Study N-200 June 16, 1995

Memorandum 95-30

Judicial Review of Agency Action: Revised Draft Statute

Attached to this memorandum is a revised staff draft on judicial review of agency action incorporating Commission decisions at the last meeting. Also attached are letters from the following persons, which are referred to in this memorandum:

Professor Michael Asimow	Exhibit pp. 1-6
David Long, State Bar Director of Research	Exhibit p. 7
Chief Court Counsel to State Bar Court	Exhibit pp. 8-17
State Bar Committee on Appellate Courts	Exhibit pp. 18-22

We plan at the meeting to review unresolved issues on judicial review of agency action, preparatory to approving and circulating for comment a tentative recommendation on the matter. Any person who wishes to raise any point not already raised in this memorandum or in a staff note in the draft should do so at the meeting.

The following issues are discussed in this memorandum:

STATUTE REPLACES OTHER FORMS OF JUDICIAL REVIEW

Exclusive Procedure

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

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

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

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

> **§ 1121.120. Exclusive procedure**
>
> 1121.120. This title provides the exclusive means of judicial review of agency action and replaces other forms of judicial review of agency action, including administrative mandamus, ordinary

mandamus, certiorari, prohibition, declaratory relief, and injunctive relief. Other types of actions may not be joined with a proceeding under this title.

Comment. Section 1120.120 is drawn from 1981 Model State APA § 5-101. By establishing this title as the exclusive method for review of agency action, Section 1120.120 continues and broadens the effect of former Section 1094.5. See, e.g., Viso v. State, 92 Cal. App. 3d 15, 21, 154 Cal. Rptr. 580, 584 (1979). . . . Nothing in this section limits the type of relief or remedial action available in a proceeding under this title. See Section 1123.660 (type of relief).

The staff is quite concerned about this approach, however. In particular, the existing remedies, such as the extraordinary writs and injunctive relief provide a means of immediate action to restrain a public entity or officer, if necessary. If we are going to replace the existing remedies with the new judicial review scheme, we'll need to greatly expand the review procedure to provide for immediate temporary relief, as well as for appropriate procedural protections for the entity or officer restrained. The existing procedures already include detailed statutory provisions for these purposes. This appears to be a classic case of "reinventing the wheel".

A better approach might be to provide not that the new review procedure replaces the existing procedures, but that the existing procedures provide ancillary remedies in connection with the new review procedure:

§ 1121.120. Other procedures ancillary

1121.120. This title provides the exclusive means of judicial review of agency action. Other forms of judicial review of agency action, including mandamus, certiorari, prohibition, declaratory relief, and injunctive relief are ancillary to and may be used as supplemental remedies in connection with a proceeding under this title.

Alternatively, the new procedure could be limited to review of decisions in adjudicative proceedings, replacing the existing administrative mandamus scheme. This would cure the worst problems in existing law without generating procedural difficulties in the new judicial review scheme.

Either of these alternate approaches would also satisfy another concern of the staff — that we should be careful in the area of judicial review to avoid running afoul of separation of powers requirements. The California Constitution gives the judicial branch "original jurisdiction in proceedings for extraordinary relief in the

nature of mandamus, certiorari, and prohibition." Cal. Const. Art. VI, § 10. It is questionable whether the Legislature may eliminate the ability of the courts to make use of these constitutional remedies.

Conflicting Statutes

There are a few special statutes applicable to particular agencies that need to be saved. For example, the Commission tentatively decided to keep de novo review for the State Board of Equalization. Special statutes of other agencies are discussed below. **We need a provision along the following lines** to preserve them:

> **§ 1121.110. Conflicting or inconsistent statute controls**
>
> 1121.110. A statute applicable to a particular entity or a particular agency action prevails over a conflicting or inconsistent provision of this title.
>
> **Comment.** Section 1121.110 is drawn from the first sentence of former Government Code Section 11523 (judicial review in accordance with provisions of Code of Civil Procedure "subject, however, to the statutes relating to the particular agency").

STANDARD OF REVIEW

Questions of Law

Professor Asimow's letter argues persuasively against a special standard of review for determinations of questions of law by the Public Employment Relations Board and Agricultural Labor Relations Board. Exhibit pp. 1-4. **The staff agrees with Professor Asimow that PERB cases using the "clearly erroneous" standard of review of questions of law should be put in the Comment to subdivision (b) of Section 1123.420 dealing with the general standard of independent judgment with appropriate deference, and not subdivision (c) dealing with delegated interpretive power.** The staff has revised the Comment to Section 1123.420 in the attached draft as suggested by Professor Asimow.

Local Agency Interpretation of Its Own Ordinance

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

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

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

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

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

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

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

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

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

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

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

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

Professor Asimow observes that the many land use cases providing abuse of discretion review where a local agency had discretion to determine whether a planned project was consistent with a general plan will be preserved under Section 1123.440 on review of agency exercise of discretion. Exhibit pp. 5-6. To make this clearer, **the staff would add the following to the Comment to Section 1123.440**:

Section 1123.440 applies, for example, to a local agency land use decision as to whether a planned project is consistent with the agency's general plan. E.g., Sequoyah Hills Homeowners

Association v. City of Oakland, 23 Cal. App. 4th 704, 717-20, 29 Cal. Rptr. 2d 182, 189-91 (1993); Dore v. County of Ventura, 23 Cal. App. 4th 320, 328-29, 28 Cal. Rptr. 299, 304 (1994). See also Local and Regional Monitor v. City of Los Angeles, 16 Cal. App. 4th 630, 638, 20 Cal. Rptr. 2d 228, 239 (1993); No Oil, Inc. v. City of Los Angeles, 196 Cal. App. 3d 223, 243, 242 Cal. Rptr. 37 (1987); Greenebaum v. City of Los Angeles, 153 Cal. App. 3d 391, 400-02, 200 Cal. Rptr. 237 (1984).

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

Agency Fact-Finding

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

Perhaps we can better accomplish the goal of providing substantial evidence review of fact-finding except where politically problematic by narrowing the exception to apply only to occupational licensing cases. See Asimow, *The Scope of Judicial Review of Administrative Action* 50 (Jan. 1993). This would preserve substantial evidence review in non-occupational cases adjudicated under the APA, where parties have considerable due process protection which minimizes the need for intense judicial scrutiny. *Id.* at 50-51. **The staff recommends revising Section 1123.430 as follows:**

> 1123.430. (a) This section applies to a determination by the court of whether agency action is based on an erroneous determination of fact made or implied by the agency.
>
> (b) Except as provided in subdivision (c), the standard for judicial review under this section is whether the agency's determination is supported by substantial evidence in the light of the whole record.
>
> (c) The standard for judicial review under this section is the independent judgment of the court whether the decision is supported by the weight of the evidence only if ~~both~~ all of the following conditions are satisfied:
>
> (1) The proposed decision is made by an administrative law judge employed by the Office of Administrative Hearings in a formal adjudicative proceeding under the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.
>
> (2) The proceeding involves an occupational license provided for in the Business and Professions Code.
>
> ~~(2)~~ (3) The agency has changed a finding of fact of, or has increased the penalty imposed by, the administrative law judge in the proceeding.

Review of Hospital Decisions

Section 1123.460 in the draft statute continues subdivision (d) of Code of Civil Procedure Section 1094.5, which provides substantial evidence review of findings by hospital boards, except that independent judgment review applies if a podiatrist claims the hospital discriminated in awarding staff privileges. This provision was enacted in 1978 at the behest of the California Hospital Association to overturn a 1977 case applying independent judgment review to dismissal of a physician by a private hospital. Goldberg, *The Constitutionality of Code of Civil Procedure Section 1094.5(d): Effluvium From an Old Fountainhead of Corruption*, 11 Pac. L.J. 1 (1979).

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

Review of Decisions of Particular Agencies

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

JUDICIAL REVIEW OF NONGOVERNMENTAL ENTITY ACTION

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

The draft statute would repeal and replace Section 1094.5 of the Code of Civil Procedure, which now applies to judicial review of actions of private hospitals and possibly other nongovernmental agencies. See Anton v. San Antonio Community Hospital, 19 Cal. 3d 802, 814-20, 567 P.2d 1162, 140 Cal. Rptr. 442 (1977) (private hospital); Delta Dental Plan v. Banasky, 27 Cal. App. 4th 1598, 33 Cal. Rptr. 381 (1994) (dental health plan); California Administrative Mandamus, *supra,* §§ 3.18-3.19, at 87-90. The *Banasky* case "may open the door for courts to review a wide range of private administrative decisions by administrative

mandamus" under Section 1094.5. California Administrative Mandamus Supplement § 3.19, at 31 (2d ed., Cal. Cont. Ed. Bar 1995).

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

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

> 1120.110. ...
> (b) This title does not govern judicial review of action of a nongovernmental entity, except a decision of a private hospital board in an adjudicative proceeding.
> **Comment.** In applying this title to judicial review of a decision of a private hospital board, subdivision (b) continues the effect of subdivision (d) of former Section 1094.5 of the Code of Civil Procedure.

PROPER COURT FOR JUDICIAL REVIEW; VENUE

Proper Court

The Commission has not yet decided whether the superior court or Court of Appeal is the best court for judicial review of agency action. Sections 1123.510 and 1123.520 in the draft statute generally place judicial review of all agency action — decision-making or otherwise — in the superior court. However the draft shifts judicial review of formal adjudication under the APA from the superior court to the Court of Appeal.

This is consistent with Professor Asimow's recommendation. Asimow, *supra*, at 26. The justification for shifting review of formal APA cases to the Court of Appeal is that, since we are recommending replacing independent judgment review with substantial evidence review in most cases, the review function will be appellate in nature. *Id.* at 27. But the staff notes that the appellate division of the superior court is also equipped and experienced at the appellate function.

We will face substantial political opposition to making any significant shift of cases to the Court of Appeal. The transfer is opposed by the State Bar Committee on Appellate Courts, "as imposing an undue burden on the appellate court system and depriving litigants of speedy determinations on the merits." Exhibit pp. 19-21. We know from our trial court unification study that the Court of Appeal will resist any increase in its workload. The California Academy of Attorneys for Health Care Professionals strongly opposes transfer of judicial review to the Court of Appeal. See Memorandum 94-54. They say the Court of Appeal is not equipped to take new evidence, and that, in cases involving the constitutionality of agency action, proceedings in superior court are necessary to create an evidentiary record.

We are still seeking statistics on the volume of cases we are talking about here, and will provide them if we are able to obtain them.

We can generally preserve the existing balance of judicial workload by replacing draft Sections 1123.510 (superior court jurisdiction) and 1123.520 (Court of Appeal jurisdiction) with the following section:

> **§ 1123.510. Superior court proper court for judicial review**
>
> 1123.510. Except as otherwise provided by statute, the superior court is the proper court for judicial review under this title.
>
> **Comment.** Section 1123.510 is drawn from 1981 Model State APA Section 5-104, alternative A. Under prior law, except where the issues were of great public importance and had to be resolved promptly, the superior court was the proper court for administrative mandamus proceedings. See Mooney v. Pickett, 4 Cal. 3d 669, 674-75, 483 P.2d 1231, 94 Cal. Rptr. 279 (1971). Under Section 1123.510, the superior court is the proper court for judicial review of agency action whether or not issues of great public importance are involved.
>
> The introductory clause of Section 1123.510 recognizes that statutes applicable to particular proceedings provide that judicial review is in the court of appeal. See Bus. & Prof. Code §§ 6082 (State Bar Court), 23090 (Alcoholic Beverage Control Appeals Board); Gov't Code §§ 3520(c), 3542(c), 3564(c) (Public Employment

Relations Board); Lab. Code §§ 1160.8 (Agricultural Labor Relations Board), 5950 (Workers' Compensation Appeals Board); Pub. Util. Code § 1756 (Public Utilities Commission).

The Comment to Section 1123.510 above notes that the section would preserve Court of Appeal review for the four agencies that now have it — Alcoholic Beverage Control Appeals Board, Agricultural Labor Relations Board, Workers' Compensation Appeals Board, and Public Employment Relations Board. Although preserving Court of Appeal review for these four agencies would continue the "illogical hodge-podge" of existing law (Asimow, *supra,* at 24), it seems consistent with Professor Asimow's recommendation to treat these cases as more appellate than trial-like in nature.

There is a constitutional issue on shifting jurisdiction to the Court of Appeal, however. California Constitution Article VI, § 10 vests original jurisdiction in all causes in the superior court, except those given by statute to other trial courts. True, existing law gives some judicial review proceedings to the Court of Appeal, but these are writ proceedings. Under Article VI, § 10 the Supreme Court, Court of Appeal, and superior court have jurisdiction in proceedings for extraordinary relief "in the nature of" mandamus, certiorari, and prohibition. Whether our new review procedure is "in the nature of" a writ proceeding is problematic, although we seek to give it that effect by providing summary dismissal authority to the court.

By conforming revisions in the draft statute, we shift judicial review to the Court of Appeal for the two agencies that now have direct Supreme Court review — the Public Utilities Commission and State Bar Court. This is what Professor Asimow recommended. Asimow, *supra,* at 33-34. He says the Supreme Court is too busy to take seriously review of the complex decisions of the PUC. They are normally summarily affirmed, making PUC decisions essentially unreviewable. The same argument applies to Supreme Court review of decisions of the State Bar Court. Appellants would be more likely to receive review at the Court of Appeal level than the Supreme Court, and review of individual attorney discipline cases is "simply not a wise use of the Supreme Court's precious resources." By conforming revision in the draft statute, we also eliminate the option of Supreme Court review for the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board.

