Study N-200 September 5, 1996

Memorandum 96-63

Judicial Review of Agency Action: Comments on Revised Tentative Recommendation

Attached is a staff draft of a recommendation on *Judicial Review of Agency Action*, and the following comments on the revised tentative recommendation:

Attorney General Dan Lungren	Exhibit pp. 1-3
Cara Vonk, Judicial Council	Exhibit p. 4
Karl Engeman, Office of Administrative Hearings	Exhibit pp. 5-6
Herb Bolz, Office of Admin. Law (memo 8/22/96)	Exhibit pp. 7-9
Herb Bolz, Office of Admin. Law (memo 8/28/96)	Exhibit pp. 10-13
Elise Rose, Chief Counsel, State Personnel Board	Exhibit pp. 14-18
Elisabeth Brandt, Chief ALJ, Dep't of Health Svcs.	Exhibit pp. 19-21
David Parker Hall, staff attorney, Court of Appeal	Exhibit pp. 22-23
Ruth Sorenson, County Counsels' Association	Exhibit pp. 24-26
State Bar Committee on Administration of Justice	Exhibit pp. 27-31
William Heath, California School Employees Ass'n	Exhibit pp. 32-33
Peter Arth, Public Utilities Commission	Exhibit pp. 34-36
Julie Miller, Southern California Edison	Exhibit pp. 37-39
Gregory Tanner	Exhibit p. 40
Professor Gregory Ogden, Pepperdine Law School	Exhibit p. 41
Philip Conti	Exhibit pp. 42-43

The following issues are discussed in this memorandum:

GENERAL COMMENTS

Support. The State Bar Committee on Administration of Justice supports replacing existing methods of judicial review with a single method to promote simplicity and uniformity. Cara Vonk of the Judicial Council says the "Commission is to be commended for undertaking this important and complex project," and that the straightforward draft statute to replace "what has become a confusing judicial review system will assist in the effective administration of justice." Elise Rose of the State Personnel Board applauds "the Commission's efforts in taking on such a large and complex task," and looks forward to "implementation of an improved judicial review process in the future." Elisabeth Brandt, Chief Administrative Law Judge of the Department of Health Services, says the recommendation "is a big step in the right direction, with significant improvements over current law." Julie Miller of Southern California Edison agrees the existing system for judicial review of agency action is "antiquated, and should be replaced with a single, straightforward statute for judicial review of all forms of state and local agency action." Professor Ogden supports the recommendation because it will make the law clearer and easier to use, allowing courts and litigants "to do their jobs better and more efficiently."

Concern. Attorney General Dan Lungren is concerned that comprehensive revision of the judicial review statutes may be neither necessary or prudent. The County Counsels' Association has "major concerns regarding the scope and magnitude of the changes" that affect local government.

AGENCIES TO WHICH STATUTE APPLIES

Nongovernmental Entities Generally (§ 1120)

The draft statute continues existing law by applying to review of adjudication of a private hospital board, but does not otherwise apply to review of actions of nongovernmental entities. This appears too narrow in light of recent and developing case law holding that the administrative mandamus statute applies to review adjudication of various nongovernmental entities, including:

— Denial of tenure by a private college. Pomona College v. Superior Court, 45 Cal. App. 4th 1716, 53 Cal. Rptr. 2d 662 (1996) (administrative mandamus available if a hearing and procedural protections are required by law).

— A fee dispute between a dental plan and two participating dentists. Delta Dental Plan v. Banasky, 27 Cal. App. 4th 1598, 33 Cal. Rptr. 2d 381 (1994) (administrative mandamus available if private organization controls important economic interests resulting in fair procedure being required).

— A grievance hearing under a collective bargaining agreement between a private company and its employees. Wallin v. Vienna Sausage Mfg. Co., 156 Cal. App. 3d 1051, 203 Cal. Rptr. 375 (1984) (administrative mandamus available if hearing results in "loss of fundamental vested rights").

— A hearing removing a union officer from office. Bray v. International Molders & Allied Workers Union, 155 Cal. App. 3d 608, 202 Cal. Rptr. 269 (1984) (administrative mandamus available if a hearing and procedural protections are required by law).

— Discharge without hearing of an employee of a nonprofit foundation auxiliary organization to a state university. Coppernoll v. Board of Directors, 138 Cal. App. 3d 915, 188 Cal. Rptr. 394 (1983).

The determining factor leading the court to apply the administrative mandamus statute in the *Delta Dental* case was Delta's legal obligation under its written rules to provide the dentists with a fair procedure. Other factors were that the plan was "tinged with public stature or purpose," and that Delta is the largest dental plan in California and thus controls an important economic interest. The first case to apply administrative mandamus to review a nongovernmental entity, Anton v. San Antonio Community Hospital, 19 Cal. 3d 802, 814, 567 P.2d 1162, 140 Cal. Rptr. 442 (1979), said this procedure applies where a hearing is required by law, evidence is required to be taken, and discretion to determine facts is vested in the nongovernmental entity.

The C.E.B. treatise says *Delta Dental* "may open the door for courts to review a wide range of private administrative decisions by administrative mandamus." California Administrative Mandamus § 3.19, at 40 (Cal. Cont. Ed. Bar, 2d ed., April 1996 update). Apparently no appellate case has considered whether administrative mandamus is available to review membership disputes in private associations such as political parties, athletic associations, condominiums, fraternal organizations, or health care groups. California Administrative Mandamus § 3.19, at 90 (Cal. Cont. Ed. Bar, 2d ed. 1989).

