Study N-201/202 March 1, 1995

Memorandum 95-11

Judicial Review of Agency Action: Standing, Timing, and Scope of Review (Draft Statute)

Attached to this memorandum is a consolidated draft statute of decisions made so far by the Commission concerning standing, timing, and scope of review issues involved in judicial review of agency action. We are assembling and fleshing out the draft as decisions are made.

Also attached as Exhibit pp. 1-8 are comments from Professor Asimow suggesting Commission reconsideration of several matters in the draft. His points are summarized in staff notes following the relevant provisions of the draft.

The Commission should review the draft statute and staff notes to determine whether further changes appear appropriate at this time.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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August 27, 1993

Judge Arthur Marshall
Chair, California Law Revision Commission
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Dear Judge Marshall,

At its July 23 meeting, the Commission voted by a 3-2 majority to add the following language to the staff draft of §652.240 as a limitation on private interest standing: "The person's asserted interests are among those the agency was required to consider when it engaged in the agency action being challenged." I disagree with this decision and I hope that it can be reconsidered.

As a compromise, I would not object to language that would deny standing upon a showing that the statute in question manifested an affirmative intention to preclude review by the class of persons to which the plaintiffs belong. See Block v. Community Nutrition Inst., 467 U.S. 340 (1984) (statute precludes consumers from challenging milk regulations).

The test that the Commission voted to add was drawn from the 1981 Model Act, §5-106(a)(5)(ii); the Model Act extracted it from U. S. Supreme Court cases. Those cases, starting with Assoc. of Data Proc. Service Orgs. v. Camp, 397 U.S. 150 (1970), require that the interest that a plaintiff sought to protect be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." The Court apparently believed that this test was required by §702 of the federal APA. The test requires a search of the language and legislative history of the statute in question in order to ascertain whether the legislature ever

considered the interest of the class of people represented by the plaintiff to be among those the statute was intended to protect. Note that the Model Act omitted the term "arguably," thus making the test more difficult to satisfy.

1. Arguments against the zone test. I oppose inclusion of this test in the California statute for several reasons:

i) Experience in the federal courts reveals that it is difficult to decide whether a particular plaintiff does or does not fall within the zone of interest; therefore the courts and litigants expend precious resources fighting over a side issue. The legislative history is usually inconclusive. Then the question is whether you are limited to looking at only the section of the statute in dispute or whether you can look at the whole statute or whether you can look at all related statutes to get clues about how the legislature felt about the plaintiff's class. As a result, the decisions are confusing and inconsistent. My goal has been to simplify and streamline the judicial review rules so that resources will not be wasted in fighting over them.

ii) Even the Supreme Court which invented the test has often ignored it or treated it in perfunctory fashion when it wanted to reach the merits. More recently, it has applied the test very strictly to avoid reaching the merits. This vacillation suggests that the test lacks utility and is overly subject to result-oriented manipulation.

iii) The test confuses standing and the merits. The decision that the legislature did not want to protect the interest asserted by the plaintiff's class is often equivalent to a decision that the defendant's conduct was legal because it did not violate plaintiff's rights. It is a mistake to merge merits issues with threshold issues. Doing so invites courts to manipulate the doctrine to get rid of cases that they do not want to deal with on the merits.

iv) California statutes usually lack any written legislative history. Consequently, a court can rely on little but guesswork in trying to decide whether a particular interest was one that the legislature would have wanted to protect. This insures even more result-oriented manipulation of standing doctrine.

v) The zone test was apparently derived from language in the federal APA. In California, of course, we have no such constraint.

vi) At the Commission meeting, the view was expressed that the zone test would get rid of a lot of costly lawsuits, especially at the local level. I doubt this. Generally plaintiffs in local planning, zoning, and environmental disputes will be

able to satisfy the zone test (or find co-plaintiffs who can satisfy it) since the statutes in question were probably intended to protect neighbors or others who share the resource in question. While the zone test will not get rid of many lawsuits, it will greatly complicate those lawsuits as government seeks (usually unsuccessfully) to deflect the litigation by arguing zone of interest.

2. Supreme Court vacillation in applying the zone test. The Supreme Court has vacillated in its application of the test. After treating the zone test with benign neglect for many years, the Court returned to it in Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987). It declared that "the test is not meant to be especially demanding," and it excludes a party "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."

My compromise suggestion in the second paragraph of this letter builds on the Clarke rationale; upon an affirmative showing that the legislature meant to preclude plaintiff's class from challenging the action in question, plaintiff would be denied standing.

After sending a signal in Clarke that the zone test should only be applied in extreme cases, the Court changed course sharply in Air Courier Conference v. American Postal Workers Union, 111 S.Ct. 913 (1991). This case was the first and so far the only Supreme Court decision that actually applied the zone test to deny a plaintiff standing. Air Courier involved an attempt by a postal union to challenge a decision by the post office to surrender part of the postal monopoly. Although the workers successfully established injury in fact from this action (based on loss of jobs), they lost under the zone of interest test.

The postal monopoly statute dates back to 1792, before there were any letter carriers; the purpose of the statute was to protect the government's investment in post roads. It was reconsidered in 1845, but none of the available history of the 1845 revision mentions the interests of postal workers. In 1970 Congress recognized the right of postal workers to organize, but the Court refused to integrate the 1970 revision with the 1792 and 1845 statutes. This case well illustrates how frustrating and futile the zone test can be. Do people seriously believe that the happenstance of whether a committee report or a congressional or debate in 1792 or 1845 (if any reports are available) happens to mention the interest of workers really should be determinative in deciding whether injured-in-fact workers can bring a lawsuit in 1990?

3. Lower court experience. While the Supreme Court has vacillated, lower courts have been engulfed in confusion in

trying to apply the test. I will not prolong this letter by recounting the long string of muddled lower court decisions. They are summarized by Judge, now Justice, Ruth Bader Ginsburg who wrote: "The absence of a cogent explanation by the Supreme Court of the purpose, scope, or proper application of the 'zone of interests' test has bred confusion and divergent approaches among lower federal courts." Copper & Brass Fabricators Council, Inc. v. Dep't of the Treasury, 679 F.2d 951, 954 (D.C.Cir. 1982) (concurring op.).

4. State courts. Generally state courts have rejected the zone of interest test. State experience should be a highly relevant model for the Commission. As the Illinois Supreme Court said, "since we are convinced that the zone-of-interests test would unnecessarily confuse and complicate the law, we decline to adopt it...the criticisms generally leveled against it persuade us that it is not a useful addition to the doctrine of standing...it leads to confusion between standing and the merits of the suit..While it is often possible to identify the primary purpose of a statute, its secondary or subsidiary purposes are often not so obvious. The task of searching for them becomes more difficult when the legislative history is, as in this case, relatively sparse..." Greer v. Illinois Housing Dev. Authority, 524 N.E.2d 561 (Ill. 1988).

5. Views of commentators. Commentators have roundly criticized the zone of interest test. I will quote a few of them; I could find many more. Kenneth Davis, the leading authority on administrative law, analyzed the zone test in his magisterial Treatise. He pointed out that the Supreme Court had failed to even mention the test in 27 opinions when it would have been relevant. He declares the test makes no sense and the questions it asks are often impossible to answer. The test is "analytically faulty, contrary to much case law the Court could not have meant to overrule, cumbersome, artificial, and contrary to Congressional intent in the Administrative Procedure Act." 4 Admin. Law Treatise 279 (2d ed. 1983).

