Study N-200 April 1, 1996

First Supplement to Memorandum 96-26

Judicial Review of Agency Action: Revised Tentative Recommendation

Attached is a staff draft of the narrative portion of the Revised Tentative Recommendation on *Judicial Review of Agency Action*. This will have to be revised after the April meeting to reflect Commission decisions at that meeting. The staff welcomes editorial suggestions from Commissioners and others.

§ 1123.430. Review of agency fact finding generally
§ 1123.440. Review of fact finding in local agency adjudication

The following technical revision, inadvertently omitted, should be made to Section 1123.430(a) in the draft statute attached to the basic memorandum:

> 1123.430. (a) The standard for judicial review of whether agency action, other than a decision of a local agency in an adjudicative proceeding, is based on an erroneous determination of fact made or implied by the agency is whether the agency's determination is supported by substantial evidence in the light of the whole record.
> (b) . . . .

The standard of review of fact-finding in an adjudicative proceeding of a local agency is governed by Section 1123.440.

Sections 1123.430 and 1123.440 provide substantial evidence review of fact-finding in most administrative adjudication. At the last meeting, the Western Center on Law and Poverty objected to substantial evidence review of social welfare cases. The Center said satisfactory procedural rights are now provided in social welfare cases, but that independent judgment review is still needed in social welfare cases involving a fundamental, vested right substantially affected by agency action, citing Frink v. Prod, 31 Cal. 3d 166, 643 P.2d 476, 181 Cal. Rptr. 893 (1982). The Commission asked the staff to analyze this case and report back.

Frink was an administrative mandamus case to review denial by the State Department of Social Welfare of benefits under the aid to the totally disabled program. The Supreme Court held the petitioner had a fundamental right to these benefits, and held the standard of review of fact-finding was the independent judgment of the court. The holding was based on statute, not the

California Constitution. The court weakened the requirement that the right affected be "vested," saying the search for vestedness and the search for fundamentalness are one and the same. But there is nothing in the case to suggest that fact-finding in welfare cases should be subject to a more stringent standard of review than other cases involving fundamental rights. Accordingly, the staff would not make a special exception for social welfare cases, despite *Frink*.

§ 1123.760. New evidence on judicial review

The basic memorandum discusses a point raised by the Department of Industrial Relations concerning judicial notice of agency decisions in prior cases not referenced in the record. The staff concluded that, for the court to take judicial notice of a prior decision, it need not be actually cited in the agency decision as long as it was before the agency in some form.

Martin Fassler of DIR called to say his agency is concerned the requirement that the decision be before the agency in some form may interfere with agency practice of issuing an opinion letter citing some but not all relevant prior decisions, and that to preclude reference on judicial review to decisions not cited would hinder proper judicial resolution of the case. The staff is sympathetic to this, and suggests the following be added to Section 1123.760:

> (e) Nothing in this section precludes the court from taking judicial notice of a prior decision of the agency as authorized by the Evidence Code.

The Comment should refer to Evidence Code Section 452(c) (official acts of executive department).

Respectfully submitted,

Robert J. Murphy
Staff Counsel

JUDICIAL REVIEW OF AGENCY ACTION

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JUDICIAL REVIEW OF AGENCY ACTION

BACKGROUND

This recommendation is submitted as part of the Commission's continuing study of administrative law. The Commission's recommendation on administrative adjudication by state agencies[1] was enacted in 1995.[2]

This recommendation on judicial review of agency action is the second phase of the Commission's study of administrative law.[3] It proposes that California's antiquated provisions for judicial review of agency action by administrative mandamus be replaced with a single, straightforward statute for judicial review of all forms of state and local agency action. The goal is to allow litigants and courts to resolve swiftly the substantive issues in dispute, rather than to waste resources disputing tangential procedural issues.

REPLACING MANDAMUS AND OTHER FORMS OF JUDICIAL REVIEW[4]

Under existing law, on-the-record adjudicatory decisions of state and local government are reviewed by superior courts under the administrative mandamus provisions of Code of Civil Procedure Section 1094.5. Regulations adopted by state agencies are reviewed by superior courts through actions for declaratory judgment.[5] Various other agency actions are reviewed by traditional mandamus under Code of Civil Procedure Section 1085[6] or by declaratory judgment.[7] Many statutes set forth special review procedures for different agencies.[8] Agency action

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1. *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55 (1995).

2. 1995 Cal. Stat. ch. 938.

3. The Commission retained Professor Michael Asimow of the UCLA Law School to serve as consultant and prepare background studies. Professor Asimow prepared three studies on judicial review of agency action for the Commission. These are: Asimow, *Judicial Review of Administrative Decision: Standing and Timing* (Sept. 1992), Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157 (1995), and Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus* (Nov. 1993).

4. The discussion under this heading is drawn from Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus* 2-12 (Nov. 1993).

5. Gov't Code § 11350(a); Code Civ. Proc. § 1060.

6. See, e.g., Vernon Fire Fighters v. City of Vernon, 107 Cal. App. 3d 802, 165 Cal. Rptr. 908 (1980); Shuffer v. Board of Trustees, 67 Cal. App. 3d 208, 136 Cal. Rptr. 527 (1977).

7. See, e.g., Californians for Native Salmon Ass'n v. Department of Forestry, 221 Cal. App. 3d 1419, 271 Cal. Rptr. 270 (1990).

8. Decisions of the Public Utilities Commission are reviewed by the California Supreme Court. Pub. Util. Code § 1756; Cal. R. Ct. 58. Decisions of the Public Employment Relations Board and the Agricultural Labor Relations Board are reviewed by the courts of appeal. Gov't Code §§ 3520, 3542, 3564; Lab. Code § 1160.8. Decisions of the State Energy Resources Conservation and Development Commission

can also be reviewed in the context of enforcement actions or criminal actions brought against individuals for violation of regulatory statutes or rules.

