Study N-200 April 14, 1995

Memorandum 95-21

Judicial Review of Agency Action: Consolidated Draft Statute

Attached are a letter from Bernard McMonigle, Senior Counsel for the Public Employment Relations Board, and a revised draft of the judicial review statute reflecting Commission decisions at the last meeting.

Review of Questions of Law

Section 1123.420 in the draft statute says courts shall use independent judgment in reviewing agency interpretations of law, with appropriate deference to the agency interpretation. The staff put in the statute factors formerly in the Comment determining how much deference the court should give.

Mr. McMonigle is concerned about applying this standard to PERB. He wants to keep PERB's existing standard under which courts uphold PERB's interpretation of statutes within its expertise unless clearly erroneous. The staff thinks independent judgment with appropriate deference and "clearly erroneous" are not that different from one another. If the standard were "erroneous" without the "clearly," that would be the same as independent judgment with no deference. The question is: How much deference is required by "clearly"?

According to Professor Asimow's study, "clearly erroneous" might mean one of two things: It might simply be another way to state the deference test, giving the court discretion to defer to agency interpretation using factors such as those in Section 1123.420 — whether the agency is interpreting a statute or its own regulation, whether it has been consistent in its interpretation and the interpretation is long-standing, whether the agency has interpretive qualifications superior to the court's, and the degree to which the interpretation has been carefully considered by the agency. This meaning of "clearly erroneous" is supported by Nipper v. California Automobile Assigned Risk Plan, 19 Cal. 3d 35, 45, 136 Cal. Rptr. 854 (1977) (courts respect "administrative interpretations of a law and, unless clearly erroneous, have deemed them *significant factors* in ascertaining statutory meaning and purpose") (emphasis added). If "clearly erroneous" is merely another way to state the deference test,

the staff has no problem with it, and believes it is now in Section 1123.420. To buttress this conclusion, the staff cited *Nipper* in the Comment, and included the language quoted in parentheses.

Or "clearly erroneous" might mean the court must accept a reasonable agency interpretation with which it disagrees. This would depart from the mainstream doctrine of deference. The staff would not adopt this meaning. Moreover, the staff sees no compelling reason to single out particular agencies for a more deferential standard of review on questions of law than other agencies. One standard should be applied to all agencies, as the draft statute does.

Agency Interpretation of its Own Regulation or Ordinance

The Commission wanted to know if the existing standard of review of agency interpretation of a regulation or ordinance which it enacted is independent judgment or abuse of discretion. Under existing law, this question is treated generally the same as other agency interpretations of law: The court uses independent judgment with appropriate deference to the agency interpretation.

Professor Asimow's study says, "A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation as opposed to another," citing Westfall v. Swoap, 58 Cal. App. 3d 109, 114, 129 Cal. Rptr. 750 (1976). A similar rule was applied to a city agency interpreting a city ordinance in Guinnane v. San Francisco City Planning Commission, 209 Cal. App. 3d 732, 738, 257 Cal. Rptr. 742 (1989) (long-standing administrative interpretation of the San Francisco Municipal Code by the Planning Commission "charged with its enforcement and interpretation is entitled to great weight"). Section 1123.420 preserves existing law by saying that factors in determining appropriate deference include whether the agency is interpreting its own regulation.

Review of Application of Law to Facts

Section 1123.420 adopts the independent judgment test with appropriate deference for review of agency application of law to facts (mixed questions of law and fact), as recommended by Professor Asimow. This is the same as for review of agency determinations of pure questions of law, discussed above.

Application questions pervade administrative adjudication. They include such questions as whether an accidental injury was one arising out of and in the

course of employment, whether a teacher is unfit to teach, whether a work stoppage was reasonably foreseeable, and whether medication was medically necessary. Applying the independent judgment standard to these questions, as the draft statute does, should partly address anticipated objections of the private bar to substantial evidence review for pure questions of fact, discussed next.

Review of Findings of Fact: Substantial Evidence or Independent Judgment?