Bernard Schwartz writes: "The bipartite injury test [i.e. injury in fact plus zone of interest] laid down by the majority [in Data Processing] is needlessly complex; despite the Court's disclaimer, it is a backward step toward the discredited 'legal wrong' requirement. There is much to be said for the state decisions rejecting the bipartite injury test in favor of a single 'injury in fact' test [citing a number of state cases]. If an agency does, in fact, cause injury to plaintiffs, that should be enough to give them standing to challenge the act, unless the injury itself is too remote." B. Schwartz, Administrative Law 507 (3d ed. 1991).

Professor Lee Albert writes that the zone test preserves the ancient problem of confusing the issue of standing with the merits. "The new tests of standing set out in the recent

Supreme Court cases are as unnecessary and productive of confusion and litigation as the older ones. Additionally they perpetuate some old difficulties and introduce several new ones...the zone of interest test in these two cases deals with merit issues. Canvassing the entire statute and legislative background for indicia of protective intent necessarily involves a preliminary examination of the merits and a forecast of the strength of the claims...zone of interest standing appears to serve no intelligible function. Indeed it is its cloudy purpose that renders application uncertain and difficult." Albert, "Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief," 83 Yale L.J. 425, 493-97 (1974).

6. Conclusion: The impulse by the Commission to want to get rid of burdensome litigation is understandable. But the zone of interest test is not the way to do it. It will get rid of little litigation, but it will seriously complicate the litigation that does occur. In place of the zone test, the Commission should adopt a provision that would deny standing upon an affirmative showing that the legislature meant to preclude members of the class represented by plaintiff from seeking review.

Thank you for your attention to this letter.

Sincerely,

Michael Asimow

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October 2, 1993

Sanford Skaggs
Chair, California Law Revision Commission
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Dear Sandy,

At its Sept. 24 meeting, the Commission voted 3-2 in favor of the following scope of judicial review standard: "The standard for judicial review under this section is whether there is a rational basis for the agency action, as determined by substantial evidence in the light of the whole record, except that where the agency has changed a finding of fact by the presiding officer the standard of review of the changed finding is the independent judgment of the court whether the finding is supported by the weight of the evidence." The Commission also voted to apply this provision only to state agencies, leaving the scope of review of decisions of local agencies the same as under existing law unless the local agency elects to follow the APA.

This provision presumably supersedes language the Commission earlier adopted as an amendment to Code of Civil Procedure section 1094.5 (see p. 110 of Tentative Recommendation, Document N-100) which also would apply only to state agency adjudication and which provides: "...The court shall give great weight to a determination of the presiding officer in the adjudicative proceeding based substantially on credibility of a witness to the extent the determination of the presiding officer identifies the observed demeanor, manner, or attitude of the witness that supports the determination."

Related to the language just quoted is §649.120(b) which provides: "If the factual basis for the proposed or final decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination."

Both the Commission's newly adopted independent judgment test (quoted in the first paragraph) and its previous formulation (quoted in the second paragraph) focus on the same problem: reversals by agency heads of fact findings by presiding officers. I certainly agree that an enhanced standard of review should apply in such cases. And I am delighted that the Commission has endorsed abandonment of the independent judgment test in the vast majority of cases in which the agency heads do not reverse the fact findings of the presiding officer.

However, there is a problem with the Commission's new formulation. In my opinion, it does not work properly where the reversed fact finding is not one based on credibility or demeanor but involves technical expertise or policy. Here, the presiding officer has no comparative advantage over the agency heads; the fact finding has nothing to do with whether one believes a witness and is not enhanced by having heard or seen the witness. And the judge who is asked to substitute judgment has less expertise than either the presiding officer or the agency heads.

For example, I do not believe that the independent judgment test should apply to legislative fact findings (such as whether spotted owls live only in old growth forests) or predictive fact findings (whether the owls will become extinct if old growth forests are cut down or whether the use of telephones will decline 5% if rates are raised 3%). Independent judgment should not apply to technical matters (such as determining whether a new power plant is needed to meet anticipated needs for electric power). It should not apply where the expertise of agency heads is important (such as determination of the appropriate bargaining unit for labor negotiations). Nor should it apply to resolving clashes between expert witnesses over technical matters (such as whether an accountant's failure to make certain investigations in the course of an audit fell below the standard of care applicable to accountants in the relevant community). I simply do not believe that trial judges are more competent than agency heads to resolve such questions--whether or not the agency heads have reversed a presiding officer. It is important to realize that statutes impose the responsibility for deciding such questions on agency heads; this responsibilty should not be shifted to trial judges. Indeed, the need to have expert specialists (rather than judges) resolve such questions is one of the reasons we have agencies in the first place.

I believe that the Commission should return to the formulation it decided on earlier--the §1094.5 amendment quoted on p. 110 of the Tentative Recommendation. This is also the federal rule under the Universal Camera decision. Under that approach, the substantial evidence test is applied in such a way that where the agency heads have reversed the presiding officer

in a case where credibility is important, this reversal detracts from the substantiality of the evidence in support of the agency's decision. This approach works smoothly in federal law; it is not confusing; and it continues to give full authority to agency heads to discharge their statutory responsibility while protecting the authority of presiding officers to resolve credibility questions.

If the Commission wishes to preserve independent judgment in cases where the agency heads reverse fact findings of the presiding officer, I strongly urge it to limit this provision to fact findings based substantially on credibility of a witness.

I believe that the members of the private bar who have urged the Commission to retain independent judgment are concerned primarily with agency head decisions that relate to credibility determinations--not to the sorts of matters of legislative fact or technical determinations I have discussed in this letter.

I remind the Commission that the language it previously adopted amending §1094.5 was adopted over the strong opposition of several agencies. The new formulation goes much further and is certain to provoke much greater opposition. This is inevitable because the new standard would apply to a large number of agencies to which independent judgment does not now apply (such as the Workers' Comp. Appeals Board, the State Personnel Board, the Public Utilities Commission and numerous other constitutional agencies) and to countless issues to which independent judgment does not now apply (because no "fundamental, vested right" is involved). Therefore, I suggest that the Commission be aware of the political implications of its action and proceed with caution.

Thank you for considering the foregoing.

Sincerely,

Michael Asimow

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

TITLE 2. JUDICIAL REVIEW OF AGENCY ACTION

CHAPTER 1. GENERAL PROVISIONS

Article 1. Application of Title

§ 1120. Application of title

1120. This title governs judicial review of agency action of any of the following agencies:

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

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

Comment. Section 1120 makes clear that the judicial review provisions of this title apply to actions of local agencies as well as state government.

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

Article 2. Definitions

§ 1121.210. Application of definitions

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

Comment. Section 1121.210 limits these definitions to judicial review of agency action. Some parallel provisions may be found in the statues governing adjudicative proceedings by state agencies. See Gov't Code § 11400 et seq.

§ 1121.220. Adjudicative proceeding

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

Comment. Section 1121.220 is drawn from the Administrative Procedure Act. See Gov't Code § 1121.220 & Comment ("adjudicative proceeding" defined).

§ 1121.230. Agency

1121.230. "Agency" means a board, bureau, commission, department, division, office, officer, or other administrative unit, including the agency head, and one or more members of the agency head or agency employees or other persons directly

or indirectly purporting to act on behalf of or under the authority of the agency head.

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

§ 1121.240. Agency action

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

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

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

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

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

The principal effect of the broad definition of "agency action" is that everything an agency does or does not do is subject to judicial review. See Section 1123.110 (requirements for judicial review). Success on the merits in such cases, however, is another thing. In this statute, the standards of review utilized by the courts in judicial review proceedings (see Article 4 (commencing with Section 1123.410)) are relied on to discourage frivolous litigation, rather than the preclusion of judicial review entirely in whole classes of potential cases.