There is pending legislation to remove review of PUC decisions from the Supreme Court to the Court of Appeal. **Whatever action the Legislature takes on**

PUC review jurisdiction, the staff believes we should incorporate into our draft.

With regard to the State Bar Court, the letter of **Scott J. Drexel, the Chief Court Counsel to State Bar Court, argues against removing review from the Supreme Court to the Court of Appeal.** Exhibit pp. 8-17. Mr. Drexel notes that under the existing attorney discipline scheme, the Supreme Court is the only entity vested with disciplinary authority. He also argues that relocation to the Court of Appeal would cause inconsistency of application of discipline, and that the Court of Appeal is opposed to it.

Venue

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

Professor Asimow made three alternative recommendations for venue (Asimow, *supra,* at 35-39):

• If review of formal APA cases is shifted from superior court to the Court of Appeal, he would have venue for superior court and Court of Appeal proceedings in the county of the residence or principal place of business of the person seeking review. This is what the draft statute currently provides. See Sections 1123.510(b), 1123.520(b). He notes that this would not significantly change the results under the existing rule that venue is proper where the cause of action arose.

• He thought the Commission might consider giving the person seeking review a choice between his or her residence or principal place of business and the place where the agency is located or, if the Attorney General will represent the agency, where the AG has an office (Los Angeles, Sacramento, San Diego, and San Francisco). The staff prefers this alternative to the county of residence or principal place of business of the person seeking review as in the draft statute. **If**

the Commission decides to keep the provision in the draft statute for review of APA proceedings in the Court of Appeal, we could add to draft Sections 1123.510(b) and 1123.520(b) the option of venue where the agency is located or, if the Attorney General is representing the agency, where the AG has an office.

• If review of APA cases is not shifted from superior court to the Court of Appeal, he would have venue for superior court proceedings in Sacramento County or, if the agency is represented by the Attorney General, in counties where the Attorney General has an office (Los Angeles, Sacramento, San Diego, and San Francisco). The argument for this approach is that it will avoid local judicial bias, and permit development of expertise in judicial review of agency action. **This alternative is as follows, and could be adopted if the Commission decides to keep most proceedings in superior court:**

> **§ 1123.520. Venue of superior court proceedings**
>
> 1123.520. (a) Venue of proceedings in superior court under this title is as follows:
>
> (1) For judicial review of action of a state agency, in Sacramento County or, if the agency is represented by the Attorney General, in any county or city and county in which the Attorney General has an office.
>
> (2) For judicial review of action of a local agency, in the county or city and county in which the local agency is located.
>
> (b) A case filed in the wrong court shall not be dismissed for that reason, but shall be transferred to the proper court.
>
> **Comment.** Paragraph (1) of subdivision (a) of Section 1123.520 is drawn from Section 401 and from Business and Professions Code Section 2019. Paragraph (2) is drawn from Section 394.
>
> Subdivision (b) codifies case law. See Lipari v. Department of Motor Vehicles, 16 Cal. App. 4th 667, 673, 20 Cal. Rptr. 2d 246, 250 (1993).

OTHER PROCEDURAL PROVISIONS

Court Discretion to Dismiss Summarily on the Pleadings

Existing mandamus proceedings follow the same pleading rules as civil actions generally: The petition must allege specific facts showing entitlement to relief; if specific facts are not alleged, the petition is subject to general demurrer or summary dismissal. 2 G. Ogden, California Public Agency Practice § 53.04[1][a] (1995). (Summary dismissal is not available if the noticed motion procedure is used instead of an alternative writ of mandamus. California Administrative Mandamus, *supra,* § 9.1, at 307.) Although concern was expressed

at the last meeting that summary dismissal might not work well in superior court because of lack of staff to provide analysis, superior courts now have authority to dismiss summarily. The staff would not take away that authority — to do so would affect the workload of the courts with significant fiscal and constitutional (separation of powers) implications. And Professor Asimow recommended continuing existing discretion for the court to decline to grant relief. Asimow, *supra,* 20. The staff believes summary dismissal will be workable, whether proceedings are in superior court or the Court of Appeal.

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

> 1123.110. ~~A~~ Subject to subdivision (b), a person who qualifies under this chapter regarding standing and who satisfies other applicable provisions of law regarding exhaustion of administrative remedies, ripeness, time for filing, advancement of costs, and other pre-conditions is entitled to judicial review of final agency action.
>
> (b) The court may summarily decline to grant judicial review if the notice of review does not present a substantial issue for resolution by the court.
>
> **Comment.** . . . Subdivision (b) continues the former discretion of the courts to decline to grant a writ of administrative mandamus. Parker v. Bowron, 40 Cal. 2d 344, 351, 254 P.2d 6, 9 (1953); Dare v. Board of Medical Examiners, 21 Cal. 2d 790, 796, 136 P.2d 304, 308 (1943); Berry v. Coronado Board of Education, 238 Cal. App. 2d 391, 397, 47 Cal. Rptr. 727 (1965); California Administrative Mandamus § 1.3, at 5 (Cal. Cont. Ed. Bar, 2d ed. 1989). *Cf.* Code Civ. Proc. § 437c (summary judgment in civil action on ground that action has no merit).

Name of Initiating Document

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

Contents of Notice of Review

At the last meeting, the Commission wanted the notice of review to be simplified, since all that is needed is a document to initiate judicial review.

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

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

> 1123.620. (a) The notice of review must set forth all of the following:
>
> ~~(a)~~ (1) The name and mailing address of the person seeking review.
>
> ~~(b)~~ (2) The name and mailing address of the agency whose action is at issue.
>
> ~~(c)~~ (3) Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action.
>
> ~~(d)~~ (4) Identification of persons who were parties in any adjudicative proceedings that led to the agency action.
>
> ~~(e) Facts to demonstrate that the person seeking judicial review is entitled to it.~~
>
> ~~(f) The reasons why relief should be granted.~~
>
> ~~(g)~~ (5) A request for relief, specifying the type and extent of relief requested.
>
> (b) On a party's written demand filed with the court, the person seeking review shall file with the court a pleading that states facts to demonstrate that the person is entitled to judicial review, and the reasons why relief should be granted.

Limitations Period for Judicial Review

Under existing law, judicial review of an adjudication under the APA must be commenced within 30 days after the last day on which reconsideration can be ordered. Gov't Code § 11523. Judicial review of specified adjudications of a local agency (other than a school district) must be commenced within 90 days after the decision is final, or 30 days after delivery or mailing of a timely-requested agency record, whichever is later. Code Civ. Proc. § 1094.6. In non-APA cases, the

agency's statute may specify the limitations period. If not, the limitations period for ordinary civil actions applies, as determined by the nature of the right asserted. California Administrative Mandamus, *supra,* §§ 7.6-7.7, at 243.

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

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

The Commission considered these issues at the January and July 1993 meetings. The Commission first decided there should be a uniform 60-day limitations period for judicial review of state and local adjudications, an increase from the existing 30-day APA limitations period and a decrease from the 90-day local agency limitations period. But the Commission wanted to preserve special limitations periods supported by policy reasons, such as the 30-day PERB and ALRB judicial review periods. The Commission thought there should be no limitations period for compelling an agency to issue a decision when it has failed to do so.

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

The draft statute (Section 1123.630) prescribes a uniform 30-day limitations period for adjudicatory action only. The time period commences to run from the date the decision is "effective." In APA proceedings, a decision is effective 30

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

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

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

• Specified local agency adjudication other than by school districts, now 90 days after the decision is final, or 30 days after delivery or mailing of a timely-requested agency record, whichever is later. Code Civ. Proc. § 1094.6.

• Decision of Public Employment Relations Board, now 30 days after issuance. Gov't Code § 3542.

• Various state personnel decisions, including decisions of State Personnel Board, now one year, but remedies are limited unless the challenge is made within 90 days. Gov't Code § 19630.

• Decision of local zoning appeals boards, now 90 days. Gov't Code § 65907.

• Decision of the Agricultural Labor Relations Board, now 30 days after issuance. Lab. Code § 1160.8.

• Decision of Workers' Compensation Appeals Board, now 45 days after order or denial of petition for reconsideration. Lab. Code § 5950.

• Appeal of decision of Unemployment Insurance Appeals Board, now six months. Unemp. Ins. Code § 410.

• Drivers' license order, now 90 days after notice. Veh. Code § 14401(a).

• Welfare decision of Department of Social Services, now one year after notice. Welf. & Inst. Code § 10962.

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

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

Rules of Pleading and Practice

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

Under existing law, judicial review is commenced either by alternative writ of administrative mandamus or by noticed motion for a peremptory writ. See Code Civ. Proc. § 1088; California Administrative Mandamus, *supra,* § 9.1, at 307. A summons is not required in either case. California Administrative Mandamus, *supra,* §§ 9.8, 9.21, at 315, 324. The alternative writ or notice of motion serves the

purpose of a summons in a civil action, and is served in the same manner. *Id.* §§ 8.48, 9.17, 9.23, at 298-99, 320, 326.

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

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

Except as provided in the administrative mandamus provisions, the rules of pleading and practice for civil actions generally apply to administrative mandamus. Code Civ. Proc. § 1109; California Administrative Mandamus, *supra,* § 8.14, at 268. Thus the respondent may file a demurrer, a motion to dismiss, or an answer as in civil practice. California Administrative Mandamus, *supra,* § 10.1, at 338. The time for filing these pleadings is prescribed by the mandamus statutes. *Id.* § 10.3, at 340-41. Discovery is available in administrative mandamus, but by case law discovery is tailored to the limited admissibility of evidence in the mandamus proceeding. City of Fairfield v. Superior Court, 14 Cal. 3d 768, 774-75, 537 P.2d 375, 122 Cal. Rptr. 543 (1975). The rules are the same, whether in superior court or the Court of Appeal. See 2 G. Ogden, *supra,* § 53.05[1][a].

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

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

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

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

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

Briefing Schedule

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

Trial Preference

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

PREPARATION OF THE RECORD

Time to Prepare the Record

As suggested by Karl Engeman at the last meeting, Section 1123.730 in the draft statute requires the administrative record to be delivered within 60 days after the request for an adjudicative proceeding involving evidentiary hearings of more than 10 days, and within 30 days after the request for an adjudicative proceeding involving evidentiary hearings of 10 days or less and for a non-

adjudicative proceeding. Are these time periods too short for adjudicative proceedings of local agencies now subject to the 190-day time period of Code of Civil Procedure Section 1094.6, or for non-adjudicative proceedings?

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

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

> 1123.730. . . .
>
> (c) Except as provided by statute, the administrative record shall be delivered to the person seeking judicial review as follows:
>
> (1) Within 60 days after the request for an adjudicative proceeding involving evidentiary hearings of more than 10 days, and for nonadjudicative proceedings.
>
> (2) Within 30 days after the request for an adjudicative proceeding involving evidentiary hearings of 10 days or less~~, and for nonadjudicative proceedings~~.
>
> (d) The time limits provided in subdivision (c) shall be extended by the court for good cause shown.

Cost of Preparing the Record

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

The rules for costs in these three types of proceedings are generally consistent with each other and with the Model Act (Section 5-115). In APA proceedings, the person seeking judicial review initially pays for the cost of preparing the transcript and other portions of the record, and the cost of certifying the record. If the person seeking review prevails in overturning the administrative decision, the agency must reimburse the person for the cost of preparing, compiling, and certifying the administrative record. Gov't Code § 11523. Other costs, such as the filing fee and fees for service of documents, appear to be recoverable in the court's discretion. California Administrative Mandamus, *supra,* § 13.28, at 430. It is unclear whether the provisions for waiver of costs when the person seeking review proceeds in forma pauperis apply in APA proceedings.

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

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

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

	Cost of record	Filing & service fees
APA proceedings:	As of right	Court's discretion
Non-APA, state agency:	As of right	Court's discretion
Local agency:	Court's discretion	Court's discretion

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

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

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

CIVIL ENFORCEMENT OF AGENCY RULE OR ORDER

Professor Asimow recommended the draft statute provide that an agency can seek enforcement of a rule or order, including a subpoena, by a petition to the court for civil enforcement. Asimow, *supra,* 21. The Model Act has a whole chapter with five sections on civil enforcement. It permits an agency to seek enforcement of its rule or order by filing with the court a petition for civil

enforcement. The agency may request declaratory relief, temporary or permanent injunctive relief, and any other civil remedy provided by law. If the agency fails to seek civil enforcement, any person with standing may file the petition for civil enforcement after notice to the agency. The contents, preparation, and transmittal of the agency record are the same as for judicial review generally under the Model Act.

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

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

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

Chapter 4. Civil Enforcement

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

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

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

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

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

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

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

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

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

(1) The head of the agency concerned.

(2) The Attorney General.

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

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

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

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

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

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

(1) The agency action is outside the range of discretion delegated to the agency by any provision of law.

(2) The agency action, other than a rule, is inconsistent with a rule of the agency.

(3) The agency action, other than a rule, is inconsistent with the agency's prior practice, unless the agency justifies the inconsistency by stating facts and reasons to demonstrate a fair and rational basis for the inconsistency.

(4) The agency action is otherwise unreasonable, arbitrary, or capricious.

(d) Except to the extent expressly authorized by law, a petition for civil enforcement filed under this section may not request, and the court may not grant, any monetary payment apart from taxable costs.