Professor Asimow says the standard of review of agency fact-finding is the most important part of this draft. The Commission considered this standard at the last meeting. There was criticism of the draft which continued the existing distinction between cases that affect fundamental vested rights (independent judgment) and those that do not (substantial evidence). Professor Asimow recommended eliminating this distinction as difficult to apply ("metaphysical," "utterly incoherent"), yielding results impossible to predict, and resolvable only by "the incessant litigant's parade" to the courts. He also recommended eliminating the distinction between constitutional agencies (substantial evidence) and non-constitutional agencies (independent judgment). The Commission asked for alternative drafts on the standard of review of findings of fact.

Alternative 1 below (the same as Section 1123.430 in the attached draft) provides independent judgment review of findings of fact in adjudications by an ALJ from OAH where the agency head changes a finding of fact or increases the penalty, and substantial evidence review in all other cases. Alternative 1 makes no distinction between state and local agency action (the same as existing law), eliminates the fundamental vested rights distinction, and eliminates the distinction between constitutional and non-constitutional agencies. Ideally, the staff would like to eliminate independent judgment review of findings of fact altogether, consistent with Professor Asimow's recommendation and the recent legislative trend. But this may be politically impossible. And even under the independent judgment test in Alternative 1 below, the reviewing court must still give great weight to a determination of the presiding officer based on credibility of a witness. Section 11425.50 [in SB 532]. The staff believes Alternative 1 is a reasonable compromise between the ideal of eliminating independent judgment review of fact-finding altogether and the need to accommodate the political interests of professional and occupational licensees:

Alternative 1 (Section 1123.430 in attached draft, recommended by staff):

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

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

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

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

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

The next alternative — Alternative 2 — embodies the ideal of completely eliminating independent judgment review of fact-finding as recommended by Professor Asimow. The main problem with Alternative 2 is political:

Alternative 2 (substantial evidence in all cases, not recommended by staff):

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) 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.

The next alternative — Alternative 3 — is the one the Commission considered at the last meeting. It is objectionable because it continues the untenable distinction between cases involving a fundamental, vested right (comprehended within the language "unless the court is authorized by law to exercise its independent judgment") and those that do not:

Alternative 3 (independent judgment for fundamental, vested rights, not recommended by staff):

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.

Proper Court for Review

The Commission deferred deciding whether the superior court or Court of Appeal is the best court for judicial review of agency action. Existing review is mostly in superior court. Sections 1123.510 and 1123.520 in the draft statute attempt to codify Professor Asimow's recommendation to shift judicial review of adjudication under the APA to the Court of Appeal, except for cases that are low-stakes and fact-oriented, such as DMV drivers' license cases and welfare and unemployment cases, review of which would remain in superior court. Review of state agency decisions not under the APA and all local agency decisions would also remain in superior court.

The Commission was interested in statistics being developed by the Attorney General's Office on the number of writs of mandate filed under the administrative mandamus statute. Joel Primes agreed to provide the Commission with those statistics at the April meeting.

Staff Work Yet to Be Completed

We have not yet completed work on (1) statutes of limitations for judicial review and (2) costs.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

STATE OF CALIFORNIA PETE WILSON, *Governor*

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April 6, 1995

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Dear Commissioners:

On behalf of the Public Employment Relations Board (PERB), I wish to address your Judicial Review Draft of March 1, 1995. Specifically, the PERB wishes to address at this time the standards of review under Article 4, a topic which was discussed at your meeting of March 31, 1995.

~~PERB administers~~ three collective bargaining acts. The Educational Employment Relations Act (EERA), the Higher Education Employer-Employee Relations Act (HEERA) and the State Employer-Employee Relations Act (Dills Act). The procedures for judicial review of final PERB decisions and orders in unfair practice cases is the same under all three statutes. A petition for writ of extraordinary relief is filed in a court of appeal within thirty (30) days of issuance of the decision or order denying reconsideration.

The relationship between PERB and the reviewing courts is generally one of deference. (Regents of the University of California v. Public Employment Relations Board (1986) 41 Cal.3d 601, 617). The courts apply three standards of review to board unfair practice decisions. One standard covers questions of law and statutory construction within PERB's expertise, another standard is applied to PERB's determination of factual questions and a third standard is applied to remedial orders.