There are many problems with this patchwork scheme. First, it is often unclear whether judicial review should be sought by administrative mandamus, traditional mandamus, or declaratory relief. If an action for administrative mandamus can be brought, it must be brought under the administrative mandamus provisions. Parties regularly file under the wrong provisions. Some cases hold that if the trial court uses the wrong writ, the case must be reversed on appeal so it can be retried under the proper procedure, even if no one objects.

Second, it is often difficult to decide which form of mandamus to use because of the problematic distinction between quasi-legislative and quasi-judicial action, especially in local land use planning and environmental decisions. Administrative mandamus is proper to review quasi-judicial action, while traditional mandamus or declaratory relief is proper to review quasi-legislative action.

Third, if administrative mandamus is unavailable because statutory requirements are not met, and traditional mandamus is unavailable because there has been no deprivation of a clear legal right or an abuse of discretion, the case will be unreviewable by the courts.

Both administrative and traditional mandamus involve complex rules of pleading and procedure. The proceeding may be commenced by a petition for issuance of an alternative writ of mandamus or by a notice of motion for a peremptory writ. Trial courts must distinguish between these two forms of mandamus because there are many differences between them, including use of juries, statutes of limitations, exhaustion of remedies, stays, open or closed record, whether the agency must make findings, and scope of review of factual issues.

This awkward hybrid is the result of the historical development of judicial review procedures in California. At the time the administrative mandamus concept was devised in 1945, the California Constitution was held to limit the ability of the Legislature to affect the appellate jurisdiction of the courts.[9] Since that time, the Constitution has been amended to delete the reference to the "writ of review", and Constitution has been construed to allow the Legislature greater latitude in prescribing appropriate forms of judicial review, provided the discretion of the judicial branch to deny review is preserved.[10]

The Law Revision Commission recommends that the archaic judicial review system that has evolved over the years be replaced by a simple and straightforward statute. The proposed law provides that final state or local agency action is

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are reviewed in the same manner as decisions of the Public Utilities Commission. Pub. Res. Code § 25531. Decisions of the Department of Alcoholic Beverage Control, Alcoholic Beverage Control Appeals Board, and Workers' Compensation Appeals Board are reviewed either by the Supreme Court or the Court of Appeal. Bus. & Prof. Code §§ 23090, 23090.5; Lab. Code §§ 5950, 5955.

9. Judicial Council of California, *Tenth Biennial Report* (1944).

10. See, e.g., Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd., 24 Cal. 3d 335, 156 Cal. Rptr. 1, 595 P. 2d 579 (1979); Powers v. City of Richmond, 40 Cal. Rptr. 2d 839 (1995).

reviewable by a petition for review filed with the appropriate court. For the purpose of judicial review of agency action, common law writs such as mandamus, certiorari, and prohibition, and equitable remedies such as injunction and declaratory judgment, would be replaced by the unified scheme of the proposed law.[11]

Existing statutes draw little or no distinction between judicial review of state and local agency action. The proposed statute on judicial review of agency action applies to local as well as to state government. It applies to review of any type of government action — adjudicative decisions, agency regulations, and quasi-legislative, informal, or ministerial action.[12]

RULES OF PROCEDURE

The proposed law provides a few key procedural rules for judicial review, and authorizes the Judicial Council to provide procedural detail by rule not inconsistent with the proposed law. Where no specific rule is applicable, normal rules of civil procedure govern judicial review.[13]

STANDING TO SEEK JUDICIAL REVIEW[14]

Existing California law on standing to seek judicial review of agency action is mostly uncodified.[15] A petitioner for administrative or traditional mandamus to review a decision of a state or local agency must be beneficially interested in.[16] or

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11. The proposed law preserves the action to prevent an illegal expenditure by a local governmental entity under Section 526a of the Code of Civil Procedure, but applies its standing provisions to such actions. See generally Asimow, *Judicial Review of Administrative Decision: Standing and Timing* 5 (Sept. 1992); Asimow, *supra* note 4, at 22-23. The proposed law also makes clear that it does not govern or apply where a statute provides for judicial review by a trial de novo, including an action for refund of taxes under the Revenue and Taxation Code, does not apply to an action under the California Tort Claims Act, does not apply to litigation in which the sole issue is a claim for money damages or compensation if the agency whose action is at issue does not have statutory authority to determine the claim, does not apply to validating proceedings under the Code of Civil Procedure, does not apply to judicial review of a decision of a court, does not apply to judicial review of an award in binding arbitration under Government Code Section 11420.10, does not apply to judicial review of action of a nongovernmental entity except a decision of a private hospital board in an adjudicative proceeding, and does not limit use of the writ of habeas corpus. The proposed law also makes clear the court continues to have discretion summarily to deny relief if the petition for review does not present a substantial issue for resolution by the court.

12. See proposed Code of Civil Procedure Sections 1120, 1121.240. The State Bar Court is exempted from application of the proposed statute, because regulation of attorney discipline is a judicial function where the California Supreme Court has inherent and primary regulatory power. See 1 B. Witkin, California Procedure *Attorneys* §§ 257-258, at 292-93 (3d ed. 1985); Cal. R. Ct. 952.

13. The proposed law provides that Code of Civil Procedure Section 426.30 relating to compulsory cross-complaints does not apply to a judicial review proceeding.

14. The discussion under this heading is drawn from Asimow, *Judicial Review of Administrative Decision: Standing and Timing* (Sept. 1992).

15. Asimow, *supra* note 14, at 4.

16. Code Civ. Proc. § 1086.

aggrieved by,[17] the decision. This requirement is applied in various ways, depending on whether the action being reviewed is administrative adjudication, rulemaking, or quasi-legislative, informal, or ministerial action.

