road building project); Jt. Council of Interns & Residents v. Bd. of Supervisors, 210 Cal.App.3d 1202, 1209-12, 258 Cal.Rptr. 762 (1989) (decision that contracting out jobs is cost-effective); Oceanside Marina Towers Ass'n v. Oceanside Community Dev. Comm'n, 187 Cal.App.3d 735, 231 Cal.Rptr. 910 (1987) (selection of site for public improvement); Karlson v. City of Camarillo, 100 Cal.App.3d 789, 798-99, 161 Cal.Rptr. 260 (1980) (amendment of general plan to rezone particular property); Marina County Water Dist. v. State Water Resources Control Bd., supra note 34 (water quality control plan); Consaul v. City of San Diego, 6 Cal.App.3d 1781, 8 Cal.Rptr. 2d 762 (1992) (rezoning of property, even a single parcel, to prevent development--unclear to court whether decision in question was legislative or adjudicative); Wilson v. Hidden Valley Mun. Water Dist. 256 Cal.App.2d 271, 63 Cal.Rptr. 889 (1967) (application to exclude property from water district legislative since issues were political).

The Supreme Court majority in Arnel seems to concede that there is not much logic to this body of law but that it is important to have well-settled categories to avoid even more confusion in the law.

[43]Hopefully, the Law Revision Commission will recommend a statute unifying the scope of review for both legislative and adjudicative action so it will not be necessary to draw the distinction for determining scope of review. Asimow, "The Scope of Judicial Review of Administrative Action" 79-80 (Jan. 1993).

[44]See Draft Statute §652.410 stating a 60-day limitation period on review of a decision in an adjudicative proceeding but no statute of limitations on non-adjudicatory action. "Decision" is defined in §651.310(a) as "an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." Probably the comment to §651.310(a) should state that the existing body of law on the legislation-adjudication distinction is intended to be preserved.

determination of whether procedural due process applies.[45]

2. Federal law and law of other states

In federal practice, common law writs have never played a significant role. In most cases federal statutes relating to specific agencies explicitly define the procedure for obtaining review. Where such specific guidance is lacking, review is normally sought through an action for an injunction or declaratory judgment. There is normally no need to pursue such questions as whether action is quasi-judicial or quasi-legislative. By statute, mandamus is also available,[46] but there are many unsettled questions about federal mandamus practice. Practitioners are advised to avoid mandamus since injunction and declaratory judgment are not encumbered by technical limitations and are usually adequate to obtain any desired relief.[47]

Older judicial review statutes of other states show mixed success in shedding the complexities of the common law writs. Many states still use the common law writ system.[48] In New York, review is sought through an Article 78 proceeding in lieu

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[45]Horn v. County of Ventura, note 42. Numerous other issues, such as the application of administrative res judicata, also turn on the distinction.

[46]28 U.S.C. §1361.

[47]Kenneth Davis, Administrative Law Treatise §23.11 (2d ed. 1983).

[48]Bernard Schwartz, Administrative Law 584 (3d ed. 1991). New Jersey allows judicial review of agency action through the writ of certiorari. Ward v. Keenan, 70 A.2d 77 (N.J. 1949). Apparently it has successfully avoided the complexities of common law writ practice. Schwartz, supra at 585-86.

of the writs of certiorari, mandamus, and prohibition.[49] However, all of the ancient rules and distinctions of writ practice are preserved in Article 78 proceedings, so a large amount of complexity and confusion remain; for a variety of purposes the courts must continue to distinguish administrative, quasi-legislative and quasi-judicial proceedings.[50] New York's judicial review statute should not be emulated.

The 1961 Model State APA, on which the law of numerous states is based, provides for judicial review of rules through an action for declaratory judgment and for review of formal adjudication through an appeal; it makes no provision for review of informal adjudication.[51] Illinois permits review by petition to the circuit court but only if the enabling statute of the particular agency adopts the provisions of the Review Act; moreover the statute apparently applies only to adjudicatory

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[49]N.Y. Civ. Prac. Law & Rules §7801 et.seq. (1981 and 1993 Supp.).

[50]Since Article 78 dates back to 1937, it was actually a pioneering effort. See Weintraub, "Statutory Procedures Governing Judicial Review of Administrative Action: From State Writs to Article 78 of the Civil Practice Law and Rules," 38 St.Johns L. Rev. 86 (1963); McLaughlin, "Practice Commentary," 7B McKinney's Consolidated Laws of N.Y. Ann. 25-38 (1981). As an example of the unsatisfactory character of Article 78, see, e.g., Lakeland Water Dist. v. Onondaga County Water Auth., 24 N.Y.2d 400, 301 N.Y.S.2d 1 (1969) (Art. 78 inapplicable to review of ratemaking that occurs without a hearing because it is "legislative" action--case continues as declaratory judgment). The annotations to §7801 (the section authorizing review and only the first of six provisions in the New York scheme) run for 236 pages of microscopic print in the 1981 Annotated Code and an additional 82 pages in the 1993 supplement.

[51]See Project, State Judicial Review of Administrative Action, 43 Admin. L. Rev. 571, 705-708 (1991).

decisions, not regulations.[52] Pennsylvania has separate provisions for judicial review of state and local adjudicatory actions.[53] The Utah statute has separate provisions for review of rules, formal adjudicatory decisions, and informal adjudicatory decisions; only state agencies are covered by these provisions.[54]

The modern trend in judicial review statutes is to draw no distinction between rulemaking and adjudication and to assimilate judicial review to other types of litigation. Under the 1981 MSAPA, judicial review is initiated by filing a petition for review in the appropriate court; the court can grant any appropriate form of relief.[55] MSAPA also provides for a petition by an agency to enforce its own rule or order, which seems

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[52]Smith-Hurd Ill. Comp. Stat. Ann. ch. 735, §§5/3-101 et.seq. (1992).

[53]2 Purdon's Pa. Stats. Ann. §701, 751 (1993 Supp.). However, there is no provision for review of non-adjudicatory agency action. See Note, 16 Duquesne L. Rev. 201 (1977).

[54]Utah Code Ann. §63-46a-12.1 (declaratory judgment to review rules); -46b-15 (informal adjudicatory proceedings reviewed de novo in trial court); -46b-16 (formal adjudicatory proceedings reviewed on the record in appellate court) (1989 and 1992 Supp.). See Thorup, "Recent Developments in State Administrative Law: The Utah Experience," 41 Admin. L. Rev. 465, 467-73 (1989)

[55]1981 MSAPA §§5-105, 5-117. This is modelled on the Florida statute which provides for review of any form of state agency action by filing a petition in the district court of appeal which can grant any appropriate form of relief. Fla. Stats. Ann. §120.68(2), (13) (1982 and 1993 Supp.). Judicial review is exclusively on the record but if no hearing has been held and the validity of the agency action depends on disputed facts, the court can remand for a prompt factfinding proceeding. §120.68(4), (5), (6).

like a useful provision.[56] However, the MSAPA applies only to review of actions of state, not to actions of local agencies.

In 1991, an Oregon advisory committee prepared a carefully drafted statute; it provides that review of any form of state or local government action is initiated by filing a notice of intent to appeal and any appropriate relief can be granted.[57] It was not enacted, however. Wyoming has a similar provision for trial court review of any action of any state or local agency.[58] The Washington statute calls for initiating review through a petition for judicial review of any state agency action in the trial court.[59]

3. Recommendation

The statute should provide that final state or local agency action[60] is reviewable by a petition for judicial

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[56]§§5-201, -202.

[57]H.R. 2362, 66th Oregon Legislative Assembly-1991 Regular Session, §§6, 22. A copy of the Oregon bill is attached; it will serve as a handy drafting source.

[58]Wy. Stats. Ann. §16-3-114 (1977, 1992 Supp.). The Wyoming statute is quite concise and leaves many questions to be resolved by rules to be adopted by the Wyoming supreme court. These rules cover questions of the content of the record, pleadings, time and manner for filing pleadings and records, and extent to which supplemental evidence can be taken.

[59]Rev. Code Wash. §34.05.514(1) (1990). See Andersen, "The 1988 Washington Administrative Procedure Act--An Introduction," 64 Wash. L. Rev. 781, 822 (1989).

[60]The statute should contain a definition of agency action like that in 1981 MSAPA §1-102(2) which covers all possible actions or inactions. Certain agency actions now reviewable by de novo trials in superior court should not be reviewable under this statute. See text at notes 75-79.

review[61] filed with the appropriate court.[62] Normal pleading and practice rules for that court would be applicable.[63] The use of common law writs, such as mandamus, certiorari, and prohibition, and the use of equitable remedies, such as injunction and declaratory judgment, should be abolished in cases involving judicial review of agency action.[64] The court should

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[61]The existing writ of certiorari is called a "writ of review" in California. The petition for judicial review recommended here is wholly different from common law certiorari.

[62]The court in which review should be sought is discussed infra. See part B. Of course, reviewability is conditioned on the plaintiff satisfying the requirements of standing and timing (exhaustion, finality, ripeness, or primary jurisdiction) or establishing that an exception to those rules is applicable.

[63]Although discovery rules would apply to these proceedings, the statute or the comment should make it clear that discovery would only be available to obtain evidence that would be admissible in the judicial review proceeding. See City of Fairfield v. Superior Court, 14 Cal.3d 768, 122 Cal.Rptr. 543 (1975). At present, the Commission's draft statute provides for a closed record in nearly all judicial review cases; if the record is inadequate for judicial review, the court should remand to the agency to develop the necessary materials or make the requisite findings. See §652.530(b) (court may receive evidence only with respect to improper constitution as decision making body, improper motive or grounds for disqualification, or unlawfulness of procedure or decision making process); Camp v. Pitts, 411 U.S. 138 (1973). The statute should not permit any other discovery proceedings in court. But see Mobil Oil Corp v. Superior Court, 59 Cal.App.3d 293, 130 Cal.Rptr. 814 (1976), which allowed discovery of evidence that could not be admitted in court but with respect to which the court could remand to the agency. See CCP §1094.5(e), (f) (court can remand to agency to receive evidence that in the exercise of reasonable diligence could not have been produced at the hearing or was improperly excluded at the hearing).

[64]Of course those writs would continue to be available in cases not involving agency action. The Commission has yet to resolve whether writ practice should be retained in certain narrow areas of agency action such as denial of a continuance by an agency presiding officer.

be empowered to provide for any appropriate form of relief--declaratory, mandatory or otherwise;[65] it should be permitted to remand for further proceedings or simply reverse outright.[66] There should be appropriate provision for filing the administrative record with the court.[67] Service of process would be according to normal practice.[68]

Present law allows a reviewing court to affirm an agency decision in summary fashion without granting argument. In

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[65]However, it should not be empowered to award money damages unless provided by some other statute, such as provisions relating to an award of attorneys' fees or costs. See 1981 MSAPA §5-117(a), (c) (no damages or compensation unless otherwise provided); §5-117(b) (any other appropriate relief, whether mandatory, injunctive, or declaratory; preliminary or final; temporary or permanent; equitable or legal).

[66]1981 MSAPA §5-117(b); Newman v. State Personnel Bd., 10 Cal.App.4d 41, 12 Cal.Rptr.2d 601 (1992) (where employing agency failed to sustain its burden of proof that employee should be discharged, Personnel Board decision should be reversed, not remanded for further proceedings).