When a court of appeal reviews PERB's statutory construction, or other questions of law within PERB's expertise, the court will generally defer to PERB's interpretation unless it is "clearly erroneous." (Banning Teachers Association v. Public Employment Relations Board (1988) 44 Cal.3d 799, 804; San Mateo City School District v. Public Employment Relations Board (1983) 33 Cal.3d 850, 856; San Lorenzo Education Association v. Wilson (1982) 32 Cal.3d 841, 850; also see State Bar of California's California Public Sector Labor Relations, (Labor and Employment Law section) (1994) at pp. 43-5 and 43-6 and cases discussed therein).

The California Supreme Court has discussed the reasoning behind the application of the clearly erroneous test to PERB's

decisions. In Banning Teachers Association, *supra*, at p. 804, the court stated:

> PERB has a specialized and focused task -- "to protect both employees and the state employer from violations of the organizational and collective bargaining rights guaranteed by the [EERA]." (Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, 198 [172 Cal.Rptr. 487, 624 P.2d 1215].) As such, PERB is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." (Universal Camera Corp. v. Labor Bd. (1951) 340 U.S. 474, 488 [95 L.Ed. 456, 467, 71 S.Ct. 456].) "[The] relationship of a reviewing court to an agency such as PERB, whose primary responsibility it is to determine the scope of the statutory duty to bargain and resolve charges of unfair refusal to bargain, is generally one of deference" (Oakland Unified School District v. Public Employment Relations Board (1981) 120 Cal.App.3d 1007, 1012 [175 Cal.Rptr. 105]), and PERB's interpretation will generally be followed unless it is clearly erroneous. (J.R. Norton Co. v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1, 29 [160 Cal.Rptr. 710, 603 P.2d 1306]; Judson Steel Corp. v. Workers' Comp Appeals Bd. (1978) 22 Cal.3d 658, 668 [150 Cal.Rptr. 250, 586 P.2d 564], quoting Bodison Mfg. Co. v. California E. Com. (1941) 17 Cal.2d 321, 325 [109 P.2d 935].)

Similar standards are applied by California courts to decisions of the Agricultural Labor Relations Board (ALRB), (J.R. Norton Co. v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1, 29), and by federal courts to decisions of the National Labor Relations Board (NLRB). (Ford Motor Company v. National Labor Relations Board (1979) 441 U.S. 488 at 497).

Consequently, the appellate courts will defer to PERB's interpretation of its own statute, unless it can be demonstrated that the interpretation is "an unreasonable or unprincipled construction of the statute." (Oakland Unified School District v. PERB (1981) 120 Cal.App.3d 1007, 1012). As long as the Board's

"construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute." (*Id.*, quoting from Ford Motor Company).

The Commission's current Judicial Review Draft at Section 1123.420 sets forth the standard for review of agency interpretations of law. While the exact level of deference courts must give to administrative agencies is not entirely clear from this initial draft, PERB is concerned that there is no inclusion of the traditional deference standard for labor decisions as described above.

The draft appears to contemplate two levels of deference. First, paragraph (b) describes the standard for judicial review which is the "independent judgment of the court," for those issues not covered by paragraph (c). This appears to be the "weak deference" standard preferred by Professor Asimow. Second, paragraph (c) states that the "standard for judicial review of the agencies' determination is abuse of discretion." However, the comment for subdivision (c) refers to a rulemaking case in which the court came to the conclusion that no deference to administrative interpretation of a controlling statute was required because "the meaning of the applicable language and its legislative history was accessible, and hence intelligible, to judges." (Henning v. Division of Occupational Safety and Health (1990) 219 Cal.App.3d 747, 759. We are concerned that neither standard includes the deference appropriately given to PERB and ALRB decisions.

At this time PERB requests that the Commission reconsider the draft sections with regard to standard of review and consider the reasoning of the courts as described in the cases above for granting strong deference to the statutory interpretations of the final decisions of such agencies as PERB. We further request that your Judicial Review Draft be revised to clearly permit the courts to grant the traditional level of deferral.