If the administrative mandamus statute does not apply to review a decision by a nongovernmental entity, traditional mandamus may apply. See California Civil Writ Practice §§ 6.16-6.17, at 203-05 (Cal. Cont. Ed. Bar, 3d ed. 1996) (application to corporations and labor unions). Whether administrative or traditional mandamus applies is significant. In administrative mandamus, review is generally on a closed record and the limitations period is short. In traditional mandamus to review ministerial or informal action, extra-record evidence is freely admissible if the facts are in dispute. Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 576, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 148 (1995). A longer limitations period applies in traditional mandamus. Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus* 7-9 (Nov. 1993). In using administrative rather than traditional mandamus to review decisions of nongovernmental entities, the courts seem to be influenced by the judicial efficiency of review on a closed record. See, e.g., Pomona College v. Superior Court, *supra*.

The staff would not interfere with case law development in this area, and thus would not preclude application of the draft statute to nongovernmental entities other than private hospitals, as Section 1120 now does. **The staff recommends broadening Section 1120(g) to codify case law on application of administrative mandamus to nongovernmental entities as set out below.**

The Commission's draft recommendation on *Administrative Adjudication by Quasi-Public Entities* would apply the fundamental due process and public policy requirements of the Administrative Procedure Act to adjudication by quasi-public entities created by statute to administer a state function. **Judicial review of quasi-public entity hearings that are subject to the APA should be under the draft statute.**

The staff would accomplish the foregoing by revising Section 1120(g) as follows:

(g) ~~Except as expressly provided by statute, this title does not apply to~~ This title governs judicial review of ~~action~~ a decision of a nongovernmental entity only if one of the following conditions exists:

(1) A statute expressly so provides.

(2) An evidentiary hearing for determination of facts and fair procedures are required by law.

(3) The decision is made in a proceeding to which Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code applies.

Comment. . . . Paragraphs (1) and (2) of subdivision (g) codify case law on the availability of administrative mandamus to review a decision of a nongovernmental entity. See, e.g., Anton v. San Antonio Community Hospital, 19 Cal. 3d 802, 814, 567 P.2d 1162, 140 Cal. Rptr. 442 (1979); Pomona College v. Superior Court, 45 Cal. App. 4th 1716, 53 Cal. Rptr. 2d 662 (1996); Delta Dental Plan v. Banasky, 27 Cal. App. 4th 1598, 33 Cal. Rptr. 2d 381 (1994); Wallin v. Vienna Sausage Mfg. Co., 156 Cal. App. 3d 1051, 203 Cal. Rptr. 375 (1984); Bray v. International Molders & Allied Workers Union, 155 Cal. App. 3d 608, 202 Cal. Rptr. 269 (1984); Coppernoll v. Board of Directors, 138 Cal. App. 3d 915, 188 Cal. Rptr. 394 (1983). Subdivision (g) applies this title only to nongovernmental action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person, and not to quasi-legislative acts. See Section 1121.250 ("decision" defined). Whether a hearing and fair procedures are required by law depend on a number of factors, including whether fundamental vested rights are involved or whether the matter is tinged with public stature or purpose. See Delta Dental Plan v. Banasky, *supra*; Wallin v. Vienna Sausage Mfg. Co., *supra*. If this title is not available to review a decision of a nongovernmental entity because the requirements of subdivision (g) are not met, traditional mandamus may be available under Section 1085. See California Civil Writ Practice §§ 6.16-6.17, at 203-05 (Cal. Cont. Ed. Bar, 3d ed. 1996).

Paragraph (3) of subdivision (g) recognizes that Government Code Sections 11400-11470.50 apply to some private entities. See Gov't Code § 11410.60 [in Commission's recommendation on *Administrative Adjudication by Quasi-Public Entities*].

Public Utilities Commission and Energy Commission

Senate Bill 1322. SB 1322 passed the Legislature and has been sent to the Governor. The bill expands jurisdiction for judicial review of adjudicative proceedings of the Public Utilities Commission to include the court of appeal. Venue is in the judicial district where petitioner resides or has its principal place of business. A party may seek an order from the Supreme Court transferring related actions to a single appellate district. Jurisdiction for judicial review of quasi-legislative and other matters of the PUC remains exclusively in the California Supreme Court. Review is on a closed record. There is no provision for evidence to be taken by the court on judicial review, except that rules of court

may permit the court to take evidence in enforcement proceedings and complaint cases. The standard of review of fact-finding is substantial evidence, except that independent judgment review applies to constitutional issues. The provisions in the Code of Civil Procedure for writs of review (certiorari) apply to these proceedings. The existing provision that PUC findings on the necessity for a taking of property and the fixing of just compensation is not subject to judicial review is continued. No stay may be issued against an order increasing or decreasing rates. The statement of legislative intent says quasi-adjudicative decisions of the PUC should be subject to review "on grounds similar to decisions subject to administrative mandamus."

SB 1322 does not change Public Resources Code Section 25531, which says power plant siting decisions of the Energy Commission "are subject to judicial review in the same manner" as decisions of the PUC. Thus SB 1322 affects judicial review of Energy Commission decisions as well as those of the PUC.

