Study N-200 April 30, 1996

Memorandum 96-32

Judicial Review of Agency Action: Revised Tentative Recommendation

Attached is a Revised Tentative Recommendation on *Judicial Review of Agency Action* incorporating Commission decisions at the last meeting. The staff made editorial revisions and renumbered and relocated some sections.

We refer in this memorandum to several letters attached to materials for the last meeting. We are attaching the letter from Lucy Quacinella of the Western Center for Law and Poverty because it has case histories relevant to the statute of limitations question.

The following issues are discussed in this memorandum:

STANDARD OF REVIEW OF FACT-FINDING

Fact-Finding in Local Agency Adjudication (§ 1123.440)

Procedural protections. As decided by the Commission at the last meeting, Section 1123.440 in the attached draft preserves existing law on standard of review of fact-finding in local agency adjudication — independent judgment if a fundamental, vested right is affected, otherwise substantial evidence. The Commission asked to see a draft to provide substantial evidence review if the agency adopts basic procedural rights for the adjudication. This may be done by revising Section 1123.440 as follows:

1123.440. (a) The standard for judicial review of whether 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:

~~(a)~~ (1) In cases in which the court is authorized by law to exercise its independent judgment on the evidence, the independent judgment of the court whether the decision is supported by the weight of the evidence.

~~(b)~~ (2) In all other cases, whether the decision is supported by substantial evidence in the light of the whole record.

(b) Notwithstanding paragraph (1) of subdivision (a), if the procedure adopted by the agency for the formulation and issuance of the decision satisfies all of the following requirements, the standard for judicial review is whether the decision is supported by substantial evidence in the light of the whole record:

(1) The procedure provides parties with notice of the proceeding at least 10 days before the proceeding.

(2) The procedure complies with Article 6 (commencing with Section 11425.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, relating to the administrative adjudication bill of rights.

(3) The procedure complies with Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, relating to subpoenas.

(4) The procedure provides parties with the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination, to impeach any witness regardless of which party first called the witness to testify, and to rebut the evidence against the party.

(5) The procedure provides that, if a contested case is heard before the agency, no member of the agency who did not hear all the evidence may vote on the decision or be present during consideration of the case.

(6) The procedure provides that if a contested case is heard by a hearing officer alone, the hearing officer shall be present during consideration of the case by the agency and, if requested, shall assist and advise the agency.

(7) The procedure provides that the agency may adopt the hearing officer's proposed decision, reduce or otherwise mitigate the proposed penalty, and make technical or other minor changes in the proposed decision and adopt it as the decision, but may not increase the proposed penalty or change the factual or legal basis of the proposed decision unless a copy of the proposed decision is furnished to each party and the party's representative, the parties have an opportunity to present oral or written argument before the

agency, and every member who participates in consideration of the case or votes on the decision has read the entire record, including the transcript or an agreed statement of the parties, with or without taking additional evidence.

(8) The procedure permits parties to apply for reconsideration of the decision, which may be granted or denied in the discretion of the agency.

Local agency adjudication under APA. A few local agency adjudications are conducted by an administrative law judge from the Office of Administrative Hearings under the formal adjudication provisions of the Administrative Procedure Act. Educ. Code §§ 44944 (hearing by Commission on Professional Competence involving school district employee), 44948.5 (school district hearing involving probationary employee), 87675 (hearing by arbitrator involving community college district employee) 87679 (hearing involving community college district employee). Because of the procedural protections of the APA and the professionalism and impartiality of ALJs from OAH, perhaps these adjudications should have substantial evidence review. At the December meeting, Eugene Huguenin of the California Teachers Association said his organization would not object to substantial evidence review of a decision of a Commission on Professional Competence under Education Code Section 44944. This may be done by adding a new provision to Section 1123.440 as follows:

The standard for judicial review of whether a proposed decision of an administrative law judge employed by the Office of Administrative Hearings in an adjudicative proceeding of a local agency is based on an erroneous determination of fact, made or implied, is whether the decision is supported by substantial evidence in the light of the whole record.

Fact-Finding by Private Hospital

A 1977 case held administrative mandamus could be used to review a private nonprofit hospital's refusal, after a hearing, to reappoint a physician to the staff, and that independent judgment should be used to review the hospital's fact-finding. Anton v. San Antonio Community Hosp., 19 Cal. 3d 802, 567 P.2d 1162, 140 Cal. Rptr. 442 (1977). The court noted that public hospitals are subject to review by administrative mandamus and that the California Medical Association and California Hospital Association recommended uniform hearing procedures for all types of hospitals, making it "peculiarly appropriate" to have the same procedure for judicial review of both types of hospitals. The Legislature reacted

to the *Anton* case in 1978 by requiring substantial evidence review of fact-finding of a private hospital, except that independent judgment review applies if a podiatrist claims the hospital discriminated in awarding staff privileges. Code Civ. Proc. § 1094.5(d). At the August meeting, the Commission decided to apply to private hospitals the general substantial evidence review provision of the draft statute, and not to continue the special independent judgment standard for podiatrists. **Because of revisions to the general standards, the August decision should be codified in a separate section**:

> 1123.445. The standard for judicial review of whether action of a private hospital board in an adjudicative proceeding is based on an erroneous determination of fact made or implied by the board is whether the board's determination is supported by substantial evidence in the light of the whole record.

Alternatively, review of fact-finding of private hospitals could be treated as a local agency proceeding under Section 1123.440 — independent judgment review if the right is fundamental and vested, which for a physician's staff privileges it will be. Independent judgment review may be justified in view of Professor Asimow's observation that private hospitals "might provide inadequate procedural protection and the impartiality of their decisionmakers is often questionable." Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1172 n.49 (1995).

"Private hospital board" should be added to the definition of "agency" in Section 1121.230.

Fact-Finding of State Agencies

In a letter attached to materials for the last meeting, Sue Ochs argued for independent judgment review of fact-finding in welfare hearings conducted by ALJs of the Department of Social Services on the ground that the hearings are politicized and the ALJs are not impartial. One of her examples involved the question of whether the aid recipient would suffer "hardship" for the purpose of invoking the estoppel doctrine. But defining "hardship" appears to involve application of law to fact, and would therefore be subject to independent judgment review under the draft statute. See Section 1123.420. **The staff would not depart from substantial evidence review of fact-finding of state agencies.**

State Agency Adjudication Generally (§ 1123.640)

The Department of Industrial Relations thought state agencies should be authorized to adopt regulations defining when a decision is "effective" for the purpose of the running of the time for judicial review. **This suggestion seems sound, and may be adopted as follows:**

> 1123.640. (a) The petition for review of a decision of a state agency in an adjudicative proceeding, and of a decision of any agency in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, shall be filed not later than 30 days after the decision is effective or after the notice required by Section 1123.630 is given, whichever is later.
>
> (b) For the purpose of this section:
>
> (1) A decision in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code is effective at the time provided in Section 11519 of the Government Code.
>
> (2) A decision of a state agency other than under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code is effective 30 days after it is delivered or mailed to the person to which the decision is directed, unless any of the following conditions exist:
>
> (A) A reconsideration is ordered within that time pursuant to express statute or rule.
>
> (B) The agency orders that the decision is effective sooner.
>
> (C) A stay is granted.
>
> <u>(D) A different effective date is provided by a regulation.</u>
>
> . . . .

Special Limitations Periods for Particular State Agencies

The proposal to impose a uniform short limitations period for judicial review of all state agency adjudication remains one of the most controversial features of the draft statute. Three letters attached to materials for the last meeting objected to shortening the limitations period in various contexts, referred to below.

Professor Asimow originally recommended a uniform 90-day period for review of all state and local agency adjudication. Asimow, *Judicial Review: Standing and Timing* 88-97 (Sept. 1992). However, he has since said this is not among the most important policy goals of the draft statute, and might well be compromised.

The state agency limitation period of the draft statute — 30 days plus an additional period of up to 30 days — will shorten existing limitations periods for decisions of the following state agencies:

• Various state personnel decisions, including decisions of the State Personnel Board, now one year, but remedies are limited unless the challenge is made within 90 days. Gov't Code § 19630. To apply the general rule of 30 days plus an additional period of up to 30 days will significantly shorten the time for review of SPB personnel decisions. The California Correctional Peace Officers Association objected to this as "unconscionable" because it does not allow time for a considered decision whether to seek review, and may require a petition just to preserve rights, unnecessarily burdening the courts.

• A decision of the Unemployment Insurance Appeals Board, now six months. Unemp. Ins. Code § 410. The general rule of 30 days plus an additional period of up to 30 days will significantly shorten the time for review of CUIAB decisions. A short limitations period may be particularly problematic in CUIAB cases because parties are unlikely to be represented by counsel.

• Drivers' license order, now 90 days after notice. Veh. Code § 14401(a). The general rule of 30 days plus an additional period of up to 30 days will significantly shorten the time for review of DMV drivers' license orders. A short limitations period may be particularly problematic in drivers' license cases because, again, parties are unlikely to be represented by counsel.

• A welfare decision of Department of Social Services, now one year after notice. Welf. & Inst. Code § 10962. The general rule of 30 days plus an additional period of up to 30 days will significantly shorten the time for review of DSS welfare decisions. At the last meeting, the Commission asked for historical background on Section 10962. It was enacted in 1965, but available materials do not show who sponsored it. Its purpose is to ensure that "aggrieved parties have access to the judicial system to establish their statutory rights." Woods v. Superior Court, 28 Cal. 3d 668, 681, 620 P.2d 1032, 170 Cal. Rptr. 484 (1981). This was confirmed by Robert Campbell, Assistant Chief Counsel for DSS. Lucy Quacinella (Western Center on Law and Poverty) and Sue Ochs oppose shortening the one-year limitations period because they believe it will effectively deny judicial review to many applicants for aid. Ms. Ochs says this will have a "devastating effect on poor people," especially in view of the funding cuts for legal services programs in California. She says it is "absolutely crucial" that the one-year limitations period be preserved. Ms. Quacinella's letter

(attached) provides supporting statistical information, and examples of actual cases where a short limitations period would have denied judicial review.

The staff recommends preserving existing limitations periods for the State Personnel Board (one year), Unemployment Insurance Appeals Board (six months), Department of Motor Vehicles (90 days), and Department of Social Services (one year).

The draft statute should not cause problems for the following state agencies, because their limitations periods are either extended or not significantly affected:

• A decision of the Public Employment Relations Board, now 30 days after issuance. Gov't Code §§ 3520, 3542. The draft statute would extend the time by 30 days in most cases because of the provision for 30 days plus an additional period of up to 30 days.

• A decision of the Agricultural Labor Relations Board, now 30 days after issuance. Lab. Code § 1160.8. The draft statute would extend this time by 30 days in most cases, the same as for PERB, *supra*.

• A decision of the Workers' Compensation Appeals Board, now 45 days after the filing of the order following reconsideration or 45 days after denial of petition for reconsideration. Lab. Code § 5950. A petition for reconsideration must be filed within 20 days after service of a final order. *Id.* § 5903. Thus the total time limit for judicial review is 65 days after service of the order. Under the draft statute, a petition for reconsideration is unnecessary, Section 1123.320, so the usual time limit will be 60 days (30 plus 30), not a significant change.

The proposed 90-day limitations period for non-APA adjudication of local agencies should be broadly acceptable. That is the existing limitations period for local agencies generally (Code Civ. Proc. § 1094.6(b)), and for a local zoning appeals board (Gov't Code § 19630).

APPLICATION OF DRAFT STATUTE TO PUC AND ENERGY COMMISSION

At the December meeting, the Commission considered whether to exempt from the draft statute rate-making decisions of the Public Utilities Commission and power plant siting decisions of the California Energy Commission. The Commission was inclined to wait for final action on Senate Bill 1322 (Calderon) which would impose on the PUC and Energy Commission judicial review procedures similar to administrative mandamus. Senate Bill 1322 has passed the Senate and policy and fiscal committees of the Assembly, and is now on the

inactive file on the Assembly floor. According to the author's office, the bill is being held up while interested parties negotiate. They hope to have all issues resolved by the end of the 1996 session. Senator Kopp thought that, if Senate Bill 1322 does not pass, rate-making decisions of the Public Utilities Commission and power plant siting decisions of the California Energy Commission should be exempted from the draft statute. Professor Asimow urged that in any event the draft statute should apply to truckers' licensing.

The attached draft does not address the question of whether it applies to the Public Utilities Commission or Energy Commission generally. The narrative portion says we will revisit this question after the current legislative session. But the staff added the following to Public Utilities Code Section 1756 in the attached draft to apply the statute to issuance or denial by the Public Utilities Commission of a certificate of public convenience and necessity or a permit for various kinds of highway carriers:

> (b) Notwithstanding any other provision of this code, judicial review of the issuance or denial of the following shall be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure:
>
> (1) A certificate of public convenience and necessity for a highway common carrier or cement carrier pursuant to Article 4 (commencing with Section 1061) of Chapter 5 of Part 1 of Division 1.
>
> (2) A permit for a highway permit carrier, highway contract carrier, livestock carrier, agricultural carrier, tank truck carrier, vacuum truck carrier, heavy-specialized carrier, dump truck carrier, or cement contract carrier pursuant to Chapter 1 (commencing with Section 3501) of Division 2.
>
> (3) Registration of a highway carrier pursuant to Chapter 2 (commencing with Section 3901) of Division 2.
>
> (4) Registration of a private carrier pursuant to Chapter 2.5 (commencing with Section 4000) of Division 2.
>
> (5) A motor transportation broker's license pursuant to Article 2 (commencing with Section 4821) of Chapter 5 of Division 2.
>
> (6) A permit for a household goods carrier pursuant to Chapter 7 (commencing with Section 5101) of Division 2.
>
> (7) A certificate of public convenience and necessity or a permit for a charter-party carrier pursuant to Chapter 8 (commencing with Section 5351) of Division 2.

The staff will ask the PUC staff to review this language for technical adequacy.

OTHER PROVISIONS

§ 1123.710. Applicability of rules of practice for civil actions

The Department of Industrial Relations would make clear Section 426.30 of the Code of Civil Procedure on compulsory cross-complaint does not apply in judicial review proceedings. The department says that to apply this provision would undesirably force it to cross-complain in a review proceeding initiated by an employer under investigation for other matters, even though the investigation is not yet complete. Arguably, Section 426.30 would not apply to a petition for review under the draft statute, because it only applies to a "a party against whom a complaint has been filed and served." But it would be risky to rely on this language to avoid the compulsory cross-complaint provision. For example, the provision for a motion to strike a complaint (Code Civ. Proc. § 435) applies to a mandamus petition. California Administrative Mandamus, *supra,* § 10.13, at 351. **The staff would revise Section 1123.710 as follows:**

> 1123.710. (a) Except as otherwise provided in this title or by rules of court adopted by the Judicial Council not inconsistent with this title, Part 2 (commencing with Section 307) applies to proceedings under this title.
>
> (b) Section 426.30 does not apply to a proceeding under this title.
>
> (c) A party may obtain discovery . . . [etc.].

§ 1123.720. Stay of agency action

Subdivision (d) of Section 1123.720 permits the court to condition a stay of agency action on the giving of security for the protection of "third parties." The Department of Industrial Relations wants this provision expanded to include security for the protection of the agency. The department says this is of particular concern to an enforcement agency trying to assure payment of wages and workers' compensation benefits where the employer is approaching insolvency. **The staff would do this by revising subdivision (d) as follows:**

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

§ 1123.730. Type of relief

Section 1123.730(a) gives courts broad authority to grant any appropriate relief. At the request of the Attorney General, we added subdivision (c) to provide a narrower scope of relief for review of formal adjudicative proceedings under the Administrative Procedure Act, drawn from existing law. See Code Civ. Proc. § 1094.5(f) (court may enter judgment either commanding the agency to set aside the decision or denying relief). Dan Siegel of the AG's Office correctly points out that, to continue existing law, this provision should apply to all state agency adjudication. **The staff agrees, and would revise subdivision (c) as follows**:

> (c) In reviewing a decision in a ~~proceeding under Chapter 5 (commencing with Section 11500)~~ state agency adjudication subject to Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code, the court shall enter judgment either commanding the agency to set aside the decision or denying relief. If the judgment commands that the decision be set aside, the court may order reconsideration of the case in light of the court's opinion and judgment and may order the agency to take further action that is specially enjoined upon it by law.