With regard to questions of fact, the Legislature has determined that PERB's factual findings are "conclusive" on appellate courts so long as those findings are supported by substantial evidence on the record considered as a whole. (Gov. Code, §3520(c) (Dills Act), §3542(c) (EERA), §3564(c) (HEERA)). The Legislature further determined that the substantial evidence test applies to "conclusions of ultimate fact." (Moreno Valley Unified School District v. PERB (1983) 142 Cal.App.3d 191, 196). When PERB "chooses between two conflicting views, the reviewing court may not substitute its own judgment." (Regents of the University of California v. Public Employment Relations Board (1986) 41 Cal.3d 601, 617). The substantial evidence standard does not change

when PERB has reversed a decision of an administrative law judge. For the PERB, and not the ALJ "is the ultimate fact finder, entitled to draw inferences from the available evidence." (MacPherson v. Public Employment Relations Board (1986) 189 Cal.3d 293, 304). While they receive due weight, an ALJ's factual findings, "even demeanor-based credibility findings, are not conclusively binding" on the Board. (*Id.*, discussing Universal Camera Corp. v. The Labor Bd. (1951) 340 U.S. at pp. 496-497). "The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree." (Universal Camera, *supra*, at p. 496).

Section 1123.430 of the Judicial Review Draft sets forth a standard for judicial review for agency factual determinations as "substantial evidence in light of the whole record, unless a court is authorized by law to exercise its independent judgment on the evidence." However, subsection (c) makes an exception to the substantial evidence test where "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."

PERB opposes this exception to the substantial evidence rule and any application of it to the review of PERB decisions. The comments and staff notes which discuss this section appear to discuss agency abuse that may occur when an agency head arbitrarily reverses the presiding officer. We do not wish to comment on the merit of an exception to the substantial evidence rule in such a case. However, this exception has no application in the appellate court review of a decision by an expert board such as PERB which is charged as the "ultimate factfinder" by the Legislature and which has engaged in a review of the entire record and subsequent briefing. PERB urges the Commission to reconsider this exception to the substantial evidence rule and recognize its inapplicability with regard to certain agency decisions.

Sincerely,

B. L. McMonigle

Bernard McMonigle
Senior Counsel

cc: Professor 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 entities:

(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).

Staff Note. *The staff will give further thought to whether the term "public corporation" in subdivision (b) may be too broad.*

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 statutes governing adjudicative proceedings by state agencies. See Gov't Code §§ 11400-11529.

§ 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 § 11405.20 & 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 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 if the limitations provided in Chapter 3 (commencing with Section 1123.110) are satisfied. 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 used 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 both of the following:

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

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

Comment. Subdivision (b) of Section 1121.280 is drawn from 1981 Model State APA § 1-102(10) and Government Code Section 11342(g). 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. The exception in subdivision (b) for an agency statement that relates only to the internal management of the agency is drawn from Government Code Section 11342(g), and is generalized to apply to local agencies.

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

§ 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 Asimow, *Judicial Review: Standing and Timing* 65-82 (Sept. 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 and who satisfies other applicable provisions of law regarding exhaustion of administrative remedies, ripeness, time for filing, advancement of costs, and other pre-conditions is entitled to judicial review of final agency action.

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), 1123.630 (time for filing notice of review of decision in adjudicative proceeding).

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).

§ 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. Department of Health Services, 3 Cal. App. 4th 301, 4 Cal. Rptr. 2d 188 (1992); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

§ 1123.150. Proceeding not moot because penalty completed

1123.150. If a final administrative order or decision is the subject of proceedings under this title and the notice of review is filed while the penalty imposed is in full force and effect, the proceeding shall not be considered to have become moot in cases where the penalty imposed by the agency has been completed or complied with during the pendency of the proceeding.

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

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 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. Private interest standing

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

(b) An organization that does not otherwise have standing under subdivision (a) has standing if an interested person 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 1123.220 governs private interest standing for judicial review of agency action other than adjudication. *Cf.* Section 1121.240 ("agency action" defined). For special rules governing standing for judicial review of a decision in an adjudicative proceeding, see Section 1123.240.