Comment. Section 1124.120 is drawn from 1981 Model State APA Section 5-202. A person other than the agency may seek enforcement only of an agency's order, not a regulation or rule. The person must be "interested" to have standing to obtain judicial review of the agency's failure to enforce its order.

The prohibition in subdivision (d) against any monetary payment other than taxable costs is intended to prevent any recovery by way of informer's fee, civil fine, reward, damages, compensation, attorney's fees, or the like, unless expressly authorized by law.

§ 1124.130. Petition by qualified person for civil enforcement of agency's order

1124.130. A defendant may assert any of the following in a proceeding under this chapter:

(a) The rule or order sought to be enforced is invalid on any of the following grounds:

(1) It is unconstitutional on its face or as applied.

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

(3) The agency has erroneously interpreted or applied the law.

(b) Any of the following defenses on which the court may consider new issues or take new evidence to the extent necessary for the determination of the matter:

(1) The rule or order does not apply to the party.

(2) The party has not violated the rule or order.

(3) The party has violated the rule or order but has subsequently complied, but a party who establishes this defense is not necessarily relieved from any sanction provided by law for past violations.

(4) Any other defense allowed by law.

Comment. Section 1124.130 is drawn from 1981 Model State APA Section 5-203. This section deals with the type of defense that can be raised, and the authority of the court to consider issues and take evidence.

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

§ 1124.140. Incorporation of certain provisions on judicial review

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

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

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

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

§ 1124.150. Review by higher court

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

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

OPERATIVE DATE; TRANSITIONAL PROVISION

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

CONFORMING REVISIONS

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

Respectfully submitted,

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April 27, 1995

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

Dear Colin,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thanks for your attention to the foregoing.

Sincerely,

Michael Asimow

THE STATE BAR
OF CALIFORNIA

OFFICE OF RESEARCH

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

June 1, 1995

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

RE: Proposed Statute Relating to Review of Administrative Actions

Dear Nat:

Enclosed are the comments of the Chief Court Counsel to the State Bar Court on the proposed statute relating to judicial review of administrative actions, insofar as it recommends that the review of attorney disciplinary and regulatory matters be transferred from the California Supreme Court to the courts of appeal.

Also enclosed are the comments of the Committee on Appellate Courts from February, 1994 concerning the earlier related proposal on administrative mandamus. These comments were held pending receipt of comments from the State Bar Court.

These comments are submitted on behalf of the Committee on Appellate Courts and the Chief Court Counsel to the State Bar Court, and have not been considered or approved by the State Bar Board of Governors.

If you would like further information or have questions about these comments, feel free to contact me.

Sincerely,

David C. Long
Director of Research

cc: Robert Murphy
Jay Plotkin
Scott Drexel
Joseph R. Zamora
Diane Yu
Heather Anderson

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THE STATE BAR
OF CALIFORNIA

OFFICE OF THE STATE BAR COURT

Senior Executive, STUART A. FORSYTH

100 VAN NESS AVENUE, 28th FLOOR, SAN FRANCISCO, CALIFORNIA 94102-5238 (415) 241-2000

May 31, 1995

David C. Long
Director of Research
The State Bar of California
555 Franklin Street
San Francisco, California 94102

Re: Application of Proposed Judicial Review Statute to Review of Attorney Disciplinary and Regulatory Proceedings

Dear David:

I am writing in my capacity as Chief Court Counsel to the State Bar Court to express my concern and opposition to the proposed judicial review statute insofar as it recommends that the review of attorney disciplinary and regulatory matters be transferred from the California Supreme Court to the Courts of Appeal.

In support of his recommendation to the Law Revision Commission that review of State Bar matters be transferred to the Courts of Appeal, UCLA Law Professor Michael Asimov suggests two alternative justifications for such transfer. First, Professor Asimov suggests that, in light of the Supreme Court's adoption in 1991 of a discretionary review standard for State Bar matters (rule 954, Calif. Rules of Ct.), "it would appear that appellants are more likely to receive review at the court of appeal level than at the Supreme Court level". (A Modern Judicial Review Statute to Replace Administrative Mandamus ("Asimov Report"), at p. 34.)

Second, Professor Asimov asserts that "review of individual attorney discipline cases is simply not a wise use of the Supreme Court's precious resources." (Asimov Report, at p. 34.)

In my view, neither of the reasons offered by Professor Asimov justify the transfer of responsibility for review of State Bar matters from the Supreme Court to the Court of Appeal.

In 1970, following an intensive three-year study of attorney discipline systems throughout the United States, the American Bar Association's Special Committee on Evaluation of Disciplinary Enforcement, chaired by retired United States Supreme Court Justice Tom Clark ("the Clark Committee") reported that there were serious problems and deficiencies with many state systems. The Clark Committee identified 36 specific problems and made

recommendations regarding the solution of those problems. Next to the inadequate funding of disciplinary agencies, the most serious problem identified by the Clark Committee was the local and fragmented nature of the disciplinary structure in many states. As a result, the Clark Committee strongly recommended that the disciplinary system be centralized on a statewide basis under the ultimate control of the state's highest court.

In 1979, the American Bar Association adopted standards for lawyer disciplinary proceedings which incorporated the Clark Committee's model in which "exclusive disciplinary jurisdiction" is vested in "the state's highest court" with a single, specialized disciplinary agency responsible for the preliminary investigation, hearing, and determination of complaints. (See ABA Joint Committee on Prof. Discipline, Stds. for Lawyer Discipline & Disability Proceedings, stds. 2.1, 3.1.)

Thereafter, in 1991, the American Bar Association's Commission on Evaluation of Disciplinary Enforcement, chaired by Professor Robert B. McKay until his death in July 1990 ("the McKay Commission"), reported on changes in attorney disciplinary since the 1970 Clark Committee report and made further recommendations for improvement. However, again central in the recommendations of the McKay Commission was the need for effective judicial regulation of the legal profession, closely overseen by the state's highest court. (See McKay Commission Report, at p. 6.)

In California, attorney regulation has always been indisputably within the inherent and plenary authority of the California Supreme Court. (See People v. Turner (1850) 1 Cal. 143, 150; In re Shattuck (1929) 203 Cal. 6, 11-12; Brotsky v. State Bar (1962) 57 Cal.2d 287, 300-302; Stratmore v. State Bar (1975) 14 Cal.3d 887, 889-890.)

In Hustedt v. Workers Comp. Appeals Bd. (1981) 30 Cal.3d 329, the California Supreme Court specifically recognized its responsibility to take the primary policy-making role with respect to the practice of law and the danger of fragmenting that role, stating (Hustedt, supra, 30 Cal.3d at p. 340):

> "This court must also heed its primary policy-making role and its responsibility in matters concerning the practice of law. (*Merco Constr. Engineers, Inc. v. Municipal Court, supra,* 21 Cal.3d at p. 731.) In this regard, the most authoritative study done to date on disciplinary structures and procedures [the Clark Committee] concluded that it is not sound policy to fragment the authority to discipline lawyers."

Perhaps in recognition of its policy-making role and of the dangers of fragmenting the authority to discipline attorneys, the Supreme Court rejected the 1988 recommendation of the Select Committee on Internal Procedures of the Supreme Court ("the Richardson Committee") to transfer review of attorney discipline and regulatory matters to the Courts of Appeal.

Part of the impetus for the Richardson Committee's recommendation for transfer of State Bar matters to the Court of Appeal was concern over the time required for review and decision of those matters by the Supreme Court. During fiscal year 1989-1990, forty-one percent (41%) of the California Supreme Court's published opinions were attorney or judicial discipline cases. Attorney discipline cases accounted for thirty-eight percent (38%) of the published Supreme Court opinions in fiscal year 1990-1991.[1]

After having had an opportunity to review and assess the work of the full-time State Bar Court judges for approximately one and one-half years, the Supreme Court in February 1991, adopted for the first time a discretionary review standard for State Bar discipline and regulatory matters.

The combination of a relatively small number of full-time State Bar Court judges (six hearing judges and three review judges) with specific expertise in attorney discipline and regulatory matters and the implementation of the discretionary review standard has dramatically decreased the number of cases in which the California Supreme Court has granted petitions for review. Since February 1991, the Supreme Court has granted review in only three cases, two involving attorney discipline and one involving an admissions proceeding.[2]

However, the fact that only three writs of review has issued since February 1991 does not indicate that the Supreme Court does not exercise its inherent and plenary review of these matters. For example, the writ of review issued by the Supreme Court on May 25, 1995, in In the Matter of John Michael Brown, Sup. Ct. No. S046753 was issued by the Court on its own motion. Neither the State Bar nor the respondent attorney had sought the Supreme

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[1] *Although the full-time State Bar Court review and hearing judges were appointed by the California Supreme Court in June 1989, and commenced hearing attorney discipline and regulatory matters on September 1, 1989, the opinions issued by the California Supreme Court in 1989-1991 related entirely to proceedings that had been heard under the former system of volunteer and compensated referees and retired judges.*

[2] *In the Matter of Joseph Menna, Sup. Ct. No. S038139 (State Bar Case No. 91-M-06903) [writ issued Aug. 11, 1994]; In the Matter of Ivan O.B. Morse, Sup. Ct. No. S041048 (State Bar Case No. 88-O-10896, et seq.) [writ issued Jan. 5, 1995]; and In the Matter of John Michael Brown, Sup. Ct. No. S046753 (State Bar Case No. 91-C-03459) [writ issued May 25, 1995].*

Court's review. Additionally, in In the Matter of Ivan O.B. Morse, Sup. Ct. No. S041048, even though the respondent attorney had filed a petition for review by the Supreme Court, the Court granted review on its own motion because it was considering the imposition of more discipline than that recommended by the State Bar Court Review Department.

The State Bar Court's power to impose discipline upon attorneys is limited to the imposition of public and private reprovals. (See Bus. & Prof. Code, § 6078.) Only the Supreme Court may actually impose suspension or disbarment; therefore, the State Bar Court's decisions on those matters constitute only a recommendation to the Supreme Court. (Bus. & Prof. Code, §§ 6078, 6081.)

If no timely petition for review is filed, the Supreme Court will typically issue an order imposing the discipline recommended by the State Bar Court. Additionally, denial of review of a decision of the State Bar Court constitutes a final judicial determination on the merits.[3] (See rules 953(b), 954(b), Calif. Rules of Ct.)

Nevertheless, the Supreme Court retains its power to exercise its inherent jurisdiction over the lawyer discipline and admissions system (rule 951(g), Calif. Rules of Ct.) and may, among other things, remand the proceeding to the State Bar Court with instructions at any time prior to the final disposition of the proceeding (rule 953.5, Calif. Rules of Ct.). Since February 1991, the Supreme Court has, following its own review, remanded approximately ten (10) matters to the State Bar Court with instructions regarding further proceedings to be conducted or issues to be addressed.

This system has worked exceedingly well during the past four years. The present system strikes an important balance between the Supreme Court's recognition of its supervisory and policy-making role with respect to regulation of the practice of law and its need to retain sufficient time and resources to enable it to address and resolve death penalty appeals and other significant criminal and civil matters.

Transfer of this system to the Courts of Appeal would pose significant problems. Since the State Bar Court's powers regarding imposition of suspension and disbarment is only that of

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[3] *This procedure for acting upon State Bar Court recommendations was adopted because of concerns expressed by the Supreme Court regarding the potential for improper delegation of judicial power to the State Bar Court. These issues were briefly by the State Bar and the State Bar Court prior to the Supreme Court's adoption of the discretionary review standard in February 1991.*

recommendation, the Courts of Appeal would be required to review the record and to act upon the State Bar Court's recommendation, whether or not judicial review was formally requested. Not only would this pose a burden on the Courts of Appeal[4], it would inevitably lead to inconsistent application of the State Bar Act and Rules of Professional Conduct and significant variations in the degree of discipline imposed for similar misconduct.

On May 5, 1995, Alexander B. Aikman, a consultant with more than 20 years experience working for the National Center for State Courts, made recommendations to the Board of Governors of the State Bar regarding modifications to the intermediate review of State Bar matters that is currently conducted by the State Bar Court Review Department.

The Board of Governors' retention of Mr. Aikman was generated by a recommendation of the Discipline Evaluation Commission ("DEC"), chaired by the Honorable Arthur L. Alarcon, in its August 1994 report that the number of requests for review from State Bar Court hearing judge decisions did not warrant a full-time, three-member State Bar Court Review Department model.[5]

One of the alternatives considered by Mr. Aikman was the elimination of the Review Department and the transfer of intermediate review to the Courts of Appeal. In connection with that proposal, Mr. Aikman interviewed the Presiding Justices of each of the six appellate districts. The Presiding Justices were unanimously opposed to the review of State Bar matters by the Courts of Appeal, both on grounds of workload, consistency and delay. (Attached is an excerpt from Mr. Aikman's May 5, 1995 report insofar as it relates to review of State Bar matters by the Courts of Appeal.)

In light of all of these circumstances, I strongly urge the Law Revision Commission not to recommend the transfer of State Bar discipline and regulatory matters from the California Supreme Court to the Courts of Appeal. Therefore, I recommend that the Law Revision Commission amend the definition of the term "agency" contained in section 1120(b) of the proposed judicial review statute to read as follows:

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[4] *In 1994, the California Supreme Court entered final disciplinary and regulatory orders in 758 separate proceedings.*

[5] *Since September 1, 1989, there have never been more than forty (40) requests for review filed by the parties in any calendar year. Unlike the former volunteer system, the State Bar Court Review Department has no authority to review proceedings except upon the request of one or both of the parties. (Bus. & Prof. Code, § 6086.65, subd. (d).)*

> "(b) A local agency, including a county, city, district, public authority, public agency, or other political subdivision or public corporation of the state [redacted]."