[67]See Ogden §53.14. Normally, the record is prepared by the respondent on request of the petitioner after the payment of appropriate fees. It is then filed with the petition. However, the record can also be filed with the respondent's points and authorities or subsequently. CCP §1094.5(a), 1094.6(c), Gov't C. §11523. If petitioner timely requests a transcript, the statute of limitations on filing a petition is tolled until the transcript is delivered. Draft statute §652.410(d). The provisions relating to filing the record with the court may differ depending on whether review is in a trial court or the court of appeal--an issue which remains to be determined. See Part B. I have not tried to deal with the details concerning the transcript and the record; agencies will have to tell us what provisions will be practicable in their particular situations.

[68]Existing CCP §1107 provides for service on an agency's presiding officer, secretary, or upon a majority of the members of the agency. Perhaps all agencies should be required to designate by rule an employee on whom process would be served. In default thereof, the rules of §1107 could continue to apply.

mandate practice, the trial court apparently can decline to issue an alternative writ either before or after the respondent files a return and submits points and authorities, although it is unclear whether such decision is a final order.[69] In court of appeal and Supreme Court practice, the court can decline to grant a writ of review.[70] The revised statute should maintain this authority in both superior court and the court of appeal, provided that the agency record is filed with the court and the party seeking review has a fair chance to oppose summary affirmance.

Petitions for judicial review should receive the same priority in the setting of a hearing as is presently accorded to writs.[71] Some superior courts handle their writ practice in

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[69]See text at notes 11-12.

[70]Summary denial is common in cases of writs seeking review of decisions of the Workers' Compensation Appeals Board; the court summarily affirms after considering the petition and the answer. See CEB, California Workers' Compensation Practice §11.76 (1985); Lavore v. Industrial Accident Comm'n, 29 Cal.App.2d 255, 84 P.2d 176 (1938) (upholding constitutionality of procedure and praising its practicality). In reviewing decisions of the Agricultural Labor Relations Board, the court of appeals has power to summarily deny a petition, but only after the record has been lodged with the court and both parties have a reasonable opportunity to file points and authorities. Tex-Cal Land Mgmt., Inc. v. ALRB, 24 Cal.3d 335, 351, 156 Cal.Rptr. 1 (1979); ALRB v. Abatti Produce, Inc., 168 Cal.App.3d 504, 214 Cal.Rptr. 283 (1985). The Supreme Court has discretion to refuse to grant a writ in PUC and State Bar Court cases. See Lakusta & Renton, "California Supreme Court Review of Decisions of the Public Utilities Commission--Is the Court's Denial of a Writ of Review a Decision on the Merits?" 39 Hast. L. J. 1147 (1988) (summary affirmance of 90% of PUC decisions; Rule 952 (State Bar Court).

[71]See CA Rule of Court §§2103(b) (general rule exempts writ practice from setting rules for civil litigation); 1907(b) (fast track). I am not certain whether or how the proposed statute should deal with the priority issue. One possibility is to require that a petitioner must request a hearing on the petition within 90 days of filing, as required by Public Res. C. §21167.4 for petitions alleging noncompliance with CEQA. See Dakin v. Dep't of Forestry, 17 Cal.App.4th 681, 21 Cal.Rptr.2d 490 (1993) [check depub] (90 day rule applies to

special writs and receivers departments which decide the cases swiftly; this practice should be maintained. Other courts treat writs in the law and motion department and also set hearings on the peremptory writs quite quickly. Typically petitions for judicial review will be accompanied by a request for a stay of the agency action in question.[72] Stay requests should be given priority consideration, whether the case is in the court of appeal or the superior court. In a later portion of this report, I suggest that many judicial review cases now considered in superior court be shifted to the court of appeal; one disadvantage of this proposal is that it would be difficult to give judicial review cases any priority on the court of appeal calendar, although stay motions could probably be disposed of quickly by the court of appeal.

The statute should provide that an agency can seek enforcement of a rule or order (including a subpoena) through a petition for civil enforcement.[73] But the statute should preserve the right to obtain review by way of defense; where government proceeds against a party civilly or criminally, the defense may be based upon the invalidity of some prior agency action such as a regulation which the party had not sought to

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challenge of timber harvest plan).

[72]The standards for granting a stay are discussed in Part D infra.

[73]1981 MSAPA §§5-201, 5-202. As to subpoenas, see 1981 MSAPA §4-210(b); Gov't C. §11187.

review.[74] It would be unfair to preclude judicial review in this situation, since many respondents never knew of the rule until it was used against them.

The statute should exclude various kinds of government actions which are reviewable in other ways according to statute.[75] Thus the statute should not be applied where a statute provides that agency action is reviewable through a de novo trial in superior court, as in the case of tax refund ac-

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[74]See 1981 MSAPA §5-203. Of course, this rule is conditioned by normal res judicata principles. For example, if the enforcement action is based upon violation of an order entered after a prior adjudication, it would be inappropriate to relitigate the issues resolved in the prior litigation.

[75]If a person seeks judicial review but should have proceeded via another form of action, the court should convert the petition for judicial review into the other recognized form of review and, if necessary, transfer the case to the correct court. This prevents the statute of limitations from running on the plaintiff's claim. The action should not be dismissed simply because the wrong form of relief was sought. Thus cases like Wenzler v. Superior Court, 235 Cal.App.2d 128, 45 Cal.Rptr. 54 (1965), should be disapproved. In Wenzler, plaintiff sought mandate to seek return of a fine he had paid and of evidence that was seized from him after his conviction was reversed; mandate was dismissed because plaintiff should have proceeded by way of a quasi-contract action.

Existing law provides that where the claim is for inverse condemnation arising out of action by an administrative agency, the claimant should seek judicial review of the agency action before seeking compensation under eminent domain. Patrick Media Group, Inc. v. Calif. Coastal Comm'n, 9 Cal.App.4th 592, 11 Cal.Rptr.2d 824 (1992), involved an inverse condemnation claim for the value of billboards removed by Commission action. The compensation claim must be first presented through a §1094.5 mandate action. An action for compensation under eminent domain could be joined with, or could follow, the §1094.5 action. The policy reason for this approach is that the §1094.5 action has a 30-day statute of limitations whereas an action for inverse condemnation can be brought five years after the taking occurred.

tions.[76] It should not cover actions reviewable under the Tort Claims Act,[77] actions for breach of contract by an agency,[78] or other recognized causes of action cognizable by courts in normal civil actions or by habeas corpus.[79]

B. Proper court for review

1. Present law

As discussed above, present law lodges most judicial review of agency action in the superior court. However, the

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[76]Mystery Mesa Mission Christian Church, Inc. v. Assessment Appeals Bd., 63 Cal. App.3d 37, 133 Cal.Rptr. 565 (1976) (§1094.5 unavailable to review tax decision--refund suit is exclusive method); Tivens v. Assessment Appeals Bd., 31 Cal. App.3d 945, 107 Cal.Rptr. 679 (1973). However, I believe that the legislature should make significant changes in California's tax adjudication system. As part of that process, the legislature might decide to dispense with exclusive judicial review of tax decisions through a superior court refund action. Instead, it might permit judicial review through a petition for administrative review; however, in the interests of avoiding revenue loss, a taxpayer might be required to pay the tax before seeking review. For another example of de novo review, see Labor Code §98.2 which provides for appeal of awards by the Labor Commissioner by trial de novo; Miller v. Foremost Motors, Inc., 16 Cal.App.4th 1271, 20 Cal. Rptr.2d 503 (1993).

[77]1981 MSAPA §5-101(1) (Act inapplicable to litigation in which sole issue is claim for money damages or compensation and agency whose action is at issue does not have statutory authority to determine the claim); Wash. Rev. Code §34.05.510(a) (same).

[78]See Royal Convalescent Hosp. v. State Bd. of Control, 99 Cal.App.3d 788, 160 Cal.Rptr. 458 (1979), which correctly holds §1094.5 inapplicable to review of a decision by the Board of Control to reject a contract claim against the state. The claim could be prosecuted by a normal damage action against the state. That procedure should not be circumvented by review of the Board of Control's decision rejecting the claim, whether or not the Board provided a hearing.

[79]§2 of the Oregon statute, note 57 (attached as appendix to this report), has a long list of exceptions, some of which were obviously negotiated with agencies (such as exceptions for workers compensation and unemployment insurance) but some of which are appropriate and generic.

Supreme Court reviews PUC and State Bar Court decisions. The Court of Appeal reviews decisions of the Workers' Compensation Appeal Board,[80] the Agricultural Labor Relations Board,[81] the Public Employees Relations Board[82] and the Alcoholic Beverage Control Appeals Board.[83] This seems to me like an illogical hodgepodge.

There is no clear pattern in other jurisdictions. Under federal practice, a great many agency rules and adjudications are reviewed at the court of appeals level. However, many types of cases remain in the federal district court, most importantly immigration and social security cases (and any others not allocated by statute to the court of appeals). The cases in district court tend to be fact intensive cases with relatively small stakes. The federal model thus would suggest that a relatively large number of California cases now heard by superior courts could be moved to the court of appeal.

In New York, all judicial review cases are filed in the trial court; however, the trial court transfers to the appellate division cases in which a formal adjudicatory hearing occurred. The theory, apparently, was that these cases do not require taking any additional evidence and are instead decided upon the agency record under the substantial evidence test.[84]

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[80]Labor C. §5950.

[81]Labor C. §1160.8.

[82]Gov't C. §3520(c), 3542(c), 3564(c).

[83]Bus. & Prof. C. §23090.

[84]CPLR §§7803(4), 7804(g).

The trend in newer judicial review statutes is to place a significant portion of judicial review cases into appellate rather than trial courts. The unenacted Oregon statute provided for appellate court review of adjudicatory cases and of rules. All other cases would have been reviewed in the trial court.[85] The Utah statute provides for review of formal adjudicatory action in an appellate court; all other cases are in the trial court.[86] Minnesota places review of both formal adjudication and rules in appellate courts.[87] Florida places review of all state agency action in an appellate court.[88] On the other hand, the new Washington statute calls for review in the trial court.[89]

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[85]Oregon statute §8(1), (2), attached as appendix to this report. By stipulation of the parties, however, any other case could be heard by the appellate court if it is required by law to be determined exclusively on a record and its validity can be determined without any judicial factfinding. §8(3). The Oregon statute also provides that if a case is filed in the wrong court, it will be transferred to the correct court without having to be refiled. §9.

[86]Utah Code Ann. §63-46a-13 (declaratory judgment in trial court to review rules); -46b-15 (informal adjudicatory proceedings reviewed in trial court); -46b-16 (formal adjudicatory proceedings reviewed in appellate court).

[87]Minn. Stat. Ann. §14.44 (rules), 14.63 (formal adjudication). See Hanson, "The Court of Appeals and Judicial Review of Agency Action," 10 Wm. Mitchell L. Rev. 645 (1984), pointing out that this statute is not exclusive and continues to allow challenges through common law writs and equitable remedies in the trial court.

[88]Fla. Stats. Ann. §120.68(2).

[89]Rev.C.Wash. §324.05.518 (1990). There is an exception for cases certified to the appellate court by the trial court. Certification can occur only if judicial review is limited to the record, and there are fundamental issues involved requiring a prompt determination.

2. Recommendation

Resolving the issue of the proper court for judicial review of agency action is difficult. The path of least resistance is to leave things as they are. However, I do not believe that would be the best course.[90]

I propose transferring the initial review of a significant body of the cases now in the superior court to the courts of appeal.[91] The Commission has not yet decided whether to abolish completely the independent judgment test in connection with review of state agency action. At this writing, it appears that the use of the independent judgment test will be greatly restricted.[92] In most cases, the test will be substan-

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[90]If that is the Commission's decision, it should explore whether to make review by the court of appeals of superior court decisions discretionary rather than available as of right. This would diminish the burden that the present system of two-level judicial review imposes on the courts. Workers' compensation cases are now heard initially in the court of appeals but under a system of discretionary review; in most cases, the court summarily declines to grant a writ of review. Court of appeals judges told me they favor this system.