§ 1121.250. Decision

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

Comment. Section 1121.250 is drawn from the Administrative Procedure Act. See Gov't Code § 11405.50 & Comment ("decision" defined).

§ 1121.260. Party

1121.260. "Party":

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

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

Comment. Subdivision (a) of Section 1121.260 is drawn from the Administrative Procedure Act. See Gov't Code § 11405.60 & Comment ("party" defined). This section is not intended to address the question of whether a person is entitled to judicial review.

Standing to obtain judicial review is dealt with in Article 2 (commencing with Section 1123.210) of Chapter 3.

§ 1121.270. Person

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

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

§ 1121.280. Rule

1121.280. "Rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy, or the organization, procedure, or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule.

Comment. Section 1121.280 is drawn from 1981 Model State APA § 1-102(10). The definition includes all agency statements of general applicability that implement, interpret, or prescribe law or policy, without regard to the terminology used by the issuing agency to describe them.

§ 1121.290. Rulemaking

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

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

CHAPTER 2. PRIMARY JURISDICTION

§ 1122.010. Application of chapter

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

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

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

§ 1122.020. Exclusive agency jurisdiction

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

Comment. Section 1122.020 requires the court to yield primary jurisdiction to an agency in the case of a legislative scheme to vest the determination in the agency. Adverse agency action is subject to judicial review. Section 1122.040 (judicial review following agency action).

§ 1122.030. Concurrent agency jurisdiction

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

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

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

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

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

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

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

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

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

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

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

§ 1122.040. Judicial review following agency action

1122.040. If an agency has exclusive or concurrent jurisdiction over the subject matter of the proceeding or an issue in the proceeding, agency action on the

matter or issue is subject to judicial review to the extent provided in Chapter 3 (commencing with Section 1123.110).

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

CHAPTER 3. JUDICIAL REVIEW

Article 1. General Provisions

§ 1123.110. Requirements for judicial review

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

Comment. Section 1123.110 is drawn from 1981 Model State APA Section 5-102(a). It ties together the threshold requirements for obtaining judicial review of final agency action, and guarantees the right to judicial review if these requirements are met. See, e.g., Sections 1123.120 (finality), 1123.130 (ripeness), 1123.210 (standing), 1123.310 (exhaustion of administrative remedies), 1123.510 (time for filing).

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

Staff Note. *The Commission has not yet considered issues involving advancement of costs.*

§ 1123.120. Finality

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

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

§ 1123.130. Ripeness

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

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

Staff Note. *The Commission tentatively decided not to attempt to codify the ripeness requirement but simply to note in commentary that existing case law on ripeness is preserved.*

However, the Commission also requested the staff to present a ripeness provision, if an adequate one could be developed, as an alternate draft for Commission consideration. The current draft is offered as an alternative by Professor Asimow.

§ 1123.140. Exception to finality and ripeness requirements

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

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

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

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

Comment. Section 1123.140 codifies an exception to the finality and ripeness requirements in language drawn from 1981 Model State APA Section 5-103. For this purpose, issues are fit for immediate judicial review if they are primarily legal rather than factual in nature and can be adequately reviewed in the absence of a concrete application by the agency. Under this language the court must assess and balance the fitness of the issues for immediate judicial review against the hardship to the person from deferral of review. See, e.g., BKHN v. Dep't of Health Services, 3 Cal. App. 4th 301, 4 Cal. Rptr. 2d 188 (1992); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

Article 2. Standing

§ 1123.210. No standing unless authorized by statute

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

Comment. Section 1123.210 states the intent of this article to override existing case law standing principles and to replace them with the statutory standards prescribed in this article. Other statutes conferring standing include [to be drafted].

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

§ 1123.220. Standing for review of decision in adjudicative proceeding

1123.220. The following persons have standing to obtain judicial review of a decision in an adjudicative proceeding:

(a) If the proceeding is subject to Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code, a party to the proceeding.

(b) If the proceeding is other than a proceeding described in subdivision (a), a participant in the proceeding if the participant also has standing under Section 1123.240 or Section 1123.250.

Comment. Section 1123.220 provides special rules for standing to obtain judicial review of a decision in an adjudicative proceeding. Standing to obtain judicial review of rulemaking is governed by Section 1123.230, and of other agency actions, by Sections 1123.240 (private interest standing) and 1123.250 (public interest standing). It should be noted that special statutes governing standing requirements for judicial review of an agency decision prevail over this section. Section 1123.210 (standing expressly provided by statute); see, e.g., Pub. Res. Code § 30801 (judicial review of decision of Coastal Commission by "any aggrieved person").

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

A party to an adjudicative proceeding under the Administrative Procedure Act includes the person to whom the agency action is directed and any other person named as a party or allowed to intervene in the proceeding. Section 1121.260 ("party" defined). This codifies existing law. See, e.g., Temescal Water Co. v. Dept. Public Works, 44 Cal. 2d 90, 279 P. 2d 963 (1955); Covert v. State Bd. of Equalization, 29 Cal. 2d 125, 173 P. 2d 545 (1946). Under this test, a complainant or victim who is not made a party does not have standing. A nonparty who might otherwise have public or private interest standing under Section 1123.240 or 1123.240 would not have standing to obtain judicial review of a decision under the Administrative Procedure Act.

Subdivision (b) applies to a decision in an adjudicative proceeding other than a proceeding subject to the Administrative Procedure Act. Under this provision, a person does not have standing to obtain judicial review unless the person both (1) was a participant in the proceeding and (2) satisfies the requirements of either Section 1123.240 (private interest standing) or Section 1123.250 (public interest standing). Participation may include appearing and testifying, submitting written comments, or other appropriate activity that indicates a direct involvement in the agency action.

§ 1123.230. Standing for review of rulemaking

1123.230. The following persons have standing to obtain judicial review of rulemaking:

(a) A person who has standing under Section 1123.240, if the following requirements are also satisfied:

(1) The person's asserted interests are among those the agency was required to consider when it engaged in the rulemaking.

(2) A judgment in favor of the person would tend substantially to eliminate or redress the adverse affect to the person caused or likely to be caused by the rulemaking.

(b) A person who has standing under Section 1123.250.

Comment. Section 1123.230 provides special rules for standing to obtain judicial review of rulemaking. Standing to obtain judicial review of a decision in adjudicative proceeding is governed by Section 1123.220, and of other agency actions, by Sections 1123.240 (private interest standing) and 1123.250 (public interest standing).

Under subdivision (a), a person seeking judicial review of rulemaking on the basis of private interest standing must also satisfy the "zone of interest" and "remediability" tests. These provisions are drawn from 1981 Model State APA Section 5-106(a)(5)(ii)-(iii).

Participation in a rulemaking proceeding is not necessary in order to have standing to challenge the resulting rule. This changes the basic case law rule, but consolidates existing exceptions to the rule. See Friends of Mammoth v. Bd. of Supervisors, 8 Cal. 3d 247, 104 Cal. Rptr. 761 (1972); see also discussion in Asimow, Judicial Review: Standing and Timing 10-12 (September 1992).

Staff Note. *Subdivision (a)(1) adopts the "zone of interest" limitation on standing to challenge an agency rule. This limitation is based on federal law.*

Professor Asimow has written objecting to insertion of the zone of interest limitation in the statute. Professor Asimow points out that:

(1) Experience in federal courts shows that this provision is hard to apply.

(2) The provision lacks utility and is subject to manipulation by the court.

(3) The provision confuses standing and the merits.

(4) California statutes generally lack legislative history on which the provision depends.

(5) The provision is based on a provision in the Federal APA which does not appear in the California APA.

(6) The provision will not substantially reduce lawsuits, but will greatly complicate them.