Administrative Adjudication and State Agency Regulations

A person seeking administrative mandamus to review an adjudicative proceeding under the Administrative Procedure Act must have been a party in the adjudicative proceeding.[18] A person seeking administrative mandamus to review an adjudicative proceeding not under the Administrative Procedure Act must have been either a party or a person authorized to participate as an interested party.[19] The proposed law codifies these rules.

For review of a state agency regulation by declaratory relief, the petitioner must be an interested person,[20] i.e., a person subject to or affected by the regulation.[21] The proposed law continues this rule.

Quasi-Legislative, Informal, or Ministerial Action

A person seeking traditional mandamus to review agency action other than an adjudicative proceeding or state agency rulemaking must show a substantial right is affected and he or she will suffer substantial damage if the action is not annulled.[22] This requirement is relaxed if a public right is involved and judicial review is sought to enforce a public duty, in which case it is enough that the person seeking review is interested as a citizen in having the laws executed and the public duty enforced.[23]

Private interest standing. By case law, a person has sufficient private interest to confer standing if the agency action is directed to that person, or if the person's interest is over and above that of members of the general public. Non-pecuniary interests such as environmental or esthetic claims are sufficient to meet the private interest test. Associations such as unions, trade associations, or political

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17. Grant v. Board of Medical Examiners, 232 Cal. App. 2d 820, 827, 43 Cal. Rptr. 270, 275 (1965); Silva v. City of Cypress, 204 Cal. App. 2d 374, 22 Cal. Rptr. 453 (1962).

18. Temescal Water Co. v. Department of Public Works, 44 Cal. 2d 90, 279 P.2d 1 (1955); Covert v. State Bd. of Equalization, 29 Cal. 2d 125, 173 P.2d 545 (1946).

19. Bodinson Mfg. Co. v. California Employment Comm'n, 17 Cal. 2d 321, 330, 109 P.2d 935, 9041 (1941).

20. Gov't Code § 11350(a).

21. Sperry & Hutchinson Co. v. California State Bd. of Pharmacy, 241 Cal. App. 2d 229, 232-33, 50 Cal. Rptr. 489 (1966). However, if a regulation is reviewed by traditional mandamus, the petitioner may have public interest standing by showing that he or she is interested as a citizen in having the law executed and the duty in question enforced. American Friends Service Comm. v. Procunier, 33 Cal. App. 3d 252, 256, 109 Cal. Rptr. 22 (1973).

22. Parker v. Bowron, 40 Cal. 2d 344, 351, 254 P.2d 6, 9 (1953); Grant v. Board of Medical Examiners, 232 Cal. App. 2d 820, 827, 43 Cal. Rptr. 270, 275 (1965).

23. Board of Social Welfare v. County of Los Angeles, 27 Cal. 2d 98, 101, 162 P.2d 627 (1945); California Administrative Mandamus § 5.1, at 210 (Cal. Cont. Ed. Bar 2d ed. 1989).

associations have standing to sue on behalf of their members. But if a person has not suffered some kind of harm from the agency action, the person lacks private interest standing to seek judicial review. The proposed law codifies these rules.

The proposed law does not continue the rule that a person seeking review must have objected to the agency action.[24] This rule has the undesirable effect of requiring a person seeking review to associate in the review process another person who was active in making a protest to the agency but is not otherwise interested in the judicial review proceeding.[25]

The proposed law denies a person who complained to an agency about a professional licensee standing to challenge an agency decision in favor of the licensee[26].

The proposed law makes clear that a local agency may have private interest standing to seek judicial review of state action, and relaxes the limiting rule that local government has standing for constitutional challenges under the commerce or supremacy clause but not under the due process, equal protection, or contract clauses.[27]

Public interest standing. The proposed law codifies case law in traditional mandamus that a person who lacks private interest standing may nonetheless sue to vindicate the public interest.[28] This promotes the policy of allowing a citizen to ensure that a government body does not impair or defeat the purpose of legislation establishing a public right.

The proposed law does not affect the rule that a plaintiff in a taxpayer's suit to restrain illegal or wasteful expenditures[29] has standing without the need to show any individual harm.

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24. See Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 267-68, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972) (administrative mandamus to set aside planning commission's issuance of conditional use and building permits); Asimow, *supra* note 14, at 10.

25. The proposed law preserves the exhaustion of remedies aspect of this rule, which requires that the ground on which agency action is claimed to be invalid must have been raised before the agency. See Asimow, *supra* note 14, at 10.

26. An exception to this rule permits the complaining person to challenge the agency decision if the person was either a party to the administrative proceeding or had a right to become a party under a statute specific to that agency.

27. The proposed law does not adopt the federal or Model Act zone of interest test. See generally Asimow, *supra* note 14, at 13-15.

28. See Asimow, *supra* note 14, at 15. Under the proposed law as under existing law, public interest standing does not apply to review of agency adjudication. The proposed law does not change the existing rule for review of rulemaking that public interest standing does not apply to actions for declaratory relief, but does apply to traditional mandamus. American Friends Serv. Comm. v. Procunier, 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (1973). The proposed law requires a person asserting public interest standing to have requested the agency to correct the agency action and that the agency has not done so within a reasonable time.