Another proposal I did not explore would be creation of a new court system to hear administrative appeals. While there is much to be said in favor of a specialized court, the shortage of state budgetary resources makes any such plan completely infeasible.

[91]See Admin. Conf. of the United States Recommendation 75-3, 1 CFR §305.75-3; Currie & Goodman, "Judicial Review of Administrative Action: Quest for the Optimum Forum," 75 Colum. L. Rev. 1 (1975) (hereinafter Currie & Goodman); 4 K. C. Davis, Administrative Law Treatise §23.5 (2d ed. 1983) (review of administrative action should be in a court of appeal except where evidence needs to be taken).

[92]Currently the Commission has decided that independent judgment should continue to apply in cases where agency heads reverse the fact findings of presiding officers. I hope this decision will be reconsidered so that independent judgment would apply only with respect to cases inititally decided by OAH ALJs and also only to reversals of presiding officer findings based on demeanor of witnesses.

tial evidence. In such cases, the function being discharged by a reviewing court is fundamentally appellate, rather than trial.[93] Essentially the court is asked to decide questions of law and to assess the reasonableness of the agency's fact findings and discretionary decisions. Review of such issues from a well-organized record seems more appropriately the work of specialists in appeals--i.e. appellate courts.[94] Thus a system that lodges cases at the appellate level makes sense, because it calls on the relevant expertise of appellate judges. Even if some issues in some cases remain to be decided under inde pendent judgment, I would not shift those cases to trial courts; appellate courts can decide those issues as well.[95]

There is another significant advantage of transferring authority to the court of appeals: judicial review will be centralized into relatively few courts. Present practice dis-

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[93]Dissenting in Bixby v. Pierno, 4 Cal.3d 130, 159 n.21, 93 Cal.Rptr. 234 (1971), Justice Burke wrote: "If a uniform substantial evidence review were adopted, the Court of Appeal rather than the trial court would be the logical forum to perform the review function. Preliminary review by the trial court would be superfluous and uneconomic in cases requiring no determination of controverted issues of fact."

[94]In the rare situation in which the appellate court needs to receive evidence and does not wish to remand to the agency, there should be provision for appointment of a referee or special master to receive the evidence. See Draft statute §652.520, .530; 1981 MSAPA §5-114(a).

[95]I would not favor a system which allocated to trial courts cases in which independent judgment applied and to appellate courts cases in which substantial evidence applied. This would be extremely difficult to apply, since there would be constant questions about which court a case should be filed in (i.e. did the agency head reverse the presiding officer on a question of law or fact; if of fact the case goes to the trial court, if of law to the appellate court).

perses the cases to superior court judges throughout the state, many of them inexperienced in administrative law. This change should ensure a more uniform pattern of decisions, one less influenced by luck of the draw or hometown favoritism. The collegial character of court of appeal decision-making should insure a higher quality of decision, a greater number of reported administrative law cases, and a better system of precedents.[96] This is especially important because a new APA will undoubtedly generate a good many interpretive disputes; it would be helpful to have an accessible body of precedents on these issues that will be generated without unnecessary delay. Transfer to the appellate level should also save the state money since its attorneys will have to do less traveling to superior courts in remote counties. And by substituting one level of review for two, this proposal will save money for litigants on both sides and bring disputes to a conclusion years sooner than under existing law.

Probably judicial review of all cases of adjudication covered by the new APA adjudication procedures should be moved to the court of appeal.[97] The exception would be those types of

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[96]See Currie & Goodman 12. The fact that most administrative law decisions are made now in unreported trial court decisions (or in depublished court of appeal decisions) drastically limits the amount of available precedents on many important issues.

[97]A compromise proposal might be to move the review only of those cases heard by an OAH ALJ to the appellate court. In general, a relatively high percentage of cases involving professional licenses and of civil rights find their way to the appellate courts; they might as well start there.

cases that generate a large volume of relatively low-stakes, fact-oriented appeals, few of which are likely to go beyond the superior court. Here I have DMV driver's license cases specifically in mind. Decisions in welfare or unemployment cases might also fall into this category. These are cases that should probably remain in the superior court. Doing so would decrease the burden on the appellate courts and perhaps would serve the convenience of litigants who could save money by going to their local trial court.[98]

Similarly, review of rules adopted under the APA's rulemaking procedures should occur initially in the court of appeal,[99] since that process generates a well-organized record[100] and the issues have already been scrutinized by OAL. The issues raised on appeal tend to be questions of law, procedure, or whether a rule was reasonably necessary (a version of the abuse of discretion test). There are not many cases of this sort and the burden on appellate courts should not be substantial. Instead, the public interest may be served by having

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[98]See ACUS Recommendation 75-3, 1 C.F.R. §305.75-3, suggesting that immigration cases and social security retirement and disability cases remain in the federal district court and that appeals concerning benefits under the Black Lung program be transferred to federal district courts.

[99]See Currie & Goodman 39-54. Of course, the validity of regulations is sometimes questioned in the course of an enforcement action in a trial court against a person alleged to have violated the rules. That person should always be able to obtain review of the validity of regulations in the course of a criminal or civil enforcement action. See text at note 74.

[100]See Gov't C. §§11346.8(d), 11347.3, 11350(b). The record must be indexed. §11347.3(a)(12).

an appellate decision on important public policy issues more quickly. Undeniably, some cases involving review of rules can involve large records presenting numerous difficult technical issues. Such cases are burdensome to whatever court considers them; because of the high stakes, however, they are likely to find their way to an appellate court. Thus even in these cases, there is little advantage to anyone (including the appellate judges) from having the cases run first through the superior court.[101]

Courts of appeal should have the same power that reviewing courts at all levels now have to affirm an agency decision without oral argument after the filing of points and authorities and after the record has been filed with the court.[102] Indeed, there is an unresolved constitutional issue lurking here; it can be argued (although I do not agree with this argument) that the court of appeals must have the power to summarily affirm.[103]

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[101]It can be argued that the court of appeals needs to do less work on a case that has been initially decided by the superior court than on a case that has not yet been subject to any judicial scrutiny. However, OAL scrutiny of rules serves this function at least as well as trial court scrutiny.

[102]See text at notes 11-12.

[103]Under Article VI, §10 of the constitution, courts of appeal "have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." Under §11 (as revised in 1966), "courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute." I believe that appellate review of an administrative decision is a "cause" and the legislature can confer appellate jurisdiction on the court of appeals to hear this "cause" under §11. See Sarracino v. Superior Court, 13 Cal.3d 1, 9-10, 118 Cal.Rptr. 21 (1974) ("cause" is the proceeding before the court); Quezada v. Superior Court, 171 Cal.App.2d 528, 530, 340 P.2d 1018 (1959) (a "cause" includes every matter that could come before a court for decision). Therefore, it is not necessary to rely on the provision in §10 relating to original jurisdiction in extraordinary writ cases, and there is no need

Finally, I would leave review of local agency decisions, and of state agency decisions that are not governed by APA procedures, in the superior court.[104] Because these kinds of decisions are often made under highly informal procedures, they tend to produce less well-organized records. Many, but far from all, involve low stakes which suggests that the trial court is a better place to hear them and that they are unlikely to be appealed after the trial court decision.[105] Moreover, I am concerned by the possible additional burden on appellate courts of having to decide a large volume of time-consuming and complex cases concerning local land-use planning or environmental law. There may also be a significant volume of appeals arising out of local personnel or education decisions.

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to incorporate anything from existing writ practice in the petition for review procedure.

However, the Supreme Court left this issue somewhat in doubt when it upheld appellate-level consideration of petitions for review of the decisions of the Agricultural Labor Relations Board. Tex-Cal Land Mgmt., Inc. v. Agricultural Labor Relations Bd., 24 Cal.3d 335, 347-52, 156 Cal.Rptr. 1 (1979). Although the court noted that the analysis in the preceding paragraph based on appeal under §11 was "arguable," id. at 347, it upheld the petition for review as an exercise of extraordinary writ authority under §10. To do so, it had to infer that the legislature wished to give the reviewing court the power to summarily deny a petition in its sound discretion after providing for a fair opportunity for the petitioner to file points and authorities and after the ALRB has provided the record to the court.

[104]Utah followed this pattern--formal adjudication is reviewed in an appellate court, informal adjudication in a trial court. See note 54.

[105]Such cases may more frequently require the court to receive additional evidence, which is more easily done in a trial court. See draft statute §652.520 and .530.

The proposal to transfer a significant volume of cases from the superior court to the court of appeals would lighten the load on our superior courts, but it would increase the load of the courts of appeal. Note, however, that a reasonably high percentage of appealed cases get to the court of appeal from the superior court anyway because if there was enough at stake to litigate, there may be enough to appeal.[106] As to cases that go to the court of appeal anyway, there would be no increase in the court of appeal caseload. Starting these cases in the court of appeals would save money for the state and the litigants alike. Nevertheless, it is undeniable that the court of appeals' workload would be increased by cases that now start and terminate in the superior court; and, of course, this means that three judges must consider a case which under present practice is finally disposed of by only one. The views of the

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[106]Unfortunately, no statistics are available to help us estimate what this percentage is. Estimates from lawyers and judges vary widely and tend to reflect the particular subspeciality in which the attorney is engaged.

Cases are somewhat more likely to be appealed from superior court to the court of appeal under a substantial evidence regime than an independent judgment regime. As pointed out in the study on scope of review, under present law a trial judge's decision under independent judgment is almost unreviewable by the court of appeals, while a trial judge's decision applying the substantial evidence test is subject to greater scrutiny by the court of appeal.

On the other hand, under a regime of substantaial evidence rather than independent judgment, there will be fewer cases brought to court in the first place. A litigant always has a shot in an independent judgment case but given a reasonably strong case on both sides, it is likely that substantial evidence supports the agency decision on factual questions.

Judicial Council on these issues will, no doubt, be influential to the Law Revision Commission.[107]

This proposal also entails moving initial review of PUC and State Bar Court decisions from the Supreme Court to the Court of Appeal. My belief is that the Supreme Court is too busy to take seriously review of the complex decisions of the PUC. They are normally summarily affirmed.[108] Of course, the PUC welcomes a situation in which its decisions are essentially unreviewable, but it is hard to explain why this one agency should be exempt from judicial scrutiny. Other agencies that engage in complex economic regulation, such as the Water Resources Control Board, must suffer the indignities of judicial scrutiny; why not the PUC as well?[109]

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[107]As mentioned earlier, an additional disadvantage of the proposal to shift cases to the court of appeal is that it would be difficult for appellate courts to give the same priority to judicial review cases as is provided now by many superior courts.

[108]See Lakusta & Renton, "California Supreme Court Review of Decisions of the Public Utilities Commission--Is the Court's Denial of a Writ of Review a Decision on the Merits?" 39 Hast. L. J. 1147 (1988) (Court denies writ in at least 90% of PUC cases without consideration of the record or statement of reasons). Yet the decisions are treated as res judicata.

[109]See Comment, "'Basic Findings' and Effective Judicial Review of the California Public Utilities Commission," 13 UCLA L. Rev. 313 (1966) (criticizing Supreme Court rubber stamp review); Lakusta & Renton, supra. According to the leading treasise on public utility law, "The road to upsetting a determination of the California commission probably climbs a steeper grade than any other similar route in the country." 1 A. J. G. Priest, Principles of Public Utility Regulation 27 (1969). However, in partial compensation to the PUC, the legislature should repeal Pub. Util. C. §1756 which calls for independent judgment on the law and the facts when a PUC order is challenged on constitutional grounds. This section is based on outdated constitutional notions. Substantial evidence review is appropriate even where a PUC order is challenged as confiscatory. Of course, PUC findings of legislative fact and PUC exercises of statutory discretion would be treated with great deference by courts under applicable scope of review principles.