I would be happy to provide any additional information or assistance that the Law Revision Commission may desire with respect to its discussion and analysis of Professor Asimov's proposed judicial review statute.

Very truly yours,

Scott J. Drexel
Chief Court Counsel

SJD:dim

Attachment

cc: Stuart A. Forsyth

ATTACHMENT A

solution in excess of the perceived problem (public perceptions that attorneys do not discipline attorneys). There are ways short of shifting the bar court from one arm of the Supreme Court to another to address that problem, including retaining public membership on the State Bar Court and better public information about the independence and good work of the current State Bar Court.

B. Court of Appeal model

The only difference between the option of having only two districts of the court take the appeals and having all six take them is a small reduction in the lack of consistency with the former option. Otherwise, all the positives and negatives indicated below apply.

1. Positives

- Breadth of perspective brought to these cases by the justices.
- The court's business is to hear appeals.
- These cases would fit into the normal caseload and look like other appeals if the standard of review were changed.
- Judges understand lawyers and the practice of law in ways they do not understand plumbers, architects, or doctors, so their review of State Bar discipline is uniquely appropriate.
- The development of law regarding the disciplining of attorneys could be fit more readily into broad trends in the law than it can by judges in the Review Department.
- The burden of these cases on any one division and department within a division would be small.
- The court provides the process with more racial, ethnic, and gender diversity than the Review Department could ever provide simply as a consequence of numbers.

2. Difficulties/Negatives

- Consistency of rulings would be lost. If only the First and Second Districts are used, there are 12 divisions and 45 judicial positions that would review these cases. If all six districts are used, there are 18 divisions and 87 judicial positions.

- Some observers fear some " home towning" by different districts that would compound the lack of consistency.

- There may be some risk of pressure on the justices to "protect" or be gentle with prominent attorneys in their local area.

- The districts are unanimous in their concern that being assigned these cases would increase pressure on the Court to take other administrative-type cases that on their own or cumulatively would add significant workload. They also are unanimous in their concern that the legislature would not provide any judgeship or other financial relief to reflect the increase in workload.

- If the Bar is required to continue to pay for the review function being performed by the Court of Appeal–a proposition more readily accepted by Bar leaders than by the presiding justices of the districts–the cost of this function might increase.

- Judicial expertise and possibly interest in this type of case would be lost.

- There is a high likelihood that these cases would be assigned to staff, leading to both expertise and decision-making shifting to people lacking public accountability and who do not necessarily possess the breadth of experience and perspective of the justices.

- The time to disposition would increase significantly. In every division in every district, the median time to disposition for civil cases is longer than the Review Department's average time; in five of the divisions in the last quarter of 1994, the median time to disposition for civil cases was more than a year longer than the Review Department's average time. Discipline cases might well take longer than the median Court of Appeal case because of record length.[10]

[10] In a representative group of 20 cases disposed by the Review Department judges in 1994, the cases had a median number of exhibits of 26 (35 average) that had a median length of 219 pages (355 average). The highest number of exhibits was 120. The longest set of exhibits was 2,394 pages long. (But the second longest was 573 pages.) All of the cases involved reporters' transcripts from underlying civil or criminal proceedings in the public courts. The median transcript length was 272 pages (317 pages average). The longest transcript was 695 pages. Members of the Review Department have cited much longer records, but these appear to have been exceptional records rather than common-place. As is usually the case with all of us, exceptional cases are remembered much more readily and come to be thought of as more frequent than they are in fact.

3. Conclusions

The surface appeal of the Court of Appeal loses its sheen as one examines the option in more detail. As with the Supreme Court options, and putting aside the unanimous opposition to being assigned these cases by the Court's six presiding justices, the difficulties and negatives of this option overwhelm the advantages. Many of the most important positives gained with the full-time professional Review Department would be lost by referring these cases to the Court of Appeal.

C. Keeping the review function with the State Bar Court

1. One- and two-judge models

Before addressing the various three-judge models, it might be useful to address the one- and two-judge models that might be devised. They are listed in Table One.

a. Positives

- Cost:
  - one judge supported by one or two staff counsel would reduce the cost of judicial salaries and fringe benefits by almost $270,000, plus other support staff, attributed rent, supplies, and possibly management costs could be reduced.
  - Two judges would save about $134,400 in salary and fringe benefits plus some of the other items mentioned above.
- The error-correction function could be preserved and there would be some screening for the Supreme Court. Two judges who agree also could address legal issues with some credibility.
- Consistency would be maximized with one judge, since one person would make all decisions.

b. Difficulties/Negatives

i. With either model

- Very strong bias in US jurisprudence for three reviewers.

ii. With one-judge model

THE COMMITTEE ON APPELLATE COURTS
THE STATE BAR OF CALIFORNIA

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February 9, 1994

Mr. David C. Long
Director of Research
Office of Research
State Bar of California
555 Franklin Street
San Francisco, CA 94102-4498

Re: Comments on the Secretary Referral Concerning the California Law Revision Commissions's Background Study re: A Modern Judicial Review Statute to Replace Administrative Mandamus

Dear Mr. Long:

At our meeting on February 4, 1994, the Committee on Appellate Courts discussed the Background Study ("the Study") referenced above.[1] The consensus of the Committee is as follows:

- The Committee **opposes** the recommendation to transfer initial review of a substantial number of writs challenging agency action from the superior courts to the courts of appeal [Study, § B].

- The Committee **supports** the recommendation to adopt a uniform standard governing stays pending judicial review of agency decisions [Study, § C].

- The Committee takes **no position** with respect to the recommendation to abolish the current system of administrative mandamus (and related procedures) and replace it with a petition for

1 The study indicates that it "is the seventh and last in a series of studies . . . relating to California administrative adjudication and judicial review of agency action." The Committee was not provided with any of the six prior reports. It is possible that certain of the recommendations made in those reports, if adopted, would affect the Committee's analysis and conclusions with respect to the recommendations in the Study.

> judicial review [Study, § A.] It likewise takes **no position** with respect to the recommendations concerning venue [Study, § D.] In the Committee's view, these recommendations as currently framed are beyond the purview of the Committee.

A summary of our analysis and conclusions follows.

Transferring Initial Review to Courts of Appeal

The report suggests changing the basic system from one in which review of most agency actions is sought in the first instance in the superior court to one in which such review would be sought first in the court of appeal. Three categories of cases should be left to superior court review: (1) cases which generate a large volume of "low-stakes, fact-oriented" appeals (e.g. DMV license cases, welfare or unemployment cases); (2) local agency decisions; and (3) state agency decisions that are not governed by APA procedures.

A. Advantages

At present, judicial review of agency decisions can be had in the first instance in the Supreme Court (PUC and State Bar Court), the courts of appeal (WCAB, ALRB, ABC), or the superior court (the bulk of the others). According to the Study, the courts of appeal appear to provide a more logical forum for reviewing most agency action: in most cases, the court's function is to decide questions of law and to assess the reasonableness of the agency's fact findings and discretionary decisions (or in rulemaking, to determine whether a rule was reasonably necessary), all based on a complete and organized record. This function is essentially appellate, not trial. Courts of appeal are specialists in such matters; trial courts are not.

The Study recommends review in the court of appeal in most cases, centralizing review into a relatively few courts. This should result in greater uniformity of decision, a higher quality of decision, and a better system of precedents. Moreover, by substituting one level of review for two, the proposal should decrease the cost and time involved in obtaining a conclusive determination.

The Study recommends that certain "low-stakes, fact-oriented" proceedings remain in superior court. According to the

Study, these cases are unlikely to go beyond the superior court stage and frequently involve litigants for whom travelling to distant appellate court venues would be extremely difficult. Similarly, superior courts should retain initial review of decisions of local agencies and of state agencies that are not governed by APA procedures, since many of these decisions are made under informal procedures (and without an organized record) and also involve relatively low stakes.

B. Disadvantages

The primary disadvantage of this recommendation is the increased workload on the courts of appeal. A related problem is that cases now decided by one (superior court) judge would be decided by three justices. The Study suggests, however, that since a high percentage of cases end up being appealed to the court of appeal anyway, these problems will not create an undue additional burden on the courts of appeal.

A problem not mentioned in the Study is the fact that under Article III, § 3.5 of the California Constitution, administrative agencies are not empowered to declare a statute unconstitutional (unless a court of appeal has previously declared them to be so). Accordingly, in cases involving a constitutional challenge, the reviewing court is the first court in which that challenge may be heard. In some situations, this challenge will require the court to take evidence and make a decision based on that evidence. The courts of appeal are ill-equipped to undertake this sort of fact-gathering and fact-finding.

A separate problem is the difficulty of obtaining priority for petitions for judicial review filed in the first instance in the court of appeal (as is typically given now to administrative writs filed in superior court).

C. Committee Position

Although the Study makes a good case for initial review in the courts of appeal in many cases, it glosses over the very real problem of increased workload on appellate court justices. The assumption that a high percentage of agency review cases which start in superior court end up in the courts of appeal is questionable. The Committee guesses that many cases never go beyond the superior court stage; and because of the inevitable

weeding out process that takes place in the superior court, those cases that are appealed reach the court of appeal in a much different posture (and require less work) than if they were filed in that court in the first instance.

Equally significant is the fact that the courts of appeal are simply unequipped to resolve these cases as quickly as do the superior courts. Given the nature of the problems involved, speedy resolution is frequently of great importance. A lesser but not insubstantial problem is the difficulty in drawing a bright line between those cases which are transferred to the courts of appeal and those which are retained in superior court.

Given these concerns, the committee opposes adoption of this recommendation as imposing an undue burden on the appellate court system and depriving litigants of speedy determinations on the merits.

Stays Pending Review

Under the APA as it exists now, an agency can stay its own decision. If it refuses to do so, the superior court may order a stay if doing so would not be against the public interest. A stricter standard applies in certain other cases, requiring the court to find that the public interest will not suffer and that the agency is unlikely to prevail on the merits.

The Study recommends setting a uniform standard applicable to all cases which would take into account a variety of factors, including (1) the public interest, (2) the likelihood of the petitioner's success, (3) the likelihood of irreparable injury to petitioner if the stay is not granted, and (4) the potential harm to third parties if the stay is granted.

A. Advantages

The recommendation would simplify California law by unifying the standards for stays in all cases seeking judicial review of agency actions. It would eliminate artificial distinctions in obtaining a stay based on the type of action which is being challenged.

B. Disadvantages

None identified.

C. **Committee Position**

The Committee believes, as the report notes, that there is no satisfactory rationale that the showing necessary to obtain a stay should vary with or depend upon the underlying action being challenged. This recommendation would simplify and unify California law while still maintaining a sufficiently rigorous standard to ensure that stays will only be granted in appropriate cases.

For these reasons, the Committee supports adoption of this recommendation.

Petition for Judicial Review/Venue

In light of the Committee's opposition to the recommendation to transfer initial jurisdiction to the courts of appeal, the recommendations concerning the proposed petition for judicial review and venue are not within the Committee's purview. At such time as recommendations are adopted which relate to appellate procedure, the Committee will be happy to comment on them.

Most sincerely,

Susan Popik

Susan M. Popik
Committee Member

cc: Philip Goar
Heather Anderson

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JUDICIAL REVIEW OF AGENCY ACTION

OUTLINE

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. Preliminary Provisions

§ 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. The term "local agency" is defined in Government Code Section 54951. See Section 1121.255 & Comment.

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).

§ 1121.110. Conflicting or inconsistent statute controls

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

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

§ 1121.130. Operative date; application to pending proceedings

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

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

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

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

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

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

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 §§ 11405.10-11405.80.

§ 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, governmental subdivision or unit of a governmental subdivision, 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).

§ 1121.255. Local agency

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

Comment. Section 1121.255 is drawn from former Section 1094.6, and is broadened to include school districts.

§ 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 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, 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.

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

Comment. Section 1123.150 continues the substance of 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 Public Resources Code Section 30801 (judicial review of decision of Coastal Commission by "any aggrieved person").

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

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); 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 on a private interest, as opposed to a public interest, basis. 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 as well, whether state or local. 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. For special rules governing standing for judicial review of a decision in an adjudicative proceeding, see Section 1123.240. *Cf.* Section 1121.240 ("agency action" defined).

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, 31 Cal. App. 4th 450, 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 Section 1123.230 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 effect, 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) A party to a proceeding under Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) A participant in a proceeding other than a proceeding described in subdivision (a), if the participant also satisfies 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 Asimow, *supra,* 39-41.

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 Asimow, *supra,* 49-50.

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 Asimow, *supra,* 43.

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 Asimow, *supra,* 42-49.

§ 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 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., Pub. Util. Code § 1757; Rev. & Tax. Code §§ 5170, 6931-6937.

§ 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.

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

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. 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., Association 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. Factors in determining the deference appropriate include such matters as (1) whether the agency is interpreting a statute or its own regulation, (2) whether the agency's interpretation was contemporaneous with enactment of the law, (3) whether the agency has been consistent in its interpretation and the interpretation is 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, and (6) the degree to which the interpretation appears to have been carefully considered by responsible agency officials. See Asimow, *The Scope of Review of Administrative Action* 54-55 (Jan. 1993).