29. Code Civ. Proc. § 526a.

EXHAUSTION OF ADMINISTRATIVE REMEDIES[30]

Under existing law, a litigant must fully complete all federal, state, and local administrative remedies before coming to court or defending against administrative enforcement unless an exception to the exhaustion of remedies rule applies. The proposed law codifies the exhaustion of remedies rule, including the rule that exhaustion of remedies is jurisdictional rather than discretionary with the court.[31] The proposed law provides exceptions to the exhaustion of remedies rule to the extent administrative remedies are inadequate[32] or where requiring their exhaustion would result in irreparable harm disproportionate to the public and private benefit from requiring exhaustion.[33] The proposed law continues the rule of existing statutes that a litigant is not required to request reconsideration from the agency before seeking judicial review.[34]

The proposed law codifies the rule that, in order to be considered by the reviewing court, the exact issue must first have been presented to the agency. The proposed law reverses existing law by requiring exhaustion of remedies for a local tax assessment alleged to be a nullity. Judicial review of such matters should not occur until after conclusion of administrative proceedings.[35]

The proposed law eliminates the rule that in an adjudicative proceeding agency denial of a request for a continuance is judicially reviewable immediately.[36]

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30. The discussion under this heading is drawn from Asimow, *supra* note 14.

31. "Jurisdictional" in this context does not mean that the court wholly lacks power to hear the matter before administrative remedies have been exhausted. Rather it means that a writ of prohibition or certiorari from a higher court will lie to prevent a lower court from hearing it. See Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 102 P.2d 329 (1941).

32. The inadequacy requirement includes and accommodates existing California exceptions to the exhaustion of remedies rule for futility, certain constitutional issues, and lack of notice. Asimow, *supra* note 14, at 62.

33. This provision was taken from the 1981 Model State Administrative Procedure Act, 15 U.L.A. 1 (1990). The proposed law expands the factors to be considered to include private as well as public benefit.

34. Gov't Code §§ 11523 (Administrative Procedure Act), 19588 (State Personnel Board). However, the common law rule in California may be otherwise. See Alexander v. State Personnel Board, 22 Cal. 2d 198, 137 P.2d 433 (1943). This rule would not apply to the Public Utilities Commission or other agencies for which reconsideration is required by statute. E.g., Pub. Util. Code § 1756. Nor would it preclude a litigant from requesting reconsideration or an agency on its own motion from reconsidering.

35. *Cf.* Stenocord Corp. v. City and County of San Francisco, 2 Cal. 3d 984, 88 Cal. Rptr. 165 (1970).

36. Gov't Code § 11524(c). Such a denial will be subject to general rules requiring exhaustion of remedies, and thus will be subject to a possible exception because administrative remedies are inadequate or because to require exhaustion would result in irreparable harm. Similarly, judicial review of discovery orders will be postponed until after conclusion of the administrative proceeding.

PRIMARY JURISDICTION[37]

Under the doctrine of primary jurisdiction, a case properly filed in court may be shifted to an administrative agency that also has statutory power to resolve some or all of the issues in the case. Thus the agency makes the initial decision in the case, but the court retains power to review the agency action.

The proposed law makes clear the doctrine of primary jurisdiction is distinct from exhaustion of remedies. It provides that the court should send an entire case, or one or more issues in the case, to an agency for an initial decision only where the Legislature intended that the agency have exclusive or concurrent jurisdiction over that type of case or issue, or where the benefits to the court in doing so outweigh the extra delay and cost to the litigants.[38]

RIPENESS[39]

The ripeness doctrine in administrative law counsels a court to refuse to hear an attack on the validity of an agency rule or policy until the agency takes further action to apply it in a specific fact situation. The ripeness doctrine is well accepted in California law, and the proposed law codifies it.

STATUTE OF LIMITATIONS FOR REVIEW OF ADJUDICATION[40]

Existing statutes of limitations for judicial review of agency adjudication are scattered and inconsistent. The limitations period for judicial review of adjudication under the Administrative Procedure Act is 30 days,[41] and for judicial review of a local agency decision other than by a school district is 90 days.[42] Other

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37. The discussion under this heading is drawn from Asimow, *supra* note 14. The doctrine of primary jurisdiction must be distinguished from the doctrine of exhaustion of remedies. The rules are different with respect to burden of proof, presumption of jurisdiction, and applicability. *Id.*

38. If the agency has concurrent jurisdiction, the party seeking to have the matter or issue referred to the agency must persuade the court that the efficiencies outweigh the cost, complexity, and delay inherent in so doing. Asimow, *supra* note 14, at 70. The court in its discretion may ask the agency to file an amicus brief with its views on the matter as an alternative to sending the case to the agency. And the court's discretion to refer the matter or issue to the agency for action gives courts considerable flexibility in the interests of justice. See Farmers Ins. Exch. v. Superior Court, 2 Cal. 4th 377, 391-92, 826 P.2d 730, 6 Cal. Rptr. 2d 487, 496 (1992).

39. The discussion under this heading is drawn from Asimow, *supra* note 14.

40. The discussion under this heading is drawn from Asimow, *supra* note 14.

41. Gov't Code § 11523.

42. Code Civ. Proc. § 1094.6(b). This provision applies only if the local agency has adopted an ordinance making it applicable. Some other statutes of limitations applicable to judicial review of administrative proceedings are: Veh. Code § 14401(a) (90-days after notice of driver's license order); Lab. Code §§ 1160.8 (30 days after ALRB decision), 5950 (45 days for decision of Workers' Compensation Appeals Board); Gov't Code §§ 3542 (30 days for PERB decisions), 19630 (one year for various state personnel decisions), 65907 (90 days for decisions of zoning appeals board); Unemp. Ins. Code § 410 (six months for appeal of decision of Unemployment Insurance Appeals Board); Welf. & Inst. Code §10962

sections applicable to particular agencies provide different limitations periods for commencing judicial review. Adjudicatory action not covered by any of these provisions is subject to the three-year or four-year limitations periods for civil actions generally.[43]

The proposed law provides a single, uniform 30-day limitations period for judicial review of all adjudicatory action, whether state or local and whether under the APA or not,[44] except that the special limitations periods under the California Environmental Quality Act[45] are preserved. Non-adjudicatory action remains subject to the general limitations periods for civil actions.