§ 1123.850. New evidence on judicial review

The Department of Industrial Relations is concerned the closed record requirement might preclude judicial notice of agency decisions in prior cases if not referenced in the administrative record. **The staff agrees, and would add a new subdivision (e) to Section 1123.850**:

> (e) Nothing in this section precludes the court from taking judicial notice of a decision designated as a precedent decision by the agency pursuant to Section 11425.60 of the Government Code.

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

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

The staff revised Section 13559 of the Vehicle Code to preserve the special venue rule of the section under which judicial review of suspension or revocation of a person's driving privilege is in the person's county of residence. This will eliminate the option of venue in Sacramento County under the general venue

provision of the draft statute (Section 1123.520). **Does the Commission approve this revision?**

Respectfully submitted,

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Re: Statute of Limitations for Judicial Review of Administrative Adjudications

Dear Commission Members:

The Commission's current recommendations would change the statute of limitations for review of public benefits cases from the one-year period now provided under Welfare and Institutions Code (W&IC) Section 10962 to a maximum of 90 days[1]. Under this dramatic reduction in the time to file, public benefits applicants and recipients will without doubt lose important rights affecting their very survival. We urge the Commission to keep the existing statute of limitations in these cases.

1) **By their very nature, subsistence payments and basic medical care involve fundamentally important rights. California's one-year statute of limitations for judicial review should be maintained to protect such crucial rights.**

As our Supreme Court has held, the right to welfare benefits is "fundamental both in economic... and human terms and...[its] importance...to the individual in the life situation.'...Because need is a condition erroneous denial of aid...deprives the eligible person 'of the very means for his survival and his situation becomes immediately desperate' [citations omitted.] Frink v. Prod, 31 Cal.3d 166, 178-179 (1982). Federal courts concur:

> Numerous cases have held that reductions in [Aid to Families with Dependent Children (AFDC)] benefits, even reductions of a relatively small magnitude, impose irreparable harm on recipient families...'For those in the grip of poverty, living on the financial edge, even a small decrease in

[1]Thirty days from the effective date of the administrative decision, which is usually 30 days from the date the decision is mailed. An additional 30 days would be added if the Director alternated the administrative law judge's decision. Recommendation, Section 1123.640.

> payments can cause irreparable harm'...'When a family is living at subsistence level, the subtraction of *any* benefit can make a significant difference to its budget and to its ability to survive' [Emphasis added][citations omitted.]

Beno v. Shalala (9th Cir. 1994) 30 F.3d 1057, 1063-1064, n. 10.

The clear purpose of W&IC Section 10962 is to insure access to judicial review for the poor precisely because of the unique importance of the rights involved. Tripp v. Swoap, 17 Cal.3d 671 (1976). Recognition of the need to facilitate access to the courts for this population is further reflected in the provisions of W&IC Section 10962 permitting the filing of public benefits writs *without* paying fees. Indeed, California courts have long recognized the fundamental importance of ensuring judicial access for the poor. See, e.g., Martin v. Superior Court, 176 Cal. 289, 294 (1917).

2) Families with young children and other persons who must rely on public benefits programs for their survival have greater difficulty than the public in general in accessing the courts. The one-year statute of limitations is an essential tool in preserving whatever access is available to the poor.

In welfare cases, "'those affected are not the average citizens...' [citation omitted.]" Beno v. Shalala, supra. With poverty comes disadvantage. The accomplishment of tasks that many of us in the "mainstream" take for granted can become nearly impossible for families or individuals who are poor, especially if they are sick or disabled. Making a phone call, getting from one place to another, keeping track of paper, getting access to information, making photocopies, finding a babysitter, and similar tasks can all become tremendously difficult for people "living on the financial edge." Legal Services attorneys routinely represent people living under bridges, in cars or shelters when not literally on the streets, often with young children; who have to make long trips on city buses, on bicycles, or on foot, no matter the weather, to get to the grocery store, a medical clinic, the welfare department, or a law office; who can barely read or write. Colleagues in my former field office had elderly clients in rural areas whose homes lacked electricity, who relied on wood stoves for heat. I myself had clients living in grain silos.

Legal Services clients are also much more likely than the general population to be in poor health: the medical literature confirms a significant correlation between poverty, especially when it results in homelessness, and compromised health status. Our clients are often unable to come to appointments or follow through on assigned tasks because of illness; the severely mentally ill, such as the schizophrenic homeless clients I have represented, probably pose the greatest difficulties in this regard.

Poor people in California have never had adequate access to the courts, not even when Legal Services experienced its highest funding level in 1980 (the year before the first round of massive federal cuts) and there was one Legal Services attorney in California for every 5,863 poor people. In 1996, the ratio has *fallen 200%:* now, there is only one Legal Services lawyer for every 11,423 Californians in poverty. Not surprisingly, under these circumstances very few people are represented at state administrative fair hearings involving public benefits . And the situation will get dramatically worse soon: Congress recently ***cut the Legal Services budget by an additional 30%.***

Given this combination of poverty among the client base and insufficient numbers of lawyers for the poor, a writ petition could not be prepared and filed in most cases involving public benefits within the maximum 90-day limitations period the Commission has recommended, even if a client contacted a Legal Services office the same day as receiving an adverse fair hearing decision. The time needed to

schedule an appointment (at many Legal Services offices, because of the volume of requests for assistance and limited staffing, non-emergency clients do not get appointments until several weeks or even a month or more after the initial contact with the office), meet with the client, get access to his or her welfare department and fair hearing records, review the record, including listening to a tape recording of the hearing, analyze the validity of claims, draft the petition, points and authorities, related stipulations on hearing and peremptory writ forms, and confer again with the client to review the papers and procure a signature easily consumes more than 90 days in most cases.

Meeting the shortened limitations period is even more difficult when class action notices go out informing class action members that they may come forward for administrative determinations of newly vindicated rights: if the administrative agency denies significant numbers of claimants, as has occurred in such cases, Legal Services offices are swamped with requests for assistance requiring review by writ all at approximately the same time.

3) **Retroactive benefits payments and retroactive coverage for health care costs are essential supplemental payments to families and aged, blind, and disabled persons on aid. Re-application for future benefits is often futile and will otherwise not meet the person's need. Moreover, in many cases, an individual does not know and could not reasonably be expected to know that he or she has a right to a retroactive award until an intervening event, unrelated to the state's wrongful benefits denial, occurs.**

As indicated, most public benefits recipients represent themselves at administrative fair hearings. The relevant law is complex, even for legal practitioners, involving not only federal and state statutes and regulations promulgated under the Administrative Procedures Acts, but also a myriad of internal policy statements, memoranda, manuals, guidelines, lists of criteria, and forms from the federal Health and Human Services Administration and related federal agencies as well as the state Departments of Social Services and of Health Services, much of which has been interpreted by an extensive body of federal and state case law. Because these programs are "means tested", complex accounting procedures are also frequently involved. See e.g., Dill v. Mayer, 57 Cal.App.3d 793(1976) (Agency manual provision limiting the availability of a stepfather's income to an AFDC family budget unit to an amount less than "the stepfather's gross income less any prior support liability, mandatory payroll deductions and the appropriate minimum basic standard of adequate care figure for persons in the stepfather unit" did not apply to calculating the income of a family with a stepfather who was contributing to the support of another family for purposes of establishing the amount a medically needy family had to pay toward the health care of their son before receiving any Medi-Cal payments); Walsh v. Gnaizda, 58 Cal.App.3d 119 (1976) (Director, apparently in reliance on internal Medi-Cal Letter No. 33-73 which was inconsistent with applicable state law and regulation, erroneously denied Medi-Cal eligibility of petitioner, an incompetent, by failing to prorate the amount of an encumbrance on her home while she was living in a skilled nursing facility).

Poor people, with their multiple deficits as a group, simply cannot be expected to navigate these treacherous waters as effectively as trained lawyers can. Not surprisingly, they frequently miss issues in administrative fair hearings when they represent themselves, and do not even learn of legal rights until long after the agency has denied their claims and only because some other, unrelated event brings them into contact with a source of legal help.

Attachment A includes but a few examples of the kinds of cases in which a person legally entitled to essential aid payments or medical care was wrongly denied but did not know, and could not reasonably have been expected to know, that the denial was wrong or that judicial relief might be available until

long after expiration of the maximum 90-day limitations period that the Commission's proposal would impose. ***In each of the attached examples, re-applying for the benefit would have been futile and would have failed to effectively ease the individual's financial crisis. The retroactive benefits involved were an essential supplement to the family's income or the only way a family could get coverage of an old medical bill.***

In addition to mitigating harm to low-income people wrongfully denied administrative claims, the attached case examples also demonstrate at least two important additional benefits of the existing one-year limitations period: medical providers are much more likely to get reimbursed for their services to the poor, a result that supports the health care system as a whole, and the government is less likely to be unjustly enriched.

4) The public policies promoted through California's one-year statute of limitations in public benefits cases are as important-- if not more important-- than those promoted through the California Environmental Quality Act's (CEQA) one-year limitations period, which the Commission has recommended to preserve.

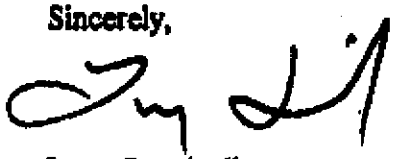
Surely the need of poor children and their families for basic aid payments for food, clothing, and shelter, and of the sick of whatever age for health care coverage to pay their medical bills merits preservation of a limitations period as long as that recommended for environmental cases.

> ...[I]t would strike one with surprise to be credibly informed that the common law courts of England shut their doors upon all poor suitors...Even greater would be the reproach to the system of jurisprudence of the state of California if it could be truly declared that in this twentieth century, by its codes and statues, it had said the same thing...

Martin v.Superior Court, supra, 176 Cal. at 294. California's existing limitations period, which is intended to promote access to the courts in cases involving a person's very survival, must be retained.

Thank you for this opportunity to comment.

Sincerely,



Lucy Quacinella
Staff Attorney

Attachment A

1) A woman was receiving AFDC on behalf of her minor children when her adult daughter and the daughter's child came to live with her. At the time, the law allowed the woman to continue receiving benefits for herself and her minor children without regard to any income or resources that her adult daughter had, so long as the woman did not seek an increase in benefits for her adult daughter and grandchild. Later, however, the law changed, so that the woman no longer had the option of excluding her adult daughter and grandchild from the family unit for AFDC purposes; the change in law meant that the adult daughter's income and resources had to be counted along with the woman's in determining whether she was still eligible for aid and how much she would get. The county welfare department (where an individual's AFDC eligibility and benefits level are determined) cut the woman's aid payments, informing her in a written notice that the cut had to take place because her adult daughter had a car worth more than the allowable resource limit. The woman went to a fair hearing on her own and argued that she knew nothing about the change in the law, otherwise she might have had her daughter and grandchild leave, so the cut was unfair. Her claim was denied, and the cut in benefits went into effect. She got deeper and deeper into a financial hole. Her landlord worked with her for a while, but eventually grew tired of not receiving the full month's rent. About six months after the administrative agency's denial, her landlord served her with an eviction notice. The eviction notice prompted her to go to the local Legal Services office, where she was asked why she was having trouble paying the rent. A review of her fair hearing file indicated that the county had overvalued her adult daughter's car, which had been damaged in a wreck and repaired; the family should not have been disqualified. Only a writ of mandamus could restore the lost income to her.

2) A working mother of two very young children found herself destitute when she got a divorce and her husband failed to pay his court-ordered child support. She kept her part-time minimum wage job, but didn't earn enough to beat the poverty line, so she swallowed her considerable pride and went down to the welfare office to apply for aid for the first time in her life. The worker explained that the District Attorney's office would try to collect her child support; if the D.A.'s office collected anything, the woman was to receive the first $50, the county would then be reimbursed the amount of the welfare she and her children were receiving each month (about $600), and, if anything remained, it would go to her and her children, eventually reducing the amount of the AFDC she would be receiving.

In a few months, the woman began receiving her $50 pass-through, but nothing more; since her ex-husband's child support payment was $680 a month, she wondered where the additional $30 a month was going after the county reimbursed itself the amount of her AFDC. She was especially curious since her ex-husband had been complaining about all the support he was paying. She called the D.A.'s office, but got nowhere. She asked her worker, who didn't really have an explanation; she asked to speak to a supervisor, who rummaged through her file and said the woman was getting all the support she was due from the county, but that, if she wasn't satisfied, she could have a fair hearing. At the fair hearing, the woman was totally befuddled by the county's accounting; when she lost, she figured the administrative law judge had to be right since she herself was so confused.

Financially, her situation was eroding as was her peace of mind, especially after collection agency letters and then a summons and complaint arrived, involving credit card bills from her marriage. One of the volunteers at the local Salvation Army soup kitchen, where she and the children regularly took their evening meals, noticed her depression, and eventually got her to talk. A referral was made to the local Legal Services program for help defending the collection action, and a review of the woman's history led to the discovery of a county error in the calculation of her child support distribution. Ten months after losing the administrative fair hearing on her own, a writ of mandate petition was filed on the

woman's behalf, and, eventually, the county disgorged the funds it had improperly been withholding from her. The several hundred dollars she received in back payments, plus interest, certainly did not resolve all of her financial problems, but the award helped her get caught up on some bills and paid for the kids' school clothes.

3) Miller v. Woods, 148 Cal.App.3d 862 (1983), a statewide class action, invalidated state regulations denying "protective supportive services" payments under the In-Home Supportive Services program for severely disabled people being cared for by relatives or others living with them in their homes. Notwithstanding judicial invalidation of the rule, eligible beneficiaries still continue to be erroneously denied the benefit and must appeal administratively. Elena Ackel, lead counsel for plaintiffs, reports that she recently filed a writ petition on a Miller case the day before the expiration of the one-year limitations period, after having had access to the administrative record for just three weeks. Her disabled client realized he could get this type of relief only after Ms. Ackel had assisted him with a later Miller claim.

4) A 45-year old woman underwent emergency surgery to unclog a femoral artery. The bill was about $40,000. After recovering, her sister helped her apply for Medi-Cal within the three month limit for covering medical expenses already incurred; she was denied, on the ground that her disability was not long-term. Again with her sister's help, she attended an administrative fair hearing; she lost. Frustrated, scared, confused by the technical rules on disability determinations, and homebound due to her illness, she gave up. Eventually, a collection agency sued, and she called a Legal Services office to for help. She learned then that bankruptcy was not an option, since the family had already filed on medical expenses related to her husband's fatal illness. Re-applying for Medi-Cal, even if successfully, would not have covered her old $40,000 surgery bill. Through a writ proceeding, begun close to a year after she had lost her administrative hearing, she was determined eligible beginning at the time of her original Medi-Cal application, and the hospital bill was paid.

#N-200

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

Revised TENTATIVE RECOMMENDATION

Judicial Review of Agency Action

May 1996

This **revised** tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS REVISED TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **August 15, 1996.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF REVISED TENTATIVE RECOMMENDATION

This recommendation would replace the various existing procedures for judicial review of agency action with a single straightforward statute for judicial review of all forms of state and local agency action, whether quasi-judicial, quasi-legislative, or otherwise. It would clarify the standard of review and the rules for standing, exhaustion of administrative remedies, limitations periods, and other procedural matters.

JUDICIAL REVIEW OF AGENCY ACTION

CONTENTS

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

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.[4] 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]

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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. Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus* 2 (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). Agency action can also be reviewed in the context of enforcement actions or criminal actions brought against individuals for violation of regulatory statutes or rules.