Professor Asimow states that the United States Supreme Court in recent years has used radically different interpretations of the zone of interest limitation, and lower court decisions are in total confusion. Courts in other states have generally rejected such a limitation because it unnecessarily confuses and complicates the law. Commentators have also roundly criticized the zone of interest test.

Professor Asimow concludes that, "The impulse by the Commission to want to get rid of burdensome litigation is understandable. But the zone of interest test is not the way to do it. It will get rid of little litigation, but it will seriously complicate the litigation that does occur." ***He suggests as an alternative a provision that would deny standing on an affirmative showing that the Legislature meant to preclude members of the class represented by plaintiff from seeking review.***

§ 1123.240. Private interest standing

1123.240. Except as otherwise provided in this article, a person has standing to obtain judicial review of agency action that adversely affects, or is likely to adversely affect, the person. An organization that does not otherwise have standing under this section has standing if a person adversely affected or likely to be adversely affected is a member of the organization, or a nonmember the organization is required to represent, and the agency action is germane to the purposes of the organization.

Comment. Section 1123.240 governs private interest standing for judicial review of agency action other than adjudication or rulemaking. *Cf.* Section 1121.240 ("agency action" defined). For special rules governing standing for judicial review of a decision in an adjudicative proceeding, see Section 1123.220. For special rules governing standing for judicial review of rulemaking, see Section 1123.230. Each of those provisions incorporates the standards of this section to some extent.

The requirement of adverse affect for standing is comparable to standards found in the law governing administrative mandamus. See, e.g., Code Civ. Proc. §§ 1060 (interested person may obtain declaratory relief), 1069 (party beneficially interested may obtain writ of review), 1086 (party beneficially interested may obtain writ of mandate); cf. Code Civ. Proc. § 902 (appeal by party aggrieved).

The first sentence of Section 1123.240 codifies case law that a person must suffer some harm from the agency action in order to have standing to obtain judicial review of the action. See, e.g., Sperry & Hutchinson v. State Board of Pharmacy, 241 Cal. App. 2d 229, 50 Cal. Rptr. 489 (1965); Silva v. City of Cypress, 204 Cal. App. 2d 374, 43 Cal. Rptr. 270 (1965).

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

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

§ 1123.250. Public interest standing

1123.250. Except as provided in this article, a person has standing to obtain judicial review of agency action that concerns an important right affecting the public interest if all of the following conditions are satisfied:

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

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

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

Comment. Section 1123.250 governs public interest standing for judicial review of agency action other than adjudication or rulemaking. *Cf.* Section 1121.240 ("agency action" defined). For special rules governing standing for judicial review of a decision in an adjudicative proceeding, see Section 1123.220. For special rules governing standing for judicial review of rulemaking, see Section 1123.230. Each of those provisions incorporates the standards of this section to some extent.

Section 1123.250 codifies the California case law doctrine that a member of the public may obtain judicial review of agency action (or inaction) to implement the public right to enforce a public duty. See, e.g., Green v. Obledo, 29 Cal. 3d 126, 172 Cal. Rptr. 206 (1981); Hollman v. Warren, 32 Cal. 2d 351, 196 P.2d 562 (1948); Board of Social Welfare v. County of Los Angeles, 27 Cal. 2d 98, 162 P.2d 627 (1945); American Friends Service Committee v. Procunier, 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (1973); Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1975).

Section 1123.250 supersedes the first portion of Section 526a (taxpayer actions). Under this section a person, whether or not a taxpayer within the jurisdiction, has standing to obtain judicial review, including restraining and preventing illegal expenditure or injury by an officer, agent, or other person acting on behalf of a entity, provided the general public interest requirements of this section are satisfied.

Section 1123.250 applies to all types of relief sought, whether pecuniary or nonpecuniary, injunctive or declaratory, or otherwise. The test of standing under this section is whether there is a duty owed to the general public or a large class of persons. A person may have standing under the section, regardless of any private interest or personal adverse affect, in order to have the law enforced in the public interest.

The limitations in subdivisions (a)-(c) are drawn loosely from other provisions of state and federal law. See, e.g., Section 1021.5 (attorney fees in public interest litigation); Section 1123.240 & Comment (private interest standing); first portion of Section 526a (taxpayer within jurisdiction); Fed. R. Civ. Proc. 23(a) (representative must fairly and adequately protect interests of class); Corp. Code § 800(b)(2) (allegation in shareholder derivative action of efforts to secure action from board).

Article 3. Exhaustion of Administrative Remedies

§ 1123.310. Exhaustion required

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

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

This chapter does not provide an exception from the exhaustion requirement for judicial review of an administrative law judge's denial of a continuance. *Cf.* former subdivision (c) of Gov't Code § 11524. Nor does it provide an exception for discovery decisions. *Cf.* Shively v. Stewart, 65 Cal. 2d 475, 55 Cal. Rptr. 217 (1965). This chapter does not continue the exemption found in the cases for a local tax assessment alleged to be a nullity. *Cf.* Stenocord Corp. v. City and County of San Francisco, 2 Cal. 3d 984, 88 Cal. Rptr. 165 (1970). Judicial review of such matters should not occur until conclusion of administrative proceedings. But see Section 1123.340 (interim review of prehearing determination).

§ 1123.320. Administrative review of decision in adjudicative proceeding

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

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

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

It should be noted that administrative remedies are deemed exhausted under this section only when no further higher level review is available within the agency issuing the decision.

This does not excuse any requirement of further administrative review by another agency such as an appeals board.

§ 1123.330. Exceptions to exhaustion of administrative remedies

1123.330. The requirement of exhaustion of administrative remedies is jurisdictional and the court may not relieve a person of the requirement unless any of the following conditions is satisfied:

(a) The remedies would be inadequate.

(b) The requirement would be futile.

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

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

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

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

Comment. Section 1123.330 authorizes the reviewing court to relieve the person seeking judicial review of the exhaustion requirement in limited circumstances; this enables the court to exercise some discretion. This section may not be used as a means to avoid compliance with other requirements for judicial review, however, such as the exact issue rule. See Section 1123.350.

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

Inadequate remedies. Under subdivision (a), administrative remedies need not be exhausted if the available administrative review procedure, or the relief available through administrative review, is insufficient. See discussion in Asimow, Judicial Review: Standing and Timing 42-45 (September 1992).

Futility. The exhaustion requirement is excused under subdivision (b) if it is certain, not merely probable, that the agency would deny the requested relief. See discussion in Asimow, Judicial Review: Standing and Timing 39-41 (September 1992).

Irreparable harm. Subdivision (c) codifies the existing narrow case law exception to the exhaustion of remedies requirement where exhaustion would result in irreparable harm disproportionate to the benefit derived from requiring exhaustion. The standard is drawn from 1981 Model State APA Section 5-107(3), but expands the factors to be considered to include private as well as public benefit.

Lack of notice. Lack of sufficient or timely notice of availability of an administrative remedy is an excuse under subdivision (d). See discussion in Asimow, Judicial Review: Standing and Timing 49-50 (September 1992).

Lack of subject matter jurisdiction. Subdivision (e) recognizes an exception to the exhaustion requirement where the challenge is to the agency's subject matter jurisdiction in the proceeding. See discussion in Asimow, Judicial Review: Standing and Timing 43 (September 1992).

Constitutional issues. Under subdivision (f) administrative remedies need not be exhausted for a challenge to a statute, regulation, or procedure as unconstitutional on its face; there is no exception for a challenge to a provision as applied, even though phrased in constitutional terms. See discussion in Asimow, Judicial Review: Standing and Timing 42-49 (September 1992).