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 old "clearly erroneous" standard was another way of requiring the courts in exercising independent judgment to give appropriate deference to the agency's interpretation of law. See Bodinson Mfg. Co. v. California Employment Comm'n, 17 Cal. 2d 321, 325-26, 109 P.2d 935 (1941). For cases applying the old standard in the labor law context, see, e.g., Agricultural Labor Relations Bd. v. Superior Court, 16 Cal. 3d 392, 400, 411, 546 P.2d 687, 128 Cal. Rptr. 183 (1976); Banning Teachers Ass'n v. Public Employment Relations Bd., 44 Cal. 3d 799, 804, 750 P.2d 313, 244 Cal. Rptr. 671 (1988); San Mateo City School Dist. v. Public Employment Relations Bd., 33 Cal. 3d 850, 856, 663 P.2d 523, 191 Cal. Rptr. 800 (1983); San Lorenzo Education Ass'n v. Wilson, 32 Cal. 3d 841, 850, 654 P.2d 202, 187 Cal. Rptr. 432 (1982). The deference due the agency's determination does not 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); Cal. Const. Art. III, § 3.5.

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). But mere authority for an agency to make regulations generally or to implement a statute is not in itself a delegation of authority to construe the meaning of words in the statute. And a delegation of authority to construe a statute is not to be implied merely because the statute is ambiguous. Subdivision (c) applies only when a statute demonstrably delegates to the agency the power to interpret particular statutory language. See Asimow, *supra* at 60. For an example of an express delegation of authority to apply law to facts (findings of "ultimate facts") and providing a more deferential standard of review, see Gov't Code § 3564 (Public Employment Relations Board).

§ 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 if the agency has changed a finding of fact of, or has increased the penalty imposed by, the administrative law judge in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

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." The 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 than the administrative law judge, the substantiality of the evidence supporting the agency's decision is called into question. *Cf.* 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 use 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(c)(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 1124.120 (civil enforcement).]

Staff Note. *Concerning the last sentence in the Comment, the Commission has not yet decided whether to add civil enforcement provisions. See Memorandum 95-30.*

§ 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) Except as provided in subdivision (c), 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.

(c) 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 under this section 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. *The staff recommends this section be deleted. See Memorandum 95-30.*

§ 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) Except as provided in Section 1123.520, the superior court has jurisdiction of judicial review of agency action.

(b) The proper county for judicial review under this section is:

(1) In the case of agency action of a state agency, the county of the residence or principal place of business of the person seeking judicial review.

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

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

(d) A decision of the superior court in a judicial review of agency action is reviewable by the court of appeal as in other civil cases.

Comment. Section 1123.510 is drawn from 1981 Model State APA Section 5-104, alternative A.

Under subdivision (a), the superior court has jurisdiction of judicial review of all agency action except decisions in specified state agency adjudicative proceedings. See Section 1123.520 & Comment. Under subdivision (c), a case filed in the wrong county should not be dismissed, but should be transferred to the proper county.

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).

§ 1123.520. Court of Appeal jurisdiction; venue

1123.520. (a) The court of appeal has jurisdiction of judicial review of a decision in the following adjudicative proceedings:

(1) An adjudicative proceeding in which jurisdiction of judicial review is vested by statute in the courts of appeal.

(2) An adjudicative proceeding required to be conducted under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code

(b) The proper appellate district for judicial review under this section is the appellate district of the residence or principal place of business of the person seeking judicial review.

(c) If the court of appeal receives evidence pursuant to Section 1123.760, the court shall appoint a referee, master, or trial court judge for this purpose, having due regard for the convenience of the parties.

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).

Adjudicative proceedings for which judicial review is vested by statute in the courts of appeal referred to in subdivision (a)(1) include proceedings of the following agencies [statute references to be provided]:

Agricultural Labor Relations Board
Alcoholic Beverage Control Appeals Board
Energy Commission
Department of Alcoholic Beverage Control
Public Employment Relations Board
Public Utilities Commission
State Bar Court
Workers' Compensation Appeals Board

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

Article 6. Review Procedure

§ 1123.610. Notice of review

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

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

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

§ 1123.620. Applicability of rules of practice for civil actions

1123.620. (a) Except as otherwise provided in this title or by Judicial Council rule not inconsistent with this title, Part 2 (commencing with Section 307) applies to proceedings under this title.

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

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

§ 1123.630. Contents of notice of review

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

(a) The name and mailing address of the person seeking judicial 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 1123.630 is drawn from 1981 Model State APA Section 5-109.

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

1123.640. (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 of review is extended as to a party during any period when the party is seeking reconsideration of the decision pursuant to express statute or regulation.

(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 1123.640 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 formerly found in various special statutes. See, e.g., Code Civ. Proc. § 1094.6 (local agency adjudication other than school district); Gov't

Code §§ 3542 (Public Employment Relations Board), 19630 (State Personnel Board), 65907 (local zoning appeals board); Lab. Code §§ 1160.8 (Agricultural Labor Relations Board), 5950 (Workers' Compensation Appeals Board); Unemp. Ins. Code § 410 (Unemployment Insurance Appeals Board); Veh. Code § 14401(a) (drivers' license order); Welf. & Inst. Code § 10962 (welfare decision of Department of Social Services).

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

The time within which judicial review must be initiated under subdivision (b) begins to run on the date the decision is effective. A decision under the formal hearing procedure of the Administrative Procedure Act 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 Unemp. Ins. Code § 410; Veh. Code § 14401(b).

§ 1123.645. Time for filing opening brief

1123.645. 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 1123.645 supersedes the eighth sentence of former Government Code Section 11523.

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

§ 1123.650. Stay of agency action

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

(b) On application of the person seeking judicial review, 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 are satisfied:

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

(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.

(c) 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 same manner as service of a summons in a civil action.

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

(e) 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 after the filing of the notice.

(f) If an appeal is taken from a 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 (b)(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 (c) 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 (d) 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 (e) 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 (f) continues the sixth sentence of former Section 1094.5(g) and the third sentence of former Section 1094.5(h)(3).

A 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 statute.

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

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 encompasses 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).

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).

§ 1123.670. Attorney fees in civil action to review administrative proceeding

1123.670. (a) In judicial review of a decision, award, finding, or other determination in an administrative proceeding under any provision of state law, where it is shown that the decision, award, finding, or other determination was the result of arbitrary or capricious action or conduct by an agency or officer in an official capacity, the complainant if the complainant prevails on judicial review 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 the complainant is personally obligated to pay the fees, from the agency, 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 an agency or officer to admit liability pursuant to a contract of insurance is not arbitrary or capricious action or conduct within the meaning of this section.

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

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 1123.760 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. See, e.g., Beverly Hills Fed. Sav. & Loan Ass'n v. Superior Court, 259 Cal. App. 2d 306, 324, 66 Cal. Rptr. 183, 192 (1968). For authority to augment the administrative record for judicial review, see Section 1123.760 (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 prescribed by 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 for the agency action 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 1123.760 (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, 522 P.2d 12, 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. 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) [AB 523].

§ 1123.730. Preparation of record

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

(1) If the agency action is a decision in an adjudicative proceeding required to be conducted under 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.

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

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

Comment. Section 1123.730 supersedes the fourth sentence of former Government Code Section 11523 and the first sentence of subdivision (c) of former Section 1094.6 of the Code of Civil Procedure. 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 (a)(1).

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

§ 1123.740. Cost of preparing record and other costs

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

(b) Except as otherwise provided by Judicial Council rule, the prevailing party is entitled to recover as a cost of suit the following costs borne by the party:

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

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

(3) Any filing fee.

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

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

(d) Notwithstanding any other provision of this section, where the person seeking judicial review 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 agency.

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

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

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

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

§ 1123.750. Disposal of administrative record

1123.750. 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 1123.750 continues former Section 1094.5(i) without change.

§ 1123.760. New evidence on judicial review

1123.760. (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 1123.760 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: A formal adjudicative proceeding conducted by an administrative law judge employed by the Office of Administrative Hearings, or where the question involves application of law to facts (mixed questions of law and fact). See Sections 1123.420, 1123.430. [This will have to be revised if the Commission narrows independent judgment review under Section 1123.430]. It should be noted that admission of evidence by the court under this provision is discretionary with the court.

CONFORMING REVISIONS

MEDICAL BOARD OF CALIFORNIA

Bus. & Prof. Code § 2019 (amended). Office of the board

2019. (a) The office of the board shall be in the City of Sacramento. Suboffices may be established in the Cities of Los Angeles, San Diego, and San Francisco or ~~the~~ their environs ~~of such cities. Legal~~ Except as provided in subdivision (b), legal proceedings against the board shall be instituted in any one of these four cities. The board may also establish other suboffices as it may deem necessary and ~~such~~ records ~~as~~ that may be necessary may be transferred temporarily to any suboffices.

(b) Judicial review of actions of the board shall be in accordance with Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

Comment. Section 2019 is amended to make judicial review of actions of the Medical Board subject to the provisions for judicial review in the Code of Civil Procedure. Venue rules for these proceedings are found in [Section 1123.510] of the Code of Civil Procedure.

STATE BAR COURT

Bus. & Prof. Code § 6082 (amended). Review of board decisions

6082. Any person complained against and any person whose reinstatement the board may refuse to recommend may have the action of the board, or of any committee authorized by it to make a determination on its behalf, pursuant to the provisions of this chapter, reviewed by ~~the California Supreme Court or by~~ a California Court of Appeal ~~in accordance with the procedure prescribed by the California Supreme Court~~.

Comment. Section 6082 is amended to provide for judicial review of a decision of the State Bar Court by the Court of Appeal, and not the Supreme Court. See also Bus. & Prof. Code § 6086.5 (State Bar Court exercises authority of State Bar Board of Governors). For the applicable review procedure, see Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

Bus. & Prof. Code § 6083 (amended). Petition for review

6083. (a) A petition to review or to reverse or modify any decision recommending the disbarment or suspension from practice of a member of the State Bar may filed with the ~~Supreme Court~~ court of appeal by the member within 60 days after the filing of the decision recommending ~~such~~ that discipline.

(b) A petition to review or to reverse or modify any decision reproving a member of the State Bar, or any action enrolling ~~him~~ the member as an inactive member pursuant to Section 6007 ~~of this code~~ or refusing to restore ~~him~~ the member to active membership, pursuant to ~~such section~~ Section 6007 may be filed

with the ~~Supreme Court~~ court of appeal by the member within 60 days after service upon ~~him~~ the member of notice of ~~such~~ the decision or action.

(c) Upon ~~such~~ review the burden is upon the petitioner to show wherein the decision or action is erroneous or unlawful.

Comment. Section 6083 is amended to provide for judicial review of a decision of the State Bar Court by the Court of Appeal, and not the Supreme Court. See also Bus. & Prof. Code § 6086.5 (State Bar Court exercises authority of State Bar Board of Governors).

Bus. & Prof. Code § 6084 (amended). Finality of State Bar decision

6084. (a) When no petition to review or to reverse or modify has been filed by either party within the time allowed therefor, or the petition has been denied, the decision or order of the State Bar Court shall be final and enforceable. In any case in which a petition to review or to reverse or modify is filed by either party within the time allowed therefor, the ~~Supreme Court~~ court of appeal shall make ~~such~~ any order ~~as~~ that it may deem proper in the circumstances. Nothing in this subdivision abrogates the ~~Supreme Court's~~ authority of the court of appeal or the Supreme Court, on its own motion, to review de novo the decision or order of the State Bar Court.

(b) Notice of ~~such~~ the order shall be given to the member and to the State Bar.

(c) A petition for rehearing may be filed within the time generally provided for petitions for rehearing in civil cases.

(d) For willful failure to comply with a disciplinary order or an order of the court of appeal or Supreme Court, or any part thereof, a member may be held in contempt of court. The contempt action may be brought by the State Bar in any of the following courts:

(1) In the Los Angeles or San Francisco Superior Court.

(2) In the superior court of the county of the member's address as shown on current State Bar membership records.

(3) In the superior court of the county where the act or acts occurred.

(4) In the superior court of the county in which the member's regular business address is located.

Changes of venue may be requested pursuant to the applicable provisions of Title 4 (commencing with Section 392) of Part 2 of the Code of Civil Procedure.

Comment. Section 6084 is amended to reflect the amendments to Section 6082.

Staff Note. *If review jurisdiction is removed from the Supreme Court to the courts of appeal, it may be appropriate to delete references to the Supreme Court from this section.*

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

Bus. & Prof. Code § 23090 (amended). Review of appeals board decisions

23090. ~~Any person affected by a final order of the board, including the department, may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of such final order. The application for writ~~

~~of review shall be made within 30 days after filing of the final order of the board.~~ The court of appeal has jurisdiction of judicial review of a final order of the board, including the department.

Comment. Section 23090 is amended to eliminate the alternative of judicial review in the Supreme Court. For the applicable judicial review procedure, see Code Civ. Proc. §§ 1120 et seq. For standing provisions, see Code Civ. Proc. §§ 1123.210-1123.240. For the finality requirement, see Code Civ. Proc. § 1123.120. For venue provisions, see Code Civ. Proc. § 1123.520. For the time for filing for judicial review, see Code Civ. Proc. § 1123.640.

Bus. & Prof. Code § 23090.1 (repealed). Return of writ; hearing

~~23090.1. The writ of review shall be made returnable at a time and place then or thereafter specified by court order and shall direct the board to certify the whole record of the department in the case to the court within the time specified. No new or additional evidence shall be introduced in such court, but the cause shall be heard on the whole record of the department as certified to by the board.~~

Comment. Section 23090.1 is repealed because it is superseded by the judicial review provisions of the Code of Civil Procedure. See Section 23090.4. The provision in the first sentence for the return of the writ of review is superseded by Section 1123.620 of the Code of Civil Procedure. The provision in the first sentence for the record of the department is superseded by Section 1123.720. The second sentence is superseded by Section 1123.710 of the Code of Civil Procedure.