The proposed law requires the agency to give written notice to the parties of the date by which review must be sought. Failure to do so would toll the running of the limitations period up to a maximum period of 180 days after the decision is effective.[46]

Under the existing Administrative Procedure Act and the existing statute for judicial review of a local agency decision, when a person seeking judicial review makes a timely request for the agency to prepare the record, the time to petition for review is extended until 30 days after the record is delivered.[47] Both statutes require that the record be requested within ten days after the decision becomes final in order to trigger the extension provision. Under the proposed law, the time to petition for review is not extended by a request for the record. The times for filing briefs will be provided by Judicial Council rule.

The proposed law preserves the case law rule that an agency may be estopped to plead the statute of limitations if a party's failure to seek review within the prescribed period was due to misconduct of agency employees.

STANDARD OF REVIEW[48]

Review of Agency Fact-Finding Other Than in Local Agency Adjudication

Existing law requires California courts to use independent judgment in reviewing an agency's factual determinations that substantially deprive a litigant of a fundamental vested right. California is the only jurisdiction in the United

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(one year after notice of decision of Department of Social Services). Various rules on tolling apply to these statutes. See Asimow, *supra* note 14, at 90 n.227.

43. These actions are also subject to the defense of laches.

44. The period starts to run from the date the agency decision becomes effective, generally 30 days after issuance of the decision. Gov't Code § 11519. The decision will inform the parties of the limitations period for judicial review. Failure to do so extends the period to six months.

45. Pub. Res. Code § 21167.

46. Concerning the effective date of the decision, see *supra* note 44.

47. Gov't Code § 11523; Code Civ. Proc. § 1094.6(d).

48. The discussion under this heading is drawn from Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157 (1995).

States that uses independent judgment as a standard for judicial review of agency action generally.[49]

The independent judgment test was imposed by a 1936 California Supreme Court decision on the theory that constitutional doctrines of separation of powers or due process required it.[50] The test applied to review of fact-finding by state agencies not established by the California Constitution, because it was thought that those agencies could not constitutionally exercise judicial power. But the courts have subsequently rejected any constitutional basis for the independent judgment test,[51] so the Legislature or the courts are now free to abolish it. Nonetheless, the courts have continued to apply the independent judgment test to decisions of nonconstitutional state agencies where fundamental vested rights are involved. Thus the substantial evidence test is applied to review decisions of constitutional state agencies, and to review decisions of nonconstitutional state agencies where fundamental vested rights are not involved. Independent judgment review is applied to nonconstitutional state agencies where substantial vested rights are involved. There is no rational policy basis for distinguishing between agencies established by the constitution and those that are not.

Independent judgment review of state agency action substitutes the factual conclusions of a non-expert trial judge for the expert and professional conclusions of the administrative law judge and agency heads. Especially in cases involving technical material or the clash of expert witnesses, the professionals are more likely to be in a position to reach the correct decision than a trial judge reviewing the record. The professionals are the administrative law judges who try cases of this sort every day, hear the lay and expert witnesses testify, and can take the necessary time to understand the issues and to question the experts until they do understand.

Independent judgment review is inefficient because it requires the parties to litigate the peripheral issue of whether or not independent judgment review applies. This involves the loose standard of the degree of "vestedness" and "fundamentalness" of the right affected. Trial judges must scrutinize every word in the record, and the transcript may be lengthy. Independent judgment review also encourages more people to seek judicial review than would do so under a substantial evidence standard.

Except in one limited case, the proposed law eliminates independent judgment review of state agency fact-finding,, and instead requires the court to uphold

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49. Some states use independent judgment review for particular situations. See, e.g., Weeks v. Personnel Bd. of Review, 373 A.2d 176 (R.I. 1977) (discharge of police officer). Colorado uses independent judgment review if a school board dismisses a teacher after the hearing officer recommended retention. Colo. Rev. Stat. § 22-63--302(10)(c) (19xx). See also Mo. Rev. Stat. § 536.140.2 (1990); Asimow, *supra* note 48, at 1164 n.13.

50. Standard Oil Co. v. State Board of Equalization, 6 Cal. 2d 557, 59 P.2d 119 (1936).

51. Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd., 24 Cal. 3d 335, 595 P.2d 579, 156 Cal. Rptr. 1 (1979).

agency findings if supported by substantial evidence in the record as a whole.[52] The proposed law preserves independent judgment review if the agency head changes a determination of fact made in an adjudicative proceeding conducted by an administrative law judge employed by the Office of Administrative Hearings.

Review of Fact-Finding in Local Agency Adjudication

Under existing law, fact-finding in adjudication by local agencies is reviewed by the same standard as for state agencies that do not derive judicial power from the California Constitution — independent judgment if a fundamental vested right is involved, otherwise substantial evidence.[53] The argument for abandoning independent judgment review is weaker for local agency adjudication than for state agency adjudication. Local agency adjudication is often informal, and lacking procedural protections that apply to state agency hearings, including the administrative adjudication bill of rights.[54] A local agency may voluntarily apply the administrative adjudication bill of rights to its adjudications,[55] but is not required to do so.