§ 1123.340. Interim review of prehearing determination

1123.340. Section 1123.310 applies to a prehearing determination in an adjudicative proceeding that is subject to Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code, but such a prehearing determination is subject to immediate judicial review by the appropriate writ under Title 1 (commencing with Section 1063).

Comment. Section 1123.340 continues the provision of former subdivision (c) of Government Code Section 11524 for judicial review of an administrative law judge's denial of a continuance, and extends it to all prehearing decisions in proceedings of all agencies under the Administrative Procedure Act.

Staff Note. *The Commission was concerned whether this provision would create problems in non-OAH agencies where there is now no interim review of continuance or any other orders. The Commission deferred decision on this matter until non-OAH agencies are heard from.*

§ 1123.350. Exact issue rule

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

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

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

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

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

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

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

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

The exact issue rule is in a sense a variation of the exhaustion of remedies requirement — the agency must first have had an opportunity to determine the issue that is subject to judicial review. Under subdivision (b) the court may relieve a person of the exact issue requirement in circumstances that are in effect an elaboration of the doctrine of exhaustion of administrative

remedies. See also Section 1123.330 & Comment (exceptions to exhaustion of administrative remedies).

The intent of paragraph (1) of subdivision (b) is to permit the court to consider an issue that was not raised before the agency if the agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue. Examples include: (A) an issue as to the facial constitutionality of the statute that enables the agency to function to the extent state law prohibits the agency from passing on the validity of the statute; (B) an issue as to the amount of compensation due as a result of an agency's breach of contract to the extent state law prohibits the agency from passing on this type of question.

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

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

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

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

Article 4. Standards of Review

§ 1123.410. Standards of review of agency action

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

Comment. Section 1123.410 is drawn from 1981 Model State APA Section 5-116(a)(2). The scope of judicial review provided in this article may be qualified by another statute that establishes review based on different standards than those in this article. See, e.g., [to be drafted].

Staff Note. *The Comment to this section will be expanded to include references to any special standards for review that are preserved, for example review to determine whether Public Utilities Commission authority has been regularly exercised.*

§ 1123.420. Review of agency interpretation of law

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

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

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

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

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

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

determination of the agency appropriate to the circumstances of the agency action.

(c) If a statute delegates determination of an issue described in subdivision (a) to an agency, the standard for judicial review of the agency's determination is abuse of discretion.

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

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

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

Subdivision (b) codifies the case law rule that the final responsibility to decide legal questions belongs to the courts, not to administrative agencies. See, e.g., Ass'n of Psychology Providers v. Rank, 51 Cal. 3d 1, 270 Cal. Rptr. 796 (1990). This rule is qualified by the requirement that the courts give deference to the agency's interpretation appropriate to the circumstances. Factors in determining the deference appropriate include such matters as (1) whether the agency is interpreting a statute or its own regulation, (2) whether the agency's interpretation was contemporaneous with enactment of the law, (3) whether the agency has been consistent in its interpretation and the interpretation is longstanding, (4) whether there has been a reenactment with knowledge of the existing interpretation, (5) the degree to which the legal text is technical, obscure, or complex and the agency has interpretive qualifications superior to the court's, and (6) the degree to which the interpretation appears to have been carefully considered by responsible agency officials. See discussion in Asimow, The Scope of Review of Administrative Action 54-55 (1993). The deference due the agency's determination does not, however, override the ultimate authority of the court to substitute its own judgment for that of the agency under the standard of subdivision (b).

Subdivision (c) codifies the rule that where the legislature has delegated authority to the agency to interpret the law, the court must accept a reasonable agency interpretation under the abuse of discretion standard. See, e.g., Henning v. Div. of Occupational Safety & Health, 219 Cal. App. 3d 747, 268 Cal. Rptr. 476 (1990).

§ 1123.430. Review of agency fact finding

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

(b) Except as provided in subdivision (c), the standard for judicial review under this section is whether the agency's determination is supported by substantial evidence in the light of the whole record, unless the court is authorized by law to exercise its independent judgment on the evidence, in which case the standard for judicial review is the independent judgment of the court whether the decision is supported by the weight of the evidence.

(c) The standard for judicial review under this section of a decision in an adjudicative proceeding that is subject to Chapter 4.5 (commencing with Section

11400) of Part 1 of Division 3 of Title 2 of the Government Code is whether the decision is supported by substantial evidence in the light of the whole record, unless the agency has changed a finding of fact of the presiding officer in the proceeding, in which case the standard for judicial review is the independent judgment of the court whether the decision is supported by the weight of the evidence.

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

Subdivision (a) does not resolve the question of whether an issue of application of law to fact (often referred to as a mixed question of law and fact) should be treated for purposes of judicial review as an issue of law under Section 1123.420 or an issue of fact under this section. *Cf.* Asimow, The Scope of Review of Administrative Action 30-32 (1993). A court must use existing law in deciding how to classify the application issue; once it is classified, the court should use the appropriate standard as set forth in Sections 1123.420 and 1123.430.

Existing law treats application issues as questions of fact, rather than questions of law, if the facts in the case (or inferences to be drawn from the facts) are disputed. However, if the facts and inferences are undisputed, the issue is treated as one of law. See Borello & Sons v. Dept. of Industrial Relations, 48 Cal. 3d 34, 349, 256 Cal. Rptr. 543 (1989) (whether "sharefarmers" are "employees" treated as question of fact since dependent on resolution of disputed evidence); *cf.* Crocker Nat. Bank v. City of San Francisco, 49 Cal. 3d 881, 264 Cal. Rptr. 139 (1989) (whether an item is a "fixture" for tax purposes is a question of law — "If the pertinent inquiry [in answering a mixed question] requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If by contrast the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently.")

Subdivision (b) continues the rule of former Section 1094.5(c), providing for substantial evidence review, subject to independent judgment review in cases where independent judgment review "is authorized by law." For a discussion of these cases, see Asimow, The Scope of Review of Administrative Action 3-25 (1993).

Subdivision (c) limits independent judgment review in cases under the adjudicative proceeding provisions of the Administrative Procedure Act, based on the approach found in former Section 1094.5(h)(2), where a second standard applied only where the agency adopted a proposed decision in its entirety or adopted it but reduced the proposed penalty. This approach addresses the primary area where agency abuse may occur — where the agency departs from the decision of the trier of fact, closer judicial review is necessary. However, where the agency adopts the presiding officer's proposed decision, less judicial scrutiny is necessary. The independent presiding officer is a buffer against agency abuse. This rule is limited to proceedings conducted under the adjudicative proceeding provisions of the Administrative Procedure Act, whether mandatory or voluntary, since those provisions ensure the neutrality of the presiding officer, whether the proceeding is conducted by an administrative law judge employed by the Officer of Administrative Hearings or by agency hearing personnel.

Staff Note. *Under existing law, the "independent judgment of the court" is the standard for judicial review of agency factual determinations where a fundamental vested right is involved. Subdivision (c) of this section limits the independent judgment test, in cases where adjudication under the Administrative Procedure Act is in issue, to situations where the agency head has changed the presiding officer's findings of fact.*

Professor Asimow has written to suggest that the Commission reconsider this decision. He thinks it goes too far in allowing a court to substitute its judgment for that of the agency in cases where the judge has less expertise than either the presiding officer or the agency heads.