The draft statute applies to PUC regulation of highway carriers. The PUC does not oppose this. The draft statute is silent concerning other PUC and Energy Commission decisions. At the December 1995 meeting, the Commission decided to preserve whatever decision the Legislature made on these issues. SB 1322 keeps review jurisdiction of matters other than adjudication exclusively in the Supreme Court. **Accordingly, nonadjudicative decisions of the PUC and Energy Commission should be exempted from the draft statute.**

If SB 1322 becomes law, we could consider making adjudicative decisions of the PUC and Energy Commission subject to the draft statute, since the Legislature intends them to be reviewed on grounds similar to administrative mandamus. Julie Miller of Southern California Edison supports this to allow development of a uniform body of law and to improve the administrative decisionmaking process. However, the Public Utilities Code provisions will differ from the draft statute in several respects, including issues which may be considered on judicial review (no review of taking and compensation) and standards of review. **The staff thinks it is better not to subject adjudicative decisions of the PUC and Energy Commission generally to the draft statute because of these significant differences between SB 1322 and the draft statute.**

PUC regulation of highway carriers. Although the PUC does not oppose applying the draft statute to regulation of highway carriers, Peter Arth, General Counsel for the PUC, asks that judicial review not be in superior court, but be consolidated in a single court of appeal because, when the required application

for rehearing is made, the PUC often corrects legal errors and narrows the issues for judicial review, making superior court review "an unnecessary extra step," and "there is a need for uniformity of decision and the development of court expertise." The draft statute applies to other agencies that have court of appeal review — Workers' Compensation Appeals Board, Department of Alcoholic Beverage Control, ABC Appeals Board, Agricultural Labor Relations Board, and Public Employment Relations Board. The draft statute does not change the proper court for review of these agencies. It would be consistent with this scheme to provide for court of appeal or Supreme Court review of PUC regulation of highway carriers, as the PUC requests. The staff is unsure whether there is a specialty in the private bar for regulation of highway carriers distinct from utilities regulation generally. To the extent these specialties overlap, it may be preferable to have all PUC decisions subject to the same jurisdiction and venue rules. For this reason, if regulation of highway carriers is to be in the court of appeal or Supreme Court, the staff would not want a special rule limiting judicial review to a single court of appeal in these cases. **The staff solicits comment on whether judicial review of PUC regulation of highway carriers under the draft statute should be in superior court, or in the court of appeal or Supreme Court.**

Mr. Arth asks that we preserve the provision commencing the running of the 30-day limitations period from PUC mailing either of its decision denying rehearing or of its decision on rehearing. **The staff has no objection to this, and would revise proposed Section 1768 of the Public Utilities Code as follows:**

> **Pub. Util. Code § 1768 (added). Judicial review of regulation of highway carriers**
>
> 1768. (a) Notwithstanding any other provision of this article and except as provided in subdivision (b), judicial review of the issuance, denial, suspension, or revocation of the following, or the imposition of any penalty on the holder of the certificate, permit, registration, or license, shall be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure:
>
> ~~(a)~~ (1) A certificate of public convenience and necessity for a passenger stage corporation pursuant to Article 2 (commencing with Section 1031) of Chapter 5.
>
> ~~(b)~~ (2) 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.
>
> ~~(c)~~ (3) 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.

~~(d)~~ (4) Registration of an interstate or foreign highway carrier pursuant to Chapter 2 (commencing with Section 3901) of Division 2.

~~(e)~~ (5) Registration of a private carrier pursuant to Chapter 2.5 (commencing with Section 4000) of Division 2.

~~(f)~~ (6) Registration of an integrated intermodal small package carrier pursuant to Chapter 2.7 (commencing with Section 4120) of Division 2.

~~(g)~~ (7) A motor transportation broker's license pursuant to Article 2 (commencing with Section 4821) of Chapter 5 of Division 2.

~~(h)~~ (8) A permit for a household goods carrier pursuant to Chapter 7 (commencing with Section 5101) of Division 2.

~~(i)~~ (9) 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.

(b) A proceeding brought pursuant to subdivision (a) shall be filed not later than the later of the following:

(1) Thirty days after the commission issues its decision denying the application for a rehearing, or, if the application was granted, 30 days after the commission issues its decision on rehearing.

(2) Thirty days after the notice required by Section 1123.630 of the Code of Civil Procedure is delivered, served, or mailed.

Scope of relief. Section 1123.730(c) in the draft statute provides for more limited judicial relief for review of state agency adjudication subject to the new provisions of the APA — the court may command the agency to set aside the decision or may deny relief. At the January meeting, the Commission considered a request from the PUC to apply this provision to its adjudications, even though the PUC was exempted from the new provisions of the APA. This limited relief provision is closely similar to the existing relief provision for review of PUC decisions. See Pub. Util. Code § 1758. The Commission wanted to revisit this question if the PUC is not exempted from the draft statute. If the PUC still thinks this is important, we could add a subdivision (c) to Section 1768 above as follows:

(c) In a proceeding brought pursuant to subdivision (a), the court may grant the relief provided in Section 1123.730 of the Code of Civil Procedure, except that the court shall grant the relief provided in subdivision (c), and not the relief provided in subdivision (a), of that section.

If this language is adopted, the introductory clause of Section 1768 should be revised to say "except as provided in ~~subdivision~~ subdivisions (b) and (c) . . . ."

LIMITATIONS PERIOD FOR REVIEW OF ADJUDICATION

The draft statute provides the following limitations periods:

— For review of a decision of a state agency in an adjudicative proceeding, or of a decision of any agency in a formal adjudication under the Administrative Procedure Act, not later than 30 days after the decision is effective or the agency gives notice of the last day to seek review, whichever is later.

— For review of all other decisions in an adjudicative proceeding, not later than 90 days after the decision is announced or notice is given, whichever is later.

— For review of non-adjudicative action, including informal, ministerial, and quasi-legislative action, the general three or four year statute for civil actions applies.

The State Bar Committee on Administration of Justice supports the limitations provisions of the draft statute.

Special Limitations Periods for Particular State Agencies

The draft statute replaces special limitations periods for some state agencies and preserves others.

State agency limitations periods to be replaced by draft statute (§ 1123.640). The state agency limitation period of the draft statute — 30 days plus an additional period of up to 30 days depending on the effective date of the decision — will replace existing limitations periods for the following state agencies:

— A decision of the Public Employment Relations Board, now 30 days after issuance. Gov't Code §§ 3520 (bargaining unit determination), 3542 (same). The draft statute would extend the time by 30 days because of the provision for 30 days plus an additional period of up to 30 days, but PERB can achieve the same effect as under existing law by making the decision effective immediately, either in the decision itself or in a regulation.