Bus. & Prof. Code § 23090.2 (repealed). Extent of review; trial de novo

~~23090.2. The review by the court shall not extend further than to determine, based on the whole record of the department as certified by the board, whether:~~

~~(a) The department has proceeded without or in excess of its jurisdiction.~~

~~(b) The department has proceeded in the manner required by law.~~

~~(c) The decision of the department is supported by the findings.~~

~~(d) The findings in the department's decision are supported by substantial evidence in the light of the whole record.~~

~~(e) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the hearing before the department.~~

~~Nothing in this article shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence.~~

Comment. Subdivisions (a) through (d) of former Section 230090.2 are superseded by Sections 1123.410-1123.440 of the Code of Civil Procedure. Subdivision (e) is superseded by Section 1123.750 of the Code of Civil Procedure. The last sentence is superseded by Sections 1123.420 (interpretation or application of law) and 1123.710 (new evidence) of the Code of Civil Procedure. Nothing in the Code of Civil Procedure provisions or in this article permits the court to hold a trial de novo.

Bus. & Prof. Code § 23090.3 (amended). Findings on questions of fact

~~23090.3. The findings and conclusions of the department on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department.~~ The parties to a judicial review proceeding are the board, the department, and

each party to the action or proceeding before the board ~~shall have the right to appear in the review proceeding. Following the hearing, the court shall enter judgment either affirming or reversing the decision of the department, or the court may remand the case for further proceedings before or reconsideration by the department~~.

Comment. Section 23090.3 is largely superseded by the judicial review provisions of the Code of Civil Procedure. See Section 23090. The first sentence is superseded by Section 1123.430 of the Code of Civil Procedure. The second sentence is superseded by Section 1123.420 of the Code of Civil Procedure. The fourth sentence is superseded by Section 1123.660 of the Code of Civil Procedure.

Bus. & Prof. Code § 23090.4 (amended). Judicial review; service of pleadings

23090.4. ~~The provisions of the Code of Civil Procedure relating to writs of review shall, insofar as applicable, apply to proceedings in the courts as provided by this article. A copy of every pleading filed pursuant to this article shall be served on the board, the department, and on each party who entered an appearance before the board.~~ Judicial review shall be in accordance with Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

Comment. Section 23090.4 is amended to delete the first sentence, and to replace it with a reference to the judicial review provisions of the Code of Civil Procedure. Special provisions of this article prevail over general provisions of the Code of Civil Procedure governing judicial review. See Section 1121.110 (conflicting or inconsistent statute controls). Copies of pleadings in judicial review proceedings must be served on the parties. See. Code Civ. Proc. §§ 1123.610 (notice of review), 1123.620 (applicability of rules of practice for civil actions).

Bus. & Prof. Code § 23090.5 (repealed). Jurisdiction

~~23090.5. No court of this state, except the Supreme Court and the courts of appeal to the extent specified in this article, shall have jurisdiction to review, affirm, reverse, correct, or annul any order, rule, or decision of the department or to suspend, stay, or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the department in the performance of its duties, but a writ of mandate shall lie from the Supreme Court or the courts of appeal in any proper case.~~

Comment. Former Section 23090.5 is superseded by Section 1121.120 of the Code of Civil Procedure (exclusive procedure) [see Memorandum 95-30].

Bus. & Prof. Code § 23090.6 (repealed). Stay of order

~~23090.6. The filing of a petition for, or the pendency of, a writ of review shall not of itself stay or suspend the operation of any order, rule, or decision of the department, but the court before which the petition is filed may stay or suspend, in whole or in part, the operation of the order, rule, or decision of the department subject to review, upon the terms and conditions which it by order directs.~~

Comment. Former Section 23090.6 is superseded by Code of Civil Procedure Section 1123.650 (stays).

Bus. & Prof. Code § 23090.7 (technical amendment). Effectiveness of order

23097.7. No decision of the department which has been appealed to the board and no final order of the board shall become effective during the period in which application may be made for ~~a writ of review, as provided by Section 23090~~ judicial review.

Comment. Section 23090.7 is amended to recognize that judicial review under the Code of Civil Procedure has been substituted for a writ of review under this article. See Section 23090.4. The period during which application may be made for judicial review is within 30 days after the decision is effective. See Code Civ. Proc. § 1123.640.

TAXPAYER ACTIONS

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

526a. ~~An action to obtain a judgment, restraining and preventing any~~ (a) A proceeding for judicial review of agency action to restrain or prevent 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~~ A proceeding 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 provisions. See Sections 1120 (application of title), 1123.210-1123.240 (standing).

WRIT OF MANDATE

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

1085. ~~It~~ (a) Subject to subdivision (b), a writ of mandate 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 have 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 portion of the first sentence of former subdivision (a) relating to trial by jury is superseded by subdivision (f) of Section 1123.660. The second sentence of former subdivision (a) is superseded by Section 1123.615(a) (Judicial Council rules of pleading and practice). See also Sections 1123.730(c) (delivery of record) and 1123.740 (disposal of record). The third sentence of former subdivision (a) is superseded by subdivision (a) of Section 1123.740 (cost of preparing record). The fourth sentence of former subdivision (a) is continued in substance in subdivision (d) of Section 1123.740 (proceedings in forma pauperis). The fifth sentence of former subdivision (a) is superseded by Section 1123.615(a) (Judicial Council rules of pleading and practice). The sixth sentence of former subdivision (a) is superseded by subdivision (b) of Section 1123.740.

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 1123.760 (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. *We must search for statutes that refer to Section 1094.5 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 (a) and the first sentence of subdivision (b) of former Section 1094.6 is superseded by Sections 1121.230 ("agency" defined), 1121.255 ("local agency" defined), 1123.630 (time for filing notice of review), 1123.120 (finality), and 1123.140 (exception to finality requirement). The second, fourth, and fifth sentences of subdivision (b) are superseded by Section 1123.120. The third sentence of subdivision (b) is continued in Government Code Section 54962(b).

The first sentence of subdivision (c) is superseded by Section 1123.730 (preparation of the record). The second sentence of subdivision (c) is superseded by Section 1123.740 (cost of preparing record). The third sentence of subdivision (c) is continued in Government Code Section 54962(c).

Subdivision (d) is superseded by Section 1123.630 (time for filing notice of review). Under Section 1123.630, the time for filing the notice of review is not dependent on receipt of the record, which normally will take place after the notice is filed.

Subdivision (e) is superseded by Section 1121.250 ("decision" defined). See also Gov't Code § 54962(a).

Subdivision (f) is continued in Sections 1123.630 (time for filing notice of review of decision in adjudicative proceeding) and 1121.260 ("party" defined). Subdivision (g) is not continued.

Staff Note. *We must search for statutes that refer to Section 1094.6 for conforming revisions.*

COSTS IN CIVIL ACTIONS RESULTING FROM ADMINISTRATIVE PROCEEDINGS

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.

PUBLIC EMPLOYMENT RELATIONS BOARD

Gov't Code § 3520 (amended). Judicial review of unit determination or decision in unfair practice case

3520. (a) Judicial review of a unit determination shall only be allowed: (1) when the board, in response to a petition from the state or an employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review.

Upon receipt of a board order joining in the request for judicial review, a party to the case may ~~petition for a writ of extraordinary relief from~~ file a notice of review of the unit determination decision or order.

(b) Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, except a decision of the board not to issue a complaint in such a case, may ~~petition for a writ of extraordinary relief from such~~ file a notice of review of the decision or order.

(c) ~~Such petition~~ The notice of review shall be filed in the ~~district~~ court of appeal in the appellate district where the unit determination or unfair practice dispute occurred. The ~~petition~~ notice shall be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, as applicable. Upon the filing of ~~such petition~~ the notice, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board, within 10 days after the clerk's notice unless ~~such~~ the time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board ~~such~~ any temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying, or setting aside the order of the board. ~~The findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, shall be conclusive.~~ The provisions of ~~Title 1 (commencing with Section 1067)~~ Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure ~~relating to writs~~ shall, except where specifically superseded herein, apply to proceedings pursuant to this section.

(d) If the time to ~~petition for extraordinary relief from~~ seek judicial review of a board decision has expired, the board may seek enforcement of any final decision or order in a ~~district~~ court of appeal or a superior court in the appellate district where the unit determination or unfair practice case occurred. If, after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person or entity refuses to comply with the order, the court shall enforce ~~such~~ the order by ~~writ of mandamus~~ appropriate order. The court shall not review the merits of the order.

Comment. Section 3520 is amended to make judicial review of the Public Employment Relations Board subject to the provisions for judicial review in the Code of Civil Procedure, except as provided in this section.

Gov't Code § 3542 (amended). Review of unit determination

3542. (a) No employer or employee organization shall have the right to judicial review of a unit determination except: (1) when the board in response to a petition from an employer or employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review.

Upon receipt of a board order joining in the request for judicial review, a party to the case may ~~petition for a writ of extraordinary relief from~~ seek judicial review of the unit determination decision or order.

(b) Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, except a decision of the board not to issue a complaint in such a case, may ~~petition for a writ of extraordinary relief from such~~ seek judicial review of the decision or order.

(c) ~~Such petition shall be filed~~ The notice of review shall be filed in the ~~district~~ court of appeal in the appellate district where the unit determination or unfair practice dispute occurred. The ~~petition~~ notice of review shall be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, as applicable. Upon the filing of ~~such petition~~ the notice of review, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board, within 10 days after the clerk's notice unless ~~such~~ the time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board ~~such~~ any temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying, or setting aside the order of the board. ~~The findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, are conclusive.~~ The provisions of ~~Title 1 (commencing with Section 1067)~~ Title 2 (commencing with Section 1120) of Part 3 of the Code of

Civil Procedure ~~relating to writs~~ shall, except where specifically superseded herein, apply to proceedings pursuant to this section.

(d) If the time to ~~petition for extraordinary relief from~~ seek judicial review of a board decision has expired, the board may seek enforcement of any final decision or order in a ~~district~~ court of appeal or a superior court in the appellate district where the unit determination or unfair practice case occurred. The board shall respond within 10 days to any inquiry from a party to the action as to why the board has not sought court enforcement of the final decision or order. If the response does not indicate that there has been compliance with the board's final decision or order, the board shall seek enforcement of the final decision or order upon the request of the party. The board shall file in the court the record of the proceeding, certified by the board, and appropriate evidence disclosing the failure to comply with the decision or order. If, after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person or entity refuses to comply with the order, the court shall enforce ~~such~~ the order by ~~writ of mandamus~~ appropriate order. The court shall not review the merits of the order.

Comment. Section 3542 is amended to make judicial review of the Public Employment Relations Board subject to the provisions for judicial review in the Code of Civil Procedure, except as provided in this section. Special provisions of this section prevail over general provisions of the Code of Civil Procedure governing judicial review. See Section 1121.110 (conflicting or inconsistent statute controls).

Gov't Code § 3564 (amended). Judicial review of unit determination or unfair practice case

3564. (a) No employer or employee organization shall have the right to judicial review of a unit determination except: (1) when the board in response to a petition from an employer or employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review.

Upon receipt of a board order joining in the request for judicial review, a party to the case may ~~petition for a writ of extraordinary relief from~~ seek judicial review of the unit determination decision or order.

(b) Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, except a decision of the board not to issue a complaint in such a case, may ~~petition for a writ of extraordinary relief from such~~ seek judicial review of the decision or order.

(c) ~~Such petition~~ The notice of review shall be filed in the ~~district~~ court of appeal in the appellate district where the unit determination or unfair practice dispute occurred. The ~~petition~~ notice shall be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, as applicable. Upon the filing of ~~such petition~~ the notice, the court shall cause notice to be served upon the board and thereupon

shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board, within 10 days after the clerk's notice unless ~~such~~ the time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board ~~such~~ any temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying, or setting aside the order of the board. ~~The findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, are conclusive.~~ The provisions of ~~Title 1 (commencing with Section 1067)~~ Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure ~~relating to writs~~ shall~~, except where specifically superseded herein,~~ apply to proceedings pursuant to this section.

(d) If the time to ~~petition for extraordinary relief from~~ seek judicial review of a board decision has expired, the board may seek enforcement of any final decision or order in a ~~district~~ court of appeal or a superior court in the appellate district where the unit determination or unfair practice case occurred. If, after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person or entity refuses to comply with the order, the court shall enforce ~~such~~ the order by ~~writ of mandamus~~ appropriate order. The court shall not review the merits of the order.

Comment. Section 3564 is amended to make judicial review of the Public Employment Relations Board subject to the provisions for judicial review in the Code of Civil Procedure. Special provisions of this section prevail over general provisions of the Code of Civil Procedure governing judicial review. See Section 1121.110 (conflicting or inconsistent statute controls).

ADMINISTRATIVE PROCEDURE ACT — RULEMAKING

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.

ADMINISTRATIVE PROCEDURE ACT — ADJUDICATION

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

~~11523. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section, the petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. On request of the petitioner for a record of the proceedings, the complete record of the proceedings, or the parts thereof as are designated by the petitioner in the request, shall be prepared by the Office of Administrative Hearings or the agency and shall be delivered to petitioner, within 30 days after the request, which time shall be extended for good cause shown, upon the payment of the fee specified in Section 69950 for the transcript, the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which is collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until 30 days after its delivery to him or~~

~~her. The agency may file with the court the original of any document in the record in lieu of a copy thereof. In the event that the petitioner prevails in overturning the administrative decision following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification.~~

Comment. The first sentence of former Section 11523 is continued in Code of Civil Procedure Sections 1120 (application of title) and 1121.110 (conflicting or inconsistent statute controls).