Examples he gives where the court should not substitute its judgment for that of the agency are:

--Legislative fact findings (e.g., whether spotted owls live only in old growth forests)

--Predictive fact findings (e.g., whether telephone use will decrease 5% if rates are increased 3%)

--Technical fact findings (e.g., whether a new power plant is needed to meet anticipated needs)

--Findings based on expertise of agency head (e.g., determination of appropriate bargaining unit for labor negotiation)

--Resolving conflicts in expert testimony on technical matters (e.g., whether an accountant's failure to investigate certain matters in an audit falls below the standard of care applicable to accountants in the relevant community)

"I simply to not believe that trial judges are more competent than agency heads to resolve such questions — whether or not the agency heads have reversed a presiding officer. It is important to realize that statutes impose the responsibility for deciding such questions on agency heads; this responsibility should not be shifted to trial judges. Indeed, the need to have expert specialists (rather than judges) resolve such questions is one of the reasons we have agencies in the first place."

Professor Asimow argues that the independent judgment test should be limited to cases where the agency head has reversed fact findings of the presiding officer based substantially on the credibility of witnesses. *He notes that this approach works smoothly under federal law and continues to give full authority to agency heads to discharge their statutory responsibility while protecting the authority of presiding officers to resolve credibility questions.*

"I believe that the members of the private bar who have urged the Commission to retain independent judgment are concerned primarily with agency head decisions that relate to credibility determinations — not to the sorts of matters of legislative fact or technical determinations I have discussed [above].

"I remind the Commission that the language it previously adopted [giving great weight to credibility determinations of the presiding officer] was adopted over the strong opposition of several agencies. The new formulation goes much further and is certain to provoke much greater opposition. This is inevitable because the new standard would apply to a large number of agencies to which independent judgment does not now apply (such as the Workers' Comp. Appeals Board, the State Personnel Board, the Public Utilities Commission and numerous other constitutional agencies) and to countless issues to which independent judgment does not now apply (because no 'fundamental, vested right' is involved). Therefore, I suggest that the Commission be aware of the political implications of its action and proceed with caution."

§ 1123.440. Review of agency exercise of discretion

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

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

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

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

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

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

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

Second, discretionary action is based on a choice or judgment. A court reviews this choice by asking whether there is abuse of discretion in light of the record and the reasons stated by the agency. See Section 1123.620(d) (agency must supply reasons when necessary for proper judicial review). This standard is often encompassed by the terms "arbitrary" or "capricious." The court must not substitute its judgment for that of the agency, but the agency action must be rational. See discussion in Asimow, The Scope of Review of Administrative Action 75-78 (1993). Abuse of discretion is established if it appears from the record viewed as a whole that the agency action is unreasonable, arbitrary, or capricious. *Cf.* ABA Section on Administrative Law, Restatement of Scope of Review Doctrine, 38 Admin. L. Rev. 235 (1986) (grounds for reversal include policy judgment so unacceptable or reasoning so illogical as to make agency action arbitrary, or agency's failure in other respects to used reasoned decisionmaking).

§ 1123.450. Review of agency procedure

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

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

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

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

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

Subdivision (a) is drawn from 1981 Model State APA Section 5-116(5)-(6). It continues a portion of former Section 1094.5(b) (inquiry of the court extends to questions whether there has been a fair trial or the agency has not proceeded in the manner required by law). One example of an agency's failure to follow prescribed procedure is the agency's failure to act

within the prescribed time upon a matter submitted to the agency. Relief in such cases is available under Section [to be drafted].

§ 1123.460. Review involving hospital board

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

(1) A private hospital board.

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

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

(b) The standard for judicial review under this section is whether the agency action is supported by substantial evidence in the light of the whole record. However, if the person seeking judicial review alleges discriminatory action prohibited by Section 1316 of the Health and Safety Code, and makes a preliminary showing of substantial evidence in support of that allegation, the standard for judicial review is the independent judgment of the court whether the agency action is supported by the weight of the evidence.

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

Staff Note. *This section preserves an existing provision. The staff is researching the background of it and will make recommendations concerning it.*

It is not clear to what extent private hospital board decisions are governed by this chapter.

§ 1123.470. Burden of persuasion

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

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

Article 5. Review Procedure

§ 1123.510. Statute of limitations for review of decision in adjudicative proceeding

1123.510. (a) This section applies to a decision in an adjudicative proceeding, but does not apply to other agency action.

(b) Judicial review of a decision is initiated by filing a notice of review with the agency. The notice shall be filed not later than 30 days after the decision is effective. The time for filing the notice is extended as to a party during any period when the party is seeking reconsideration of the decision.

(c) The agency shall in the decision or otherwise notify the parties of the period for filing a notice of review. If the agency does not notify a party of the period

before the decision is effective, the party may file the notice within the earlier of the following times:

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

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

(d) A party that files a notice of review shall file its pleadings with the court within 60 days after filing the notice, or if the party ordered a transcript or other record of the proceedings within 15 days after filing the notice, within 60 days after receipt of the transcript or other record.

Comment. Section 1123.510 provides a limitation period for initiating judicial review of agency adjudicative decisions. See Section 1121.250 ("decision" defined). This preserves the distinction in existing law between limitation of judicial review of quasi-legislative and quasi-judicial agency actions. Other types of agency action may be subject to other or no limitation periods, or to equitable doctrines such as laches.

Subdivision (b) supersedes the second sentence of Government Code Section 11523 (30 days). It also unifies the review periods of various special statutes. See, e.g., former Sections [to be drafted]. The provision does not override special limitations periods supported by policy reasons, such as Government Code Section 3542 (30-day PERB review limitation) and Labor Code Section 1160.8 (30-day ALRB review limitation).

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

Nothing in this section should be construed to override standard restrictions on application of statutes of limitations, such as estoppel to plead the statute (see, e.g., Ginns v. Savage, 61 Cal. 2d 520, 39 Cal. Rptr. 377 (1964)), correction of technical defects (see, e.g., United Farm Workers of America v. ALRB, 37 Cal. 3d 912, 21 Cal. Rptr. 453 (1985)), computation of time (see Sections 6800 et seq.), and application of due process principles to notice of decision (see, e.g., State Farm Fire & Casualty v. Workers' Compensation Appeals Bd., 119 Cal. App. 3d 193, 173 Cal. Rptr. 778 (1981)).

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

Subdivision (d) supersedes the eighth sentence of former Government Code Section 11523.

Staff Note. *The staff is reviewing the special limitations periods currently in the law, including the long local public agency limitations period of Section 1094.6 and the short CEQA limitations period, to ascertain whether they are supported by policy reasons.*

The Commission has not yet considered issues involving stays.

Article 6. Record for Judicial Review

§ 1123.610. Administrative record exclusive basis for judicial review

1123.610. Except as provided in Section 1123.650 or as otherwise provided by statute, the administrative record is the exclusive basis for judicial review of agency action.

Comment. Section 1123.610 codifies existing practice. [Citations]. For authority to augment the administrative record for judicial review, see Section 1123.650 (new evidence on judicial review).

§ 1123.620. Contents of administrative record

1123.620. (a) Except as provided in subdivision (b), the administrative record for judicial review of agency action consists of all of the following:

(1) Any agency documents expressing the agency action.

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

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

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

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

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

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

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

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

Comment. Section 1123.620 is drawn from 1981 Model State APA Section 5-115(a), (d), (f), (g). For authority to augment the administrative record for judicial review, see Section 1123.650 (new evidence on judicial review). The administrative record for judicial review is related but not necessarily identical to the record of agency proceedings that is prepared and maintained by the agency. The administrative record for judicial review specified in this section is subject to the provisions of this section on shortening, summarizing, or organizing the record, or stipulation to an agreed or settled statement of the parties. Subdivision (c). See Cal. Rules of Court, R. 4-12 (record on appeal).