The provision of subdivision (a) that an "interested" person has standing is drawn from the law governing writs of mandate, and from the law governing judicial review of state agency regulations. 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); former Gov't Code § 11350(a) (interested person may obtain judicial declaration on validity of state agency regulation); *cf.* Code Civ. Proc. § 902 (appeal by party aggrieved). This requirement continues 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). A plaintiff's private interest is sufficient to confer standing if that interest is over and above that of members of the general public. Carsten v. Psychology Examining Committee, 27 Cal. 3d 793, 796, 166 Cal. Rptr. 844 (1980); see generally Asimow, *Judicial Review: Standing and Timing* 6-8 (Sept. 1992).

Subdivision (b) 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, as 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).

§ 1123.230. Public interest standing

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

Section 1123.230 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); California Homeless and Housing Coalition, ___ Cal. App. 3d ___, 37 Cal. Rptr. 2d 639 (1995); Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1975); American Friends Service Committee v. Procunier, 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (1973).

Section 1123.230 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 1123.230 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 1123.220 & 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).

§ 1123.240. Standing for review of decision in adjudicative proceeding

1123.240. Notwithstanding any other provision of this article, this section governs judicial review of a decision in an adjudicative proceeding. 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 1123.220 or Section 1123.230.

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

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 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.

§ 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. Judicial review of rulemaking

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

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

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

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

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

§ 1123.340. Exceptions to exhaustion of administrative remedies

1123.340. 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 1123.340 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. This codifies case law. See, e.g., Common Cause of Calif. v. Board of Supervisors, 49 Cal. 3d 432, 443, 261 Cal. Rptr. 574 (1989); Endler v. Schutzbank, 68 Cal. 2d 162, 168, 65 Cal. Rptr. 297 (1968); Rosenfield v. Malcolm, 65 Cal. 2d 559, 55 Cal. Rptr. 595 (1967); see generally Asimow, *Judicial Review: Standing and Timing* 42-45 (Sept. 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 (Sept. 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 (Sept. 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 (Sept. 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 (Sept. 1992).

§ 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 (Sept. 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 1123.340 & 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., Rev. & Tax. Code §§ 5170, 6931-6937 [other references to be added].

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 or application 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.

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

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

(1) Whether the agency is interpreting a statute or its own rule.

(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 long-standing.

(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.

(6) The degree to which the interpretation appears to have been carefully considered by responsible agency officials.

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

Subdivision (b) applies the independent judgment test for judicial review of questions of law with appropriate deference to the agency's determination, except in cases covered by subdivision (c). 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 of the agency action. See Asimow, *The Scope of Review of Administrative Action* 54-55 (Jan. 1993). Under subdivision (b)(6), it would be an indication that the interpretation was carefully considered if, for example, it is in a regulation adopted after public notice and comment or in a carefully crafted opinion in an adjudicative proceeding.

Subdivision (b) is consistent with cases saying courts must accept statutory interpretation by an agency within its expertise unless "clearly erroneous" as that standard was applied in Nipper v. California Automobile Assigned Risk Plan, 19 Cal. 3d 35, 45, 560 P.2d 743, 136 Cal. Rptr. 854 (1977) (courts respect "administrative interpretations of a law and, unless clearly erroneous, have deemed them significant factors in ascertaining statutory meaning and purpose"). The 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). This is especially true when constitutional questions are involved. See People v. Louis, 42 Cal. 3d 969, 987, 728 P.2d 180, 232 Cal. Rptr. 110 (1986).

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. Division of Occupational Safety & Health, 219 Cal. App. 3d 747, 268 Cal. Rptr. 476 (1990).

Staff Note. *Should Section 1123.420 say the court gives no deference at all to agency determination of constitutional issues?*

§ 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.