For similar reasons, it seems more appropriate that decisions of the Review Department of the State Bar Court be reviewed by the Court of Appeals than the Supreme Court;[110] now that review of these decisions is discretionary rather than available as of right, it would appear that appellants are more likely to receive review at the court of appeal level than at the Supreme Court level.[111] Moreover, review of individual attorney discipline cases is simply not a wise use of the Supreme Court's precious resources.[112]

I polled a good many lawyers and judges on the issue of whether to shift judicial review of most administrative decisions from the superior court to the court of appeal. The results showed no clear pattern. Some practicing lawyers wanted all cases kept in the superior court; others preferred a shift to the court of appeals. Court of appeal judges, unsurprisingly, were apprehensive about the extra workload. Superior court judges were about evenly divided.

A few final points: the statute should contain a simple transfer procedure so that cases filed in the wrong court can

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[110]These decisions can be reviewed by either the Supreme Court or the Court of Appeal in accordance with procedures prescribed by the Supreme Court. Bus. & Prof. C. §6082.

[111]Since 1991, the Supreme Court has not granted review of any of the discipline cases decided by the State Bar Court Review Department. 13 Calif. Lawyer 71 (July 1993).

[112]See Comment, "Attorney Discipline and the California Supreme Court: Transfer of Direct Review to the Courts of Appeal," 72 Calif. L. Rev. 252 (1984) (attorney discipline questions not important enough for direct Supreme Court review).

be transferred to the correct court without the need to refile. The Oregon statute has some well worked out provisions on transfers.

The statute should also provide a mechanism to deal with the situation in which a petition for judicial review is in the court of appeals but is joined with an action that requires a trial in the superior court such as eminent domain or violation of the federal civil rights statute.[113] Res judicata concerns may require that all such actions be filed together or suffer preclusion. Perhaps the court of appeal should have discretion to allow all claims to be heard in the superior court, even though the petition for judicial review would normally be at the appellate level.

C. Venue for Judicial Review

Under present law, superior court mandate actions seeking judicial review of state or local agency action are filed in the county in which the cause of action arose.[114] In licensing and personnel cases, this means the plaintiff's principal place

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[113]See Griffin Homes, Inc. v. Superior Court, 229 Cal.App.3d 991, 1003-07, 280 Cal.Rptr. 792 (1991) (judicial review and §1983 civil rights claim).

[114]CCP §393(1)(b): "...the county in which the cause, or some part thereof, arose, is the proper county for the trial of the following actions:...(b) Against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office..." However, tort and contract actions against the state must be filed in Sacramento or in any county where the Attorney General has an office. Gov. C. §955, CCP §401(1).

of business;[115] in non-licensing cases, it means where the injury occurred.[116] Review of a driver's license suspension occurs in the county of the plaintiff's residence,[117] and review of Medical Board decisions occurs only in Sacramento, Los Angeles, San Diego, or San Francisco.[118] Depending on particular statutes, cases reviewable by the court of appeal are filed in the appellate district where the cause of action arose[119] or where plaintiff resides.[120]

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[115]A cause "arises" in the county where the subject of agency action carried on business and would be hurt by official action, not where the agency signs the order or takes the challenged action. Tharp v. Superior Court, 32 Cal.3d 496, 502, 186 Cal.Rptr. 335 (1982) (car dealer must seek review in Tulare County, his principal place of business; agency cannot shift venue to Sacramento); Lynch v. Superior Court, 7 Cal.App.3d 929, 86 Cal. Rptr. 925 (1970) (dismissal of state employee--venue is proper where he worked, not where actions giving rise to charges against him occurred); Sutter Union High School District. v. Superior Court, 140 Cal.App.3d 795, 190 Cal.Rptr. 182 (1983) (same); Duval v. Contractors' State License Board, 125 Cal.App.2d 532, 271 P.2d 194 (1954) (county in which contractor's business was situated).

[116]Regents of the Univ. of Calif. v. Superior Court, 3 Cal.3d 529, 91 Cal. Rptr. 57 (1970) (taxpayers action against Regents because of unconstitutional regulations enforced against a UCLA faculty member--venue is in Los Angeles).

[117]Veh. C. §13559; Lipari v. DMV, 16 Cal.App.4th 667, 20 Cal. Rptr. 2d 246 (1993).

[118]Bus. & Prof. C. §2019.

[119]See, e.g. Gov't C. §3542(c) (PERB judicial review filed in appellate district where unit determination or unfair practice dispute occurred); Labor C. §1160.8 (ALRB review filed in appellate district where practice in question occurred or where person resides or transacts business); Bus. & Prof. C. §23090 (ABCAB case filed in appellate district where proceeding arose).

[120]Labor C. §5950 (workers' compensation).

My recommendation concerning venue depends on whether my prior recommendation concerning review of APA cases in the court of appeals is accepted. If so, I suggest that the venue for petitions for judicial review (whether in superior court or in the court of appeal) be the county (or the appellate district) of the petitioner's residence or principal place of business.[121] This approach seems somewhat more determinate than the existing rule which is tied to the county where the cause of action arose, but it would not significantly change the results.[122] The primary reason for choosing the petitioner's locale (rather than the agency's or the Attorney General's locale) is convenience to the petitioner.[123] Cases

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[121]If plaintiff resides and has a principal place of business in different counties, plaintiff could choose between the two. In cases brought against local agencies, the recommended provision would change the rule of CCP §394 (action against city or county generally tried where local agency is located); as a practical matter most actions against local agencies are filed by persons living in the locality so the change is not substantial.

[122]Another approach the Commission might consider would be to give petitioner a choice between his or her locale (home or principal place of business) and the place where the agency is located or, if the Attorney General will represent the agency, a city where the Attorney General has an office. See Fla. Stats. Ann. §120.68(2) (venue is appellate court in district where agency maintains headquarters or a party resides); 1981 MSAPA §5-104 (offering states the choice of the state capital or the plaintiff's residence).

[123]"The underlying purpose of statutory provisions as to venue for actions against state agencies is to afford to the citizen a forum that is not so distant and remote that access to it is impractical and expensive...Access to the judicial forum should be as expeditious, inexpensive, and direct as possible." Regents of the Univ. of Calif. v. Superior Court, supra at 536, 543.

filed in the wrong superior court or court of appeal should not be dismissed but should be transferred to the proper court.[124]

If the Commission decides not to follow my recommendation to lodge review of APA cases in the court of appeal, then my recommendation concerning venue is different. It is probable that superior court judges in small counties are inexperienced in administrative law matters. Most counties do not maintain a specialized writ and receiver department, so the cases are assigned to judges at random. Some say there is a significant hometown advantage for the petitioner. For that reason, if review of APA cases is to remain lodged in superior court, venue in actions against state agencies should be located in Sacramento or, where the agency is represented by the Attorney General, in counties where the Attorney General has an office (Sacramento, Los Angeles, San Francisco, and San Diego).[125] This is presently required in medical board cases.[126]

Assuming review remains in the superior court, it seems particularly important to centralize review of state agency legislative action (such as adoption of regulations) in the superior courts of larger counties or in Sacramento. Typically a large number of petitioners would have standing to challenge such matters. If plaintiffs could sue in their home county, there would be substantial opportunity to forum shop. Yet

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[124]Lipari v. DMV, note 117.

[125]CCP §401(1).

[126]Bus. & Prof. C. §2019. See letter of Joel S. Primes to the Commission (Apr. 20, 1993).

these cases tend to be difficult (they involve review of a rulemaking record) and often involve issues of large public importance. The superior court judges who must decide them should be more experienced and specialized in administrative law than superior court judges in general.

D. Stays pending review

1. Existing law

Under the existing APA, an agency has power to stay its own decision.[127] Regardless of whether the agency did so, the superior court has discretion to stay the agency action, but should not impose or continue a stay if it is satisfied that it would be against the public interest.[128] A stricter standard is imposed in medical, osteopathic or chiropractic cases in which a hearing was provided under the APA.[129] The stricter standard also applies to non-health care APA cases in which the agency heads adopted the ALJs proposed decision in its entirety (or adopted the proposed decision and reduced the penalty). Under this stricter standard, a stay should not be granted unless the court is satisfied a) that public interest will not suffer and b) the agency is unlikely to prevail ultimately on

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[127]Gov't C. §11519(b).

[128]CCP §1094.5(g). The public interest determination must be made on a case-by-case basis by the court in which administrative mandamus is sought. Sterling v. Santa Monica Rent Control Bd., 168 Cal.App.3d 176, 186-87, 214 Cal.Rptr. 71 (1985) (improper for court in which prohibition was sought to grant a stay pending judicial review).

[129]The constitutionality of imposing the stricter standard in medical cases was upheld in Bd. of Med. Qual. Assur. v. Superior Court, 114 Cal.App.3d 272, 170 Cal.Rptr. 468 (1980).

the merits.[130] The court has power to condition a stay order upon the posting of a bond.[131]

If the trial court denies the writ and a stay is in effect, the appellate court can continue the stay (and must continue it for 20 days after a notice of appeal is filed). If the trial court grants the writ, the agency action is stayed pending appeal unless the appellate court otherwise orders.[132] In cases not arising under section 1094.5, presumably a trial court and an appellate court have the normal power to grant a stay through a preliminary injunction.

2. Recommendation

The draft statute already provides that an agency may grant a stay of its decision.[133] As to stays on judicial

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[130]§1094.5(h)(1). The statute requires a preliminary assessment of the merits of the petition and a conclusion that the petitioner is likely to obtain relief; it is insufficient that petitioner merely state a possibly viable defense or restate arguments rejected by the ALJ or the agency. Medical Bd. of Calif. v. Superior Court, 227 Cal.App.3d 1458, 278 Cal.Rptr. 247 (1991); Bd. of Med. Qual. Assurance v. Superior Court, supra.

In APA cases not involving health care licensing, this stricter standard does not apply if the agency rejected the ALJ's decision. In such cases, the laxer standard of §1094.5(g) applies.

[131]Venice Canals Resident Home Owners Ass'n v. Superior Court, 72 Cal.App.3d 675, 140 Cal.Rptr. 361 (1977) (bond protects interests of homeowners who were allowed to build homes by the agency order under review during lengthy period of delay while the record is prepared). Even if petitioner is indigent, the court still has discretion to order posting of a bond as a condition to granting a stay. Ibid.

[132]CCP §1094.5(g), (h)(3).

[133]Draft statute §§650.110(a)(2), 650.120. It should be made clear in a comment that it is not necessary for a petitioner to exhaust the remedy of requesting a stay from the agency in order to request one from the court.

review, present California law should be simplified by unifying the standards. There is no apparent reason why the stay standard should vary depending on what sort of case is involved or whether the agency heads did or did not adopt the judge's original decision.

Moreover, the existing criteria for granting stays seem unduly narrow; in addition to the factors relating to the public interest and the likelihood of success on the merits, the court should consider the degree to which the applicant for a stay will suffer irreparable injury from denial of a stay and the degree to which the grant of a stay would harm third parties.[134] If these factors were cranked into the equation, the standard for granting a stay would be similar to the standard for granting a preliminary injunction which it closely resembles.[135]

The comment should also approve case law[136] that allows the court to condition the granting of a stay upon posting of a bond in order to protect third parties.[137]

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[134]See 1981 MSAPA §5-111(c). Harm to third parties is often a relevant concern in the case of local zoning and environmental decisions.