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

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.[9] 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.[10]

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.[11]

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.[12] Trial courts must distinguish between these two forms of mandamus because there are many differences between them, including use of juries,[13] statutes of limitations,[14] exhaustion of remedies,[15] stays,[16] open or closed record,[17] whether the agency must make findings,[18] and scope of review of factual issues.[19]

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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. See California Administrative Mandamus § 1.8, at 8 (Cal. Cont. Ed. Bar, 2d ed. 1989).

10. See, e.g., Eureka Teachers Ass'n v. Board of Educ., 199 Cal. App. 3d 353, 244 Cal. Rptr. 240 (1988).

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

12. See Code Civ. Proc. § 1088; California Administrative Mandamus § 9.1, at 307 (Cal. Cont. Ed. Bar, 2d ed. 1989).

13. *Compare* Code Civ. Proc. § 1090 *with* Code Civ. Proc. § 1094.5(a).

14. See, e.g., Griffin Homes, Inc. v. Superior Court, 229 Cal. App. 3d 991, 1003-07, 280 Cal. Rptr. 792 (1991).

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

16. See Code Civ. Proc. § 1094.5(g)-(h).

17. See Code Civ. Proc. § 1094.5(e); Del Mar Terrace Conservancy, Inc. v. City Council, 10 Cal. App. 4th 712, 725-26, 741-44, 12 Cal. Rptr. 2d 785 (1992).

18. See, e.g., California Aviation Council v. City of Ceres, 9 Cal. App. 4th 1384, 12 Cal Rptr. 2d 163 (1992); Eureka Teachers Ass'n v. Board of Educ., 199 Cal. App. 3d 353, 244 Cal. Rptr. 240 (1988).

19. *Compare* Code Civ. Proc. § 1094.5(c) (administrative mandamus) *with* Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal.. 3d 28, 34 n.2, 520 P.2d 29, 112 Cal. Rptr. 805 (1974) (traditional mandamus).

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 thought to limit the ability of the Legislature to affect appellate jurisdiction of the courts.[20] Since that time, the Constitution has been amended to delete the reference to the "writ of review," and has been construed to allow the Legislature greater latitude in prescribing appropriate forms of judicial review if court discretion to deny review is preserved.[21]

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 reviewable by a petition for review filed with the appropriate court. Common law writs such as mandamus, certiorari, and prohibition, and equitable remedies such as injunction and declaratory judgment, would be replaced for judicial review of agency action by the unified scheme of the proposed law.[22] The proposed law 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.[23]

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.[24]

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

21. See, e.g., Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd., 24 Cal. 3d 335, 348-51, 156 Cal. Rptr. 1, 595 P. 2d 579 (1979). See also Powers v. City of Richmond, 10 Cal. 4th 85, 893 P.2d 1160, 40 Cal. Rptr. 2d 839 (1995).

22. 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 the new 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 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.

23. This discretion appears necessary to avoid constitutional issues. See Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd., 24 Cal. 3d 335, 350-51, 156 Cal. Rptr. 1, 595 P. 2d 579 (1979).

24. 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.

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.[25]

STANDING TO SEEK JUDICIAL REVIEW

Existing California law on standing to seek judicial review of agency action is mostly uncodified.[26] A petitioner for administrative or traditional mandamus to review a decision of a state or local agency must be beneficially interested in,[27] or aggrieved by,[28] 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.[29] 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.[30] The proposed law codifies these rules.

For review of a state agency regulation by declaratory relief, the petitioner must be an interested person,[31] i.e., a person subject to or affected by the regulation.[32] If a regulation is reviewed by mandamus, the petitioner may have public interest standing by showing that he or she is interested as a citizen in having the law

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25. 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.

26. Asimow, *Judicial Review of Administrative Decision: Standing and Timing* 4 (Sept. 1992).

27. Code Civ. Proc. § 1086.

28. 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).

29. 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).

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

31. Gov't Code § 11350(a).

32. Sperry & Hutchinson Co. v. California State Bd. of Pharmacy, 241 Cal. App. 2d 229, 232-33, 50 Cal. Rptr. 489 (1966).

executed and the duty in question enforced.[33] The proposed law continues these rules.

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.[34] 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.[35]

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.[36] Non-pecuniary interests such as environmental or esthetic claims are sufficient to meet the private interest test.[37] Associations such as unions, trade associations, or political associations have standing to sue on behalf of their members.[38] 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.[39] 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.[40] This rule has the undesirable effect of requiring a person seeking review to associate in the review process another

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33. Green v. Obledo, 29 Cal. 3d 126, 144-45, 624 P.2d 256, 172 Cal. Rptr. 206 (191981); American Friends Service Comm. v. Procunier, 33 Cal. App. 3d 252, 256, 109 Cal. Rptr. 22 (1973). See also discussion under "Public interest standing" in text accompanying notes 44-45.

34. 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).

35. 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).

36. Carsten v. Psychology Examining Comm., 27 Cal. 3d 793, 796, 614 P.2d 276, 166 Cal. Rptr. 844 (1980); see Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 284-85, 384 P.2d 158 (1963).

37. See, e.g., Bozung v. Local Agency Formation Comm'n, 13 Cal. 3d 263, 272, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975); Albion River Watershed Protection Ass'n v. Department of Forestry, 235 Cal. App. 3d 358, 286 Cal. Rptr. 573, 580-88 (1991); Kane v. Redevelopment Agency, 179 Cal. App. 3d 899, 224 Cal. Rptr. 922 (1986); Citizens Ass'n for Sensible Development v. County of Inyo, 172 Cal. App. 3d 151, 159, 217 Cal. Rptr. 893 (1985).

38. Brotherhood of Teamsters v. Unemployment Ins. Appeals Bd., 190 Cal. App. 3d 1515, 1521-24, 236 Cal. Rptr. 78 (1987); Residents of Beverly Glen, Inc. v. City of Los Angeles, 34 Cal. App. 3d 117, 109 Cal. Rptr. 724 (1973). See also County of Alameda v. Carleson, 5 Cal. 3d 730, 737 n.6, 488 P.2d 953, 97 Cal. Rptr. 385 (1971).

39. Parker v. Bowron, 40 Cal. 2d 344, 254 P.2d 6 (1953); Grant v. Board of Medical Examiners, 232 Cal. App. 2d 820, 43 Cal. Rptr. 270 (1965); Silva v. City of Cypress, 204 Cal. App. 2d 374, 22 Cal. Rptr. 453 (1962).

40. 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).

person who was active in making a protest to the agency but is not otherwise interested in the judicial review proceeding.[41]

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[42].

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.[43]

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.[44] 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[45] has standing without the need to show any individual harm.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

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.[46] The proposed law codifies the exhaustion of remedies rule, including the rule that exhaustion of remedies is jurisdictional rather than discretionary with the

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41. 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.

42. 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.

43. The proposed law does not adopt the federal or Model Act zone of interest test. See generally Asimow, *supra* note 26, at 13-15.

44. See, e.g., Green v. Obledo, 29 Cal. 3d 126, 144-45, 624 P.2d 256, 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 & Housing Coalition v. Anderson, 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). The proposed law requires a person asserting public interest standing to request the agency to correct its action and to show the agency has not done so within a reasonable time. The proposed law continues the existing rule that public interest standing does not apply to review of agency adjudication.

45. Code Civ. Proc. § 526a.

46. South Coast Regional Comm'n v. Gordon, 18 Cal. 3d 832, 558 P.2d 867, 135 Cal. Rptr. 781 (1977); People v. Coit Ranch, Inc., 204 Cal. App. 2d 52, 57-58, 21 Cal. Rptr. 875 (1962).

court.[47] The proposed law provides exceptions to the exhaustion of remedies rule to the extent administrative remedies are inadequate[48] or where requiring their exhaustion would result in irreparable harm disproportionate to the public and private benefit from requiring exhaustion.[49] 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.[50]

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.[51]

The proposed law eliminates the rule that in an adjudicative proceeding agency denial of a request for a continuance is judicially reviewable immediately.[52]

PRIMARY JURISDICTION

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.[53] 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

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47. "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).

48. 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 26, at 62.

49. 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.

50. 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.

51. *Cf.* Stenocord Corp. v. City and County of San Francisco, 2 Cal. 3d 984, 471 P.2d 966, 88 Cal. Rptr. 166 (1970) (complaint for recovery of taxes).

52. 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.

53. Asimow, *supra* note 26, at 66. 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.* at 69-70.

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.[54]

RIPENESS

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.[55] The ripeness doctrine is well accepted in California law,[56] and the proposed law codifies it.

STATUTE OF LIMITATIONS FOR REVIEW OF ADJUDICATION

Existing statutes of limitations for judicial review of agency adjudication are scattered and inconsistent.[57] The limitations period for judicial review of adjudication under the Administrative Procedure Act is 30 days,[58] and for judicial review of a local agency decision other than by a school district is 90 days.[59] Other sections applicable to particular agencies provide different limitations periods for commencing judicial review.[60] Adjudicatory action not covered by any of these provisions is subject to the three-year or four-year limitations periods for civil actions generally.[61]

The proposed law continues the 30-day limitations period for judicial review of adjudication under the Administrative Procedure Act, and generalizes it to apply to

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54. 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 26, 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).

55. Asimow, *supra* note 26, at 83.

56. See 2 G. Ogden, California Public Agency Practice § 51.01 (1996).

57. Asimow, *supra* note 26, at 88.

58. Gov't Code § 11523.

59. Code Civ. Proc. § 1094.6(b). Formerly, this provision applied only if the local agency adopted an ordinance making it applicable. Asimow, *supra* note 26, at 89. Now it applies directly without the need for the agency to adopt an ordinance. California Administrative Mandamus, April 1995 Update, § 7.11, at 63 (Cal. Cont. Ed. Bar, 2d ed.).

60. See, e.g., 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 (one year after notice of decision of Department of Social Services). Various rules on tolling apply to these statutes. See Asimow, *supra* note 26, at 90 n.227.

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

all state agency adjudication.[62] The proposed law continues the 90-day limitations period for local agency adjudication,[63] except that local agency adjudication under the Administrative Procedure Act will be 30 days as at present.[64] Special limitations periods under the California Environmental Quality Act[65] 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 will toll the running of the limitations period up to a maximum period of 180 days after the decision is effective.[66]

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.[67] 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

Review of Agency Fact-Finding

Under existing law, in reviewing factual determinations of an agency not given judicial power by the California Constitution, courts use independent judgment if the proceeding substantially deprives a party's fundamental vested right.[68]

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62. The period for judicial review 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.

63. The period starts to run from the date the decision is announced or the date the local agency notifies the parties of the period for filing a petition for review, whichever is later.

64. For local agency adjudication now under the Administrative Procedure Act, see Educ. Code §§ 44944 (suspension or dismissal of certificated employee of school district), 44948.5 (employment of certificated employee of school district), 87679 (employee of community college district).

65. Pub. Res. Code § 21167.

66. Concerning the effective date of the decision, see *supra* notes 62 and 63.

67. Gov't Code § 11523; Code Civ. Proc. § 1094.6(d). Both statutes require that the record be requested within ten days after the decision becomes final to trigger the extension provision.

68. E.g., Bixby v. Pierno, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971); see generally Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157 (1995).

California is the only jurisdiction in the United States that uses independent judgment so broadly as a standard for judicial review of agency action.[69]

The independent judgment test was imposed by a 1936 California Supreme Court decision on the ground that constitutional doctrines of separation of powers or due process required it.[70] The test applied to review of fact-finding by state agencies not established by the California Constitution, because it was thought those agencies could not constitutionally exercise judicial power. But courts have subsequently rejected any constitutional basis for the independent judgment test,[71] so the Legislature or the courts are now free to abolish it. Nonetheless, 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 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 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.[72]

Independent judgment review is inefficient because it requires 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.[73]

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69. 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) (Supp. 1995). See also Mo. Rev. Stat. § 536.140.2 (1990); Asimow, *supra* note 68, at 1164 n.13.

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

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

72. Asimow, *supra* note 68, at 1181-82.

73. Asimow, *supra* note 68, at 1184-85.

Except in one limited case, the proposed law eliminates independent judgment review of state agency fact-finding, and instead requires the court to uphold agency findings if supported by substantial evidence in the record as a whole.[74] Under the exception, 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. The impact of eliminating independent judgment review of state agency fact-finding will be considerably softened by the Commission's recommendation to provide independent judgment review of application of law to fact,[75] a question which is involved in virtually every adjudicative decision.[76]

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.[77] The proposed law continues these rules for local agency adjudication, i.e., proceedings involving an evidentiary hearing to determine a legal interest of a particular person.[78]

The proposed law eliminates independent judgment review of fact-finding in local agency proceedings other than adjudication, and instead applies substantial evidence review.[79]

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74. 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 68, 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).

75. See discussion under heading "Review of Agency Application of Law to Fact" in text accompanying notes 90-94.

76. Asimow, *supra* note 68, at 1209.

77. Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

78. 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. Gov't Code §§ 11410.20 (application to state), 11425.10-11425.60 (administrative adjudication bill of rights) (operative July 1, 1997). Independent judgment review has been justified as needed to salvage administrative procedures which would otherwise violate due process. Bixby v. Pierno, 4 Cal. 3d 130, 140 n.6, 481 P.2d 242, 93 Cal. Rptr. 234 (1971). A local agency may voluntarily apply the administrative adjudication bill of rights to its adjudications, Gov't Code § 11410.40 (operative July 1, 1997), .but is not required to do so. The Commission has not made a detailed study of procedures in adjudications of the many types of local agencies. In the absence of such a study, the Commission believes existing law should be continued.

79. Such proceedings include quasi-legislative, ministerial, or informal action not involving an evidentiary hearing to determine the legal interest of a particular person.

Review of Agency Interpretation of Law

Under existing law, courts use independent judgment to review an agency interpretation of law.[80] 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.[81] 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.[82]

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.[83]

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.[84] 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.[85] An

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80. See, e.g., 20th Century Ins. Co. v. Garamendi, 8 Cal. 4th 216, 271, 878 P.2d 566, 600, 32 Cal. Rptr. 2d 807, 841 (1994); Pacific Southwest Realty Co. v. County of Los Angeles, 1 Cal. 4th 155, 171, 820 P.2d 1046, 1056, 2 Cal. Rptr. 2d 536, 546 (1991); California Ass'n of Psychology Providers v. Rank, 51 Cal. 3d 1, 11, 793 P.2d 2, 6-7, 270 Cal. Rptr. 796, 800-801 (1990); Dyna-Med, Inc. v. Fair Employment & Housing Comm'n, 43 Cal. 3d 1379, 1388-89, 743 P.2d 1323, 1327-28, 241 Cal. Rptr. 67, 71-72 (1987), *cert. denied*, 470 U.S. 1049 (1985); Vaessen v. Woods, 35 Cal. 3d 749, 756-57, 677 P.2d 1183, 1187-89, 200 Cal. Rptr. 893, 897-99 (1984); Carmona v. Division of Indus. Safety, 13 Cal. 3d 303, 309-10, 530 P.2d 161, 165-66, 118 Cal. Rptr. 473, 477-78 (1975).

81. See, e.g., Dix v. Superior Court, 53 Cal. 3d 442, 460, 807 P.2d 1063, 1072, 279 Cal. Rptr. 834, 843 (1991); Whitcomb Hotel, Inc. v. California Employment Comm'n, 24 Cal. 2d 753, 757-58, 151 P.2d 233, 236 (1944); Scates v. Rydingsword, 229 Cal. App. 3d 1085, 1097, 280 Cal. Rptr. 544, 550-51 (1991); Guinnane v. San Francisco Planning Comm'n, 209 Cal. App. 3d 732, 738, 257 Cal. Rptr. 742, 746 (1989), *cert. denied*, 493 U.S. 936 (1989).