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

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

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

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

The substantial evidence test of subdivision (b) is not a toothless standard which calls for the court merely to rubber stamp an agency's finding if there is any evidence to support it: The court must examine the evidence in the record both supporting and opposing the agency's findings. Bixby v. Pierno, *supra*. If a reasonable person could have made the agency's findings, the court must sustain them. But if the agency head comes to a different conclusion about credibility from that of the administrative law judge, this detracts from the substantiality of the evidence supporting the agency's decision. See Gov't Code § 11425.50 [in SB 532].

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

§ 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 1123.720(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 Asimow, *The Scope of Review of Administrative Action* 75-78 (Jan. 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. Jurisdiction and venue

§ 1123.510. Superior court jurisdiction; venue

1123.510. (a) The superior court shall conduct judicial review of all of the following:

(1) An agency decision made in an adjudicative proceeding under the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, that is subject to [statutory provisions defining cases that are low-stakes and fact-oriented, such as DMV drivers' license cases and welfare and unemployment cases].

(2) State agency decisions not made in an adjudicative proceeding under the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code,

(3) A decision of a local agency.

(b) Venue is in the county in which the residence or principal place of business of the person seeking judicial review is located. A case filed in the wrong court should not be dismissed, but should be transferred to the proper court.

Comment. Section 1123.510 is drawn from 1981 Model State APA Section 5-104, alternative A. See generally Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus* 23-39 (Nov. 1993).

§ 1123.520. Court of Appeal jurisdiction; venue

1123.520. (a) Except for cases where the superior court has jurisdiction under Section 1123.530, the Court of Appeal shall conduct judicial review of an agency decision under the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) Venue is in the appellate district in which the residence or principal place of business of the person seeking judicial review is located. A case filed in the wrong court should not be dismissed, but should be transferred to the proper court.

(c) If evidence is to be received by the Court of Appeal in accordance with Section 1123.750, the Court of Appeal shall appoint a [referee, master, trial court judge] for this purpose, having due regard for the convenience of the parties.

(d) Decisions of the superior court for review of agency action are reviewable by the Court of Appeal as in other civil cases.

Comment. Subdivisions (a)-(c) of Section 1123.520 are drawn from 1981 Model State APA Section 5-104, alternative B. See generally Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus* 23-39 (Nov. 1993). Subdivision (d) is drawn from 1981 Model State APA Section 5-118 and codifies existing law. See California Administrative Mandamus § 14.4, at 437-38 (Cal. Cont. Ed. Bar, 2d ed. 1989).

Article 6. Review Procedure

§ 1123.610. Notice of review

1123.610. Judicial review of agency action is initiated by filing a notice of review with the court.

Comment. Section 1123.610 supersedes the former first sentence of Section 11523 of the Government Code.

Staff Note. *The Commission has not decided in which court (superior court or Court of Appeal) the notice of review should be filed.*

§ 1123.620. Contents of notice of review

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

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

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

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

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

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

(f) The reasons why relief should be granted.

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

Comment. Section 1123.620 is drawn from 1981 Model State APA Section 5-109.

§ 1123.630. Time for filing notice of review of decision in adjudicative proceeding

1123.630. (a) This section applies to a decision in an adjudicative proceeding, but does not apply to other agency action.

(b) The notice of review 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.

Comment. Section 1123.630 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 [former] 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 overrides 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 Gov't Code §§ 6800-6807), 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.

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.

§ 1123.640. Time for filing opening brief

1123.640. A party that files a notice of review shall file its opening brief 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 1123.640 supersedes the former eighth sentence of Government Code Section 11523.

§ 1123.650. Stay of agency action

1123.650. (a) On application of a person seeking judicial review under this title, the reviewing court may grant a stay of the agency action pending the judgment of the court if it finds that all of the following conditions exist:

(1) The applicant is likely to prevail when the court finally disposes of the matter.

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

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

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

(b) The application for a stay shall be accompanied by proof of service of a copy of the application on the agency. Service shall be made in the manner provided in Title 5 (commencing with Section 410.10) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

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

(d) If an appeal is taken from a denial of relief by the superior court, the decision of the agency shall not be further stayed except on 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 is continued by operation of law for a period of 20 days from the filing of the notice.