[135]See Cohen v. Bd. of Supervisors, 40 Cal.3d 277, 286, 219 Cal.Rptr. 467 (1985); 6 B. Witkin, Calif. Proc. §§282-83 (1985).

[136]See note 131.

[137]1981 MSAPA §5-111 is somewhat different from this recommendation. That section casts the stay decision as judicial review of an agency's decision to deny a stay. That implies that requesting an agency to grant a stay is an administrative remedy that must be exhausted. I do not think that should be required.

In cases involving threats to public health, safety, or welfare, §5-111 provides that no stay can be granted unless the court finds the petitioner is likely to prevail on the merits, the petitioner would suffer irreparable injury if denied a stay, the grant of relief will not substantially harm

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third parties, and the threat to public health, safety or welfare relied on by the agency is not sufficiently serious to justify denial of a stay. In cases not involving a substantial threat to public health, safety or welfare, the court shall grant relief if, in its independent judgment, the agency's denial of temporary relief was unreasonable in the circumstances.

[file mand.1]

House Bill 2362

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Presession filed (at the request of Joint Interim Judiciary Committee)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Establishes exclusive means of judicial review for state and local governmental actions. Specifies exemptions. Imposes requirements relating to ripeness and exhaustion of remedies. Prescribes standing requirements, and lists persons with standing without necessity of additional proof.

Prescribes procedures for filing and service of notice of intent to appeal. Specifies contents of that notice.

Imposes time limitations on seeking review of government action. Divides authority for initial review of government action between circuit court and Court of Appeals. Specifies policy for misfiled notices by allowing transfer to correct tribunal.

Allows stay of government action pending review under certain circumstances. Establishes method of supplementing record for judicial review. Prescribes standards to be applied in reviewing government action. Creates requirement in some cases that issues be raised before review is sought. Specifies manner of conducting proceeding to review government action, and nature of relief that may be granted.

Prescribes effective date of January 1, 1992.

A BILL FOR AN ACT

Relating to judicial review; creating new provisions; amending ORS 19.028, 28.020, 30.510, 30.520, 30.530, 30.560, 34.020, 34.040, 34.110, 58.355, 65.021, 65.657, 65.744, 92.234, 100.255, 128.896, 131.735, 144.335, 161.385, 176.805, 179.640, 181.350, 181.664, 183.310, 183.315, 183.410, 183.415, 183.480, 186.025, 196.115, 196.686, 196.825, 196.835, 196.850, 196.860, 197.328, 197.335, 197.650, 197.810, 197.825, 197.850, 198.785, 199.461, 199.476, 203.060, 222.896, 223.302, 223.401, 223.462, 224.065, 224.100, 236.630, 237.210, 240.563, 251.285, 262.025, 267.257, 279.019, 279.045, 281.085, 284.850, 294.100, 305.740, 307.533, 307.680, 308.466, 308.471, 330.557, 330.585, 341.065, 341.076, 341.185, 342.905, 343.175, 345.992, 348.855, 390.658, 416.145, 418.645, 418.845, 418.997, 421.195, 431.756, 431.850, 432.120, 432.130, 432.140, 432.142, 432.290, 435.070, 441.740, 442.435, 446.255, 448.255, 454.635, 458.060, 464.500, 465.215, 465.225, 466.140, 466.185, 466.370, 468.110, 469.400, 469.421, 469.441, 469.994, 471.312, 476.835, 479.195, 479.830, 480.275, 480.660, 480.665, 496.176, 508.760, 508.765, 508.796, 508.825, 508.867, 508.910, 522.475, 527.700, 532.700, 536.075, 540.560, 553.815, 564.110, 583.096, 602.900, 604.056, 621.120, 633.711, 647.075, 652.332, 652.900, 653.370, 656.298, 657.282, 657.485, 657.487, 657.663, 657.683, 657.684, 663.220, 671.220, 687.087, 689.852, 701.100, 703.230, 706.600, 707.705, 707.710, 711.022, 711.112, 717.160, 722.459, 737.209, 756.580, 778.100 and 836.380; repealing ORS 19.230, 183.400, 183.482, 183.484, 183.485, 183.486, 183.490, 183.497, 183.500, 663.205, 663.215, 663.225, 756.585, 756.590, 756.594, 756.598, 756.600 and 756.610; and prescribing an effective date.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Definitions. As used in sections 1 to 23 of this Act:

(1) "Enactment" means a government action reflected in a writing that is a directive, managerial policy, ordinance, rule, resolution, statute or other decision of general applicability, and includes only government actions that implement, interpret or prescribe law or policy or that describe the

NOTE: Matter in bold face in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.

Appendix A

procedural requirements of a government unit.

(2) "Government action" means a government unit's performance of or failure to perform any discretionary or nondiscretionary act.

(3) "Government unit" means any entity or individual with authority to act for the state, a county, a city, a special district or any other government authority. However, a "government unit" does not include a court acting in its adjudicative capacity, independent contractors of a public entity or arbitrators who resolve public disputes under ORS chapter 243.

(4) "Judicial review proceeding" means a proceeding commenced by a notice of intent to appeal under section 6 of this Act that seeks review of a government action subject to review under this Act in the circuit court or the Court of Appeals.

(5) "Law" means a constitution, charter, statute, ordinance, rule, regulation, measure or the functional equivalent thereof.

(6) "Party" means a person who files a notice of intent to appeal under section 6 of this Act, the government unit that must be served under section 6 of this Act and any person allowed by the court to intervene in a judicial review proceeding.

(7) "Person" means an individual, partnership, corporation, association, public or private organization or government unit.

SECTION 2. Exempt government actions. (1) Except as otherwise provided in this section, sections 1 to 23 of this Act establish the exclusive means of judicial review of all government actions.

(2) The following government actions are exempt from review under sections 1 to 23 of this Act:

(a) Any government action taken in the course of a judicial proceeding if the action would be reviewable in or on appeal from that proceeding;

(b) Any government action to the extent that the action gives rise to a claim against the government unit based on contract;

(c) Any government action to the extent that the action gives rise to a tort claim under ORS 30.260 to 30.300;

(d) Any government action subject to review by the Workers' Compensation Board;

(e) Any government action subject to review by the Land Use Board of Appeals;

(f) Any government action subject to review by the Employment Relations Board, except that rules and orders of that board shall be reviewed as provided by section 1 to 23 of this Act;

(g) Any government action subject to review by the Employment Appeals Board, except as provided in ORS 657.282 and 657.684;

(h) Any government action subject to binding arbitration under ORS 243.650 to 243.782;

(i) Any government action which is within the sole and exclusive jurisdiction of the Oregon Tax Court;

(j) Any government action subject to judicial review under the provisions of ORS 33.720;

(k) Any order of the State Board of Parole and Post-Prison Supervision subject to appeal under ORS 144.335;

(L) Any government action subject to review under ORS 250.085, 250.195, 250.296, 251.235, 255.155 or 258.055;

(m) Any government action subject to review under ORS 30.210 to 30.250;

(n) Any government action reviewable by a writ of habeas corpus under ORS 34.310 to 34.730;

(o) Any government action relating to bidding on public contracts subject to review under ORS

279.045 or 279.067;

(p) Any government action relating to public records subject to review under ORS 192.410 to 192.505;

(q) Any government action relating to suspension of driving privileges subject to review under ORS 813.410;

(r) Any government action under the General Condemnation Procedure Act subject to review under ORS chapter 35;

(s) Any government action relating to attorney discipline subject to review under ORS 9.536;

(t) Any government action reviewable under the provisions of chapter 791, Oregon Laws 1989; and

(u) Any government action reviewable under the provisions of chapter 839, Oregon Laws 1989.

(3) Nothing in sections 1 to 23 of this Act shall affect a person's right to seek review of government action by way of mandamus proceedings in the Supreme Court as provided in section 2, Article VII (Amended) of the Oregon Constitution.

(4) If a statute provides a procedure for judicial review of a government action that differs substantially from a procedure provided in sections 1 to 23 of this Act, the procedure provided by sections 1 to 23 of this Act shall apply unless the court is shown that the procedure provided by sections 1 to 23 of this Act would frustrate the legislative purpose reflected in the inconsistent statutory procedure. No claim for application of an inconsistent procedure shall be allowed unless the claim is made prior to the earliest time provided for the procedure by sections 1 to 23 of this Act or by the inconsistent statutory provision.

(5) Nothing in sections 1 to 23 of this Act shall affect a person's ability to challenge the validity of a government action in a judicial proceeding that is either initiated by a government unit or is between private parties.

SECTION 3. Ripeness. (1) A person may obtain judicial review of government action only when the government unit has completed all proceedings and made all determinations it intends or is required by law to make relating to the challenged government action. If the government action is required by law to be expressed in writing, a person may not obtain judicial review of the government action until the writing is completed.

(2) A person may obtain judicial review of government action other than an enactment before the government unit has completed all proceedings and made all determinations described in subsection (1) of this section if:

(a) Postponement of judicial review would result in an inadequate remedy or irreparable harm to the person; or

(b) The government unit initiated the action without any legal authority over the subject matter or the person.

SECTION 4. Exhaustion of remedies. (1) No person may obtain judicial review under section 6 of this Act before pursuing all remedies available from the government unit, except a person need not have asked a government unit to:

(a) Reconsider or rehear a decision made by that unit, unless another law specifically requires the person to ask for rehearing or reconsideration; or

(b) Amend or repeal or to grant an exemption from an enactment, unless another law specifically requires the person to ask for amendment, repeal or exemption from its effect.

(2) The court may excuse a person from the requirements of subsection (1) of this section if:

(a) The remedy within the government unit is inadequate;

(b) Pursuit of the remedy within the government unit will result in delay that will cause irreparable harm to the person; or

(c) The remedy within the government unit is rehearing, reconsideration, amendment, repeal or exemption and the period for requesting such remedy is less than the period provided for filing a notice of intent to appeal under section 7 of this Act.

(3) If a notice of intent to appeal a government action under section 6 of this Act is filed prior to the time a person has pursued all remedies within the government unit and available by law as required by subsection (1) of this section, the court in which the notice of intent to appeal is filed shall dismiss the notice of intent to appeal. The dismissal shall be without prejudice to a later judicial review proceeding.

SECTION 5. Standing. (1) Any person adversely affected by a government action may file a notice of intent to appeal or a petition to intervene in a proceeding under sections 1 to 23 of this Act. The following persons are adversely affected for the purposes of sections 1 to 23 of this Act without the necessity of additional proof:

(a) A named party to the proceedings that led to the challenged government action;

(b) An identifiable person to whom the challenged government action is specifically directed;

(c) A government unit whose ability to carry out its policies, responsibilities or programs will be adversely affected by the challenged government action;

(d) A person entitled by law to seek review to protect a public interest if the specified public interest would otherwise be unprotected; and

(e) An association or organization, with 25 or more members, if the government action will injure an identifiable interest represented by the association or organization, and the association or organization has authorized the filing of the notice of intent to appeal or the petition to intervene.

(f) The Attorney General in any case where the Attorney General is served under the provisions of section 6 (4) of this Act.

(2)(a) Upon proper motion, the court shall not allow a person who has filed a petition for review or intervention to participate in the review proceeding if the court determines that the petitioner is not a person described in subsection (1) of this section.

(b) Upon proper motion, the court shall not allow a person to intervene if the court finds that the petition to intervene is filed so late in the proceeding or is so cumulative or repetitious of petitions by other persons as to unduly delay an efficient and expeditious process of judicial review.