— A decision of the Agricultural Labor Relations Board, now 30 days after issuance. Lab. Code § 1160.8 (unfair labor practice). The draft statute would have the same effect 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.

— Suspension or revocation of a driver's license by the Department of Motor Vehicles under the administrative per se provisions for driving while intoxicated, now 30 days from issuance of the notice of determination. Veh. Code § 13559. The draft statute will extend this time to 60 days, unless the order is made effective immediately to protect public safety. See Veh. Code § 13953.

The Commission has not previously considered the 90-day limit for review of a denial by the Unemployment Insurance Appeals Board of an employer's protest of a statement of charges or credits to the employer's account. Unemp. Ins. Code § 1243. Although the draft statute preserves the six-month period for unemployment compensation decisions of CUIAB (*id.* § 410), to impose the 30 days plus up to another 30 days of the draft statute seems less problematic in this context. Since the agency must give notice of the last day for judicial review, it appears that the 30 plus 30 of the draft statute would not likely be prejudicial to an employer. **On balance, the staff recommends subjecting this provision to the draft statute:**

> **Unemp. Ins. Code § 1243 (amended). Judicial review**
>
> 1243. A decision of the appeals board on an appeal from a denial of a protest under Section 1034 or on an appeal from a denial or granting of an application for transfer of reserve account under Article 5 (commencing with Section 1051) shall be subject to judicial review ~~if an appropriate proceeding is filed by the employer within 90 days of the service of notice of the decision~~ under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. The director may, in writing, extend for a period of not exceeding two years the time provided in Section 1123.640 of the Code of Civil Procedure within which such proceeding may be instituted if written request for such extension is filed with the director within the ~~90-day period~~ time prescribed by that section.
>
> **Comment.** Section 1243 is amended to make clear that judicial review under the section shall be under Code of Civil Procedure Sections 1120-1123.950. The former 90-day time limit for a proceeding under this section is superseded by the time limit provided in Code of Civil Procedure Section 1123.640 (30 days from effective date of decision or giving of notice, whichever is later).

State agency limitations periods to be preserved. The draft statute preserves the following special state agency limitations periods, especially important where

the period is longer than under the draft statute and parties are unlikely to be represented by counsel:

— One year for various state personnel decisions, including those of the State Personnel Board, but remedies are limited unless the challenge is made within 90 days. Gov't Code § 19630.

— Six months for decisions of the Unemployment Insurance Appeals Board. Unemp. Ins. Code § 410.

— Ninety days after notice for an order of the Department of Motor Vehicles relating to the privilege to operate a motor vehicle (other than an administrative per se order). Veh. Code § 14401(a).

— One year after notice for a welfare decision of the Department of Social Services. Welf. & Inst. Code § 10962.

The Commission has not previously considered the following special state agency limitations periods which ought to be preserved:

— Ninety days to review an administratively-issued withholding order for taxes. Code Civ. Proc. § 706.075. **The staff would preserve this 90-day period, because the taxpayer is unlikely to have counsel when the order is issued.**

— Thirty days from notice of filing with the court of a notice of deficiency of an assessment due from a producer under a commodity marketing program. Food & Agric. Code §§ 59234.5, 60016. The Director has four years after the administrative determination to file it with the court. The event that begins the running of the period — filing — is not readily adaptable to the scheme of the draft statute, which begins the running of the period from the effective date of the order. **The staff recommends preserving these two sections.**

Special Local Agency Limitations Periods to be Preserved

The draft statute preserves the various time limits for judicial review of action under the California Environmental Quality Act. Pub. Res. Code § 21167. This has been approved by the Commission. The following limitations periods for review of local agency action have not yet been considered by the Commission:

Cancellation of local land use contract. The draft statute does not affect the 180-day limit for administrative mandamus to challenge cancellation by a city or county of a contract limiting use of agricultural land under the Williamson Act. Gov't Code § 51286. The Legislature intended contract cancellation under the act to be reserved for situations where it would not be inconsistent with protecting the public's interest in agricultural land. *Review of Selected 1981 California*

Legislation, 13 Pac. L.J. 513, 750 (1982); see Gov't Code § 51220(f). If cancellation were easily available, it would render the act ineffective as a land use control device. Sierra Club v. City of Hayward, 28 Cal. 3d 840, 853, 623 P.2d 180, 171 Cal. Rptr. 619 (1981). The 180-day limit was added in 1981 to lengthen the 90-day limit of Code of Civil Procedure Section 1094.6 for judicial review of local agency action, and was a carefully balanced compromise between competing interests. People *ex rel*. Dep't of Conservation v. Triplett, 96 Daily Journal D. A. R. 9711, 9713 (Aug. 12, 1996). Thus the 180-limit appears to be supported by policy considerations similar to those supporting the longer limitations periods under CEQA. **Accordingly, the staff recommends preserving the 180-limit for judicial review of contract cancellation under the Williamson Act.**

BCDC. There is a 30-day limit to review a cease and desist order of the Bay Conservation and Development Commission, Gov't Code § 66639, and to review a complaint by BCDC for administrative civil liability, Gov't Code § 66641.7. Although Government Code Section 66639 was adopted before Code of Civil Procedure Section 1094.6 with its 90-day rule, Government Code Section 66641.7 was adopted after Section 1094.6, and so appears to reflect considered legislative policy. **The staff would preserve these short limitations periods for BCDC.**

Local zoning ordinance. There is a 90-day limit for commencing an action or proceeding to challenge a decision of a local legislative body adopting or amending a zoning ordinance, regulation attached to a specific plan, or development agreement. Gov't Code § 65009. Adopting or amending an ordinance or regulation is quasi-legislative, and thus would not be affected by the limitations periods in the draft statute which apply only to adjudication. Adopting or amending a development agreement may be adjudicatory in nature, but the 90-day period is consistent with 90-day provision of the draft statute for local agency adjudication. **So no revision of Section 65009 is necessary.**

Tolling During Preparation of Record?