The second sentence 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 first portion of the fourth sentence is continued in Code of Civil Procedure Section 1123.730 (preparation of record). The last portion of the fourth sentence is continued in substance in Code of Civil Procedure Section 1123.740(a) (cost of preparing record).

The fifth sentence is superseded by Code of Civil Procedure Section 1123.740(b).

The first portion of the sixth sentence is omitted as unnecessary, since under Section 11243.735(b) the cost of the record is recoverable by the prevailing party, and under general rules of civil procedure costs of suit are included in the judgment. See Code Civ. Proc. § 1034(a); Cal. Ct. R. 870(b)(4). The last portion of the sixth sentence is continued in Code of Civil Procedure Section 1123.740(c).

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 continued in substance in Code of Civil Procedure Section 1123.740b).

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

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).

STATE PERSONNEL BOARD

Gov't Code § 19630 (amended). When action barred; compensation after cause arose; cause of action after final decision of board

19630. (a) No action or proceeding shall be brought by any person having or claiming to have a cause of action or complaint or ground for issuance of any complaint or legal remedy for wrongs or grievances based on or related to any civil service law in this state, or the administration thereof, unless that action or proceeding is commenced and served within one year after the cause of action or complaint or ground for issuance of any writ or legal remedy first arose. The person shall not be compensated for the time subsequent to the date when the cause or ground arose unless that action or proceeding is filed and served within 90 days after the cause or ground arose. Where an appeal is taken from a decision of the board, the cause of action does not arise until the final decision of the board.

(b) Notwithstanding subdivision (a), judicial review of a decision of the board in an adjudicative proceeding is subject to the time limits specified in Section 1123.630 of the Code of Civil Procedure.

(c) This section shall not be applicable to any action or proceeding for the collection of salary or wage, the amount of which is not disputed by the state agency owing that salary or wage.

Comment. Section 19630 is amended to add subdivision (b) to make clear that judicial review of an adjudicative proceeding of the State Personnel Board is subject to the time limits in the judicial review provisions in the Code of Civil Procedure.

LOCAL AGENCIES

Gov't Code § 54962 (added). Decision; record of proceedings

54962. (a) This section applies to a decision of a local agency, other than a school district, 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.

(b) 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.

(c) Judicial review of the decision shall be in accordance with Title 2 (commencing with 1120) of Part 3 of the Code of Civil Procedure. In addition to the matters required by Section 1123.720 of the Code of Civil Procedure, the record of the proceedings 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.

Comment. Subdivision (a) of Section 54962 continues subdivision (e) of former Section 1094.6 of the Code of Civil Procedure. Subdivision (b) continues the third sentence of subdivision (b) of former Section 1094.6 of the Code of Civil Procedure. The first sentence and the introductory clause of the second sentence of subdivision (c) are new. The remainder of the second sentence of subdivision (c) continues the third sentence of subdivision (c) of former Section 1094.6 of the Code of Civil Procedure.

ZONING ADMINISTRATION

Gov't Code § 65907 (amended). Time for attacking administrative determination

65907. (a) ~~Except as otherwise provided by ordinance, any action or proceeding to attack, review, set aside, void, or annul~~ A proceeding for judicial review of any decision of matters listed in Sections 65901 and 65903, or ~~concerning~~ of any of the proceedings, acts, or determinations taken, done, or made prior to ~~such~~ the decision, or ~~to determine the reasonableness, legality, or validity~~ of any condition attached thereto, ~~shall not be maintained by any person unless the action or proceeding is commenced within 90 days and the legislative body is served within 120 days after the date of the decision~~ is subject to Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. Thereafter, all persons are barred from ~~any such action or~~ a proceeding for judicial review or any defense of invalidity or unreasonableness of that decision or of these proceedings, acts, or determinations. ~~All actions~~ A proceeding for judicial review brought pursuant to this section shall be given preference over all other civil matters before the court, except probate, eminent domain, and forcible entry and unlawful detainer proceedings.

(b) Notwithstanding Section 65803, this section shall apply to charter cities.

~~(c) The amendments to subdivision (a) shall apply to decisions made pursuant to this division on or after January 1, 1984.~~

Comment. Subdivision (a) of Section 65907 is amended to make proceedings to which it applies subject to the judicial review provisions in the Code of Civil Procedure. Subdivision (c) is deleted as no longer necessary.

AGRICULTURAL LABOR RELATIONS BOARD

Lab. Code § 1160.8 (amended). Review of final order of board; procedure

1160.8. Any person aggrieved by the final order of the board granting or denying in whole or in part the relief sought may obtain a review of ~~such~~ the order in the court of appeal having jurisdiction over the county wherein the unfair labor practice in question was alleged to have been engaged in, or wherein ~~such~~ the person resides or transacts business, ~~by filing in such court a written petition requesting that the order of the board be modified or set aside. Such petition shall be filed with the court within 30 days from the date of the issuance of the board's order.~~ in accordance with Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. Upon the filing of ~~such petition~~ the notice of review, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board within 10 days after the clerk's notice unless ~~such~~ the time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board ~~such~~ any temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the board. ~~The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.~~

An order directing an election shall not be stayed pending review, but ~~such~~ the order may be reviewed as provided in Section 1158.

If the time for review of the board order has lapsed, and the person has not voluntarily complied with the board's order, the board may apply to the superior court in any county in which the unfair labor practice occurred or wherein ~~such~~ the person resides or transacts business for enforcement of its order. If after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person refuses to comply with the order, the court shall enforce ~~such~~ the order by writ of injunction or other proper process. The court shall not review the merits of the order.

Comment. Section 1160.8 is amended to make proceedings to which it applies subject to the judicial review provisions in the Code of Civil Procedure.

WORKERS' COMPENSATION APPEALS BOARD

Lab. Code § 5950 (amended). Judicial review

5950. ~~Any person affected by an order, decision, or award of the appeals board may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award or of the order, decision, or award following~~

~~reconsideration. The application for writ of review must be made within 45 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeal board's own motion, within 45 days after the filing of the order, decision, or award following reconsideration.~~ The court of appeal has jurisdiction of judicial review of an order, decision, or award of the appeals board.

Comment. Section 5950 is amended to eliminate the alternative of judicial review in the Supreme Court. For the applicable judicial review procedure, see Code Civ. Proc. §§ 1120 et seq. For standing provisions, see Code Civ. Proc. §§ 1123.210-1123.240. For the finality requirement, see Code Civ. Proc. § 1123.120. For venue provisions, see Code Civ. Proc. § 1123.520. For the time for filing for judicial review, see Code Civ. Proc. § 1123.640.

Lab. Code § 5951 (repealed). Writ of review

~~5951. The writ of review shall be made returnable at a time and place then or thereafter specified by court order and shall direct the appeals board to certify its record in the case to the court within the time therein specified. No new or additional evidence shall be introduced in such court, but the cause shall be heard on the record of the appeals board as certified to by it.~~

Comment. Section 5951 is repealed because it is superseded by the judicial review provisions of the Code of Civil Procedure. See Section 5954. The provision in the first sentence for the return of the writ of review is superseded by Section 1123.620 of the Code of Civil Procedure. The provision in the first sentence for the record of the department is superseded by Section 1123.720. The second sentence is superseded by Section 1123.710 of the Code of Civil Procedure.

Lab. Code § 5952 (repealed). Scope of review

~~5952. The review by the court shall not be extended further than to determine, based upon the entire record which shall be certified by the appeals board, whether:~~

~~(a) The appeals board acted without or in excess of its powers.~~

~~(b) The order, decision, or award was procured by fraud.~~

~~(c) The order, decision, or award was unreasonable.~~

~~(d) The order, decision, or award was not supported by substantial evidence.~~

~~(e) If findings of fact are made, such findings of fact support the order, decision, or award under review.~~

~~Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence.~~

Comment. Subdivisions (a) through (d) of former Section 5952 are superseded by Sections 1123.410-1123.440 of the Code of Civil Procedure. Subdivision (e) is superseded by Section 1123.750 of the Code of Civil Procedure. The last sentence is superseded by Sections 1123.420 (interpretation or application of law) and 1123.710 (new evidence) of the Code of Civil Procedure. Nothing in the Code of Civil Procedure provisions or in this article permits the court to hold a trial de novo.

Lab. Code § 5953 (amended). Right to appear in judicial review proceeding

5953. ~~The findings and conclusions of the appeals board on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the appeals board.~~ The parties to a judicial review proceeding are the appeals board and each party to the action or proceeding before the appeals board ~~shall have the right to appear in the review proceeding. Upon the hearing, the court shall enter judgment either affirming or annulling the order, decision, or award, or the court may remand the case for further proceedings before the appeals board~~ whose interest is adverse to the person seeking judicial review.

Comment. Section 5953 is largely superseded by the judicial review provisions of the Code of Civil Procedure. See Section 5950. The first sentence is superseded by Section 1123.430 of the Code of Civil Procedure. The second sentence is superseded by Section 1123.420 of the Code of Civil Procedure. The fourth sentence is superseded by Section 1123.660 of the Code of Civil Procedure.

Lab. Code § 5954 (amended). Procedure; service of pleadings

5954. ~~The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable, apply to proceedings in the courts under the provisions of this article. A copy of every pleading filed pursuant to the terms of this article shall be served on the appeals board and upon every party who entered an appearance in the action before the appeals board and whose interest therein is adverse to the party filing such pleading.~~ Judicial review shall be in accordance with Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

Comment. Section 5954 is amended to delete the first sentence, and to replace it with a reference to the judicial review provisions of the Code of Civil Procedure. Special provisions of this article prevail over general provisions of the Code of Civil Procedure governing judicial review. See Section 1121.110 (conflicting or inconsistent statute controls). Copies of pleadings in judicial review proceedings must be served on the parties. See. Code Civ. Proc. §§ 1123.610 (notice of review), 1123.620 (applicability of rules of practice for civil actions).

Lab. Code § 5955 (repealed). Courts having jurisdiction; mandate

~~5955. No court of this state, except the Supreme Court and the courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or award of the appeals board, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the appeals board in the performance of its duties but a writ of mandate shall lie from the Supreme Court or a court of appeal in all proper cases.~~

Comment. Section 5955 is is superseded by Section 1121.120 of the Code of Civil Procedure (exclusive procedure) [see Memorandum 95-30].

Lab. Code § 5956 (repealed). Stay of order

~~5956. The filing of a petition for, or the pendency of, a writ of review shall not of itself stay or suspend the operation of any order, rule, decision, or award of the~~

~~appeals board, but the court before which the petition is filed may stay or suspend, in whole or in part, the operation of the order, decision, or award of the appeals board subject to review, upon the terms and conditions which it by order directs, except as provided in Article 3 of this chapter.~~

Comment. Former Section 5956 is superseded by Code of Civil Procedure Section 1123.650 (stays). The stay provisions of the Code of Cvil Procedure are subject to Article 3 (commencing with Section 6000) (undertaking on stay order). See Section 1121.110 (conflicting or inconsistent statute prevails).

Lab. Code § 6000 (amended). Undertaking on stay order

6000. The operation of any order, decision, or award of the appeals board under the provisions of this division or any judgment entered thereon, shall not at any time be stayed by the court ~~to which petition is made for a writ of review~~ in which judicial review is sought, unless an undertaking is executed on the part of the ~~petitioner~~ person seeking judicial review.

Comment. Section 6000 is amended reflect replacement of the writ of review by the judicial review procedure in Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. The stay provisions of the Code of Civil Procedure Section 1123.650 are subject to this article. See Code Civ. Proc. § 1121.110 (conflicting or inconsistent statute prevails).

CALIFORNIA ENVIRONMENTAL QUALITY ACT

Pub. Res. Code § 21167 (amended). Review of acts or decisions of public agency

21167. (a) Any action or proceeding to attack, review, set aside, void, or annul the following acts or decisions of a public agency on the grounds of noncompliance with this division shall be commenced as follows:

~~(a)~~ (1) An action or proceeding alleging that a public agency is carrying out or has approved a project which may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment shall be commenced within 180 days of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days after commencement of the project.

~~(b)~~ (2) Any action or proceeding alleging that a public agency has improperly determined whether a project may have a significant effect on the environment shall be commenced within 30 days after the filing of the notice required by subdivision (a) of Section 21108 or subdivision (a) of Section 21152.

~~(c)~~ (3) Any action or proceeding alleging that an environmental impact report does not comply with the provisions of this division shall be commenced within 30 days after the filing of the notice required by subdivision (a) of Section 21108 or subdivision (a) of Section 21152 by the lead agency.

~~(d)~~ (4) Any action or proceeding alleging that a public agency has improperly determined that a project is not subject to the provisions of this division pursuant

to subdivision (b) of Section 21080 or pursuant to Section 21085 or 21172 shall be commenced within 35 days after the filing by the public agency, or person specified in subdivision (b) or (c) of Section 21065, of the notice authorized by subdivision (b) of Section 21108 or subdivision (b) of Section 21152. If the notice has not been filed, the action or proceeding shall be commenced within 180 days of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days after commencement of the project.