(3) Upon proper motion, the court shall not allow a person to participate in the review proceedings if the court finds, based on facts established by the respondent, that the petition for review alleges the invalidity of an enactment the validity of which is presently under review in another judicial or administrative proceeding to which petitioner is or could be a party and obtain substantially similar review.

(4) Upon proper motion, the court shall not allow a person described in paragraph (c) or (d) of subsection (1) of this section to participate in the review proceedings if the court finds, based on facts established by the respondent, that the petitioner is incapable of adequately presenting the issues raised in the petition, and these issues are likely to be raised in the future by other petitioners who should not be foreclosed by an inadequately litigated decision.

SECTION 6. Notice of intent to appeal. (1) Review of government action under sections 1 to 23 of this Act shall be commenced by filing a notice of intent to appeal with the clerk of the ap-

propriate court within the time provided by section 7 of this Act, which notice shall set forth:

(a) The name, mailing address and residence or business address of the person filing the notice of intent to appeal;

(b) The name of the challenged government unit and the address of its headquarters;

(c) Identification of the challenged government action and the date it was taken or should have been taken, together with a copy, or if no copy exists, a brief description of that action;

(d) A brief statement of the nature of the alleged error or errors; and

(e) If the challenged government action resulted from a government action other than an enactment, and there was a proceeding in which there were parties other than the person filing the notice of intent to appeal and the government unit, identification of those parties.

(2) A person shall serve a copy of the notice of intent to appeal by registered or certified mail upon the government unit and all parties required to be identified in the notice as provided in subsection (1) of this section. In addition, after the notice of intent to appeal is filed, the person shall serve a copy of the notice on any person identified by the court in a manner and within a period of time specified by the court.

(3) For purposes of subsection (1) of this section:

(a) If the government action is an enactment, the government unit that is charged with administering or enforcing the enactment shall be named as the government unit whose action is challenged under paragraph (b) of subsection (1) of this section.

(b) If the government action is other than an enactment, the government unit that took the action shall be named as the government unit whose action is challenged under paragraph (b) of subsection (1) of this section.

(4) If the person challenges the validity of a statute, the person shall also serve a copy of the notice of intent to appeal on the Attorney General in the same manner as provided by this section for service on the government unit whose action is challenged.

(5) Failure of a person to comply with the requirements of this section, except for the requirement that the notice be timely filed, shall not be grounds for dismissal of the proceeding unless the failure substantially prejudiced the rights of an adverse party. If the notice is not timely filed, the court shall dismiss the judicial review proceeding.

(6) Except as otherwise provided by sections 1 to 23 of this Act, a notice of intent to appeal shall be considered filed in circuit court at the time the clerk of the court or the person exercising the duties of that office actually receives the notice.

(7) Except as otherwise provided in sections 1 to 23 of this Act, a notice of intent to appeal shall be filed in the Court of Appeals in the same manner as provided in ORS chapter 19 for a notice of appeal in a civil action, and subsequent proceedings shall be conducted in the manner provided for appeals in civil actions. The Supreme Court may adopt rules of procedure for such proceedings consistent with applicable provisions of law and the Oregon Rules of Civil Procedure.

SECTION 7. Time limitations on filing notice of intent to appeal. (1) Unless otherwise provided by statute, a notice of intent to appeal government action other than an action described in subsections (2) to (5) of this section shall be filed within 35 days after the date of notice of the action.

(2) Unless otherwise provided by this section or by statute, a notice of intent to appeal an enactment may be filed at any time.

(3) Notwithstanding subsection (2) of this section:

(a) A notice of intent to appeal an enactment alleging the government unit failed to follow pre-

scribed procedures in enacting the enactment shall be filed within two years after the date of notice of the enactment.

(b) A notice of intent to appeal the following enactments shall be filed within 35 days of the date of notice of the enactment:

(A) An enactment relating to a local improvement district or any special assessment.

(B) An enactment adopted under ORS 294.305 to 294.520, 294.555 and 294.565.

(C) An enactment relating to the offer for sale, issuance, refunding, payment or redemption of any bond, warrant, certificate or other financial instrument.

(4)(a) If a law establishes a time certain during which a government unit should act, a notice of intent to appeal alleging that the government unit failed to act shall be filed within 70 days after the date the government unit should have acted. If there is no time certain, or if there is a continuing duty to act after the time certain has passed, the notice of intent to appeal shall be filed not earlier than 35 days after the date the person mailed or delivered to the chief executive officer or attorney of the government unit a written request for action by the unit and not later than 35 days after the person receives a written response to that request.

(b) A court may excuse a person from the requirement of paragraph (a) of this subsection that the person wait 35 days after mailing or delivery of a request for action if pursuit of a remedy within the government unit will result in delay that will cause irreparable harm to the person.

(c) The written response of the government unit under paragraph (a) of this subsection may provide for a longer period of time for the filing of a notice of intent to appeal than that provided for in this subsection.

(d) This subsection does not affect a claim of laches if that defense is otherwise available to a government unit.

(5)(a) If a person is required by section 4 of this Act to pursue all remedies available within a government unit, or if a person otherwise makes reasonable and timely attempts to pursue all remedies available within a government unit, the 35-day period for filing shall begin on the date that all such remedies within the government unit have been exhausted. If the government unit does not act upon a timely request for rehearing or reconsideration, a request for rehearing or reconsideration shall be deemed denied the 35th day following the date the request was submitted, and the notice of intent to appeal shall be filed within 28 days following the date the request was deemed denied. If the person and government unit have agreed in writing or on the record to extend the time for the unit to act on the request for rehearing or reconsideration, the notice of intent to appeal shall be filed within 28 days following the date the request is denied.

(b) A request is "timely" within the meaning of this section if filed within the time expressly provided in the law providing for rehearing or reconsideration. If no law makes express provision for rehearing or reconsideration, or does so but specifies no time period for filing the request, then the request shall be deemed timely if filed within the time specified in this section for filing a notice of intent to appeal.

(c) If the government unit denies a request for rehearing or reconsideration within the 35-day period, then the notice of intent to appeal shall be filed within 28 days following the date of notice that the request was denied.

(d) If the person requesting a rehearing or reconsideration and the government unit have agreed in writing or on the record to extend the time for the unit to act on the request, and the government unit fails to act on a request for rehearing or reconsideration within the time agreed to by the

parties, the notice of intent to appeal shall be filed within 28 days following the last date for action agreed to by the parties.

(6) A notice of intent to appeal a denial of party status shall be filed within 35 days after the date of notice of the government action resulting from the proceedings in which party status was denied.

(7) As used in this section, "date of notice" means:

(a) If the law requires the government unit to have served notice of its action on the person filing the notice of appeal, and the government unit has served notice, whichever of the following dates is earlier:

(A) The date on which the government unit personally serves notice of its action on the person; or

(B) The date seven days after the date on which the government unit mailed notice of its action to the person.

(b) If the law requires the government unit to have served notice of its action on the person filing the notice of intent to appeal, and the government unit has failed to serve notice, the date on which the person received actual notice of the government action.

(c) If the law requires that the government unit publish notice of its action, and the government unit has published notice, the date on which the notice is published.

(d) If the law requires that the government unit publish notice either of its action or the proceeding at which the action in question is authorized, mandated or taken, and the government unit has not published notice, the date on which the person filing the notice of intent to appeal received actual notice of the government action.

(e) If the action was mandated or taken at a proceeding, and the government unit gave notice of the proceeding to the public, the date of the proceeding.

(f) If law requires that the government action be expressed in writing, the date the writing is completed.

(g) If more than one of paragraphs (a) to (f) of this subsection apply to the government action, the latest of the dates specified by paragraphs (a) to (f) of this subsection.

(h) If paragraphs (a) to (f) of this subsection do not apply to the government action, the date of the government action.

SECTION 8. Authority of Courts. (1) The Court of Appeals shall review the following government actions:

(a) An order resulting from a contested case proceeding under ORS 183.310 (2);

(b) A rule as defined in ORS 183.310; and

(c) A declaratory ruling issued under ORS 183.410.

(2) The circuit court shall review government action that is not subject to review by the Court of Appeals under subsection (1) of this section.

(3) Notwithstanding the provisions of subsections (1) and (2) of this section, the Court of Appeals shall review a government action if all of the parties agree in writing to such review and:

(a) The government action is required by law to be based exclusively upon a record;

(b) The validity of the challenged government action can be determined without any factfinding beyond that provided for in section 18 of this Act; or

(c) The government unit, in the exercise of its discretion, has based its action exclusively on a record, the development of which included notice and an opportunity for interested or affected per-

sons to appear and be heard and the preparation of findings of fact and conclusions of law, and the law does not require further development of a record to afford judicial review of the action.

(4) The parties may not revoke an agreement entered into under subsection (3) of this section for review of government action by the Court of Appeals.

(5) If any issue arises after the filing of a notice of intent to appeal as to the existence of a written agreement under subsection (3) of this section, the Court of Appeals shall allow the parties seven days to provide proof of the written agreement.

SECTION 9. Transfer. (1) If the court in which a notice of intent to appeal is filed under section 6 of this Act does not have authority to hear the case, and the case should have been filed in another court or tribunal, the court shall transfer the case to the other court or tribunal authorized by law to hear the case. If there is more than one such court or tribunal, the court shall transfer the case to the court or tribunal specified by the person filing the notice of intent to appeal.

(2) If the court or tribunal to which the case is transferred disputes that it is a court or tribunal authorized by law to hear the case, it shall refer the question, if it is not the Court of Appeals, to the Court of Appeals.

(a) The Court of Appeals shall determine the proper tribunal under rules adopted by that court, which shall provide for an expeditious and summary determination, but only after an opportunity for the parties to address the question.

(b) The Court of Appeals shall direct the transfer of the case to the appropriate court or tribunal or proceed to decide the case if it is the appropriate court.

(c) Except as provided in this subsection, the determination of any court under this section as to the appropriate court or tribunal shall not be subject to interlocutory review.

(3) If the notice of intent to appeal was filed within the time allowed for filing in the court or tribunal to which the case is transferred, that court or tribunal shall not dismiss the case as not being timely filed.

(4) If the court in which the notice of intent to appeal is filed, or the Court of Appeals under subsection (2) of this section, determines that there is no court or tribunal authorized by law to consider the case, the court shall dismiss the notice.

(5) Within 10 days of the order of the transfer, the person filing the notice of intent to appeal shall pay to the court or tribunal to which the case is transferred any filing fees charged by that court or tribunal, and shall not be entitled to any refund of any filing fees paid to the court transferring the case.

(6) If the court in which the notice of intent to appeal is filed finds that the person filing the notice acted in bad faith or without a reasonable basis in fact or in law in filing in that court, the court shall award the adverse party or parties costs and reasonable attorney fees for opposing that filing. The court may decline to award all or part of the costs and attorney fees to the opposing party or parties if the court finds that the person filing the notice was substantially justified or that special circumstances exist that make the award of all or part of the costs and attorney fees unjust.

(7) For purposes of this section, a tribunal means any government unit authorized by law to review the decisions of a government unit.

(8) The court shall not transfer the case as provided in this section but shall dismiss the case as provided by section 4 (3) of this Act if the notice of appeal is filed prior to the time a person has pursued all remedies within the government unit as required by section 4 of this Act.

SECTION 10. Venue. If a government action is reviewable by the circuit court under section

8 of this Act, a notice of intent to appeal shall be filed as follows:

(1) If the challenged government action is an action of a state agency as defined in ORS 183.310, the notice shall be filed in the Circuit Court of Marion County, the county in which any individual person seeking review resides or, if the person is other than an individual, in the county in which the person has its principal business office.