82. Asimow, *supra* note 68, at 1195.

83. Asimow, *supra* note 68, at 1195-96.

84. See Hudgins v. Neiman Marcus Group, Inc., 34 Cal. App. 4th 1109, 1125-26, 41 Cal. Rptr. 2d 46, 56 (1995).

85. Brewer v. Patel, 20 Cal. App. 4th 1017, 1021-22, 25 Cal. Rptr. 2d 65, 68-69 (1993).

interpretation is more worthy of deference if it first occurred contemporaneously with enactment of the statute being interpreted.[86] Deference may also be appropriate if the Legislature reenacted the statute in question with knowledge of the agency's prior interpretation.[87]

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.[88]

The Commission finds existing law on the standard of review of agency interpretation of law to be generally satisfactory. The proposed law continues independent judgment review of agency interpretation of law, with appropriate deference to the agency's interpretation.[89]

Review of Agency Application of Law to Fact

In nearly every adjudicatory decision, the agency must apply a legal standard to basic facts.[90] 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[91] or matters of inference from circumstantial

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86. See Woosley v. State, 3 Cal. 4th 758, 776, 13 Cal. Rptr. 2d 30, 38-39 (1992), *cert. denied*, 113 S. Ct. 2416 (1993); California Ass'n of Psychology Providers v. Rank, 51 Cal. 3d 1, 17, 793 P.2d 2, 11, 270 Cal. Rptr. 796, 805 (1990); Dyna-Med, Inc. v. Fair Employment & Housing Comm'n, 43 Cal. 3d 1379, 1388-89, 743 P.2d 1323, 1326-28, 241 Cal. Rptr. 67, 70-72 (1987), *cert. denied*, 470 U.S. 1049 (1985); International Business Machines v. State Bd. of Equalization, 26 Cal. 3d 923, 930, 163 Cal. Rptr. 782, 785 (1980); Nipper v. California Auto. Assigned Risk Plan, 19 Cal. 3d 35, 44-45, 560 P.2d 743, 747-48, 136 Cal. Rptr. 854, 858-59 (1977); Whitcomb Hotel, Inc. v. California Employment Comm'n, 24 Cal. 2d 753, 757, 151 P.2d 233, 235 (1944).

87. See Moore v. California State Bd. of Accountancy, 2 Cal. 4th 999, 1017-18, 831 P.2d 798, 808-09, 9 Cal. Rptr. 2d 358, 368-69 (1992); Nelson v. Dean, 27 Cal. 2d 873, 882, 168 P.2d 16, 21-22 (1946).

88. See Moore v. California State Bd. of Accountancy, 2 Cal. 4th 999, 1015, 831 P.2d 798, 807, 9 Cal. Rptr. 2d 358, 367 (1992); California Ass'n of Psychology Providers v. Rank, 51 Cal. 3d 1, 11, 793 P.2d 2, 270 Cal. Rptr. 796 (1990).

89. 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 regulatory authority to be given greater deference by the courts.

90. Asimow, *supra* note 68, at 1209.

91. Board of Educ. v. Jack M., 19 Cal. 3d 691, 698 n.3, 566 P.2d 602, 605 n.3, 139 Cal. Rptr. 700, 703 n.3 (1977).

evidence.[92] 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.[93] 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 distinguish between pure questions of law and questions of application, because it is often difficult to know which is which.[94]

Review of Agency Exercise of Discretion

An agency has discretion when the law allows it to choose between several alternative policies or 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.[95]

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.[96] Under existing law, the court reviews

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92. Holmes v. Kizer, 11 Cal. App. 4th 395, 400-01, 13 Cal. Rptr. 2d 746, 749 (1992).

93. See, e.g., Dimmig v. Workmen's Compensation Appeals Bd., 6 Cal. 3d 860, 864-65, 495 P.2d 433, 435-36, 101 Cal. Rptr. 105, 107-108 (1972); S. G. Borello & Sons v. Department of Indus. Relations, 48 Cal. 3d 341, 349, 769 P.2d 399, 403, 256 Cal. Rptr. 543, 547 (1989); Yakov v. Board of Medical Examiners, 68 Cal. 2d 67, 74 n.7, 64 Cal. Rptr. 785, 791 n.7 (1968). *But see* Young v. California Unemployment Ins. Appeals Bd., 37 Cal. App. 3d 607, 610, 112 Cal. Rptr. 460, 463 (1974).

94. 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, and would require courts to ignore important public policy reasons for judicial rather than agency responsibility for applying law to fact, a formula for rigidity. Treating them as questions of law with appropriate deference to the agency decision is a formula for flexibility. Asimow, *supra* note 68, at 1217, 1223-24.

95. Asimow, *supra* note 68, at 1224.

96. See Saleeby v. State Bar, 39 Cal. 3d 547, 563, 702 P.2d 525, 534, 216 Cal. Rptr. 367, 376 (1985); Paulsen v. Golden Gate Univ., 25 Cal. 3d 803, 808-09, 602 P.2d 778, 780-81, 159 Cal. Rptr. 858, 860-61 (1979); Shuffer v. Board of Trustees, 67 Cal. App. 3d 208, 220, 136 Cal. Rptr. 527, 534 (1977); Manjares v. Newton, 64 Cal. 2d 365, 370, 49 Cal. Rptr. 805, 809 (1966).

adjudicative and quasi-legislative action by traditional mandamus generally on a closed record, but in reviewing ministerial or informal action, extra-record evidence is freely admissible if the facts are in dispute.[97] The agency must give reasons for the discretionary action in the case of review of adjudicatory action,[98] but not in the case of quasi-legislative action.[99]

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.[100] Within these limits, the agency has power to choose between alternatives, and a court must not substitute its judgment for the agency's, since the Legislature gave 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.[101]

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.[102] Legislative history of a 1982 enactment[103] also suggests that substantial evidence is the appropriate test whenever the issue is the factual basis for agency discretionary action.

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.[104]

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97. Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 575-79, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 147-50 (1995); see also discussion under "Closed Record" in text accompanying notes 110-17.

98. 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).

99. California Aviation Council v. City of Ceres, 9 Cal. App. 4th 1384, 12 Cal. Rptr. 2d 163 (1992); City of Santa Cruz v. Local Agency Formation Comm'n, 76 Cal. App. 3d 381, 386-91, 142 Cal. Rptr. 873, 875-77 (1978). *Cf.* California Hotel & Motel Ass'n v. Industrial Welfare Comm'n, 25 Cal. 3d 200, 216, 599 P.2d 31, 157 Cal. Rptr. 840, 850 (1979) (statement of basis for decision required by statute).

100. See California Ass'n of Psychology Providers v. Rank, 51 Cal. 3d 1, 11, 793 P.2d 2, 270 Cal. Rptr. 796, 800-01 (1990).

101. Asimow, *supra* note 68, at 1228-29.

102. Asimow, *supra* note 68, at 1229.

103. 1982 Cal. Stat. ch. 1573, § 10.

104. 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 68, at 1240. The proposed law generally provides for review of agency exercise of discretion on a closed record. See discussion under "Closed Record" in text accompanying notes 110-17.

Review of Agency Procedure

Under existing law, California courts use independent judgment on the question of whether agency action complied with procedural requirements of statutes or the constitution.[105] California courts have occasionally mandated administrative procedures not required by any statute, either in the interest of fair procedures[106] or to facilitate judicial review.[107]

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.[108]

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.[109]

CLOSED RECORD

Under existing law, in administrative mandamus[110] 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.[111] For independent judgment review, the court may either admit the evidence itself or remand if one of those two conditions is satisfied.[112]

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105. See California Hotel & Motel Ass'n v. Industrial Welfare Comm'n, 25 Cal. 3d 200, 209-16, 599 P.2d 31, 36-41, 157 Cal. Rptr. 840, 845-50 (1979); City of Fairfield v. Superior Court, 14 Cal. 3d 768, 776, 537 P.2d 375, 379, 122 Cal. Rptr. 543, 547 (1975).

106. See, e.g., Ettinger v. Board of Medical Quality Assurance, 135 Cal. App. 3d 853, 185 Cal. Rptr. 601 (1982).

107. Saleeby v. State Bar, 39 Cal. 3d 547, 566-68, 702 P.2d 525, 536-38, 216 Cal. Rptr. 367, 378-80 (1985); 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).

108. Asimow, *supra* note 68, at 1246.

109. 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 68, at 1247.

110. 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).

111. Code Civ. Proc. § 1094.5(e).

112. 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.[113] The court simply takes evidence and determines the issues.[114] 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.[115]

The proposed law eliminates free admissibility evidence in court for review of ministerial or informal action. The proposed law requires that, if evidence in the record is insufficient for review, the matter is generally remanded to the agency for additional fact-finding.[116] 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.[117]

PROPER COURT FOR REVIEW; VENUE

Under existing law, most judicial review of agency action is in superior court.[118] The Supreme Court reviews decisions of the Public Utilities Commission[119] and State Energy Resources Conservation and Development

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113. 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).

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

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

116. 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.

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

118. Asimow, *supra* note 4, at 23.

119. See Pub. Util. Code § 1756. 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. At present, the proposed law applies the new judicial review statute to PUC regulation of highway carriers, but is silent with respect to other PUC regulation.

Commission.[120] Either the Supreme Court or the court of appeal reviews decisions of the Workers' Compensation Appeals Board,[121] Department of Alcoholic Beverage Control,[122] and Alcoholic Beverage Control Appeals Board.[123] The court of appeal reviews decisions of the Agricultural Labor Relations Board[124] and Public Employment Relations Board.[125] The proposed law does not alter this scheme.[126]

Under existing law, venue in superior court for administrative mandamus is in the county where the cause of action arose.[127] The proposed law adds Sacramento County as an additional permissible county when a state agency is involved.[128] 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

Under the existing APA, an agency has power to stay its own decision.[129] 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.[130]

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

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120. See Pub. Res. Code § 25531. Senate Bill 1322 (1995-96 regular session) would provide for judicial review of decisions of the Energy 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. At present, the proposed law is silent with respect to judicial review of decisions of the Energy Commission.

121. Lab. Code §§ 5950, 5955.

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

123. *Id.*

124. Lab. Code § 1160.8.

125. Gov't Code §§ 3520, 3542, 3564.

126. 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 24 *supra*.

127. 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).

128. The provision for venue in Sacramento County does not apply to judicial review of a decision of a private hospital board under the proposed law.

129. Gov't Code § 11519(b).

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

to prevail ultimately on the merits.[131] The court may condition a stay order on the posting of a bond.

If the trial court denies the writ of mandamus and a stay is in effect, the appellate court can continue the stay.[132] If the trial court grants the writ, the agency action is stayed pending appeal unless the appellate court orders otherwise.[133]

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.[134]

COSTS

The proposed law consolidates and generalizes 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.[135]

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131. See Code Civ. Proc. § 1094.5(h).

132. 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).

133. 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.

134. 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.

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

JUDICIAL REVIEW OF AGENCY ACTION

OUTLINE

CODE OF CIVIL PROCEDURE

PART 3. OF SPECIAL PROCEEDINGS OF A CIVIL NATURE

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. (a) Except as provided in this section, this title governs judicial review of agency action of any of the following entities:

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

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

(3) A public corporation in the state.

(b) This title does not apply where a statute provides for judicial review of agency action by any of the following means:

(1) A trial de novo, including an action for refund of taxes under the Revenue and Taxation Code.

(2) An action under Division 3.6 (commencing with Section 810) of the Government Code, relating to claims and actions against public entities and public employees.

(c) This title does not apply to judicial review of proceedings of the State Bar Court.

(d) This title does not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(e) This title does not apply to a proceeding under Chapter 9 (commencing with Section 860) of Title 10 of Part 2, relating to validating proceedings.

(f) This title does not apply to judicial review of a decision of a court.

(g) Except as expressly provided by statute, this title does not apply to judicial review of action of a nongovernmental entity.

(h) This title does not apply to judicial review of an award in a binding arbitration under Section 11420.10 of the Government Code.

(i) This title does not apply to a disciplinary decision under Section 19576.1 of the Government Code.

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 1121.260 & Comment.

Under subdivision (b)(1), this title does not apply where a statute provides for judicial review by a trial de novo. In addition to Revenue and Taxation Code provisions for an action for refund of taxes, such statutes include: Educ. Code §§ 33354 (hearing on compliance with

federal law on interscholastic activities), 67137.5 (judicial review of college or university withholding student records); Food & Ag. Code § 31622 (hearing concerning vicious dog); Gov't Code § 53088.2 (judicial review of local action concerning video provider); Lab. Code §§ 98.2 (judicial review of order of Labor Commissioner on employee complaint), 1543 (judicial review of determination of Labor Commissioner involving athlete agent), 1700.44 (judicial review of order of Labor Commissioner involving talent agency); Rev. & Tax. Code § 1605.5 (change of property ownership or new construction); Welf. & Inst. Code § 5334 (judicial review of capacity hearing).

Subdivision (b)(2) provides that this title does not apply to an action brought under the California Tort Claims Act. However, subdivision (b)(2) does not prevent the claims requirements of the Tort Claims Act from applying to an action seeking primarily money damages and also extraordinary relief incidental to the prayer for damages. See Section 1123.680(b) (damages subject to Tort Claims Act "if applicable"); Eureka Teacher's Ass'n v. Board of Educ., 202 Cal. App. 3d 469, 474-76, 247 Cal. Rptr. 790 (1988); Loehr v. Ventura County Community College Dist., 147 Cal. App. 3d 1071, 1081, 195 Cal. Rptr. 576 (1983).

Under subdivision (c), this title does not apply to proceedings of the State Bar Court, which are reviewed by the California Supreme Court as prescribed by rules of that court. Bus. & Prof. Code § 6082.

Under subdivision (d), this title does not apply, for example, to enforcement of a government bond in an action at law, or to actions involving contract, intellectual property, or copyright. Under subdivision (e), this title does not apply to a validating proceeding under Sections 860-870.

Subdivision (g) recognizes that another statute may apply this title to a nongovernmental entity. See Section 1121.110 (adjudication by private hospital board).

Subdivision (i) is consistent with former Code of Civil Procedure Section 1094.5(j).

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).

See also Section 1123.160 (condition of relief).

§ 1121.110. Application of title to adjudication by private hospital board; venue

1121.110. This title governs judicial review of a decision of a private hospital board in an adjudicative proceeding. The proper county for judicial review of the decision is determined under Title 4 (commencing with Section 392) of Part 2.

Comment. The first sentence of Section 1121.110 continues the effect of former Code of Civil Procedure Section 1094.5(d). The second sentence continues the substance of existing law. See Section 1109; California Administrative Mandamus § 8.16, at 269 (Cal. Cont. Ed. Bar, 2d ed. 1989).

§ 1121.120. Conflicting or inconsistent statute controls

1121.120. A statute applicable to a particular entity or a particular agency action prevails over a conflicting or inconsistent provision of this title.

Comment. Section 1121.120 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"). As used in Section 1121.120, "statute" does not include a local ordinance. See Cal. Const. Art. IV, § 8(b) (statute enacted only by bill in the Legislature); *id.* Art. XI, § 7 (local ordinance).

§ 1121.130. Other forms of judicial review replaced

1121.130. (a) The procedure provided in this title for judicial review of agency action is a proceeding for extraordinary relief in the nature of mandamus and shall be used in place of administrative mandamus, ordinary mandamus, certiorari, prohibition, declaratory relief, injunctive relief, and any other judicial procedure, to the extent those procedures might otherwise be used for judicial review of agency action.

(b) Nothing in this title limits use of the writ of habeas corpus.

(c) Notwithstanding Section 427.10, no cause of action may be joined in a proceeding under this title unless it states independent grounds for relief.

Comment. Subdivision (a) of Section 1120.130 is drawn from 1981 Model State APA § 5-101. By establishing this title as the exclusive method for judicial review of agency action, Section 1120.130 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). However, subdivision (a) does not supersede the original writ jurisdiction given by Article VI, Section 10, of the California Constitution.

Under subdivision (b), this title does not apply to the writ of habeas corpus. See Cal. Const. Art. I, § 11; Art. VI, § 10. See also *In re* McVickers, 29 Cal. 2d 264, 176 P.2d 40 (1946); *In re* Stewart, 24 Cal. 2d 344, 149 P.2d 689 (1944); *In re* DeMond, 165 Cal. App. 3d 932, 211 Cal. Rptr. 680 (1985).