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

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

Subdivision (a)(1) generalizes the requirement of former Section 1094.5(h)(1) that a stay may not be granted unless the applicant is likely to prevail on the merits. The former

provision applied only to a decision of a licensed hospital or state agency made after a hearing under the formal hearing provisions of the Administrative Procedure Act.

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

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

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

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

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

§ 1123.660. Type of relief; jury trial

1123.660. (a) The court may award damages or compensation only to the extent expressly authorized by another provision of law.

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

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

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

(e) Except as provided in subdivision (f), all proceedings shall be heard by the court sitting without a jury.

(f) For the purpose of awarding damages or compensation, the court may in its discretion provide for trial by jury as to those issues alone.

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

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

Subdivision (f) is drawn from a portion of the first sentence of Section 1095. See generally California Administrative Mandamus § 1.13, at 14 (Cal. Cont. Ed. Bar, 2d ed. 1989).

For statutes authorizing an award of attorney's fees, see Sections 1028.5, 1123.590. See also Gov't Code §§ 68092.5 (expert witness fees), 68093 (mileage and fees in civil cases in

superior court), 68096.1-68097.10 (witness fees of public officers and employees). *Cf.* Gov't Code § 11450.40 (fees for witness appearing in APA proceeding pursuant to subpoena).

Staff Note. *The CEB treatise says that, although a jury trial under CCP § 1095 on the issue of damages is discretionary with the court, a party may be entitled to a jury "if other causes of action seeking damages are joined." The staff assumes that no other causes of action may be joined on judicial review under this draft statute. Should the statute say so expressly?*

§ 1123.670. Costs in civil action to review administrative proceeding

1123.670. (a) 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.

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

(c) Refusal by a public entity or officer thereof to admit liability pursuant to a contract of insurance is not arbitrary or capricious action or conduct within the meaning of this section.

Comment. Section 1123.670 continues former Government Code Section 800.

Article 7. Record for Judicial Review

§ 1123.710. Administrative record exclusive basis for judicial review

1123.710. Except as provided in Section 1123.750 or as otherwise provided by statute, the administrative record is the exclusive basis for judicial review of agency action.

Comment. Section 1123.710 codifies existing practice. [Citations]. For authority to augment the administrative record for judicial review, see Section 1123.750 (new evidence on judicial review). For other statutes providing exceptions to Section 1123.710, see Rev. & Tax. Code §§ 5170, 6931-6937 (State Board of Equalization).

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

§ 1123.720. Contents of administrative record

1123.720. (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 reporting of proceedings, the transcript or a copy of the electronic reporting 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 1123.720 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 1123.750 (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 reporting 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 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 court may grant appropriate relief, including setting aside, modifying, enjoining, or staying the agency action, or remanding for further proceedings. Section 1123.660.

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 for the decision. Gov't Code § 11425.50 (decision).

§ 1123.730. Preparation of record

1123.730. (a) 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.

(b) On request of the person seeking judicial review for the administrative record for judicial review of agency action other than that described in subdivision (a), the administrative record shall be prepared by the agency.

(c) The administrative record 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 1123.730 supersedes the fourth sentence of former Government Code Section 11523. Under former Section 11523, in judicial review of proceedings under the Administrative Procedure Act, the record was to be prepared either by the Office of Administrative Hearings or by the agency. However, in practice the record was prepared by the Office of Administrative Hearings, consistent with subdivision (b).

Staff Note. *The Commission has not yet considered issues involving costs, including costs of preparation of the record.*

§ 1123.740. Disposal of administrative record

1123.740. 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 1123.740 continues former Section 1094.5(i) without change.

§ 1123.750. New evidence on judicial review

1123.750. (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 1123.750 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 1123.710, 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 1123.210-1123.240.

Code Civ. Proc. § 1085 (amended). Courts which may issue writ of mandamus; parties to whom issued; purpose

1085. ~~It~~ (a) Subject to subdivision (b), a writ of mandamus may be issued by any court, except a municipal ~~or justice~~ court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which ~~he~~ the party is entitled, and from which ~~he~~ the party is unlawfully precluded by ~~such~~ the inferior tribunal, corporation, board or person.