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

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

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

If there is an issue of completeness of the administrative record, the court may wish to permit limited discovery of the agency file for the purpose of determining the accuracy of the affidavit of completeness. It should be noted that a party is not entitled to discovery of material in the agency file that is privileged. See, e.g., Gov't Code § 6254 (exemptions from California Public Records Act). Moreover, the administrative record reflects the actual documents that are the basis of the agency action. Except as provided in subdivision (d), the agency cannot be ordered to prepare a document that does not exist, such as a summary of an oral ex parte contact in a case where the contact is permissible and no other documentation requirement exists. If judicial review reveals that the agency action is not supported by the record, the remedy is to reverse or remand. Section [to be drafted].

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

§ 1123.630. Preparation of record

1123.630. On request of the person seeking judicial review for the administrative record for judicial review of an adjudicative proceeding that is subject to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, the administrative record shall be prepared by the Office of Administrative Hearings or the agency and shall be delivered to the person seeking judicial review within 30 days after the request, which time shall be extended for good cause shown.

Comment. Section 1123.630 continues the substance of the fourth sentence of former Government Code Section 11523.

Staff Note. The Commission has not yet considered whether this section can be extended beyond its present scope, nor has it considered issues involving costs, including costs of preparation of the record.

§ 1123.640. Disposal of administrative record

1123.640. Any administrative record received for filing by the clerk of the court may be disposed of as provided in Sections 1952, 1952.2, and 1952.3.

Comment. Section 1123.640 continues former Section 1094.5(i) without change.

§ 1123.650. New evidence on judicial review

1123.650. (a) Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded in the agency proceedings, it may enter judgment remanding the case for reconsideration in the light of that evidence. Except as provided in

subdivision (b), the court shall not admit the evidence on judicial review without remanding the case.

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

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

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

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

(2) The agency action is a decision in an adjudicative proceeding and the standard of review by the court is the independent judgment of the court.

Comment. Subdivision (a) of Section 1123.650 supersedes former Section 1094.5(e), which permitted the court to admit evidence without remanding the case in cases in which the court was authorized by law to exercise its independent judgment on the evidence. Under this section and Section 1123.610, the court is limited to evidence in the administrative record except under subdivision (b).

Subdivision (b)(1) is drawn from 1981 Model State APA Section 5-114(a)(1)-(2). It permits the court to receive evidence, subject to a number of conditions. First, evidence may be received only if it is likely to contribute to the court's determination of the validity of agency action under one or more of the standards set forth in Sections 1123.410-1123.450. Second, it identifies some specific issues that may be addressed, if necessary, by new evidence. Since subdivision (b)(1) permits the court to receive disputed evidence only if needed to decide disputed "issues", this provision is applicable only with regard to "issues" that are properly before the court. See Section 1123.350 on limitation of new issues.

Subdivision (b)(2) applies in the following types of cases, which involve adjudicative proceedings where the standard of review is the independent judgment of the court: [to be provided]. It should be noted that admission of evidence by the court under this provision is discretionary with the court.

CONFORMING REVISIONS

Code Civ. Proc. § 526a (amended). Taxpayer actions

526a. (a) An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, ~~either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein.~~ by a person who has standing to obtain judicial review of agency action under Article 2 (commencing with Section 1123.210) of Chapter 3 of Title 2 of Part 3.

(b) This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities.

(c) An action brought pursuant to this section to enjoin a public improvement project shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

Comment. Section 526a is amended to conform to judicial review standing provisions. See Sections 1123.210-1123.250.

Code Civ. Proc. § 1094.5 (repealed). Administrative mandamus

1094.5. (a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner. Where the petitioner has proceeded pursuant to Section 68511.3 of the Government Code and the Rules of Court implementing that section and where the transcript is necessary to a proper review of the administrative proceedings, the cost of preparing the transcript shall be borne by the respondent. Where the party seeking the writ has proceeded pursuant to Section 1088.5, the administrative record shall be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner, where required, or as otherwise directed by the court.

If the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs.

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

~~(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.~~

~~(d) Notwithstanding subdivision (c), in cases arising from private hospital boards or boards of directors of districts organized pursuant to The Local Hospital District Law, Division 23 (commencing with Section 32000) of the Health and Safety Code or governing bodies of municipal hospitals formed pursuant to Article 7 (commencing with Section 37600) or Article 8 (commencing with Section 37650) of Chapter 5 of Division 3 of Title 4 of the Government Code, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record. However, in all cases in which the petition alleges discriminatory actions prohibited by Section 1316 of the Health and Safety Code, and the plaintiff makes a preliminary showing of substantial evidence in support of that allegation, the court shall exercise its independent judgment on the evidence and abuse of discretion shall be established if the court determines that the findings are not supported by the weight of the evidence.~~

~~(e) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case.~~

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

(g) Except as provided in subdivision (h), the court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. However, no such stay shall be imposed or continued if the court is satisfied that it is against the public interest; provided that the application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which the appeal is taken. However, in cases where a stay is in effect at the time of filing the notice of appeal, the stay shall be continued by operation of law for a period of 20 days from the filing of the notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which the appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect, the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of the proceedings.

(h) (1) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision of any licensed hospital or any state agency made after a hearing required by statute to be conducted under the provisions of the Administrative Procedure Act, as set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, conducted by the agency itself or an administrative law judge on the staff of the Office of Administrative Hearings pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. However, the stay shall not be imposed or continued unless the court is satisfied that the public interest will not suffer and that the licensed hospital or agency is unlikely to prevail ultimately on the merits; and provided further that the application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(2) The standard set forth in this subdivision for obtaining a stay shall apply to any administrative order or decision of an agency which issues licenses pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code or pursuant to the Osteopathic Initiative Act or the Chiropractic Initiative Act. With respect to orders or decisions of other state agencies, the standard in

this subdivision shall apply only when the agency has adopted the proposed decision of the administrative law judge in its entirety or has adopted the proposed decision but reduced the proposed penalty pursuant to subdivision (b) of Section 11517 of the Government Code; otherwise the standard in subdivision (g) shall apply.

(3) If an appeal is taken from a denial of the writ, the order or decision of the hospital or agency shall not be stayed except upon the order of the court to which the appeal is taken. However, in cases where a stay is in effect at the time of filing the notice of appeal, the stay shall be continued by operation of law for a period of 20 days from the filing of the notice. If an appeal is taken from the granting of the writ, the order or decision of the hospital or agency is stayed pending the determination of the appeal unless the court to which the appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect, the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of the proceedings.

~~(i) Any administrative record received for filing by the clerk of the court may be disposed of as provided in Sections 1952, 1952.2, and 1952.3.~~

Comment. The portion of the first sentence of subdivision (a) of former Section 1094.5 relating to finality is superseded by Section 1123.120 (finality).

The provision of subdivision (b) relating to review of whether the respondent has proceeded without or in excess of jurisdiction is superseded by Section 1123.420 (review of agency interpretation of law). The provision relating to whether there has been a fair trial is superseded by Section 1123.450 (review of agency procedure). The provision relating to whether there has been a prejudicial abuse of discretion is superseded by Section 1123.440 (review of agency exercise of discretion). The provision relating to proceeding in the manner required by law is superseded by Section 1123.450 (review of agency procedure). The provision relating to an order or decision not supported by findings or findings not supported by evidence is superseded by Section 1123.430 (review of agency fact finding).

Subdivision (c) is superseded by Section 1123.430 (review of agency fact finding).

Subdivision (d) is continued in Section 1123.460 (review involving hospital board).

Subdivision (e) is superseded by Section 1123.650 (new evidence on judicial review).

Subdivision (i) is continued without change in Section 1123.640 (disposal of administrative record).