Subdivision (c) continues prior law. See, e.g., State v. Superior Court, 12 Cal. 3d 237, 249-51, 524 P.2d 1281, 115 Cal. Rptr. 497, 504 (1974) (declaratory relief not appropriate to review administrative decision, but is appropriate to declare a statute facially unconstitutional); Hensler v. City of Glendale, 8 Cal. 4th 1, 876 P.2d 1043, 32 Cal. Rptr. 2d 244, 253 (1994) (inverse condemnation action may be joined in administrative mandamus proceeding involving same facts); Mata v. City of Los Angeles, 20 Cal. App. 4th 141, 147-48, 24 Cal. Rptr. 2d 314, 318 (1993) (complaint for violation of civil rights may be joined with administrative mandamus). If other causes of action are joined with a proceeding for judicial review, the court may sever the causes for trial. See Section 1048. See also Section 598.

Nothing in this section limits the type of relief or remedial action available in a proceeding under this title. See Section 1123.730 (type of relief).

§ 1121.140. Injunctive relief ancillary

1121.140. Injunctive relief is ancillary to and may be used as a supplemental remedy in connection with a proceeding under this title.

Comment. Section 1121.140 makes clear that the procedures for injunctive relief may be used in a proceeding under this title. See Section 1123.730 (injunctive relief authorized).

§ 1121.150. Exercise of agency discretion

1121.150. Nothing in this title authorizes the court to interfere with a valid exercise of agency discretion or to direct an agency how to exercise its discretion.

Comment. Section 1121.150 is drawn from 1981 Model State APA § 1-116(c)(8)(i), and is consistent with the last clause in former Section 1094.5(f).

§ 1121.160. Operative date; application to pending proceedings

1121.160. (a) Except as provided in this section, this title becomes operative on January 1, 1999.

(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 continues to apply to the proceeding.

(c) On and after January 1, 1998, the Judicial Council may adopt any rules of court necessary so that this title may become operative on January 1, 1999.

Comment. Section 1121.160 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 (operative July 1, 1997).

§ 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 (operative July 1, 1997) & Comment ("adjudicative proceeding" defined). See also Sections 1121.230 ("agency" defined), 1121.250 ("decision" 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 (operative July 1, 1997) & 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 1121.290 (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. See also Section 1123.160 (condition of relief).

See also Section 1121.230 ("agency" defined).

§ 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 (operative July 1, 1997) & Comment ("decision" defined). See also Sections 1121.240 ("agency action" defined), 1121.280 ("person" defined).

§ 1121.260. Local agency

1121.260. "Local agency" means "local agency" as defined in Section 54951 of the Government Code.

Comment. Section 1121.260 is drawn from former Section 1094.6, and is broadened to include school districts. See also Section 1121.230 ("agency" defined).

§ 1121.270. Party

1121.270. "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 1121.270 is drawn from the Administrative Procedure Act. See Gov't Code § 11405.60 (operative July 1, 1997) & Comment ("decision" defined). This section does not 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. See also Section 1121.230 ("agency" defined).

§ 1121.280. Person

1121.280. "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 1121.280 is drawn from the Administrative Procedure Act. See Gov't Code § 11405.70 (operative July 1, 1997) & Comment ("person" defined). It supplements the definition in Code of Civil Procedure Section 17 and is broader in its application to a governmental subdivision or unit. This includes 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.

§ 1121.290. Rule

1121.290. "Rule" means all 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.

(c) A local agency ordinance.

Comment. Subdivision (a) of Section 1121.290 only applies to state agencies. See Gov't Code § 11342(g).

Subdivision (b) is drawn from 1981 Model State APA § 1-102(10) and Government Code Section 11342(g). Although subdivision (b) applies to state and local agencies, its usefulness is to provide a definition for local agencies. 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. See also Sections 1121.230 ("agency" defined), 1121.260 ("local agency" defined).

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.

CHAPTER 2. PRIMARY JURISDICTION

§ 1122.010. Application of chapter

1122.010. Notwithstanding Section 1120, 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 introductory clause makes clear this chapter applies, for example, to a judicial proceeding involving a trial de novo. 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 if there is 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. (a) 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:

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

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

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

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

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

(6) 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.

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

(b) This section does not apply to a criminal proceeding.

(c) Nothing in this section confers concurrent jurisdiction on a court over the subject matter of a pending disciplinary 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.

Comment. Section 1122.030 codifies the court's broad discretion to refer the matter or an issue to an agency for action if there is concurrent jurisdiction. See, e.g., Farmers Ins. Exch.

v. Superior Court, 2 Cal. 4th 377, 391-92, 826 P.2d 730, 6 Cal. Rptr. 2d 487, 496 (1992). See generally Asimow, *Judicial Review: Standing and Timing* 66-82 (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 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) Subject to subdivision (b), a person who has standing under this chapter and who satisfies the requirements governing exhaustion of administrative remedies, ripeness, time for filing, and other preconditions is entitled to judicial review of final agency action.

(b) The court may summarily decline to grant judicial review if the petition for review does not present a substantial issue for resolution by the court.

Comment. Subdivision (a) of 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), 1123.640-1123.650 (time for filing petition for 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 and inaction. This chapter contains provisions for judicial review of all types of agency action.

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 Bd. 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).

§ 1123.120. Finality

1123.120. A person may not obtain judicial review of agency action unless the agency action is final.

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. Agency action is typically 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. For example, state agency action concerning a proposed rule subject to the rulemaking part of the Administrative Procedure Act is not final until the agency submits the proposed rule to the Office of Administrative Law for review as provided by that act, and the Office of Administrative Law approves the rule pursuant to Government Code Section 11349.3. See also Section 1123.130(a) (rulemaking may not be enjoined or prohibited).

For an exception to the requirement of finality, see Section 1123.140 (exception to finality and ripeness requirements).

§ 1123.130. Judicial review of agency rule

1123.130. (a) Notwithstanding any other provision of law, a court may not enjoin or otherwise prohibit an agency from adopting a rule.

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

Comment. Subdivision (a) of Section 1123.130 continues State Water Resources Control Bd. v. Office of Admin. Law, 12 Cal. App. 4th 697, 707-708, 16 Cal. Rptr. 2d 25, 31-32 (1993). Subdivision (a) prohibits, for example, a court from enjoining a state agency from holding a public hearing or otherwise proceeding to adopt a proposed rule on the ground that the notice was legally defective. Similarly, subdivision (a) prohibits a court from enjoining the Office of Administrative Law from reviewing or approving a proposed rule that has been submitted by a regulatory agency pursuant to Government Code Section 11343(a). A rule is subject to judicial review after it is adopted. See Sections 1120, 1123.110. See also Section 1123.140 (rule must be fit for immediate judicial review).

Subdivision (b) codifies the case law ripeness requirement for judicial review of an agency rule. See, e.g., Pacific Legal Foundation v. California Coastal Comm'n, 33 Cal. 3d 158, 655 P.2d 306, 188 Cal. Rptr. 104 (1982). A rule includes an agency statement of law or policy. Section 1121.290 ("rule" defined). For an exception to the requirement of ripeness, see Section 1123.140 (exception to finality and ripeness requirements). An allegation that procedures followed in adopting a state agency rule were legally deficient would not be ripe for judicial review until the agency completes the rulemaking process and formally adopts the rule (typically by submitting it to the Office of Administrative Law pursuant to Government Code Section 11343), the Office of Administrative Law approves the rule and submits it to the Secretary of State pursuant to Government Code Section 11349.3 thus allowing it to become final, and the adopting agency applies the rule.

§ 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, Inc. 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 chapter is not made moot by satisfaction of a penalty imposed by agency action 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).

§ 1123.160. Condition of relief

1123.160. The court may grant relief under this chapter only if it determines that agency action is invalid on grounds specified in Article 4 (commencing with Section 1123.410) for reviewing agency action.

Comment. Section 1123.160 is drawn from 1981 Model State APA Section 5-116(c) (introductory clause). It supersedes the provision in former Section 1094.5(b) that the inquiry in an administrative mandamus case is whether the agency proceeded without or in excess of jurisdiction, whether there was a fair trial, and whether there was any prejudicial abuse of discretion. The grounds for invalidating agency action under Article 4 are the following (see Sections 1123.420-1123.460):

(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.

(6) Whether agency action is based on an erroneous determination of fact made or implied by the agency.

(7) Whether agency action is a proper exercise of discretion.

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

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

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 1121.130. The provisions on standing therefore accommodate persons who seek judicial review of the entire range of agency actions, including rules, decisions, and other action or inaction. 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 basis of private, as opposed to public, interest. See, e.g., Sperry & Hutchinson Co. v. California State Bd. of Pharmacy, 241 Cal. App. 2d 229, 50 Cal. Rptr. 489 (1966); Silva v. City of Cypress, 204 Cal. App. 2d 374, 22 Cal. Rptr. 453 (1962). 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, 614 P.2d 276, 166 Cal. Rptr. 844 (1980). Non-pecuniary injuries, such as environmental or aesthetic claims, are sufficient to satisfy the private interest test. Bozung v. Local Agency Formation Comm'n, 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975); Albion River Watershed Protection Ass'n v. Department of Forestry, 235 Cal. App. 3d 358, 286 Cal. Rptr. 573 (1991); Kane v. Redevelopment Agency of Hidden Hills, 179 Cal. App. 3d 899, 224 Cal. Rptr. 922 (1986); Citizens Ass'n for Sensible Development v. County of Inyo, 172 Cal. App. 3d 151, 217 Cal. Rptr. 893 (1985). 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, 32 Cal. Rptr. 830 (1963); Residents of Beverly Glen, Inc. v. City of Los Angeles, 34 Cal. App. 3d 117, 109 Cal. Rptr. 724 (1973). This principle extends to standing of the organization to obtain judicial review where a nonmember is adversely affected, as 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 effect 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 1121.280 ("person" includes governmental subdivision). See also Bus. & Prof.

Code § 23090 (Department of Alcoholic Beverage Control may get judicial review of decision of Alcoholic Beverage Control Appeals Board); Martin v. Alcoholic Beverage Control Appeals Bd., 52 Cal. 2d 238, 243, 340 P.2d 1, 4 (1959) (same); Veh. Code § 3058 (DMV may get judicial review of order of New Motor Vehicle Board); Tieberg v. Superior Court, 243 Cal. App. 2d 277, 283, 52 Cal. Rptr. 33, 37 (1966) (Director of Department of Employment may get judicial review of decision of Unemployment Insurance Appeals Board, a division of that department); Los Angeles County Dep't of Health Serv. v. Kennedy, 163 Cal. App. 3d 799, 209 Cal. Rptr. 595 (1984) (county department of health services may get judicial review of decision of county civil service commission); County of Los Angeles v. Tax Appeals Bd. No. 2, 267 Cal. App. 2d 830, 834, 73 Cal. Rptr. 469, 471 (1968) (county may get judicial review of tax appeals board decision); County of Contra Costa v. Social Welfare Bd., 199 Cal. App. 2d 468, 471, 18 Cal. Rptr. 573, 575 (1962) (county may get judicial review of State Social Welfare Board decision ordering county to reinstate welfare benefits); Board of Permit Appeals v. Central Permit Bureau, 186 Cal. App. 2d 633, 9 Cal. Rptr. 83 (1960) (local permit appeals board may get traditional mandamus against inferior agency that did not comply with its decision). *But cf.* Star-Kist Foods, Inc. v. County of Los Angeles, 42 Cal. 3d 1, 719 P.2d 987, 227 Cal. Rptr. 391 (1986) (city or county standing to challenge state action as violating federal constitutional rights).

§ 1123.230. Public interest standing

1123.230. Whether or not a person has standing under Section 1123.220, 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 and the agency action is germane to the purposes of the organization.

(b) The person will adequately protect the public interest.

(c) The person has previously requested the agency to correct the agency action and the agency has not, within a reasonable time, done so. The request shall be in writing unless made orally on the record in the agency proceeding. The agency may by rule require the request to be directed to the proper agency official. As used in this subdivision, a reasonable time shall not be less than 30 days unless the request shows that a shorter period is required to avoid irreparable harm. This subdivision does not apply to judicial review of an agency rule.

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 California case law 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, 144-45, 624 P.2d 256, 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 & Housing Coalition v. Anderson, 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 standing rules 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 a public entity, if 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 for 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, 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); Corp. Code § 800(b)(2) (allegation in shareholder derivative action of efforts to secure action from board); Fed. R. Civ. Proc. 23(a) (representative must fairly and adequately protect interests of class). The requirement in subdivision (c) of a request to the agency does not supersede the California Environmental Quality Act. See Section 1121.120 (conflicting or inconsistent statute controls); Pub. Res. Code § 21177 (objection may be oral or written).

§ 1123.240. Standing for review of decision in adjudicative proceeding

1123.240. (a) Notwithstanding any other provision of this article, a person does not have standing to obtain judicial review of a decision in an adjudicative proceeding unless one of the following conditions is satisfied:

(a) The person is 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) The person is a participant in a proceeding other than a proceeding described in subdivision (a) and satisfies Section 1123.220 or 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 (b)(1) 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) (operative July 1, 1997).

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 1121.270 ("party" defined). This codifies existing law. See, e.g., 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). 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)(2) 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, 109 P. 2d 942 (1941) (exhaustion requirement jurisdictional). Exceptions to the exhaustion requirement are stated in other provisions of this article. See Sections 1123.340 (exceptions to exhaustion of administrative remedies), 1123.350 (exact issue rule).

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, 421 P.2d 65, 55 Cal. Rptr. 217 (1966). 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, 471 P.2d 966, 88 Cal. Rptr. 166 (1970). Judicial review of such matters should not occur until conclusion of administrative proceedings.

§ 1123.320. Administrative review of 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 Bd., 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).]

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) A person may obtain judicial review of rulemaking notwithstanding the person's failure to petition the agency promulgating the rule for, or otherwise to seek, amendment, repeal, or reconsideration of the rule.

(b) A person may obtain judicial review of an agency's failure to adopt a rule under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, notwithstanding the person's failure to request or obtain a determination from the Office of Administrative Law under Section 11340.5 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), 1121.290 ("rule" defined). The petition to the agency referred to in subdivision (a) is authorized by Government Code Section 11340.6.

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 was entitled to notice of a proceeding in which relief could be provided but lacked timely notice of the proceeding. The court's authority under this subdivision is limited to remanding the case to the agency to conduct a supplemental proceeding in which the person has an opportunity to participate.

(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. See generally Asimow, *Judicial Review: Standing and Timing* 39-52 (Sept. 1992). 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, 777 P.2d 610, 261 Cal. Rptr. 574 (1989); Endler v. Schutzbank, 68 Cal. 2d 162, 168, 436 P.2d 297, 65 Cal. Rptr. 297 (1968); Rosenfield v. Malcolm, 65 Cal. 2d 559, 421 P.2d 697, 55 Cal. Rptr. 505 (1967).

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 Ogo Assocs. v. City of Torrance, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (1974).

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 the agency proceeding is an excuse under subdivision (d). See Environmental Law Fund v. Town of Corte Madera, 49 Cal. App. 3d 105, 113-14, 122 Cal. Rptr. 282, 286 (1975).

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, e.g., County of Contra Costa v. State of California, 177 Cal. App. 3d 62, 73, 222 Cal. Rptr. 750, 758 (1986).

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. See, e.g., Horn v. County of Ventura, 24 Cal. 3d 605, 611, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979); Chevrolet Motor Div. v. New Motor Vehicle Bd., 146 Cal. App. 3d 533, 539, 194 Cal. Rptr. 270 (1983). There is no exception for a challenge to a provision as applied, even though phrased in constitutional terms.

§ 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 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 a 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. If a statute or rule requires the person to maintain an address with the agency, adequate notice includes notice given to the person at the address maintained with the agency.

(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, e.g., Resource Defense Fund v. Local Agency Formation Comm'n, 191 Cal. App. 3d 886,

894, 236 Cal. Rptr. 794, 798 (1987); Coalition for Student Action v. City of Fullerton, 153 Cal. App. 3d 1194, 200 Cal. Rptr. 855 (1984); see generally 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 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. This does not give standing to a person not otherwise entitled to notice of the adjudicative proceeding.