~~(e)~~ (5) Any action or proceeding alleging that any other act or omission of a public agency does not comply with the provisions of this division shall be commenced within 30 days after the filing of the notice required by subdivision (a) of Section 21108 or subdivision (a) of Section 21152.

~~(f)~~ (6) If a person has made a written request to the public agency for a copy of the notice specified in Section 21108 or 21152 within the posting periods specified in Sections 21108 and 21152, the time periods specified in subdivisions (b), (c), (d), and (e) shall commence from the date that the public agency deposits a written copy of the notice in the United States mail, first-class postage prepaid.

(b) Judicial review of an act or decision of a public agency on the grounds of noncompliance with this division shall be in accordance with Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

Comment. Section 21167 is amended to make judicial review under this section subject to the judicial review provisions of the Code of Civil Procedure. Special provisions of this section prevail over general provisions of the Code of Civil Procedure governing judicial review. See Section 1121.110 (conflicting or inconsistent statute controls).

CALIFORNIA ENERGY COMMISSION

Pub. Res. Code § 25531 (amended). Judicial review

25531. (a) The decisions of the commission on any application of any electric utility for certification of a site and related facility are subject to judicial review in the same manner as the decisions of the Public Utilities Commission on the application for a Certificate of Public Convenience and Necessity for the same site and related facility.

(b) ~~No new or additional evidence may be introduced upon review and the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the United States Constitution or the California Constitution. The findings and conclusions of the commission on questions of fact are final and are not subject to review, except as provided in this article. These questions of fact shall include ultimate facts and the findings and conclusions of the commission.~~ A report prepared by, or an approval of, the commission pursuant to Section 25510, 25514,

25516, or 25516.5, or subdivision (b) of Section 25520.5, shall not constitute a decision of the commission subject to judicial review.

(c) Subject to the right of judicial review of decisions of the commission, no court in this state has jurisdiction to hear or determine any case or controversy concerning any matter which was, or could have been, determined in a proceeding before the commission, or to stop or delay the construction or operation of any thermal powerplant except to enforce compliance with the provisions of a decision of the commission.

(d) Notwithstanding Section 1250.370 of the Code of Civil Procedure:

(1) If the commission requires, pursuant to subdivision (a) of Section 25528, as a condition of certification of any site and related facility, that the applicant acquire development rights, that requirement conclusively establishes the matters referred to in Sections 1240.030 and 1240.220 of the Code of Civil Procedure in any eminent domain proceeding brought by the applicant to acquire the development rights.

(2) If the commission certifies any site and related facility, that certification conclusively establishes the matters referred to in Sections 1240.030 and 1240.220 of the Code of Civil Procedure in any eminent domain proceeding brought to acquire the site and related facility.

(e) No decision of the commission pursuant to Section 25516, 25522, or 25523 shall be found to mandate a specific supply plan for any utility as prohibited by Section 25323.

Comment. Subdivision (b) of Section 25531 is amended to delete first four sentences which are superseded by Sections 1123.710, 1123.420, and 1123.430 of the Code of Civil Procedure. The provisions for judicial review in the Code of Civil Procedure apply to proceedings of the Energy Commission under subdivision (a), which incorporates provisions for judicial review of decisions of the Public Utilities Commission. See Pub. Util. Code § 1756.

PUBLIC UTILITIES COMMISSION

Pub. Util. Code § 1756 (amended). Review of commission decisions

1756. ~~Within 30 days after the commission issues its decision denying the application for a rehearing, or, if the application was granted, then within 30 days after the commission issues its decision on rehearing, the applicant may apply to the Supreme Court of this state for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified. For purposes of this article, the date upon which the commission issues its decision denying rehearing, or issues its decision on rehearing, is the date when the commission mails the decision to the parties to the action or proceeding.~~ Judicial review of decisions of the commission shall be by the court of appeal in

accordance with Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

Comment. Section 1756 is amended to make judicial review of decisions of the Public Utilities Commission subject to general provisions in the Code of Civil Procedure for review of agency action, and to shift review from the Supreme Court as under prior law to the court of appeal.

Staff Note. *Judicial review of PUC decisions would be shifted from the Supreme Court to the court of appeal by SB 1322 which has passed the Senate. If the bill is enacted, several new sections added by the bill will need conforming revisions.*

Pub. Util. Code § 1757 (repealed). New evidence; finality

~~1757. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.~~

~~The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.~~

Comment. Former Section 1757 is superseded by Section 1756.

Pub. Util. Code § 1758 (repealed). Parties; judgment; procedure

~~1758. The commission and each party to the action or proceeding before the commission may appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable and not in conflict with the provisions of this part, apply to proceedings instituted in the Supreme Court under the provisions of this article.~~

Comment. Former Section 1758 is superseded by Section 1756.

Pub. Util. Code § 1759 (repealed). Jurisdiction

~~1759. No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.~~

Comment. Former Section 1759 is superseded by Section 1756.

Pub. Util. Code § 1760 (repealed). Independent judgment

~~1760. In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.~~

Comment. Former Section 1760 is superseded by Section 1756.

Pub. Util. Code § 1761 (amended). Pendency of judicial review not a stay

1761. The pendency of ~~a writ of~~ judicial review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of the ~~writ the Supreme Court~~ proceeding the court in the manner provided in this article in its discretion may stay or suspend in whole or in part the operation of the commission's order or decision.

Comment. Former Section 1761 is amended to reflect the amendments to Section 1756. Stay orders are governed by this article and not by Section 1123.650 of the Code of Civil Procedure.

Pub. Util. Code § 1762 (amended). Order of stay or suspension

1762. Except as provided in this section, no order staying or suspending an order or decision of the commission shall be made by the ~~Supreme Court~~ court except upon five days' notice and after hearing. If the order or decision of the commission is stayed or suspended the order suspending it shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner and specifying the nature of the damage, but the ~~Supreme Court~~ court may grant a temporary stay restraining the operation of the commission order or decision at any time before ~~such~~ the hearing and determination of the application for a stay when, in its opinion irreparable loss or damage would result to petitioner unless ~~such~~ a temporary stay is granted. ~~Such~~ The temporary stay shall remain in force only until the hearing and determination of the application for a stay upon notice. The hearing of ~~such~~ the application for a stay shall be given precedence and assigned for hearing at the earliest practicable day after the expiration of the notice.

Comment. Section 1762 is amended to reflect the amendments to Section 1756.

Pub. Util. Code § 1763 (amended). Temporary stay

1763. No temporary stay shall be granted by the ~~Supreme Court~~ court unless it clearly appears from specific facts shown by the verified petition that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and hearing had on a motion for a stay as provided in this article. Every ~~such~~ temporary stay shall be endorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the

injury and state why it appears to be irreparable and why the order was granted without notice, and shall by its terms expire within ~~such~~ any time after entry not to exceed 10 days as the court may fix unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for ~~such~~ the extension shall be entered of record. In case a temporary stay is granted without notice the matter of the issuance of a stay shall be set down for hearing at the earliest possible time, and when it comes up for hearing the party obtaining the temporary stay shall proceed with the application for a stay and if ~~he~~ the party does not do so the court shall dissolve the temporary stay.

Comment. Section 1763 is amended to reflect the amendments to Section 1756.

Pub. Util. Code § 1765 (amended). Conditional stay

1765. In case the ~~Supreme Court~~ court stays any order or decision denying to the utility an increase in any rate or classification, the court may condition ~~such~~ the stay or temporary stay so as to permit petitioner to charge a higher rate pending the determination of the review and may attach other reasonable conditions to ~~such~~ the stay or temporary stay.

Comment. Section 1765 is amended to reflect the amendments to Section 1756.

Pub. Util. Code § 1766 (amended). Keeping of accounts

1766. In case the ~~Supreme Court~~ court stays or suspends any order or decision lowering any rate or classification or stays any order or decision denying petitioner the right to charge an increased rate or classification and as a condition thereof permits the charging of higher rates, the court shall require the public utility affected to keep ~~such~~ any accounts, verified by oath as may, in the judgment of the court, suffice to show the amounts being charged or received by ~~such~~ the public utility, pending the review, in excess of the charges allowed by the order or decision of the commission, together with the names and addresses of the corporations or persons to whom overcharges will be refundable in case the order or decision of the commission is upheld. The court may from time to time require the petitioner to give additional security, or to increase the suspending bond, whenever in its opinion such action is necessary to insure the prompt payment of the damages and overcharges. If the final decision by the ~~Supreme Court~~ court upholds the commission's order or decision, all money which the public utility has collected pending the appeal in excess of that authorized by the order or decision of the commission, together with ~~such~~ any interest as may be reasonable, shall be promptly paid to the corporations or persons entitled thereto in the manner prescribed by the court.

Comment. Section 1766 is amended to reflect the amendments to Section 1756.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Unemp. Ins. Code § 410 (amended). Finality of decisions; judicial review

410. A decision of the appeals board is final, except for ~~such~~ action ~~as~~ that may be taken by a judicial tribunal as permitted or required by law.

A decision of the appeals board is binding on the director with respect to the parties involved in the particular appeal.

The director shall have the right to seek judicial review from an appeals board decision irrespective of whether or not he or she appeared or participated in the appeal to the administrative law judge or to the appeals board. Judicial review of an appeals board decision shall be in accordance with Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

Notwithstanding any other provision of law, the right of the director, or of any other party except as provided by Sections 1241, 1243, and 5313, to seek judicial review from an appeals board decision shall be exercised ~~not later than six months after the date of the decision of the appeals board~~ within the period provided in Section 1123.630 of the Code of Civil Procedure or not later than 30 days after the date on which the decision of the appeals board is designated as a precedent decision, whichever is later.

The appeals board shall attach to all of its decisions where a request for review may be taken, an explanation of the party's right to seek such review.

Comment. Section 410 is amended to make judicial review under this section subject to the judicial review provisions of the Code of Civil Procedure. Special provisions of this section prevail over general provisions of the Code of Civil Procedure governing judicial review. See Section 1121.110 (conflicting or inconsistent statute controls).

DEPARTMENT OF MOTOR VEHICLES

Veh. Code § 13559 (amended). Petition for review

13559. (a) ~~Notwithstanding Section 14400 or 14401, within 30 days of the issuance of the notice of determination of the department sustaining an order of suspension or revocation of the person's privilege to operate a motor vehicle after the hearing pursuant to Section 13558, the person may file a petition for review of the order in the court of competent jurisdiction in the person's county of residence. The filing of a petition for judicial review shall not stay the order of suspension or revocation. The review shall be on the record of the hearing and the court shall not consider other evidence. If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is not supported by the evidence in the record, the court may order the department to rescind the order of suspension or revocation and return, or reissue a new license to, the person.~~ Judicial review of a decision of the department shall be in accordance with Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

(b) A finding by the court after a review pursuant to this section shall have no collateral estoppel effect on a subsequent criminal prosecution and does not preclude relitigation of those same facts in the criminal proceeding.

Comment. Subdivision (a) of Section 13559 is amended to make judicial review under this section subject to the judicial review provisions of the Code of Civil Procedure.

Veh. Code § 14401 (amended). Statute of limitations on review

14401. (a) ~~Any action brought in a court of competent jurisdiction to review~~ Judicial review of any order of the department refusing, canceling, placing on probation, suspending, or revoking the privilege of a person to operate a motor vehicle shall be commenced within ~~90 days from the date the order is noticed~~ the period provided in Section 1123.630 of the Code of Civil Procedure.

(b) Upon final completion of all administrative appeals, the person whose driving privilege was refused, canceled, placed on probation, suspended, or revoked shall be given written notice by the department of his or her right to a review by a court pursuant to subdivision (a).

Comment. Section 14401 is amended to make judicial review of specified orders of the Department of Motor Vehicles subject to the time limits for judicial review prescribed in the Code of Civil Procedure.

DEPARTMENT OF SOCIAL SERVICES

Welf. & Inst. Code § 10962 (amended). Judicial review

10962. The applicant or recipient or the affected county~~, within one year after receiving notice of the director's final decision,~~ may file a ~~petition~~ notice of review with the superior court, ~~under the provisions of Section 1094.5~~ in accordance with Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure~~, praying for a review of the entire proceedings in the matter, upon questions of law involved in the case. Such~~ . The review~~, if granted,~~ shall be the exclusive remedy available to the applicant or recipient or county for review of the director's decision. The director shall be the sole respondent in ~~such~~ the proceedings. Immediately upon being served the director shall serve a copy of the petition on the other party entitled to judicial review and ~~such~~ that party shall have the right to intervene in the proceedings.

No filing fee shall be required for the filing of a ~~petition~~ notice of review pursuant to this section. ~~Any such petition to the superior court~~ The proceeding for judicial review shall be entitled to a preference in setting a date for hearing ~~on the petition~~. No bond shall be required in the case of any ~~petition for~~ notice of review, nor in any appeal ~~therefrom~~ from the decision of the superior court. The applicant or recipient shall be entitled to reasonable attorney's fees and costs, if ~~he obtains a decision in his favor~~ the applicant or recipient obtains a favorable decision.

Comment. Section 10962 is amended to make judicial review of a welfare decision of the Department of Social Services subject to the judicial review provisions in the Code of Civil

Procedure. Special provisions of this section prevail over general provisions of the Code of Civil Procedure governing judicial review. See Section 1121.110 (conflicting or inconsistent statute controls).

BILL PROVISIONS

Uncodified (added). Severability

SEC. ___. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Uncodified (added). Operative date; application to pending proceedings

SEC. ___. (a) Except as provided in this section, this act becomes operative on January 1, 1998.

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

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