Staff Note. *The Commission has not yet considered issues involving costs or stays.*

Code Civ. Proc. § 1094.6 (repealed). Review of local agency decision

1094.6. (a) Judicial review of any decision of a local agency, other than school district, as the term local agency is defined in Section 54951 of the Government Code, or of any commission, board, officer or agent thereof, may be had pursuant to Section 1094.5 of this code only if the petition for writ of mandate pursuant to such section is filed within the time limits specified in this section.

(b) Any such petition shall be filed not later than the 90th day following the date on which the decision becomes final. If there is no provision for

reconsideration of the decision, or for a written decision or written findings supporting the decision, in any applicable provision of any statute, charter, or rule, for the purposes of this section, the decision is final on the date it is announced. If the decision is not announced at the close of the hearing, the date, time, and place of the announcement of the decision shall be announced at the hearing. If there is a provision for reconsideration, the decision is final for purposes of this section upon the expiration of the period during which such reconsideration can be sought; provided, that if reconsideration is sought pursuant to any such provision the decision is final for the purposes of this section on the date that reconsideration is rejected. If there is a provision for a written decision or written findings, the decision is final for purposes of this section upon the date it is mailed by first-class mail, postage prepaid, including a copy of the affidavit or certificate of mailing, to the party seeking the writ. Subdivision (a) of Section 1013 does not apply to extend the time, following deposit in the mail of the decision or findings, within which a petition shall be filed.

(c) The complete record of the proceedings shall be prepared by the local agency or its commission, board, officer, or agent which made the decision and shall be delivered to the petitioner within 190 days after he has filed a written request therefor. The local agency may recover from the petitioner its actual costs for transcribing or otherwise preparing the record. Such record shall include the transcript of the proceedings, all pleadings, all notices and orders, any proposed decision by a hearing officer, the final decision, all admitted exhibits, all rejected exhibits in the possession of the local agency or its commission, board, officer, or agent, all written evidence, and any other papers in the case.

(d) If the petitioner files a request for the record as specified in subdivision (c) within 10 days after the date the decision becomes final as provided in subdivision (b), the time within which a petition pursuant to Section 1094.5 may be filed shall be extended to not later than the 30th day following the date on which the record is either personally delivered or mailed to the petitioner or his attorney of record, if he has one.

(e) As used in this section, decision means a decision subject to review pursuant to Section 1094.5, suspending, demoting, or dismissing an officer or employee, revoking, or denying an application for a permit, license, or other entitlement, or denying an application for any retirement benefit or allowance.

~~(f) In making a final decision as defined in subdivision (e), the local agency shall provide notice to the party that the time within which judicial review must be sought is governed by this section.~~

~~As used in this subdivision, "party" means an officer or employee who has been suspended, demoted or dismissed; a person whose permit, license, or other entitlement has been revoked or suspended, or whose application for a permit, license, or other entitlement has been denied; or a person whose application for a retirement benefit or allowance has been denied.~~

(g) This section shall prevail over any conflicting provision in any otherwise applicable law relating to the subject matter, unless the conflicting provision is a state or federal law which provides a shorter statute of limitations, in which case the shorter statute of limitations shall apply.

Comment. Subdivision (f) is continued in Sections 1123.510 (statute of limitations for review of decision in adjudicative proceeding) and 1121.260 ("party" defined).

Staff Note. *The term "local agency" as defined in Government Code Section 54951 means "a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency."*

Gov't Code § 800 (repealed). Costs in civil actions resulting from administrative proceedings

DIVISION 3.5. COSTS IN CIVIL ACTIONS RESULTING FROM ADMINISTRATIVE PROCEEDINGS

800. In any civil action to appeal or review the award, finding, or other determination of any administrative proceeding under this code or under any other provision of state law, except actions resulting from actions of the State Board of Control, where it is shown that the award, finding, or other determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity, the complainant if he or she prevails in the civil action may collect reasonable attorney's fees, computed at one hundred dollars ($100) per hour, but not to exceed seven thousand five hundred dollars ($7,500), where he or she is personally obligated to pay the fees, from the public entity, in addition to any other relief granted or other costs awarded.

This section is ancillary only, and shall not be construed to create a new cause of action.

Refusal by a public entity or officer thereof to admit liability pursuant to a contract of insurance shall not be considered arbitrary or capricious action or conduct within the meaning of this section.

Staff Note. *The staff's research indicates the provision has been applied more broadly than its apparent application to mandamus proceedings involving administrative adjudication — it has also been applied in other types of administrative mandamus proceedings, as well as in ordinary writ of mandate proceedings.*

The Commission has not yet considered issues involving allocation of costs.

Gov't Code § 11523 (repealed). Judicial review

11523. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency. ~~Except as otherwise provided in this section, the petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. On request of the petitioner for~~

~~a record of the proceedings, the complete record of the proceedings, or the parts thereof as are designated by the petitioner in the request, shall be prepared by the Office of Administrative Hearings or the agency and shall be delivered to petitioner, within 30 days after the request, which time shall be extended for good cause shown,~~ upon the payment of the fee specified in Section 69950 for the transcript, the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which is collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. ~~The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until 30 days after its delivery to him or her. The agency may file with the court the original of any document in the record in lieu of a copy thereof.~~ In the event that the petitioner prevails in overturning the administrative decision following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification.

Comment. The second sentence is superseded by Section 1123.510 (statute of limitations for review of decision in adjudicative proceeding).

The third sentence is restated in Code of Civil Procedure Section 1123.320 (administrative review of final decision).

The fourth sentence is continued in Code of Civil Procedure Section 1123.630 (preparation of record).

The seventh sentence is superseded by Code of Civil Procedure Section 1123.620 (contents of administrative record).

The eighth sentence is superseded by Code of Civil Procedure Section 1123.510 (statute of limitations for judicial review).

The ninth sentence is not continued because it is unnecessary.

Staff Note. *The version of this section set out here is as it would be amended by the administrative adjudication proposal.*

The Commission has not yet considered issues involving costs. The fee specified in Government Code Section 69950 is a transcription and copy fee based on the number of words. The provision is revised periodically and was last amended in 1990.

Gov't Code § 11524 (amended). Continuances; grant time; good cause; denial; notice review

11524. (a) The agency may grant continuances. When an administrative law judge of the Office of Administrative Hearings has been assigned to the hearing, no continuance may be granted except by him or her or by the presiding judge of

the appropriate regional office of the Office of Administrative Hearings, for good cause shown.

(b) When seeking a continuance, a party shall apply for the continuance within 10 working days following the time the party discovered or reasonably should have discovered the event or occurrence which establishes the good cause for the continuance. A continuance may be granted for good cause after the 10 working days have lapsed if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause.

~~(c) In the event that an application for a continuance by a party is denied by an administrative law judge of the Office of Administrative Hearings, and the party seeks judicial review thereof, the party shall, within 10 working days of the denial, make application for appropriate judicial relief in the superior court or be barred from judicial review thereof as a matter of jurisdiction. A party applying for judicial relief from the denial shall give notice to the agency and other parties. Notwithstanding Section 1010 of the Code of Civil Procedure, the notice may be either oral at the time of the denial of application for a continuance or written at the same time application is made in court for judicial relief. This subdivision does not apply to the Department of Alcoholic Beverage Control.~~

Comment. Section 11524 is amended to delete the provision for immediate review of denial of a continuance. Standard principles of finality and exhaustion of administrative remedies apply to this and other preliminary decisions in adjudicative proceeding. See, e.g., Code Civ. Proc. § 1123.310 (exhaustion required). But see Code Civ. Proc. § 1123.340 (interim review of prehearing determination).