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. Agricultural Labor Relations Bd., 41 Cal. 3d 861, 718 P.2d 106, 226 Cal. Rptr. 119 (1986).

Article 4. Standards of Review

§ 1123.410. Standards of review of agency action

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

Comment. Section 1123.410 is drawn from 1981 Model State APA Section 5-116(a)(2). The scope of judicial review provided in this article may be qualified by another statute that establishes review based on different standards than those in this article. See, e.g., Rev. & Tax. Code §§ 5170, 6931-6937.

§ 1123.420. Review of agency interpretation or application of law

1123.420. (a) The standard for judicial review of the following issues is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action:

(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) This section does not apply to interpretation or application of law by the Public Employment Relations Board, Agricultural Labor Relations Board, or Workers' Compensation Appeals Board within the regulatory authority of those agencies.

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

Subdivision (a) applies the independent judgment test for judicial review of questions of law with appropriate deference to the agency's determination. Subdivision (a) 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, 793 P.2d 2, 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 Judicial Review of Decisions of California Administrative Agencies,* 42 UCLA L. Rev. 1157, 1195-98 (1995). See also Jones v. Tracy School Dist., 27 Cal. 3d 99, 108, 611 P.2d 441, 165 Cal. Rptr. 100 (1980) (no deference for statutory interpretation in internal memo not subject to notice and hearing process for regulation and written after agency became amicus curiae in case at bench); Hudgins v. Neiman Marcus Group, Inc., 34 Cal. App. 4th 1109, 41 Cal. Rptr. 2d 46 (1995) (deference to contemporaneous interpretation long acquiesced in by interested persons); City of Los Angeles v. Los Olivos Mobile Home Park, 213 Cal. App. 3d 1427, 262 Cal. Rptr. 446 (1989) (no deference for interpretation of city ordinance in internal memo not adopted as regulation); Johnston v. Department of Personnel Administration, 191 Cal. App. 3d 1218, 1226, 236 Cal. Rptr. 853 (1987) (no deference for interpretation in inter-departmental communication rather than in formal regulation); California State Employees Ass'n v. State Personnel Bd., 178 Cal. App. 3d 372, 380, 223 Cal. Rptr. 826 (1986) (formal regulation entitled to deference, informal memo prepared for litigation not entitled to deference).

Under subdivision (a), the question of the appropriate degree of judicial deference to the agency interpretation or application of law is treated as "a continuum with nonreviewability at one end and independent judgment at the other." See 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). Subdivision (a) is consistent with and continues the substance of 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 Auto. 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 "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).

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), especially 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 (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 Comm'n, 42 Cal. 3d 52, 74-77, 720 P.2d 15, 227 Cal. Rptr. 667 (1986). Agency application of law to facts should not be confused with basic fact-finding. Typical findings of facts include determinations of what happened or will happen in the future, when it happened, and what the state of mind of the participants was. These findings may be subject to substantial evidence review under Section 1123.430 or 1123.440. After fact-finding, the agency must decide abstract legal issues that can be resolved without knowing anything of the basic facts in the case. Finally, the agency must apply the general law to the basic facts, a situation-specific application of law which will be subject to independent judgment review under Section 1123.420. See Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1211-12 (1995).

Agency application of law to facts should not be confused with an exercise of discretion that is based on a choice or judgment. See the Comment to Section 1123.450. Typical exercises of discretion include whether to impose a severe or lenient penalty, whether there is cause to deny a license, whether a particular land use should be permitted, and whether a corporate reorganization is fair. Asimow, *supra*, at 1224. The standard of review for an exercise of discretion is provided in Section 1123.450.

Under subdivision (b), Section 1123.420 does not affect case law under which legal interpretations by the Public Employment Relations Board, Agricultural Labor Relations Board, or Workers' Compensation Appeals Board of statutes within their area of expertise have been given special deference. 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).

§ 1123.430. Review of agency fact finding

1123.430. (a) Except as provided in Section 1123.440, the standard for judicial review of whether agency action 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) Notwithstanding subdivision (a), the standard for judicial review of a determination of fact made by an administrative law judge employed by the Office of Administrative Hearings that is changed by the agency head is the independent judgment of the court whether the determination is supported by the weight of the evidence.

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

Subdivision (a) 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 Judicial Review of Decisions of California Administrative Agencies,* 42 UCLA L. Rev. 1157, 1161-76 (1995).

The substantial evidence test of subdivision (a) 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 (operative July 1, 1997).

In an adjudicative proceeding to which Government Code Section 11425.50 applies, the court must give great weight to a determination of the presiding officer based substantially on the credibility of a witness to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it. Gov't Code § 11425.50(b). Government Code Section 11425.50 applies to adjudications of most state agencies (see Gov't Code § 11410.20 & Comment) and to adjudications of state and local agencies that voluntarily apply the section to the proceeding. See Gov't Code § 11410.40.

§ 1123.440. Review of fact finding in local agency adjudication

1123.440. The standard for judicial review of whether 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:

(a) In cases in which the court is authorized by law to exercise its independent judgment on the evidence, the independent judgment of the court whether the decision is supported by the weight of the evidence.

(b) In all other cases, whether the decision is supported by substantial evidence in the light of the whole record.

Comment. Section 1123.440 continues former Section 1094.5(c) as it applied to fact-finding in local agency adjudication. See Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 32, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

§ 1123.450. Review of agency exercise of discretion

1123.450. (a) The standard for judicial review of whether agency action is a proper exercise of discretion, including an agency's determination under Section 11342.2 of the Government Code that a regulation is reasonably necessary to

effectuate the purpose of the statute that authorizes the regulation, is abuse of discretion.

(b) Notwithstanding subdivision (a), to the extent the agency action is based on a determination of fact, made or implied by the agency, the standard for judicial review is whether the agency's determination is supported by substantial evidence in the light of the whole record.

Comment. Section 1123.450 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).

Agency exercise of discretion should be distinguished from agency interpretation or application of law, which is subject to the standard of review prescribed in Section 1123.420. Section 1123.450 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 Ass'n 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. 2d 299, 304 (1994). See also Local & Regional Monitor v. City of Los Angeles, 16 Cal. App. 4th 630, 648, 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). Examples in the labor law field include Independent Roofing Contractors v. Department of Industrial Relations, 23 Cal. App. 4th 345, 28 Cal. Rptr. 2d 550 (1994), Pipe Trades Dist. Council No. 51 v. Aubry, 41 Cal. App. 4th 1457, 49 Cal. Rptr. 2d 208 (1996), and International Brotherhood of Electrical Workers, Local 11 v. Aubry, 41 Cal. App. 4th 1632, 49 Cal. Rptr. 2d 759 (1996), all concerning agency discretion in making prevailing wage determinations, and International Brotherhood of Electrical Workers, Local 889 v. Department of Industrial Relations, 42 Cal. App. 4th 861, 50 Cal. Rptr. 2d 1 (1996), concerning agency discretion in selecting an appropriate bargaining unit for transit district employees.

Subdivision (a) continues a portion of former Section 1094.5(b) (prejudicial abuse of discretion). Subdivisions (a) and (b) clarify the standards for court determination of abuse of discretion but do not significantly change existing law. See former Code Civ. Proc. § 1094.5(c) (administrative mandamus); Gov't Code § 11350(b) (review of regulations). The reference in subdivision (a) to an agency determination under Government Code Section 11342.2 that a regulation is reasonably necessary continues existing law. See Moore v. State Board of Accountancy, 2 Cal. 4th 999, 1015, 831 P.2d 798, 9 Cal. Rptr. 2d 358, 367 (1992); California Ass'n of Psychology Providers v. Rank, 51 Cal. 3d 1, 11, 793 P.2d 2, 270 Cal. Rptr. 796 (1990).

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 state agency findings of fact generally. Section 1123.430. 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 1123.820(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 Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1228-29 (1995). 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).

§ 1123.460. Review of agency procedure

1123.460. The standard for judicial review of the following issues is the independent judgment of the court, giving deference to the agency's determination of appropriate procedures:

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

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

Comment. Section 1123.460 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).

Section 1123.460 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.

The degree of deference to be given to the agency's determination under Section 1123.460 is for the court to determine. The deference is not absolute. Ultimately, the court must still use its judgment on the issue.

§ 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. Superior Court Jurisdiction and Venue

§ 1123.510. Superior court jurisdiction

1123.510. (a) Except as otherwise provided by statute, jurisdiction for judicial review under this chapter is in the superior court.

(b) Nothing in this section prevents the Supreme Court or courts of appeal from exercising original jurisdiction under Section 10 of Article VI of the California Constitution.

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 or where otherwise provided by statute, 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). Although the Supreme Court and courts of appeal may exercise original mandamus jurisdiction in exceptional circumstances, the superior court is in a better position to determine questions of fact than is an appellate tribunal and is therefore the preferred court. Roma Macaroni Factory v. Giambastiani, 219 Cal. 435, 437, 27 P.2d 371 (1933).

The introductory clause of Section 1123.510 recognizes that statutes applicable to particular proceedings provide that judicial review is in the court of appeal or Supreme Court. See Bus. & Prof. Code § 23090 (Alcoholic Beverage Control Appeals Board and Department of Alcoholic Beverage Control); 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. Res. Code § 25531 (State Energy Resources Conservation and Development Commission); Pub. Util. Code § 1756 (Public Utilities Commission).

§ 1123.520. Superior court venue

1123.520. (a) Except as otherwise provided by statute, the proper county for judicial review under this chapter is:

(1) In the case of state agency action, the county where the cause of action, or some part thereof, arose, or Sacramento County.

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

(b) A proceeding under this chapter 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.

Comment. Subdivision (a)(1) of Section 1123.520 continues prior law for judicial review of state agency action, with the addition of Sacramento County. 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). Subdivision (a)(2) is new, but is probably not a substantive change, since the cause of action is likely to arise in the county of the local agency's jurisdiction.

Under subdivision (b), a case filed in the wrong county should not be dismissed, but should be transferred to the proper county. See Sections 1123.710(a), 396b. *Cf.* Padilla v. Department of Alcoholic Beverage Control, __ Cal. App. 4th __, 51 Cal. Rptr. 2d 133 (1996) (transfer from court lacking jurisdiction).

The venue rules of Section 1123.520 are subject to a conflicting or inconsistent statute applicable to a particular entity (Section 1121.120), such as Bus. & Prof., Code § 2019 (venue for proceedings against the Medical Board of California). For venue of judicial review of a decision of a private hospital board, see Section 1120.110.

Article 6. Petition for Review; Time Limits

§ 1123.610. Petition for review

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

(b) The petition shall name as respondent only the agency whose action is at issue or the agency head by title, and not individual employees of the agency.

(c) The petitioner shall cause a copy of the petition for 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) codifies existing practice. See California Administrative Mandamus §§ 6.1-6.3, at 225-27 (Cal. Cont. Ed. Bar, 2d ed. 1989). Although the petition may name the agency head as a respondent by title, subdivision (b) makes clear "agency" does not include individual employees of the agency. See Sections 1123.230 ("agency" defined), 1123.210 (definitions vary as required by the provision).

Subdivision (c) 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 petition for 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. Contents of petition for review

1123.620. The petition for review shall state all of the following:

(a) The name of the petitioner.

(b) The address and telephone number of the petitioner or, if the petitioner is represented by an attorney, of the petitioner's attorney.

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

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

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

(f) Facts to demonstrate that the petitioner is entitled to judicial review.

(g) The reasons why relief should be granted.

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

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

§ 1123.630. Notice to parties of period for filing petition for review

1123.630. In an adjudicative proceeding, the agency shall in the decision or otherwise notify the parties of the period for filing a petition for review.

Comment. Section 1123.630 is drawn from and generalizes former Code of Civil Procedure Section 1094.6(f). See also Unemp. Ins. Code § 410; Veh. Code § 14401(b).

§ 1123.640. Time for filing petition for review in adjudication of state agency and formal adjudication of local agency

1123.640. (a) The petition for review of a decision of a state agency in an adjudicative proceeding, and of a decision of any agency in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, shall be filed not later than 30 days after the decision is effective or after the notice required by Section 1123.630 is given, whichever is later.

(b) For the purpose of this section:

(1) A decision in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code is effective at the time provided in Section 11519 of the Government Code.

(2) A decision of a state agency in an adjudicative proceeding other than under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code is effective 30 days after it is delivered or mailed to the person to which the decision is directed, unless any of the following conditions exist:

(A) A reconsideration is ordered within that time pursuant to express statute or rule.

(B) The agency orders that the decision is effective sooner.

(C) A stay is granted.

(c) The time for filing the petition for review is extended for a party during any period when the party is seeking reconsideration of the decision pursuant to express statute or rule.

(d) In no case shall a petition for review of a decision of a state agency in an adjudicative proceeding, or of a decision of any agency in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, be filed later than one hundred eighty days after the decision is effective.

Comment. Section 1123.640 provides a limitation period for initiating judicial review of specified agency adjudicative decisions. See Section 1121.250 ("decision" defined). See also Section 1123.650 (time for filing petition in other adjudicative proceedings). 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 (a) 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., 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 under the California Environmental Quality Act. Pub. Res. Code § 21167. See Section 1121.120 (conflicting or inconsistent statute controls).

The time within which judicial review must be initiated under subdivision (a) 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, 393 P.2d 689, 39 Cal. Rptr. 377 (1964)), correction of technical defects (see, e.g., United Farm Workers of America v. ALRB, 37 Cal. 3d 912, 694 P.2d 138, 210 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.

☞ **Staff Note.** The Commission solicits comments on whether the one-year statute of limitations in Welfare and Institutions Code Section 10962 should be preserved.

§ 1123.650. Time for filing petition for review in other adjudicative proceedings

1123.650. (a) The petition for review of a decision in an adjudicative proceeding, other than a decision governed by Section 1123.640, shall be filed not later than 90 days after the decision is announced or after the notice required by Section 1123.630 is given, whichever is later.

(b) The time for filing the petition for review is extended as to a party during any period when the party is seeking reconsideration of the decision pursuant to express statute, regulation, charter, or ordinance.

(c) In no case shall a petition for review of a decision in an adjudicative proceeding, other than a decision governed by Section 1123.640, be filed later than one hundred eighty days after the decision is announced or reconsideration is rejected, whichever is later.

Comment. Section 1123.650 continues the 90-day limitations period for local agency adjudication in former Section 1094.6(b).

Article 7. Review Procedure

§ 1123.710. Applicability of rules of practice for civil actions

1123.710. (a) Except as otherwise provided in this title or by rules of court adopted by the Judicial Council 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 the following:

(1) Matters reasonably calculated to lead to the discovery of evidence admissible under Section 1123.850.

(2) Matters in possession of the agency for the purpose of determining the accuracy of the affidavit of the agency official who compiled the administrative record for judicial review.

Comment. Subdivision (a) of Section 1123.710 continues the effect of Section 1109 in proceedings under this title. For example, under Section 632, upon the request of any party appearing at the trial, the court shall issue a statement of decision explaining the factual and

legal basis for its decision as to each of the principal controverted issues at trial. See Delany v. Toomey, 111 Cal. App. 2d 570, 571-72, 245 P.2d 26 (1952).

Subdivision (b)(1) codifies City of Fairfield v. Superior Court, 14 Cal. 3d 768, 774-75, 537 P.2d 375, 122 Cal. Rptr. 543 (1975). The affidavit referred to in subdivision (b)(2) is provided for in Section 1123.820.

§ 1123.720. Stay of agency action

1123.720. (a) The filing of a petition for review under this title does not of itself stay or suspend the operation of any agency action.

(b) Subject to subdivision (g), on application of the petitioner, 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 petitioner is likely to prevail ultimately on the merits.

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

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

(4) The grant of a stay to the petitioner 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 agency action 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) Except as provided by statute, if an appeal is taken from a granting of relief by the superior court, the agency action is stayed pending the determination of the appeal unless the court to which the appeal is taken orders otherwise. Notwithstanding Section 916, the court to which the appeal is taken may direct that the appeal shall not stay the granting of relief by the superior court.