(b) Judicial review of agency action to which Title 2 (commencing with Section 1120) applies shall be pursuant to that title, and not pursuant to this chapter.

Comment. Section 1085 is amended to add subdivision (b) and to make other technical revisions. The former reference to a justice court is deleted, because justice courts have been abolished. See Cal. Const. Art. VI, § 1.

Code Civ. Proc. § 1085.5 (repealed). Review of action of Director of Food and Agriculture

~~1085.5. Notwithstanding this chapter, in any action or proceeding to attack, review, set aside, void, or annul the activity of the Director of Food and Agriculture under Division 4 (commencing with Section 5001) or Division 5~~

~~(commencing with Section 9101) of the Food and Agricultural Code, the procedure for issuance of a writ of mandate shall be in accordance with Chapter 1.5 (commencing with Section 5051) of Part 1 of Division 4 of that code.~~

Comment. Section 1085.5 is repealed as obsolete, since Sections 5051-5064 of the Food and Agricultural Code were repealed in 1987.

Staff Note. *We asked the Department of Food and Agriculture to confirm that Section 1085.5 is no longer necessary.*

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 or application 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 1123.750 (new evidence on judicial review).

The first through sixth sentences of subdivision (g), and the first, second, and third sentences of subdivision (h)(3), are superseded by Section 1123.650. The seventh sentence of subdivision (g) and the fourth sentence of subdivision (h)(3) are continued in Section 1123.150.

Subdivision (i) is continued without change in Section 1123.740 (disposal of administrative record).

Staff Note. *The Commission has not yet considered issues involving costs. A search of other statutes that refer to Section 1094.5 will be necessary for conforming revisions.*

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) of former Section 1094.6 is continued in Sections 1123.630 (time for filing notice of 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."*

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.

A search of other statutes that refer to Section 1094.6 will be necessary for conforming revisions.

Gov't Code § 800 (repealed). Costs in civil action to review administrative proceeding

~~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.~~

Comment. Former Section 800 is continued in Code of Civil Procedure Section 1123.670.

Gov't Code § 11350 (amended). Judicial declaration on validity of regulation

11350. (a) Any interested person may obtain a judicial declaration as to the validity of any regulation ~~by bringing an action for declaratory relief in the superior court in accordance with~~ under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. ~~The right to a judicial determination shall not be affected either by the failure to petition or to seek reconsideration of a petition filed pursuant to Section 11347.1 before the agency promulgating the regulations.~~ The regulation may be declared to be invalid for a substantial failure to comply with this chapter, or, in the case of an emergency regulation or order to repeal, upon the ground that the facts recited in the statement do not constitute an emergency within the provisions of Section 11346.1.

(b) In addition to any other ground that may exist, a regulation may be declared invalid if either of the following exists:

(1) The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.

(2) The agency declaration pursuant to paragraph (8) of subdivision (a) of Section 11346.5 is in conflict with substantial evidence in the record.

For purposes of this section, the record shall be deemed to consist of all material maintained in the file of the rulemaking proceeding as defined in Section 11347.3.

(c) The approval of a regulation by the office or the Governor's overruling of a decision of the office disapproving a regulation shall not be considered by a court in ~~any action for declaratory relief brought with respect to~~ a proceeding under

Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure for judicial review of a regulation.

Comment. Section 11350 is amended to recognize that judicial review of agency regulations is now accomplished under Title 2 of Part 3 of the Code of Civil Procedure. The former second sentence of subdivision (a) is continued in Section 1123.330 of the Code of Civil Procedure.

Gov't Code § 11523 (repealed or amended). 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 former second sentence of Section 11523 is superseded by Code of Civil Procedure Section 1123.630 (time for filing notice of 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 1123.730 (preparation of record).

The seventh sentence is superseded by Code of Civil Procedure Section 1123.720 (contents of administrative record).

The eighth sentence is superseded by Code of Civil Procedure Section 1123.630 (time for filing notice of review of decision in adjudicative proceeding).

The ninth sentence is not continued because it is unnecessary.

Staff Note. *Section 11523 is set out here as it would be amended by SB 523.*

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).