For judicial review of formal adjudication under the Administrative Procedure Act, a timely request for the agency to prepare the record tolls the running of the limitations period until 30 days after the record is delivered. Gov't Code § 11523. A similar rule applies to review of local agency proceedings. See Code Civ. Proc. § 1094.6(d). Professor Asimow recommended keeping this tolling rule, because often "counsel must examine the record in order to determine whether it is sensible to seek judicial review; therefore, the record

should be available before the decision to pursue review must be made." Asimow, *Judicial Review of Administrative Decision: Standing and Timing* 100 (Sept. 1992). The same argument has been made by commentators on previous drafts.

The Commission decided not to provide for tolling while the record is being prepared. Originally, the thought was that the judicial review proceeding should be commenced by the filing of a concise and simple document, akin to a notice of appeal. Under this concept, the record would not be needed to file this simple initiating document. The briefing schedule would be provided by Judicial Council rule. Legal argument would be developed later in the proceeding when the record is available. As the draft statute evolved, however, the existing rule was preserved that requires the first pleading to state facts sufficient to establish a prima facie case for relief, necessary to survive a demurrer or motion for summary judgment. See California Administrative Mandamus, *supra*, § 10.1, at 338. Thus counsel will need factual material to draft a petition that has some assurance of getting past the pleading stage.

Is the record necessary to decide whether to seek review and to draft the petition? If so, should the tolling rule of existing law be included in the draft statute? Or can counsel decide whether to seek review and draft a pleading based on factual information from the client? **The staff solicits comment.**

SECTIONS IN DRAFT STATUTE

The staff plans to discuss at the meeting only items below preceded by a bullet [•]:

§ 1120. Application of title

Herb Bolz of the Office of Administrative Law suggests changing "executive department" to "executive branch" in Section 1120(a)(1). The staff would refer instead to exercising "executive powers" to correspond to the California Constitution. See Cal. Const. Art. III, § 3; *id.* Art. V, § 1.

> 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~~ exercising executive ~~department~~ powers or otherwise.

§ 1121.150. Operative date
Uncodified. Operative date

• The Judicial Council says it does not need a deferred operative date. **The staff would replace the two operative date provisions in the draft statute with the following:**

> 1121.150. (a) This title applies to a proceeding commenced on or after January 1, 1998, for judicial review of agency action .
> (b) The applicable law in effect before January 1, 1998, continues to apply to pending proceedings.
>
> SEC. ___. (a) This act applies to a proceeding commenced on or after January 1, 1998, for judicial review of agency action.
> (b) The applicable law in effect before January 1, 1998, continues to apply to pending proceedings.

§ 1121.290. Rule

Mr. Bolz would restore the reference to an "agency statement" in Section 1121.290. That language was removed because of Department of Energy concern that it might permit judicial review of informal agency communications such as staff advice letters or telephone information. Moreover, there is no reference to "agency statement" in the definition of "regulation" in Government Code Section 11342. **The staff would not restore this language.**

Subdivisions (a) and (b) of Section 1121.290 are closely similar to each other. **The staff would consolidate subdivisions (a) and (b):**

> 1121.290. "Rule" means ~~all~~ both of the following:
> (a) ~~"Regulation" as defined in Section 11342 of the Government Code~~.
> ~~(b)~~ The whole or a part of an agency regulation, including "regulation" as defined in Section 11342 of the Government Code, 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)~~ (b) A local agency ordinance.

§ 1123.230. Public interest standing

• Section 1123.230 continues existing law permitting a member of the public to challenge agency action to implement a public right or enforce a public duty,

without showing any personal adverse effect. To reduce litigation, the Attorney General renews his suggestion to eliminate or restrict public interest standing. Professor Asimow and the staff strongly opposed this suggestion. Professor Asimow noted that public interest standing is well-accepted in California law, and there is often no other way to challenge illegal agency action. Allowing a member of the public to challenge illegal action promotes lawful and accountable government. The staff thought the Attorney General's suggestion would be very controversial, and might divert the focus of this project and overshadow the careful work we have done so far. The Commission previously rejected this suggestion. **The staff recommends this provision not be changed.**

§ 1123.240. Standing for review of decision in adjudicative proceeding

• Section 1123.240 provides standing rules for review of an adjudicative proceeding, defined as "an evidentiary hearing for determination of facts" in which an agency "determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." Sections 1121.220, 1121.250. The standing rule in Section 1123.240 depends on the nature of the adjudication. For formal or informal adjudication subject to Sections 11400-11470.50 of the Administrative Procedure Act, Section 1123.240 gives standing to a "party." Except for a few agency proceedings that are exempt from these new provisions of the APA, nearly all state agency adjudication will be covered by this rule.

• For other adjudication (mostly by local agencies), Section 1123.240 gives standing to a "participant" if the participant is also either "interested" or has public interest standing. The Department of Health Services is concerned that "participant" is too broad for its hearings, but this will not apply to DHS. Rather DHS hearings will be covered by the provision giving standing to a "party," because DHS hearings, like those of most state agencies, will be covered by Sections 11400-11470.50 of the APA.