(g) No stay may be granted to prevent or enjoin the state or an officer of the state from collecting a tax.

Comment. Section 1123.720 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 petitioner is likely to prevail on the merits. The former provision applied only to a decision of a licensed hospital or state agency made after a hearing under the formal hearing provisions of the Administrative Procedure Act.

Subdivision (b)(1) requires more than a conclusion that a possible viable defense exists. The court must make a preliminary assessment of the merits of the judicial review proceeding and conclude that the petitioner is likely to obtain relief in that proceeding. Medical Bd. of California v. Superior Court, 227 Cal. App. 3d 1458, 1461, 278 Cal. Rptr. 247 (1991); Board

of Medical Quality Assurance v. Superior Court, 114 Cal. App. 3d 272, 276, 170 Cal. Rptr. 468 (1980).

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).

The first sentence of subdivision (f) continues the sixth sentence of former Section 1094.5(g) and the third sentence of former Section 1094.5(h)(3). The introductory clause of the first sentence recognizes that statutes may provide special stay rules for particular proceedings. See, e.g., Section 1110a (proceedings concerning irrigation water). The second sentence of subdivision (f) is drawn from Section 1110b, and replaces Section 1110b for judicial review proceedings under this title.

Subdivision (g) recognizes that the California Constitution provides that no legal or equitable process shall issue against the state or any officer of the state to prevent or enjoin the collection of any tax. Cal. Const. Art. XIII, § 32.

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

§ 1123.730. Type of relief

1123.730. (a) Subject to subdivision (c), the court may grant appropriate relief justified by the general set of facts alleged in the petition for review, 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. The court may grant necessary ancillary relief to redress the effects of official action wrongfully taken or withheld.

(b) The court may award damages or compensation, subject to Division 3.6 (commencing with Section 810) of the Government Code, if applicable, and to other express statute.

(c) In reviewing a decision in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, the court shall enter judgment either commanding the agency to set aside the decision or denying relief. If the judgment commands that the decision be set aside, the court may order reconsideration of the case in light of the court's opinion and judgment and may order the agency to take further action that is specially enjoined upon it by law.

(d) The court may award attorney's fees or witness fees only to the extent expressly authorized by statute.

(e) 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.

Comment. Section 1123.730 is drawn from 1981 Model State APA Section 5-117, and supersedes former Section 1094.5(f). Section 1123.730 makes clear that the single form of action established by Sections 1121.130 and 1123.610 encompasses any appropriate type of relief, with the exceptions indicated.

Subdivision (b) continues the effect of Code of Civil Procedure Section 1095 permitting the court to award damages in an appropriate case. Under subdivision (b), the court may award damages or compensation subject to the Tort Claims Act "if applicable." The claim presentation requirements of the Tort Claims Act do not apply, for example, to a claim against a local public entity for earned salary or wages. Gov't Code § 905(c). See also Snipes City of Bakersfield, 145 Cal. App. 3d 861, 193 Cal. Rptr. 760 (1983) (claims requirements of Tort Claims Act do not apply to actions under Fair Employment and Housing Act); O'Hagan v. Board of Zoning Adjustment, 38 Cal. App. 3d 722, 729, 113 Cal. Rptr. 501, 506 (1974) (claim for damages for revocation of use permit subject to Tort Claims Act); Eureka Teacher's Ass'n v. Board of Educ., 202 Cal. App. 3d 469, 475-76, 247 Cal. Rptr. 790 (1988) (action seeking damages incidental to extraordinary relief not subject to claims requirements of Tort Claims Act); Loehr v. Ventura County Community College Dist., 147 Cal. App. 3d 1071, 1081, 195 Cal. Rptr. 576 (1983) (action primarily for money damages seeking extraordinary relief incidental to damages is subject to claims requirements of Tort Claims Act). Nothing in Section 1123.730 authorizes the court to interfere with a valid exercise of agency discretion or to direct an agency how to exercise its discretion. Section 1121.150.

Subdivision (c) continues the first sentence and first portion of the second sentence of former Section 1094.5(f).

For statutes authorizing an award of attorney's fees, see Sections 1028.5, 1123.950. 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) (operative July 1, 1997).

§ 1123.740. Jury trial

1123.740. All proceedings shall be heard by the court sitting without a jury.

Comment. Section 1123.740 continues a portion of the first sentence of former Section 1094.5(a).

Article 8. Record for Judicial Review

§ 1123.810. Administrative record exclusive basis for judicial review

1123.810. Except as provided in Section 1123.850 or as otherwise provided by statute, the administrative record is the exclusive basis for judicial review of agency action.

Comment. Section 1123.810 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 1123.850 (new evidence on judicial review).

§ 1123.820. Contents of administrative record

1123.820. (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 1123.820 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 1123.850 (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).

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.

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) (operative July 1, 1997).

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. See Section 1123.710(b) (discovery in judicial review proceedings). 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 1123.730.

§ 1123.830. Preparation of record

1123.830. (a) On request of the petitioner 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 by an administrative law judge employed by the Office of Administrative Hearings, 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.

(b) Except as otherwise provided by statute, the administrative record shall be delivered to the petitioner as follows:

(1) Within 30 days after the request in an adjudicative proceeding involving an evidentiary hearing of 10 days or less.

(2) Within 60 days after the request in a nonadjudicative proceeding, or in an adjudicative proceeding involving an evidentiary hearing of more than 10 days.

(c) The time limits provided in subdivision (b) may be extended by the court for good cause shown.

Comment. Section 1123.830 supersedes the fourth sentence of former Government Code Section 11523 and the first sentence of subdivision (c) of former Code of Civil Procedure Section 1094.6. 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).

Although Section 1123.830 requires the Office of Administrative Hearings or the agency to prepare the record, the burden is on the petitioner attacking the administrative decision to show entitlement to judicial relief, so it is petitioner's responsibility to make the administrative record available to the court. Foster v. Civil Service Comm'n, 142 Cal. App. 3d 444, 453, 190

Cal. Rptr. 893, 899 (1983). However, this does not authorize use of an unofficial record for judicial review.

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).

§ 1123.840. Disposal of administrative record

1123.840. 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 1123.840 continues former Section 1094.5(i) without change.

§ 1123.850. New evidence on judicial review

1123.850. (a) If 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 this section, the court shall not admit the evidence on judicial review without remanding the case.

(b) The court may receive evidence described in subdivision (a) without remanding the case in any of the following circumstances:

(1) The evidence relates to the validity of the agency action and is needed to decide (i) improper constitution as a decision making body, or grounds for disqualification, of those taking the agency action, or (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.

(c) Whether or not the evidence is described in subdivision (a), the court may receive evidence in addition to that contained in the administrative record for judicial review without remanding the case if no hearing was held by the agency, and the court finds that (i) remand to the agency would be unlikely to result in a better record for review and (ii) the interests of economy and efficiency would be served by receiving the evidence itself. This subdivision does not apply to judicial review of rulemaking.

(d) If jurisdiction for judicial review is in the Supreme Court or court of appeal and the court is to receive evidence pursuant to this section, the court shall appoint a referee, master, or trial court judge for this purpose, having due regard for the convenience of the parties.

Comment. Subdivision (a) of Section 1123.850 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 1123.810, the court is limited to evidence in the administrative record except under subdivision (b). The provision in subdivision (a) permitting new evidence that could not in the exercise of reasonable diligence have been produced in the administrative proceeding should be narrowly construed. Such evidence is admissible only in rare instances. See Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 578, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 149 (1995).

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 1123.410-1123.460. 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 to judicial review of agency interpretation of law or application of law to facts (mixed questions of law and fact). See Section 1123.420. Admission of evidence by the court under this provision is discretionary with the court.

As used in subdivision (c), "hearing" includes both informal and formal hearings.

Subdivision (d) is drawn from 1981 Model State APA Section 5-104(c), alternative B. Statutes that provide for judicial review in the court of appeal or Supreme Court are: Bus. & Prof. Code § 23090 (Alcoholic Beverage Control Appeals Board and Department of Alcoholic Beverage Control); 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. Res. Code § 25531 (California Energy Conservation and Development Commission); Pub. Util. Code § 1756 (Public Utilities Commission).

Section 1123.850 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. For standing rules, see Sections 1123.210-1123.240.

Article 9. Costs and Fees

§ 1123.910. Fee for transcript and preparation and certification of record

1123.910. The agency preparing the administrative record for judicial review shall charge the petitioner 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.

Comment. Section 1123.910 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 Code of Civil Procedure Section 1094.5, and the second sentence of subdivision (c) of former Code of Civil Procedure Section 1094.6.

§ 1123.920. Recovery of costs of suit

1123.920. Except as otherwise provided by rules of court adopted by the Judicial Council, the prevailing party is entitled to recover the following costs of suit borne by the party:

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

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

(c) Any filing fee.

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

Comment. Section 1123.920 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. Section 1123.920 generalizes these provisions to apply to all proceedings for judicial review of agency action. See also Bus. & Prof. Code § 125.3 (recovery of costs of

investigation and enforcement in a disciplinary proceeding by a board in the Department of Consumer Affairs or the Osteopathic Medical Board).

§ 1123.930. No renewal or reinstatement of license on failure to pay costs

1123.930. No license of a petitioner for 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 shall be renewed or reinstated if the petitioner fails to pay all of the costs required under Section 1123.920.

Comment. Section 1123.930 continues the substance of a portion of the sixth sentence of former Section 11523 of the Government Code.

§ 1123.940. Proceedings in forma pauperis

1123.940. Notwithstanding any other provision of this article, if the petitioner has proceeded pursuant to Section 68511.3 of the Government Code and the Rules of Court implementing that section and if 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. Section 1123.940 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.

§ 1123.950. Attorney fees in action to review administrative proceeding

1123.950. (a) If it is shown that a decision, award, finding, or other determination in an administrative proceeding under any provision of state law was the result of arbitrary or capricious action or conduct by an agency or officer in an official capacity, the petitioner if the petitioner 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 petitioner 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 1123.950 continues former Government Code Section 800.

SELECTED CONFORMING REVISIONS

MEDICAL BOARD OF CALIFORNIA

Bus. & Prof. Code § 2337 (amended). (Second of two, operative 1/1/96, repealed 1/1/99)
Judicial review

2337. Notwithstanding any other provision of law, review of final decisions of an administrative law judge of the Medical Quality Hearing Panel, or the Division of Medical Quality or the Board of Podiatric Medicine in the event a review is ordered pursuant to Section 2335, shall be ~~by writ of mandamus pursuant to Section 1094.5~~ under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure before a ~~district~~ court of appeal. ~~The court of appeal shall exercise its independent judgment in review of the proceedings below, and, 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 at the hearing, it may admit the evidence without remanding the case.~~

The Judicial Council may adopt rules to allocate these cases to a particular panel or panels within each district for consistent and efficient consideration. Review shall be entitled to calendar priority, and the hearing shall be set no later than 180 days from the filing of the action.

This section shall become operative on January 1, 1996, and shall be repealed as of January 1, 1999, unless a later enacted statute, which is enacted before January 1, 1999, deletes or extends that date.

Comment. Section 2337 is amended to make judicial review under this section subject to the provisions for judicial review in the Code of Civil Procedure. The former second sentence of Section 2337 is superseded by Code of Civil Procedure Sections 1123.410-1123.460 and 1123.850.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

Bus. & Prof. Code § 23090 (amended). Jurisdiction

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~~ petition the Supreme Court or ~~to~~ the court of appeal for the appellate district in which the proceeding arose, for ~~a writ of~~ judicial review of ~~such~~ the final order. ~~The application for writ of review shall be made within 30 days after filing of the final order of the board.~~

Comment. Section 23090 is amended to change the application for a writ of review to a petition for judicial review, consistent with Code of Civil Procedure Section 1123.610, and to delete the 30-day time limit formerly prescribed in this section. Under Code of Civil Procedure Section 1123.640, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the respondent, unless the agency orders that it shall become effective sooner. Gov't Code § 11519.

Bus. & Prof. Code § 23090.1 (repealed). Writ of review

~~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 Code of Civil Procedure Section 1123.710 (applicability of rules of practice for civil actions). The provision in the first sentence for the record of the department is superseded by Code of Civil Procedure Section 1123.820 (contents of administrative record). The second sentence is superseded by Code of Civil Procedure Sections 1123.810 (administrative record exclusive basis for judicial review) and 1123.850 (new evidence on judicial review).

Bus. & Prof. Code § 23090.2 (repealed). Scope of review

~~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 23090.2 are superseded by Code of Civil Procedure Sections 1123.410-1123.460 and 1123.160. Subdivision (e) is superseded by Code of Civil Procedure Section 1123.850. The last sentence is superseded by Code of Civil Procedure Sections 1123.420 (interpretation or application of law), 1123.430 (fact-finding), 1123.810 (administrative record exclusive basis for judicial review), and 1123.850 (new evidence on judicial review). Nothing in the Code of Civil Procedure or in this article permits the court to hold a trial de novo.

Bus. & Prof. Code § 23090.3 (amended). Right to appear in judicial review proceeding

~~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~~ whose interest is adverse to the person seeking judicial review.

Comment. Section 23090.3 is largely superseded by the judicial review provisions of the Code of Civil Procedure. See Section 23090.4. The first sentence is superseded by Code of Civil Procedure Section 1123.430 (review of agency fact-finding). The second sentence is superseded by Code of Civil Procedure Section 1123.420 (interpretation or application of law). The fourth sentence is superseded by Code of Civil Procedure Section 1123.730 (type of relief).

Bus. & Prof. Code § 23090.4 (amended). Judicial review

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 under 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 Bus. & Prof. Code § 1121.120 (conflicting or inconsistent statute controls). Copies of pleadings in judicial review proceedings must be served on the parties. See Code Civ. Proc. §§ 1123.610 (petition for review), 1123.710 (applicability of rules of practice for civil actions).

Bus. & Prof. Code § 23090.5 (amended). Courts having 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. Section 23090.5 is amended to delete the former reference to a writ of mandate. The writ of mandate has been replaced by a petition for review. See Section 23090.4; Code Civ. Proc. § 1123.610 (petition for review). *But cf.* Code Civ. Proc. § 1123.510(b) (original jurisdiction of Supreme Court or courts of appeal under California Constitution).

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 1123.720 (stays). See Section 23090.4.

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

23097.7. ~~No~~ Except for the purpose of Section 1123.640 of the Code of Civil Procedure, 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~~ a petition for review may be made ~~for a writ of review, as provided by Section 23090~~.

Comment. Section 23090.7 is amended to add the "except" clause. Section 23090.7 is also 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.

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.~~ under Title 2 (commencing with Section 1120) 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 1120-1123.950. Under the judicial review provisions, the petitioner must show agency action is invalid on a ground specified in Sections 1123.410-1123.460. See Section 1123.160. The petition for review must name the agency as respondent or the agency head by title, not individual employees of the agency. Section 1123.610. Standing rules are provided in Sections 1123.210-1123.240.

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 under that title, and not 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 have been repealed.

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.~~

~~(j) Effective January 1, 1996, this subdivision shall apply only to state employees in State Bargaining Unit 5. For purposes of this section, the court is not authorized to review any disciplinary decisions reached pursuant to Section 19576.1 of the Government Code.~~

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 Section 1123.740. The second sentence of former subdivision (a) is superseded by Section 1123.710(a) (Judicial Council rules of pleading and practice). See also Sections 1123.830(c) (delivery of record) and 1123.840 (disposal of record). The third sentence of former subdivision (a) is superseded by Section 1123.910 (fee for preparing record). The fourth sentence of former subdivision (a) is continued in substance in Section 1123.940 (proceedings in forma pauperis). The fifth sentence of former subdivision (a) is superseded by Section 1123.710(a) (Judicial Council rules of pleading and practice). The sixth sentence of former subdivision (a) is superseded by Section 1123.920 (recovery of costs of suit).