(2) If the challenged government action is an action of a government unit other than a state agency, the notice shall be filed in the circuit court of the county in which the challenged government unit has its principal business office.

SECTION 11. Stay. (1)(a) Any person who could file a notice of intent to appeal under sections 1 to 23 of this Act with respect to a government action may file a request with a government unit to stay that action pending appeal, whether or not a notice of intent to appeal has been filed at the time of the request.

(b) The filing of a notice of intent to appeal shall not automatically stay the challenged government action.

(c) A stay issued pursuant to this section shall only be effective until the expiration of the period specified in section 7 of this Act for the filing of a notice of intent to appeal if the person requesting the stay does not file a notice of intent to appeal within that period.

(d) Except as provided in subsection (8) of this section, a person seeking a stay shall request the stay from the government unit that would be named in the notice of intent to appeal under section 6 of this Act.

(e) This section does not:

(A) Provide independent legal authority to a government unit to stay government action;

(B) Provide independent legal authority for any government unit to waive any otherwise existing procedural requirements incident to granting a stay under this section;

(C) Require any government unit to entertain requests for stays; or

(D) Require the granting of a stay beyond that necessary to protect the interests of the party or parties seeking the stay.

(2) Unless the government unit determines that substantial harm to the public or other parties to the proceeding will result if it grants a stay, the government unit shall approve a request for stay upon a showing by the person that:

(a) The person has a colorable claim under section 14 of this Act; and

(b) Without relief the person will suffer irreparable injury.

(3) If a government unit determines that substantial harm to the public or other parties to the proceeding will result from granting a stay, the government unit shall approve a request for a stay upon a showing by the person that:

(a) Without relief the person will suffer irreparable injury;

(b) There is a substantial likelihood that the person will prevail upon judicial review; and

(c) The person's injury outweighs the harm to the public or other parties to the proceeding, taking into consideration the degree and nature of that injury and harm and the likelihood of the person's success upon judicial review.

(4) A government unit may impose such conditions to protect the public or other parties to the proceeding, including the giving of an appropriate bond or other undertaking, if the imposition of such conditions will allow a person to meet the requirements of subsection (2) or (3) of this section.

(5) Nothing in subsections (2) and (3) of this section shall prevent a government unit in the ex-

ercise of its discretion from staying its own action if the government unit determines that a stay is appropriate, subject to such conditions as the government unit may impose.

(6) If a government unit denies a request for a stay, or grants a stay under subsection (5) of this section, the government unit shall announce its decision in writing. The writing shall set forth the reasons for any denial of a stay.

(7)(a) By motion filed in the court in which the notice of intent to appeal is filed, a person may seek review of a government unit denial of a stay or of any conditions imposed on the granting of a stay.

(b) In review of the denial of a stay under this section, the court shall decide anew the request for a stay to determine if the person meets the requirements of subsections (2) and (3) of this section.

(c) The court shall decide anew any conditions imposed under subsection (4) of this section, but shall affirm any such conditions that are not clearly unreasonable.

(8) Notwithstanding subsections (1) to (7) of this section, a person may file a request for a stay pending a decision on review directly with the court in which a notice of intent to appeal is filed. The court shall grant the request only if the person can show that:

(a) The filing of a stay request with the government unit would be futile or the government unit is unable or unwilling to act on the request;

(b) Without a stay the person will suffer irreparable injury; and

(c) Either of the following:

(A) The person has a colorable claim under section 14 of this Act, and neither the public nor other parties to the proceeding will suffer substantial harm from a grant of the stay; or

(B) There is a substantial likelihood that the person will prevail upon judicial review, and the person's injury outweighs the harm to the public or other parties to the proceeding, taking into consideration the degree and nature of the injury and harm and the likelihood of the person's success upon judicial review.

(9) A court may impose conditions on any stay granted under this section to safeguard the public or other parties to the proceeding, including the giving of an appropriate bond or other undertaking, if:

(a) In considering a motion filed under subsection (7) of this section, the imposition of such conditions would allow the person to meet the requirements of subsection (2) or (3) of this section; or

(b) In considering a motion under subsection (8) of this section, the imposition of such conditions would allow the person to meet the requirements of subsection (8) of this section.

SECTION 12. Record. (1) Within 21 days after service of the notice of intent to appeal, or within such further time as the court may allow, the government unit shall transmit to the court the original or a certified copy of the record, if any, upon which the government based its action. The government unit need not transmit any large maps or documents which are difficult to duplicate until the date of trial or other hearing date established by the court.

(2) At the time of transmitting the record to the court under subsection (1) of this section, the government unit shall serve a copy of the record, exclusive of large maps and other documents which are difficult to duplicate, on the person filing the notice of intent to appeal. The government unit shall also serve a copy of the record on any other party requesting a copy provided the other party reimburses the government unit for the reasonable expense incurred in copying the record.

(3) Upon motion of a party, the court may allow the record to be corrected, shortened, summa-

rized or reorganized. The court shall allow the record to be corrected, shortened, summarized or reorganized upon stipulation of all parties. Except as specifically provided in this section, the court shall not require any party to pay the cost of the record.

(4) Before filing a motion relative to the record under subsection (3) of this section, a party shall attempt to resolve the matter with the government unit's legal counsel. A motion asserting that the minutes or transcripts are incomplete or inaccurate shall demonstrate with particularity how the minutes or transcripts are defective and shall explain with particularity why the defect is material. Upon such demonstration, the court shall require the government unit to produce additional evidence to prove the accuracy of the contested minutes or transcripts. If the evidence regarding contested minutes is in an audio recording, the government unit shall submit a transcript of the relevant portions of the recording. The court may conduct a telephone conference with the parties to consider any motion regarding the record.

(5) Within 21 days after the conclusion of any supplemental proceedings conducted under section 17 or 18 of this Act or within such further time as the court allows, the government unit or court-appointed master shall transmit to the court the original or a certified copy of the record of the supplemental proceedings.

(6) The record for review of an enactment shall be limited to:

(a) The enactment under review;

(b) Copies of all documents necessary to demonstrate that the government unit complied with all applicable procedures for promulgating the enactment; and

(c) All materials and documentation before the government unit when adopting the enactment, if the enactment is required by law to be based upon a factual determination.

SECTION 13. Petition for review. (1) Within 28 days after filing a notice of intent to appeal in a circuit court in the manner provided for in section 6 of this Act, a petitioner shall file with the court, and serve on all parties entitled to be served with a copy of the notice of intent to appeal, a copy of the petition for review of the government action. The petition shall contain:

(a) The facts that establish that the petitioner meets the requirements of section 5 of this Act and has exhausted all remedies as required by section 4 of this Act;

(b) If petitioner contends that review is subject to section 3 (2) of this Act, the facts showing that the action meets the requirements of section 3 (2) of this Act;

(c) A description of the alleged errors and the legal issues presented;

(d) A statement as to whether additional evidence needs to be taken under section 17 or 18 of this Act, and if additional evidence is required, a statement of the factual issues in dispute; and

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

(2) If the notice of intent to appeal is filed in the Court of Appeals, no petition for review shall be filed, and the allegations required to be included in a petition for review under subsection (1) of this section shall be set forth in petitioner's brief. Petitioner's brief shall thereafter be considered the petition for review for the purposes of this Act.

(3) If a notice of intent to appeal is transferred to a circuit court pursuant to section 9 of this Act, the petition for review shall be due within the time provided by the circuit court, but in no case shall the petition be due more than 28 days from the date of transfer.

(4) If petitioner challenges the validity of a statute, petitioner shall serve a copy of the petition for review on the Attorney General in the same manner as provided for service of the petition for review on the government unit in this section. If the notice of intent to appeal has been filed in the

Court of Appeals, petitioner shall serve a copy of petitioner's brief on the Attorney General in the same manner as provided for service of appellant's brief on opposing parties in the Court of Appeals.

(5) Insofar as practicable, a petition for review in the circuit court shall be filed and served in the manner provided for a summons and complaint in a civil action, and all subsequent proceedings conducted in the manner provided by law for civil actions unless otherwise provided by sections 1 to 23 of this Act.

SECTION 14. Nature of review. (1) Unless otherwise provided by section 2 of this Act, the court shall review government action for the errors described in this section and shall grant the appropriate relief as provided in this section and section 22 of this Act. If the validity of a government action depends on the existence of facts in dispute, the court shall resolve those facts as provided in sections 17 and 18 of this Act.

(2) To determine whether a government unit failed to follow a procedure required by law, the court shall review all procedural requirements applicable to the government unit when it took the challenged action. If the court finds that the government unit failed to follow a procedure required by law, and the failure did affect or where the court reasonably concludes that the failure could have affected the fairness or outcome of the proceeding to the injury of a party, the court shall remand the action to the government unit with a direction that the unit follow all procedures required by law.

(3)(a) In reviewing an allegation that there is not sufficient evidentiary support in the record for a government action other than an enactment, the court shall first determine if the law requires the action being reviewed to be based upon a determination of fact. If not, the court shall discontinue its review of that allegation. If the law does require the action to be based upon a determination of fact, the court shall decide if the facts upon which the action is based are supported by substantial evidence. For purposes of this paragraph, substantial evidence exists to support a determination of fact when the record, viewed as a whole, would permit a reasonable person to make that determination of fact. If the court determines that one or more determinations of fact upon which the action is based are not supported by substantial evidence, the court shall set aside or remand the action.

(b) In reviewing an allegation that an enactment is not supported by facts, the court shall first determine if a law requires the enactment to be based upon a factual determination. If not, the court shall discontinue its review of the allegation. If a law does require the enactment to be based upon a factual determination, the court shall decide whether there was substantial support for any factual determination required by law. For purposes of this paragraph, substantial support exists for a government unit's factual determination if a reasonable person could have made that determination based upon the information possessed by the government unit at the time it made the determination. If the court determines that there was not substantial support for a factual determination required by law, the court shall set aside or remand the action.

(4) To determine if a government action other than an enactment unlawfully deviated from past practice, the court shall first review the government unit's past decisions, prior practices and officially stated policies to determine if the government unit has limited its discretion with respect to the challenged government action. If the government unit has not limited its discretion, the court shall discontinue its review. If the government unit has limited its discretion, the court shall determine if the challenged action is inconsistent with that limitation. If the court determines that the action is not inconsistent with the limitation, the court shall discontinue its review. If the action is

determined to be inconsistent with the limitation, and the government unit does not provide a reason for the inconsistency that removes the limitation on discretion, the court shall remand the action to the government unit. The court's review of the government unit's reason for the inconsistency shall be limited to whether the reason advances a policy or purpose of the original grant of discretion.

(5) To determine if a government unit unlawfully failed to act, the court shall review all provisions of the law relevant to the government unit's duty to act and any time limitations imposed upon the action. If the court finds that the government unit unlawfully failed to act, the court shall order the government unit to act within a specified time after the date of the order. If a law limits the time for taking the action, the court shall not specify a time greater than the limitation imposed by law upon the action.

(6) To determine if a government unit exceeded the limits of its legal authority, the court shall review all relevant sources of authority. If the court finds that the challenged action exceeded the legal authority of the government unit, the court shall set aside the action or remand the action to the government unit for disposition within the limits of its legal authority as determined by the court.