• Nonetheless, the DHS letter suggests we take another look at Section 1123.240. Limiting standing to a "party" in an adjudication subject to the new provisions of the APA may be too narrow, and may restrict existing law. Professor Asimow recommended codifying case law on standing, except that he recommended making clear that a person who complains to an agency about a professional licensee is not by virtue of the complaint alone permitted to challenge an agency decision in favor of the licensee. Asimow, *Judicial Review of Administrative Decision: Standing and Timing* 4, 12 (Sept. 1992). Under existing

law, a person must be "beneficially interested" to obtain administrative mandamus. Code Civ. Proc. § 1086; California Administrative Mandamus, *supra*, § 5.1, at 210. A person is beneficially interested if the person is aggrieved by the decision or has an interest beyond the public at large. California Administrative Mandamus, *supra*. And a person who participates in an adjudication under a statute or ordinance authorizing participation is ordinarily deemed to be beneficially interested, thus having standing for judicial review. *Id.* § 5.2, at 211.

• A person may occasionally have public interest standing to challenge an adjudication. See, e.g., Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1975) (review of approval of subdivision map by planning commission, apparently an adjudicative proceeding within the meaning of the draft statute). By limiting standing to a "party" or "participant," Section 1123.240 would overturn this rule.

• Existing law allows associations, including unions, trade associations, or political associations, to seek judicial review for a member who was a party. For example, in Brotherhood of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd., 190 Cal. App. 3d 1515, 236 Cal. Rptr. 78 (1987), a union sought mandamus challenging denial of unemployment insurance benefits to some of its members. The union was not a party to the administrative proceeding, although the union represented its members who were parties. The court held the union had standing because it was beneficially interested, even though not a party to the administrative proceeding. The draft statute continues this rule in Section 1123.220 (private interest standing), but this does not apply to adjudication. Thus Section 1123.240 would overturn this rule.

• Should there be a separate rule for adjudication at all? The 1981 Model State Administrative Procedure Act (§ 5-106) does not provide a special standing rule for review of adjudication. Rather the general standing rules of that act apply to adjudication as well as to other forms of agency action.

• Early staff drafts of the standing provision for adjudication noted that the provision for third party standing for a person dependent on and not adverse to the interest of a party ("jus tertii") be extended to apply to adjudication. Memo 93-22. However, in July 1993 the Commission deleted the third party standing section, so the question of when a nonparty may have standing for judicial review of adjudication still needs to be addressed.

• A problem with having a special rule for adjudication is that, while the distinction between adjudication and other kinds of action such as quasi-

legislative is clear at the poles, there is a large middle ground where the distinction is unclear, especially in local land use planning and environmental decisions. For this reason, Professor Asimow recommended the judicial review statute should avoid the distinction between adjudication and quasi-legislative action wherever possible. Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus* 12 (Nov. 1993).

• **The staff recommends (1) making clear that merely filing a complaint not authorized by statute or ordinance does not confer standing, (2) preserving public interest standing to review adjudication, at least in land use cases, and (3) preserving associational standing to review adjudication with consent of the party on whose behalf the association acts.** This may be done by one of the following two alternatives:

• **Alternative 1 (no special rule for adjudication).** We could delete Section 1123.240 (adjudication), instead apply general standing rules of Sections 1123.220 and 1123.230, and add the rule that a complaint to an agency not expressly authorized by statute or ordinance does not confer standing for judicial review:

> 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, the member or nonmember consents, and the agency action is germane to the purposes of the organization.
>
> (c) For the purpose of this section, a person is not interested by the mere filing of a complaint with the agency where the complaint is not authorized by statute or ordinance.
>
> [1123.230 — Public interest standing, as in draft statute.]
>
> ~~1123.240. 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.~~

• Alternative 1 is closer to the Model Act than the draft statute but, by allowing an interested nonparty to seek judicial review of adjudication, it would create the very problem the Department of Health Services is concerned about. This may be avoided by alternative 2:

• **Alternative 2 (keep special rule for adjudication).** We could keep the special rule for adjudication in Section 1123.240, and create an exception for land use cases permitting any person with private or public interest standing under Section 1123.220 or 1123.230 to have standing for review. This would preserve the effect of the *Environmental Law Fund* case, *supra.* The provision for associational standing should be split out and applied to adjudication as well as to other forms of agency action.

> 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.~~ For the purpose of this section, a person is not interested by the mere filing of a complaint with the agency where the complaint is not authorized by statute or ordinance.
>
> [1123.230 — Public interest standing, as in draft statute.]
>
> 1123.240. Notwithstanding ~~any other provision of this article~~ Sections 1123.220 and 1123.230, a person does not have standing to obtain judicial review of a decision in an adjudicative proceeding other than a land use or environmental 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)~~ was a party in a proceeding under the formal hearing provisions of the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.
>
> (b) ~~The person is a participant in~~ In a proceeding other than a proceeding described in subdivision (a) ~~and~~ , the person was one of the following:
>
> (1) A party.
>
> (2) A participant pursuant to a statute or ordinance authorizing participation.
>
> (3) A participant who satisfies Section 1123.220 or 1123.230.

> 1123.250. An organization that does not otherwise have standing under this article has standing if an interested person is a member of the organization, or a nonmember the organization is required to represent, the member or nonmember consents, and the agency action is germane to the purposes of the organization.

The Comment to Section 1123.220(b) would say:

> If a person is authorized by statute or ordinance to file a complaint with the agency and the complaint is rejected, the person is "interested" within the meaning of subdivision (a). Covert v. State Bd. of Equalization, 29 Cal. 2d 125, 130, 173 P.2d 545 (1946). See also Spear v. Board of Medical Examiners, 146 Cal. App. 2d 207, 303 P.2d 886 (1956) (standing to challenge agency refusal to file charges of person expressly authorized by statute to file complaint).