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 1123.460 (review of agency procedure). The provision relating to whether there has been a prejudicial abuse of discretion is superseded by Section 1123.450 (review of agency exercise of discretion). The provision relating to proceeding in the manner required by law is superseded by Section 1123.460 (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 superseded by Sections 1120.110 (title applies to decision of private hospital board in adjudicative proceeding) and 1123.420-1123.460 (standards of review).

Subdivision (e) is superseded by Section 1123.850 (new evidence on judicial review).

The first sentence and first portion of the second sentence of subdivision (f) is continued in Section 1123.730(c) (type of relief). The last portion of the second sentence of subdivision (f) is continued in substance in Section 1121.150 (exercise of agency discretion).

The first through sixth sentences of subdivision (g), and the first, second, and third sentences of subdivision (h)(3), are superseded by Section 1123.720 (stay). The seventh sentence of subdivision (g) and the fourth sentence of subdivision (h)(3) are continued in Section 1123.150 (proceeding not moot because penalty completed).

Subdivision (i) is continued without change in Section 1123.840 (disposal of administrative record).

Subdivision (j) is continued in Section 19576.1 of the Government Code. See also Code Civ. Proc. § 1120 (judicial review title does not apply to decision under Government Code Section 19576.1).

☞ **Staff Note.** Conforming revisions to the many statutes that refer to Code of Civil Procedure Section 1094.5 will be set out in a separate document.

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), 1121.260 ("local agency" defined), 1123.650 (time for filing petition for 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 1123.830 (preparation of the record). The second sentence of subdivision (c) is superseded by Section 1123.910 (fee for preparing record). The third sentence of subdivision (c) is superseded by Code of Civil Procedure Section 1123.820 (contents of administrative record).

Subdivision (d) is superseded by Section 1123.650 (time for filing petition for review). Under Section 1123.650, the time for filing the petition for review is not dependent on receipt of the record, which normally will take place after the petition 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 1123.650 (time for filing petition for review of decision in adjudicative proceeding) and 1121.270 ("party" defined). Subdivision (g) is not continued.

COMMISSION ON PROFESSIONAL COMPETENCE

Educ. Code § 44945 (amended). Judicial review

44945. The decision of the Commission on Professional Competence may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction ~~in the same manner as a decision made by a hearing officer under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The court, on review, shall exercise its independent judgment on the evidence~~ under Title 2 (commencing with Section 1120) of Part

3 of the Code of Civil Procedure. The proceeding shall be set for hearing at the earliest possible date and shall take precedence over all other cases, except older matters of the same character and matters to which special precedence is given by law.

Comment. Section 44945 is amended to make judicial review under this section subject to the provisions for judicial review in the Code of Civil Procedure. The former second sentence of Section 44945 is superseded by the standards of review in Code of Civil Procedure Sections 1123.410-1123.460.

BOARD OF GOVERNORS OF CALIFORNIA COMMUNITY COLLEGES

Educ. Code § 87682 (amended). Judicial review

87682. The decision of the arbitrator or administrative law judge, as the case may be, may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction ~~in the same manner as a decision made by an administrative law judge under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The court, on review, shall exercise its independent judgment on the evidence.~~ under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. The proceeding shall be set for hearing at the earliest possible date and shall take precedence over all other cases, except older matters of the same character and matters to which special precedence is given by law.

Comment. Section 87682 is amended to make judicial review under this section subject to the provisions for judicial review in the Code of Civil Procedure. The former second sentence of Section 87682 is superseded by the standards of review in Code of Civil Procedure Sections 1123.410-1123.460.

COSTS IN CIVIL ACTIONS RESULTING FROM ADMINISTRATIVE PROCEEDINGS

Gov't Code § 800 (repealed). Costs in 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 1123.950.

☞ **Staff Note.** Conforming revisions to the statutes that refer to Government Code Section 800 will be set out in a separate document.

PUBLIC EMPLOYMENT RELATIONS BOARD

Gov't Code § 3520 (amended). Judicial review of unit determination or 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~~ 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~~ review of the decision or order.

(c) ~~Such~~ The petition shall be filed in the ~~district~~ court of appeal in the appellate district where the unit determination or unfair practice dispute occurred. ~~The petition 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~~ the petition, 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~~ 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 process. 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. The board is exempt from the provision in the Code of Civil Procedure governing standard of review of questions of application of law to facts and of pure questions of law, so existing case law will continue to apply to the board. See Code Civ. Proc. § 1123.420(c) & Comment.

The former second sentence of subdivision (c) which required the petition to 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, is superseded by Code of Civil Procedure Section 1123.640. Under that section, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the respondent, unless the agency orders that it shall become effective sooner. Gov't Code § 11519.

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~~ 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~~ judicial review of the decision or order.

(c) ~~Such~~ The petition shall be filed in the ~~district~~ court of appeal in the appellate district where the unit determination or unfair practice dispute occurred. ~~The petition 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~~ the petition, 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~~ 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 process. 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 Code of Civil Procedure Section 1121.120 (conflicting or inconsistent statute controls). The board is exempt from the provision in the Code of Civil Procedure governing standard of review of questions of application of law to facts and of pure questions of law, so existing case law will continue to apply to the board. See Code Civ. Proc. § 1123.420(c) & Comment.

The former second sentence of subdivision (c) which required the petition to 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, is superseded by Code of Civil Procedure Section 1123.640. Under that section, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the respondent, unless the agency orders that it shall become effective sooner. Gov't Code § 11519.

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~~ 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~~ judicial review of the decision or order.

(c) ~~Such~~ The petition shall be filed in the ~~district~~ court of appeal in the appellate district where the unit determination or unfair practice dispute occurred. ~~The petition 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~~ the petition, 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~~ 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 process. 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. The board is exempt from the provision in the Code of Civil Procedure governing standard of review of questions of application of law to facts and of pure questions of law, so existing case law will continue to apply to the board. See Code Civ. Proc. § 1123.420(c) & Comment.

The former second sentence of subdivision (c) which required the petition to 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, is superseded by Code of Civil Procedure Section 1123.640. Under that section, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the

respondent, unless the agency orders that it shall become effective sooner. Gov't Code § 11519.

ADMINISTRATIVE PROCEDURE ACT — RULEMAKING

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

11350. (a) ~~Any interested~~ A 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 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 Code of Civil Procedure Section 1123.330 (judicial review of rulemaking). The former second sentence of subdivision (b)(2) is continued in Code of Civil Procedure Section 1123.820(b) (contents of administrative record).

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, as amended by 1995 Cal. Stat. ch. 938, is continued in Code of Civil Procedure Sections 1120 (application of title) and 1121.120 (conflicting or inconsistent statute controls).

The second sentence is superseded by Code of Civil Procedure Section 1123.640 (time for filing petition for review of decision in adjudicative proceeding).

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

The first portion of the fourth sentence is continued in Code of Civil Procedure Section 1123.830 (preparation of record). The last portion of the fourth sentence is continued in substance in Code of Civil Procedure Section 1123.910 (fee for preparing record).

The fifth sentence is superseded by Code of Civil Procedure Section 1123.920 (recovery of costs of suit).

The first portion of the sixth sentence is omitted as unnecessary, since under Section 1123.920(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 1123.930.

The seventh sentence is superseded by Code of Civil Procedure Section 1123.820 (contents of administrative record).

The eighth sentence is superseded by Code of Civil Procedure Section 1123.640 (time for filing petition for review of decision in adjudicative proceeding).

The ninth sentence is continued in substance in Code of Civil Procedure Section 1123.710 (applicability of rules of practice for civil actions) and Evidence Code Section 1511 (duplicate and original of a writing generally admissible to same extent).

The tenth sentence is continued in substance in Code of Civil Procedure Section 1123.920.

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 AND DEPARTMENT OF PERSONNEL ADMINISTRATION

Gov't Code § 19576.1 (amended). Employee discipline in State Bargaining Unit 5

19576.1. (a) Effective January 1, 1996, notwithstanding Section 19576, this section shall apply only to state employees in State Bargaining Unit 5.

(b) Whenever an answer is filed by an employee who has been suspended without pay for five days or less or who has received a formal reprimand or up to a five percent reduction in pay for five months or less, the Department of Personnel Administration or its authorized representative shall make an investigation, with or without a hearing, as it deems necessary. However, if he or

she receives one of the cited actions in more than three instances in any 12-month period, he or she, upon each additional action within the same 12-month period, shall be afforded a hearing before the State Personnel Board if he or she files an answer to the action.

(c) The Department of Personnel Administration shall not have the above authority with regard to formal reprimands. Formal reprimands shall not be appealable by the receiving employee by any means, except that the State Personnel Board, pursuant to its constitutional authority, shall maintain its right to review all formal reprimands. Formal reprimands shall remain available for use by the appointing authorities for the purpose of progressive discipline.

(d) Disciplinary action taken pursuant to this section is not subject to Sections 19180, 19574.1, 19574.2, 19575, 19575.5, 19579, 19580, 19581, 19581.5, 19582, 19583, and 19587, or to State Personnel Board Rules 51.1 to 51.9, inclusive, 52, and 52.1 to 52.5, inclusive. Disciplinary action taken pursuant to this section is not subject to judicial review.

(e) Notwithstanding any law or rule, if the provisions of this section are in conflict with the provisions of the memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if the provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

Comment. Section 19576.1 is amended to add the second sentence to subdivision (d). This continues the substance of former Code of Civil Procedure Section 1094.5(j). See also Code Civ. Proc. § 1120(i) (judicial review title does not apply to disciplinary decision under this section).

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 1123.640 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; judicial review

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

Comment. Subdivision (a) of Section 54962 continues subdivision (e) of former Code of Civil Procedure Section 1094.6. Subdivision (b) continues the third sentence of subdivision (b) of former Code of Civil Procedure Section 1094.6. Subdivision (c) is new.

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. Thereafter,~~ shall be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. After the time provided in Section 1123.650 of the Code of Civil Procedure has expired, 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~~ under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. Upon the filing of ~~such~~ the petition for 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.

The former second sentence of Section 1160.8 which required the petition to be filed within 30 days from the date of issuance of the board's order is superseded by Code of Civil Procedure Section 1123.640. Under that section, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered

or mailed to the respondent, unless the agency orders that it shall become effective sooner. Gov't Code § 11519.

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~~ petition the Supreme Court or ~~to~~ the court of appeal for the appellate district in which ~~he~~ the person resides, for ~~a writ of~~ judicial 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.~~

Comment. Section 5950 is amended to delete the second sentence specifying the time limit for judicial review. Under Code of Civil Procedure Section 1123.640, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the respondent, unless the agency orders that it shall become effective sooner. Code Civ. Proc. § 1123.640(b)(2).

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 Code of Civil Procedure Section 1123.710 (applicability of rules of practice for civil actions). The provision in the first sentence for the record of the department is superseded by Code of Civil Procedure Section 1123.820 (contents of administrative record). The second sentence is superseded by Code of Civil Procedure Sections 1123.810 (administrative record exclusive basis for judicial review) and 1123.850 (new evidence on judicial review).

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 Code of Civil Procedure Sections 1123.410-1123.460. See also Code Civ. Proc. § 1123.160 (condition of relief).

Subdivision (e) is superseded by Code of Civil Procedure Section 1123.840 (disposal of administrative record). The last sentence is superseded by Code of Civil Procedure Sections 1123.420 (interpretation or application of law) and 1123.850 (new evidence). 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 petitioner for judicial review.

Comment. Section 5953 is largely superseded by the judicial review provisions of the Code of Civil Procedure. See Section 5954. The first sentence is superseded by Code of Civil Procedure Section 1123.430 (review of fact-finding). The second sentence is superseded by Code of Civil Procedure Section 1123.420 (review of interpretation or application of law). The fourth sentence is superseded by Code of Civil Procedure Section 1123.730 (type of relief).

Lab. Code § 5954 (amended). Judicial review

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

Comment. Section 5954 is amended to replace the former provisions 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 Code Civ. Proc. § 1121.120 (conflicting or inconsistent statute controls). Copies of pleadings in judicial review proceedings must be served on the parties. See Code Civ. Proc. §§ 1123.610 (petition for review), 1123.710 (applicability of rules of practice for civil actions).

Lab. Code § 5955 (amended). 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 amended to delete the former reference to a writ of mandate. The writ of mandate has been replaced by a petition for review. See Section 5954; Code Civ. Proc. § 1123.610 (petition for review). See also Code Civ. Proc. § 1123.510(b) (original writ jurisdiction of Supreme Court and courts of appeal not affected).

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 1123.720 (stays). The stay provisions of the Code of Civil Procedure are subject to Article 3 (commencing with Section 6000) (undertaking on stay order). See Code Civ. Proc. § 1121.120 (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~~ judicial review, unless an undertaking is executed on the part of the petitioner.

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 Code of Civil Procedure Section 1123.720 are subject to this article. See Code Civ. Proc. § 1121.120 (conflicting or inconsistent statute prevails).

PUBLIC UTILITIES COMMISSION

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

1756. (a) 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.

(b) Notwithstanding any other provision of this code, judicial review of the issuance or denial of the following shall be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure:

(1) A certificate of public convenience and necessity for a highway common carrier or cement carrier pursuant to Article 4 (commencing with Section 1061) of Chapter 5 of Part 1 of Division 1.

(2) A permit for a highway permit carrier, highway contract carrier, livestock carrier, agricultural carrier, tank truck carrier, vacuum truck carrier, heavy-specialized carrier, dump truck carrier, or cement contract carrier pursuant to Chapter 1 (commencing with Section 3501) of Division 2.

(3) Registration of a highway carrier pursuant to Chapter 2 (commencing with Section 3901) of Division 2.

(4) Registration of a private carrier pursuant to Chapter 2.5 (commencing with Section 4000) of Division 2.

(5) A motor transportation broker's license pursuant to Article 2 (commencing with Section 4821) of Chapter 5 of Division 2.

(6) A permit for a household goods carrier pursuant to Chapter 7 (commencing with Section 5101) of Division 2.

(7) A certificate of public convenience and necessity or a permit for a charter-party carrier pursuant to Chapter 8 (commencing with Section 5351) of Division 2.

Comment. Section 1756 is amended to add subdivision (b) to make judicial review of specified regulation of highway carriers subject to general provisions in the Code of Civil Procedure for review of agency action.

☞ **Staff Note.** The Law Revision Commission has not made a final decision on judicial review of rate-making proceedings of the Public Utilities Commission. This will depend on what action the Legislature takes on Senate Bill 1322.

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.

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 1123.650 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 the time limit to seek judicial review subject to the general time limits for judicial review under 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 Code Civ. Proc. § 1121.120 (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~~ a person who has been issued a 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,~~ Except as provided in this section, the proceedings shall be conducted under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. In addition to the relief authorized under Title 2, the court may order the department to rescind the order of suspension or revocation and return, or reissue a new license to, the person.

(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. Section 13559 is amended to make judicial review proceedings under the section subject to the judicial review provisions of the Code of Civil Procedure. The special venue rule of Section 13559 is preserved.

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

14401. ~~(a) Any action brought in a court of competent jurisdiction to review 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.~~

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

Comment. Former subdivision (a) of Section 14401 is deleted. Judicial review of orders of the Department of Motor Vehicles is subject to subject to Code of Civil Procedure Sections 1120-1123.950. See Code Civ. Proc. § 1120 (application of title). The time to file a petition for judicial review is prescribed in Code of Civil Procedure Section 1123.640.

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 ~~with the superior court,~~ for review under ~~the provisions of Section 1094.5~~ 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 for 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 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. Judicial review is in the superior court. Code Civ. Proc. § 1123.510. The time to file a petition for judicial review is prescribed in Code of Civil Procedure Section 1123.640. The scope of review is prescribed in Code of Civil Procedure Sections 1123.410-1123.460. See also Code Civ. Proc. § 1123.160 (condition of relief).

Special provisions of this section prevail over general provisions of the Code of Civil Procedure governing judicial review. See Code Civ. Proc. § 1121.120 (conflicting or inconsistent statute controls).

☞ **Staff Note.** The Commission solicits comments on whether the one-year statute of limitations in Section 10962 should be preserved.