The proposed law continues to apply independent judgment review to fact-finding in local agency adjudications if a fundamental vested right is involved, unless the agency adopts basic procedural protections and applies them to the adjudication being reviewed. These procedural protections should include notice of the proceeding at least 10 days before the proceeding, the administrative adjudication bill of rights (opportunity to be heard and to present and rebut evidence, the right to receive a copy of the procedure, public hearing, separation of investigative, prosecutorial, and advocacy functions within the agency, disqualification of presiding officer for bias, prejudice, or interest, written decision including a statement of its factual and legal basis, designation and indexing of precedent decisions relied on, limitation on ex parte communication, and language assistance), the right to subpoena witnesses and require production of documents, the right to call and examine witnesses, limitation on use of hearsay evidence, application of rules of privilege, procedural requirements for adopting a decision, and the right to apply for reconsideration of the decision. If the local agency applies all these procedural protections to the hearing, the agency would get the

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52. An important benefit of the substantial evidence test is that it greatly broadens the power of the appellate court in appeals from trial court decisions reviewing administrative action. Asimow, *supra* note 48, at 1168-69. The proposed law codifies the existing rule that a person challenging agency action has the burden of persuasion on overturning agency action. See California Administrative Mandamus §§ 4.157, 12.7 (Cal. Cont. Ed. Bar 2d ed. 1989).

53. Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974); Asimow, *supra* note 48, at 1171-72.

54. Gov't Code §§ 11410.20 (application to state), 11425.10-11425.60 (administrative adjudication bill of rights) (operative July 1, 1997).

55. Gov't Code § 11410.40 (operative July 1, 1997).

benefit of substantial evidence review.[56] This should encourage local agencies to improve hearing procedures where it appears economically justified, and will apply the same standard of review as for state agencies in most circumstances if comparable procedural protections are afforded.

Review of Agency Interpretation of Law

Under existing law, courts exercise independent judgment when reviewing an agency interpretation of law. This is qualified by the rule that, depending on the context, courts should give great weight to a consistent construction of a statute by the agency responsible for its implementation. Deference is given to the agency's interpretation if the court finds it appropriate to do so based on a number of factors. These factors are generally of two kinds — factors indicating that the agency has a comparative interpretive advantage over the courts, and factors indicating that the interpretation in question is probably correct.

In the comparative advantage category are factors that assume the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another. A court is more likely to defer to an agency's interpretation of a statute that the agency enforces than to its interpretation of some other statute, the common law, the constitution, or judicial precedent.

Factors indicating that the interpretation in question is probably correct include the degree to which the agency's interpretation appears to have been carefully considered by responsible agency officials. For example, an interpretation of a statute contained in a regulation adopted after public notice and comment is more deserving of deference than an interpretation contained in an advice letter prepared by a single staff member. Deference is called for if the agency has consistently maintained the interpretation in question, especially if the interpretation is long-standing. A vacillating position, however, is entitled to no deference. An interpretation is more worthy of deference if it first occurred contemporaneously with enactment of the statute being interpreted. Deference may also be appropriate if the Legislature reenacted the statute in question with knowledge of the agency's prior interpretation. If the Legislature has demonstrably delegated authority to an agency to interpret the law, the court must accept a reasonable agency interpretation using the abuse of discretion standard.[57]

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56. Even where these procedural protections are applied, the proposed law continues independent judgment review if the agency changes a determination of fact made by the presiding officer in the hearing. This is comparable to the provision for state agencies. See text accompanying note 52 *supra*.

57. A delegation typically occurs where a statute empowers an agency to adopt a rule defining language in the statute. Delegation does not occur merely because the Legislature gives legislative rulemaking

When a court reviews a regulation, it normally separates the issues, exercising independent judgment with appropriate deference on interpretive issues, such as whether the regulation conflicts with the governing statute, but applying the abuse of discretion standard on whether the regulation is reasonably necessary to effectuate the purpose of the statute.

The Commission finds existing law on the standard of review of agency interpretation of law to be generally satisfactory, although some clarification is needed. The proposed law continues independent judgment review of agency interpretation of law, with appropriate deference to the agency's interpretation.[58]

Review of Agency Application of Law to Fact

In nearly every adjudicatory decision, the agency must apply a legal standard to basic facts. Under existing law, an application question is reviewed as a question of fact if the basic facts of the case are disputed, whether the dispute concerns matters of direct testimony or matters of inference from circumstantial evidence. If there is no dispute of basic facts (whether established by direct or circumstantial evidence) but the application question is disputed, the agency's determination is reviewed as a question of law.[59]

The Commission believes the standard of review of application questions should not turn on whether the basic facts are disputed. It invites manipulation, since a party can control the standard of review by either disputing or stipulating to basic facts.

Application decisions are often treated as precedents for future cases, thus resembling issues of law more than fact. The proposed law treats application questions as questions of law. Reviewing courts would thus exercise independent judgment with appropriate deference for application decisions by administrative agencies. Treating application questions as questions of law avoids having to

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authority to an agency, or because the statute is somewhat ambiguous. This principle applies only when a statute demonstrably delegates to the agency the power to interpret particular statutory language. Asimow, *supra* note 48, at 1198. Courts may also find that the Legislature intended to delegate interpretive power when it deliberately wrote unusually vague and open-ended statutory language that an agency must apply, or when an issue of interpretation involves policy choices which the agency is empowered to make. However, there is a possibly inconsistent line of cases. *Id.* at 1199-1201.

58. The proposed law exempts the three labor law agencies from the statutory standard of review of questions of law (independent judgment with appropriate deference). These agencies are the Agricultural Labor Relations Board, Public Employment Relations Board, and Workers' Compensation Appeals Board. Thus the standard of review of questions of law for these agencies will continue to be determined by case law. See, e.g., Banning Teachers Ass'n v. Public Employment Relations Bd., 44 Cal. 3d 799, 804, 750 P.2d 313, 244 Cal. Rptr. 671 (1988); Agricultural Labor Relations Bd. v. Superior Court, 16 Cal. 3d 392, 400, 411, 546 P.2d 687, 128 Cal. Rptr. 183 (1976); Judson Steel Corp. v. Workers' Compensation Appeals Bd., 22 Cal. 3d 658, 668, 586 P.2d 564, 150 Cal. Rptr. 250 (1978); United Farm Workers v. Agricultural Labor Relations Bd., 41 Cal. App. 4th 303, 48 Cal. Rptr. 2d 696, 703 (1995). These labor agencies are exempted because they must accommodate conflicting and contentious economic interests, and the Legislature appears to have wanted legal interpretations by these agencies within their expertise to be given greater deference by the courts.