(7) To determine if a government unit has erroneously interpreted a provision of law, the court shall interpret the disputed provisions of law. The court shall give appropriate deference to a government unit's interpretation of technical terms of which the government unit has special knowledge. The court shall affirm a government unit's interpretation of a term or terms contained within a provision of law that it is empowered to apply or interpret if the court independently determines that the government unit's interpretation is consistent with the purpose, policy and express language of the provision of law. The court shall affirm a government unit's interpretation of a term or terms contained within its own enactment unless the court independently determines that the interpretation is inconsistent with the purpose, policy or express language of the enactment. If the court finds that the challenged action is based upon an erroneous interpretation of a provision of law and a correct interpretation compels a particular action, the court shall set aside the action or modify it in accordance with the correct interpretation. If the correct interpretation does not compel a particular action or leaves the government unit with discretion that it has not exercised, the court shall remand the action for disposition in accordance with the correct interpretation.

(8) To determine if a government action violated a state or federal constitutional provision, the court shall review the relevant constitutional provision. If the court finds that the challenged action is unconstitutional or is based upon an unconstitutional law, the court shall set aside the action or remand it to the government unit for action within constitutional limits.

(9) To determine if a government action violates any other law, the court shall determine the requirements of the relevant federal, state or local laws and the applicability of those laws to the challenged government action. If the court finds that the challenged government action violates any applicable provision of law, the court shall set aside or modify the government action or remand it to the government unit unless another remedy is provided by law. This subsection shall not apply to any claim of error subject to review under subsections (1) to (8) of this section.

(10) If the court believes that its decision may require consideration of legal issues that have not been addressed by the parties, the court shall give the parties an opportunity to address those issues.

SECTION 15. Reviewable issues. (1) In reviewing government actions other than enactments,

the court may only review an issue that was raised before the government unit whose action is being challenged unless:

(a) The person seeking to raise an issue did not have an opportunity to raise the issue in proceedings before the government unit; or

(b) The person seeking to raise an issue can establish that raising the issue would not have affected the outcome of the proceeding.

(2) For the purposes of paragraph (a) of subsection (1) of this section, a person shall not be considered to have been denied opportunity to raise an issue in a proceeding before the government unit solely because the person did not have notice of the proceeding, unless the person was entitled to notice by law, and the failure to notify the person can be shown to have prevented the person from raising the issue.

SECTION 16. Burden of proof. (1) Except to the extent otherwise provided by a specific provision of law, the burden of demonstrating the existence of any error shall be upon the person asserting the error.

(2) A circuit court shall make a separate and distinct written ruling on each legal and factual issue which the court resolves.

SECTION 17. Conduct of proceedings. (1) Judicial review proceedings shall be conducted without a jury.

(2) In reviewing government action, the court shall first determine what legal issues are in dispute under sections 1 to 23 of this Act, and what facts are material to those legal issues.

(3) Except as provided in subsection (4) of this section, the court shall limit its review of disputed facts to the record transmitted to the court pursuant to section 12 of this Act.

(4) The court may receive and consider evidence other than that found in the record transmitted under section 12 of this Act if:

(a) The court determines that the additional evidence would assist the court in resolving the disputed facts; and

(b) Any of the following:

(A) The court is required under section 18 of this Act to make the determination of fact without regard to any findings or determinations made by the government unit.

(B) There were good and substantial reasons for the failure to present the evidence in the proceedings before the government unit.

(C) The government action was not based exclusively on a record.

(D) Some other provision of law specifically provides that the court may consider evidence that is not in the record transmitted pursuant to section 12 of this Act.

(5) For the purposes of subsection (4) of this section, government action shall be considered to have been based exclusively on a record if:

(a) The action was required by law to be based on a record and the government unit in fact based its action on a record; or

(b) The government unit, in the exercise of its discretion, has based its action exclusively on a record, the development of which included notice of the proceeding, notice that the proceeding would be on the record, an opportunity for interested or affected persons to appear and be heard and the preparation of findings of fact and conclusions of law, and the law does not require further development of a record to afford judicial review of the action.

(6) The court shall authorize the government unit to conduct such proceedings as the court de-

termines necessary and appropriate to obtain any additional evidence that the court may receive and consider under subparagraphs (B) to (D) of paragraph (b) of subsection (4) of this section.

(a) If the court authorizes a government unit to conduct a proceeding under this subsection, the court shall designate a period of time during which the government unit may create or supplement the record and to act upon that new record.

(b) The government unit may modify its action based on the new record and shall, within the time fixed by the court, file with the court the new record together with a statement by the government unit reflecting any modification of the government unit's action based on the new record.

(c) If the government unit conducts proceedings in the manner authorized by the court under this subsection, the court shall, after the filing of the new record and statement provided for in paragraph (b) of this subsection, proceed to review the government action pursuant to section 14 of this Act and shall not receive or consider any additional evidence except as provided in section 18 of this Act.

(7) If the government unit does not conduct proceedings that are authorized by the court under subsection (6) of this section, or does not conduct those proceedings in the manner required by the court, the court shall proceed to take the evidence and resolve the disputed facts.

(a) The court shall affirm or reverse the government action based on the facts found unless the government unit retains discretion to act under the facts found and the applicable law.

(b) If the government unit retains discretion to act after the court has taken evidence and resolved the disputed facts under this subsection, the court shall designate a period of time during which the government unit may reconsider its action before the court proceeds to review the government action under section 14 of this Act.

(8) The court shall retain jurisdiction of the proceedings if the government unit elects to conduct proceedings authorized by the court under subsection (6) of this section, or if the government unit elects to reconsider its action under subsection (7) of this section. The court shall take no action on the merits of the case during the time that is allowed by the court to the government unit to conduct proceedings or to reconsider its action.

(9) At any time after the filing of a notice of intent to appeal in the circuit court, the parties may agree to a transfer of the proceeding to the Court of Appeals if the proceeding otherwise meets the requirements of section 8 (3) of this Act. The circuit court shall transfer the proceeding upon filing of the written agreement with the court.

(10) If additional evidence may be taken by the court under the provisions of this section or section 18 of this Act, that evidence may be received:

(a) In the Court of Appeals, by stipulation, by judicial notice, by appointing a master or as otherwise provided by rules adopted by the Supreme Court.

(b) In circuit courts, pursuant to the Oregon Evidence Code.

SECTION 18. Facts independently determined by reviewing court. The reviewing court shall determine facts without regard to any findings or determinations made by the government unit if:

(1) The court is required by law to determine the facts without regard to any findings or determinations made by the government unit; or

(2) The facts relate to:

(a) The court's authority under sections 1 to 8 of this Act to engage in the judicial review proceeding;

(b) A determination under sections 9 and 10 of this Act of the proper court or tribunal to con-

duct proceedings;

(c) Requests for stays under section 11 (7) to (9) of this Act;

(d) Reviewability of issues under section 15 of this Act;

(e) Review of an allegation that a government unit failed to follow a procedure required by law under section 14 (2) of this Act; or

(f) The appropriate relief to be afforded to the prevailing party under section 22 of this Act.

SECTION 19. Ancillary matters. Ancillary procedural matters, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders and other relief from disclosure of privileged or confidential material, are governed, to the extent not inconsistent with sections 1 to 23 of this Act, by other applicable law.

SECTION 20. Reconsideration. (1) Upon proper notice to the court and all parties, the government unit by the appropriate procedure may withdraw the challenged action for reconsideration at any time before the court's decision. After withdrawal and within such time as the court may allow, the government unit shall affirm, modify or reverse the challenged action. The court shall retain jurisdiction of the proceeding during such reconsideration. No later than 14 days after the date of notice of the government unit's action upon reconsideration, the petitioner may ask the court to act upon the original petition or file an amended petition for review. If the petitioner does not ask the court to act or file an amended petition within the 14-day period, the court shall dismiss the petition.

(2) At any time during the proceedings, the government unit may, by the appropriate procedure, vacate its action. Upon vacation of the government action, the court shall dismiss the petition.

(3) As used in this section, "date of notice" has the meaning given that term in section 7 of this Act.

SECTION 21. Settlement. Proceedings initiated under section 6 of this Act may be disposed of by stipulation, settlement agreement, consent order or judgment. If all of the parties stipulate or agree to a dismissal, the court shall dismiss the proceeding.

SECTION 22. Relief. (1) Relief granted under sections 1 to 23 of this Act may be mandatory, prohibitory or declaratory in form. The court shall not grant relief different from that requested by the parties unless the court notifies the parties that such relief may be granted and allows the parties to be heard with respect to such relief.

(2) The court may order relief in addition to that provided for in section 14 of this Act if such relief is authorized by other law.

(3) If the court sets aside or remands government action for further proceedings, the court may order such interlocutory relief as it finds necessary to protect and preserve the interests of the parties and the public until such further proceedings occur.

(4) The court may award damages or compensation only if and to the extent expressly authorized by law other than sections 1 to 23 of this Act.

(5) The court may award attorney fees only as specifically provided by law. Nothing in sections 1 to 23 of this Act amends or repeals any statute authorizing the award of attorney fees in actions for judicial review of government action. The court may award attorney fees under the provisions of ORS 20.105 upon making the findings required by that statute.

(6) Unless the court finds the existence of an error described in section 14 of this Act, the court shall affirm the government action. If the government action is affirmed, the court may award the government unit copying costs for the number of copies of the record the government unit was required to prepare under the terms of this Act.

SECTION 23. Appeals. (1) A decision of a circuit court made under sections 1 to 22 of this Act may be appealed as provided in ORS 19.005 to 19.026 and 19.029 to 19.220 as an action at law.

(2) A decision of the Court of Appeals made under sections 1 to 22 of this Act may be further reviewed by the Supreme Court as provided in ORS 2.520.

SECTION 24. Writ of prohibition abolished. The writ of prohibition in the review of government actions is abolished. Common law modes of seeking judicial review of government actions subject to review under sections 1 to 23 of this Act are replaced by the procedures prescribed by sections 1 to 23 of this Act.

SECTION 25. ORS 19.028 is amended to read:

19.028. (1) Filing a notice of appeal in the Court of Appeals or the Supreme Court may be accomplished by mail. The date of filing such notice shall be the date of mailing, provided it is mailed by registered or certified mail and the party filing the notice has proof from the post office of such mailing date. Proof of mailing shall be certified by the party filing the notice and filed thereafter with the court to which the appeal is taken. If the notice is received by the court on or before the date by which such notice is required to be filed, the party filing the notice is not required to file proof of mailing.

(2) Service of notice of appeal on a party, court reporter or the clerk of the trial court, or service of a [*petition for judicial review*] **notice of intent to appeal under sections 1 to 23 of this 1991 Act** on a party or administrative agency may be accomplished by first class, registered or certified mail. The date of serving such notice shall be the date of mailing. Proof of mailing shall be certified by the party filing the notice and filed thereafter with the court to which the appeal is taken.

(3) Except as otherwise provided by law, the provisions of subsections (1) and (2) of this section are applicable to [*petitions for judicial review, cross petitions for judicial review*] **notices of intent to appeal under sections 1 to 23 of this 1991 Act** and petitions under the original jurisdiction of the Supreme Court or Court of Appeals.

SECTION 26. ORS 28.020 is amended to read:

28.020. **Except for government actions subject to review under sections 1 to 23 of this 1991 Act,** any person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

SECTION 27. ORS 30.510 is amended to read:

30.510. **(1)** An action at law may be maintained in the name of the state, upon the information of the district attorney, or upon the relation of a private party against the person offending, in the following cases:

[*(1)*] **(a)** When any person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state, or any office in a corporation either public or private, created or formed by or under the authority of this state; or,

[*(2)*] **(b)** When any public officer, civil or military, does or suffers an act which, by the provisions of law, makes a forfeiture of the office of the public officer; or,

[*(3)*] **(c)** When any association or number of persons acts within this state, as a corporation,