§ 1123.310. Exhaustion required

• Section 1123.310 requires exhaustion of administrative remedies before a person may seek judicial review. It does not continue the rule that, in formal adjudication under the Administrative Procedure Act, an administrative law judge's denial of a request for a continuance is immediately reviewable. Gov't Code § 11524(c). The draft statute provides an escape valve by permitting immediate review to avoid irreparable harm. Section 1123.340(c). The Southern Section of the State Bar Committee on Administration of Justice supports this change, but the Northern Section opposes it, saying the prejudicial effect of having to proceed can rarely be cured after the matter is heard on the merits.

• Professor Asimow recommended abolishing immediate review of denial of a continuance because "such rulings by trial judges are not immediately appealable and the administrative law rule should be no different. . . . Denial of a continuance is just one of many possible rulings by an ALJ prior to or at the hearing and there is no immediate review of any others." Asimow, *Judicial Review of Administrative Decision: Standing and Timing* 58 (Sept. 1992). **The staff would not change this.**

Mr. Bolz suggested additions to the Comment. **The staff has no objection to adding this as editorially revised:**

> This chapter does not require a person seeking judicial review of a rule to have participated in the rulemaking proceeding on which the rule is based. Section 1123.330 [if revised as set out below]. However, this chapter does prohibit judicial review of proposed regulations (see Section 1123.130), regulations that have been

preliminarily adopted but are not yet final (Section 1123.120), and adopted regulations that have not yet been applied (Section 1123.130).

§ 1123.330. Judicial review of rulemaking

Mr. Bolz suggests revising Section 1123.330(a) more closely to reflect Professor Asimow's recommendation. **The staff recommends this change:**

> 1123.330. (a) A person may obtain judicial review of rulemaking notwithstanding the person's failure either to participate in the rulemaking proceeding on which the rule is based, or to petition the agency promulgating the rule for, or otherwise to seek, amendment, repeal, or reconsideration of the rule after it has become final.

§ 1123.420. Review of agency interpretation or application of law

Under existing law, questions of application of law to fact are reviewed as a question of fact if the basic facts in the case are disputed, and as a question of law (independent judgment with appropriate deference) if the facts are not disputed. Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1213 (1995). Section 1123.420 would change this by treating application questions uniformly as a question of law — independent judgment with appropriate deference to the agency's determination. The State Bar Committee on Administration of Justice supports treating application questions as questions of law.

The three labor agencies — Agricultural Labor Relations Board, Public Employment Relations Board, and Workers' Compensation Appeals Board — are expressly exempted from Section 1123.420, thus preserving their deferential standard of review of questions of law. The recommendation says these agencies are exempted "because they must accommodate conflicting and contentious economic interests, and the Legislature appears to have wanted legal interpretations by these three agencies within their regulatory authority to be given greater deference by the courts." **The staff would add to the Comment a citation to the following recent case on standard of review of ALRB legal determinations:** Agricultural Labor Relations Bd. v. Superior Court, 96 Daily Journal D.A.R. 10512, 10518 (Aug. 29, 1996).

State Personnel Board. Elise Rose of the State Personnel Board is concerned about the impact of Section 1123.420 on the board, especially in its role of

reviewing employee disciplinary action. As a constitutional agency, the Personnel Board enjoys substantial evidence review of facts, resulting in substantial evidence review of application questions if the facts are disputed. She asks that the board be given the same exemption from Section 1123.420 as has been given to the labor agencies. However, the exemption for the labor agencies was to preserve case law under which courts uphold agency determination of purely legal questions unless "clearly erroneous." The staff has not found analogous case law requiring such deference to purely legal determinations by the Personnel Board.

The justification for applying independent judgment review to application decisions is that these decisions often contain important policy issues and are often treated as precedents for future cases, thus resembling issues of law more than issues of fact. It is also easier to distinguish an application question from a question of fact than from a question of law. Asimow, *supra*, at 1217. To treat application questions as a question of law is consistent with a recent Washington case and with the recommendations of influential commentators.

The staff believes applying independent judgment review with appropriate deference for application questions will counterbalance the recommended uniform application of substantial evidence review to state agency fact-finding, and make both recommendations more acceptable to state agencies and the private bar. The State Personnel Board, however, does not get the benefit of the revision to the standard of review of fact-finding, since it already has substantial evidence review. On the other hand, the issues dealt with by the board such as employee discipline do not appear to have the same broad economic impact as decisions of the three exempted labor agencies. **On balance, the staff would not exempt the State Personnel Board from Section 1123.420.**

Alcoholic Beverage Control. David Parker Hall suggests the exemption from Section 1123.420 for the three labor agencies should be expanded to include the Department of ABC and ABC Appeals Board because, like the labor agencies, ABC agencies are reviewed by the courts of appeal. **The staff opposes this suggestion.** The staff has found no case requiring extraordinary deference to legal determinations of the Department of ABC or the ABC Appeals Board like that for the labor agencies. The general standard in the draft statute for review of questions of law — independent judgment with appropriate deference — is flexible enough to permit courts to grant greater deference where agency

expertise justifies it. We omitted the labor agencies at their request as a practical compromise. We are reluctant to expand the exception further.

The State Bar Committee on Administration of Justice opposes including in the Comment any reference to the "clearly erroneous" standard of review. But as the Comment notes, Section 1123.420 "clarifies and codifies existing case law on judicial review of agency interpretation of law." Thus we must take account of case law applying a "clearly erroneous" standard of review. The staff thinks we have satisfactorily addressed this issue by saying in the Comment that 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."