59. Some cases are inconsistent. Asimow, *supra* note 48, at 1213.

distinguish between pure questions of law and questions of application, because it is often difficult to know which is which.[60]

Review of Agency Exercise of Discretion

An agency has discretion when the law allows it to choose between several alternative policies or other courses of action. Examples include an agency's power to choose a severe or lenient penalty, whether there is good cause to deny a license, whether to grant permission for various sorts of land uses, or to approve a corporate reorganization as fair. An agency might have power to prescribe the permitted level of a toxin in drinking water, to decide whether to favor the environment at the expense of economic development or vice versa, or to decide whom to investigate or charge when resources are limited.

Existing law is replete with conflicting doctrines on these important issues. California courts may review agency discretionary decisions on grounds of legality, procedural irregularity, or abuse of discretion despite broad statutory delegations of discretionary authority. Existing law is unclear whether the court reviews the discretionary action on an open or closed record, but most California decisions preclude introduction of new evidence in such cases. The agency must give reasons for the discretionary action in the case of review of adjudicatory action, but not in the case of quasi-legislative action unless required by statute.

In reviewing discretionary action, a court first decides whether the agency's choice was legally permissible and whether the agency followed legally required procedures, using independent judgment with appropriate deference. Within these legal limits, the agency has power to choose between alternatives, and a court must not substitute its judgment for the agency's, since the Legislature delegated discretionary power to the agency, not the court. But the court should reverse if the agency's choice was an abuse of discretion. Review for abuse of discretion consists of two distinct inquiries: the adequacy of the factual underpinning of the discretionary decision, and the rationality of the choice.

In reviewing the adequacy of the factual underpinning, it is not clear whether the abuse of discretion test is merely another way to state the substantial evidence test, or whether the substantial evidence test gives the court greater leeway in reviewing the agency decision, but the prevailing view is that they are synonymous. Legislative history of a 1982 enactment[61] also suggests that

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60. This approach might create the opposite problem of distinguishing application questions from questions of fact, but this distinction should not usually be problematic. Fact questions can be answered without knowing anything of the applicable law. Application questions should not be treated as questions of fact, because it would strip courts of the responsibility for applying the law in every case, and would require the courts to ignore important public policy reasons for judicial rather than agency responsibility for applying law to fact, a formula of rigidity. Treating them as questions of law with appropriate deference to the agency decision is a formula for flexibility. Asimow, *supra* note 48, at 1217, 1223-24.

61. 1982 Cal. Stat. ch. 1573, § 10.

substantial evidence is the appropriate test whenever the issue is the factual basis for agency discretionary action.[62]

The proposed law requires the factual underpinnings of a discretionary decision to be supported by substantial evidence on the whole record, whether the decision arose out of formal or informal adjudication, quasi-legislative action such as rulemaking, or some other function.[63]

Review of Agency Procedure

Under existing law, California courts use independent judgment on the question of whether agency action complied with the procedural requirements of statutes or the constitution. California courts have occasionally mandated administrative procedures not required by any statute, either in the interest of fair procedures or to facilitate judicial review.

The Commission believes that California courts should retain the power to impose administrative procedures not found in a statute. This power is necessary to prevent procedural unfairness to parties. However, while courts should continue to use independent judgment on procedural issues, they should normally accord considerable deference to agency decisions about how to implement procedural provisions in statutes. Agency expertise is just as relevant in establishing procedure as in fact-finding and determining or applying law and policy.

The proposed law permits the court to exercise independent judgment in reviewing agency procedures, with deference to the agency's determination of what procedures are appropriate.[64]

CLOSED RECORD

Under existing law, in administrative mandamus[65] to review an adjudicative proceeding, the court may remand to the agency to admit additional evidence only if in the exercise of reasonable diligence the evidence could not have been produced at, or was improperly excluded from, the administrative hearing.[66] For independent judgment review, the court may either admit the evidence itself or remand if one of those two conditions is satisfied.[67]

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62. There are cases to the contrary. Asimow, *supra* note 48, at 1230-31.

63. The proposed law rejects case law indicating that an exercise of agency discretion can be disturbed only if evidentiary support is "entirely lacking" or that review is less intensive in abuse of discretion cases than in other cases. See generally Asimow, *supra* note 48, at 1240. The proposed law generally provides for review of agency exercise of discretion on a closed record. See discussion under "Closed Record" *infra*.

64. An agency's procedural choices under a general statute applicable to a variety of agencies, such as the Administrative Procedure Act, should be entitled to less deference than a choice made under a statute unique to that agency. Asimow, *supra* note 48, at 1247.

65. Traditional mandamus is rarely, if ever, appropriate to review an adjudicative proceeding. See California Administrative Mandamus § 1.8, at 8 (Cal. Cont. Ed. Bar 2d ed. 1989).

66. Code Civ. Proc. § 1094.5(e).

67. Code Civ. Proc. § 1094.5(e).

In traditional mandamus to review ministerial or informal action, extra-record evidence is freely admissible if the facts are in dispute.[68] The court simply takes evidence and determines the issues.[69] In traditional mandamus to review quasi-legislative action, extra-record evidence is admissible only if the evidence existed before the agency decision and it was not possible in the exercise of reasonable diligence to present it at the administrative proceeding.[70]

The proposed law eliminates the free admissibility evidence in court for review of ministerial or informal action. The proposed law requires that, if the evidence in the record is insufficient for review, the matter is generally remanded to the agency for additional fact-finding.[71] The court may receive the evidence itself without remanding the case to the agency in any of the following circumstances:

(1) The evidence is needed to decide whether those taking the agency action were improperly constituted as a decisionmaking body or whether there were grounds to disqualify them, whether the procedure or decisionmaking process was unlawful, and the evidence could not have been produced in the agency proceedings in the exercise of reasonable diligence or was improperly excluded.

(2) The standard of review of an adjudicative proceeding is the independent judgment of the court and the evidence could not have been produced in the adjudication in the exercise of reasonable diligence or was improperly excluded.

(3) No hearing was held by the agency and the court finds that remand to the agency would be unlikely to result in a better record for review and the interests of economy and efficiency would be served by receiving the evidence itself.[72]

PROPER COURT FOR REVIEW; VENUE[73]

Under existing law, most judicial review of agency action is in superior court. The Supreme Court reviews decisions of the Public Utilities Commission[74] and State Energy Resources Conservation and Development Commission.[75] Either the Supreme Court or the court of appeal reviews decisions of the Workers'

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68. Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 575-76, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 147-48 (1995).

69. California Civil Writ Practice § 5.24, at 168 (Cal. Cont. Ed. Bar 2d ed. 1987).

70. Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 578, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 149 (1995).

71. The proposed law deals only with admissibility of new evidence on issues involved in the agency proceeding. It does not limit evidence on issues unique to judicial review, such as petitioner's standing or capacity, or affirmative defenses such as laches for unreasonable delay in seeking judicial review.

72. This provision does not apply to judicial review of rulemaking.

73. The discussion under this heading is drawn from Asimow, *supra* note 4, at 23-35.

74. Senate Bill 1322 (1995-96 regular session) would provide for judicial review of decisions of the Public Utilities Commission by the Supreme Court or court of appeal. If this bill is enacted, the proposed law will be revised to reflect the amendments made by it.

75. See Pub. Res. Code § 25531. The Supreme Court also reviews decisions of the State Bar Court. Cal. R. Ct. 952. The State Bar Court is exempted from application of the proposed law. See note 13 *supra*.

Compensation Appeals Board,[76] Department of Alcoholic Beverage Control,[77] and Alcoholic Beverage Control Appeals Board.[78] The court of appeal reviews decisions of the Agricultural Labor Relations Board[79] and Public Employment Relations Board.[80] The proposed law does not alter this scheme.[81]

Under existing law, venue in superior court for administrative mandamus is in the county where the cause of action arose.[82] The proposed law adds Sacramento County as an additional permissible county when a state agency is involved. For judicial review of local agency action, the proposed law provides that venue shall be in the county of jurisdiction of the agency, probably not a substantive change, since the cause of action is likely to arise in the county of the local agency's jurisdiction.

STAYS PENDING REVIEW[83]

Under the existing APA, an agency has power to stay its own decision. Whether or not the agency does so, the superior court has discretion to stay the agency action, but should not impose or continue a stay if to do so would be against the public interest.[84]

A stricter standard applies in medical, osteopathic, or chiropractic cases in which a hearing was provided under the APA. The stricter standard also applies to non-health care APA cases in which the agency head adopts the proposed decision of the administrative law judge in its entirety or adopts the decision and reduces the penalty. Under the stricter standard, a stay should not be granted unless the court is satisfied that the public interest will not suffer and the agency is unlikely to prevail ultimately on the merits. The court may condition a stay order on the posting of a bond.

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76. Lab. Code §§ 5950, 5955.

77. Bus. & Prof. Code § 23090, 23090.5.

78. *Id.*

79. Lab. Code § 1160.8.

80. Gov't Code §§ 3520, 3542, 3564.

81. The proposed law also generally continues existing venue rules. See Asimow, *supra* note 4, at 35-39.

82. See Code Civ. Proc. § 393(1)(b); California Administrative Mandamus § 8.16, at 269 (Cal. Cont. Ed. Bar 2d ed. 1989); Duval v. Contractors State License Bd., 125 Cal. App. 2d 532, 271 P.2d 194 (1954).

83. Gov't Code § 11519(b). The discussion under this heading is drawn from Asimow, *supra* note 4, at 39-42.

84. Code Civ. Proc. § 1094.5(g). However, the court may not prevent or enjoin the collection of any tax. Cal. Const. Art. XIII, § 32.

If the trial court denies the writ of mandamus and a stay is in effect, the appellate court can continue the stay.[85] If the trial court grants the writ, the agency action is stayed pending appeal unless the appellate court orders otherwise.[86]

The proposed law simplifies this scheme by providing one standard regardless of the type of agency action being reviewed. Under the proposed law, the factors to be considered by the court in determining whether to grant a stay include, in addition to the public interest and the likelihood of success on the merits, the degree to which the applicant for a stay will suffer irreparable injury from denial of a stay and the degree to which the grant of a stay would harm third parties.[87]

COSTS

The proposed law consolidates and generalizes various provisions on the fee for preparing a transcript and other portions of the record, recovering costs of suit by the prevailing party, and proceeding in forma pauperis.[88]

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85. If a stay is in effect when a notice of appeal is filed, the stay is continued in effect by operation of law for 20 days from the filing of the notice. Code Civ. Proc. § 1094.5(g).

86. In cases not arising under the administrative mandamus statute, the trial and appellate courts presumably have their usual power to grant a stay by using a preliminary injunction. Asimow, *supra* note 4, at 40.

87. These revisions will make the standard for granting a stay similar to the standard for granting a preliminary injunction. Asimow, *supra* note 4, at 41.

88. See Code Civ. Proc. §§ 1094.5(a), 1094.6(c); Gov't Code § 11523.