Office of Administrative Law. As suggested by Mr. Bolz, **the staff would add a citation in the Comment** to Grier v. Kizer, 219 Cal. App. 3d 422, 434, 268 Cal. Rptr. 244 (1990 (determination by Office of Administrative Law that agency rule is subject to rulemaking portion of Administrative Procedure Act is entitled to great weight, since OAL is charged with enforcing and interpreting that act).

§ 1123.430. Review of agency fact finding

General comments. Attorney General Lungren strongly supports the recommendation to replace independent judgment review of fact-finding with substantial evidence review, particularly in view of enactment of the new administrative adjudication bill of rights. The State Bar Committee on Administration of Justice and Professor Ogden also support this change.

Philip Conti has "misgivings" about replacing independent judgment with substantial evidence review. Gregory Tanner calls substantial evidence review "a travesty," saying it "would leave citizens with virtually no recourse to overturn unfair administrative actions, since it would be nearly impossible to overturn such action under a substantial evidence standard. When a property interest is involved, simple justice requires further protection from . . . capricious actions."

• **DMV hearings.** William Heath of the California School Employees Association is concerned about applying substantial evidence review of fact-finding to drivers' license hearings of the Department of Motor Vehicles, which are exempt from the separation of functions requirement of the administrative adjudication bill of rights. He says DMV hearings are probably the most widely perceived as unfair. A drivers' license suspension, at least under the implied consent law, is subject to independent judgment review. Berlingheiri v.

Department of Motor Vehicles, 33 Cal. 3d 392, 657 P.2d 383, 188 Cal. Rptr. 891 (1983); Lake v. Director of the Dep't of Motor Vehicles, __ Cal. App. 4th __, 54 Cal. Rptr. 2d 822 (1996).

• Although some DMV hearings are exempt from separation of functions, the other provisions of the administrative adjudication bill of rights do apply to DMV hearings. The staff is unsure whether exemption from separation of functions is likely to lead to such unfairness that independent judgment review is needed. Moreover, on application of law to fact, the draft statute will provide independent judgment review of DMV hearings as well as all others. **On balance, the staff would not provide independent judgment review of pure fact-finding in drivers' license hearings of DMV.**

• **Comments of Karl Engeman.** Mr. Engeman suggests we reconcile two provisions enacted in 1995 on the same subject, viz., the weight to be given to findings of fact of a presiding officer in a state agency adjudication.

One provision was in the Commission's administrative adjudication bill. It applies to all state agency adjudication, APA and non-APA, and requires the court on judicial review to give great weight to a determination based on credibility of a witness. Gov't Code § 11425.50. Although the statute is unclear whether "determination" includes one made by the agency head after rejecting a proposed decision, the Comment makes this clear: It says great weight is given to credibility findings "by the trier of fact (the presiding officer in an administrative adjudication)," reversing existing law that "gives no weight to the findings of the presiding officer at the hearing." Thus this provision strengthens credibility findings of the presiding officer on judicial review, even if the proposed decision is rejected by the agency head.

The other provision, enacted in a bill not sponsored by the Commission, applies only to the Division of Medical Quality of the Medical Board and the Board of Podiatric Medicine and requires these agencies to give great weight on administrative review to all findings of fact of an ALJ unless controverted by new evidence. Bus. & Prof. Code § 2335, *as amended by* 1995 Cal. Stat. ch. 708. Although this provision is cast in terms of administrative review by the agency, it necessarily affects judicial review as well by increasing the likelihood the court will overturn agency rejection of an ALJ's decision and reinstate the original findings in a medical case.

• **Deference by agency as well as court.** Mr. Engeman thinks the Commission-recommended provision should make clear the agency as well as

the court must defer to ALJ credibility determinations. This suggestion is sound in principle, even though the practical effect of requiring both the agency and the court to defer is the same as merely requiring the court to do so, since in any event the provision can only be enforced on judicial review.

Mr. Engeman's suggestion is also consistent with Professor Asimow's recommendation. Professor Asimow recommended that, where the standard of judicial review of fact-finding is substantial evidence, both the reviewing agency and court should give great weight to ALJ credibility determinations. Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1119 (1992). For independent judgment review, he recommended the great weight requirement not apply. Instead, the court should consider the ALJ's proposed decision and the agency's final decision, giving whatever weight to either the court finds appropriate. The court is likely to be more impressed by credibility findings of the ALJ who heard the witnesses, rather than those made by an agency head who did not. *Id.* at 1120-21.

• **The staff recommends:**

— Government Code Section 11425.50 (administrative adjudication bill of rights) should be revised to make clear the agency must give great weight to credibility determinations of the ALJ. This would be technical, clarifying, and precatory, but still might be a useful encouragement to agency heads.

— The requirement in Government Code Section 11425.50 that the court give great weight to credibility determinations should be moved into the proposed judicial review statute (Section 1123.430). Also Section 1123.430(c) should be revised as suggested by the AG to make clear independent judgment review of a changed finding is limited to that finding.

> **Code Civ. Proc. § 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) <u>If the factual basis for a decision in a state agency adjudication includes a determination of the presiding officer based substantially on the credibility of a witness, the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.</u>

(c) Notwithstanding ~~subdivision (a)~~ any other provision of this section, 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 agency's determination of that fact is supported by the weight of the evidence.

Comment. . . . Subdivision (b) continues the substance of language formerly found in Government Code Section 11425.50(b). The requirement that the presiding officer identify specific evidence of observed demeanor, manner, or attitude of the witness in credibility cases is in that section.

Under subdivision (c), independent judgment review of a changed determination of fact is limited to that fact. All other factual determinations are reviewed using the standard of subdivision (a) — substantial evidence in light of the whole record.

Gov't Code § 11425.50 (amended). Decision

11425.50. (a) The decision shall be in writing and shall include a statement of the factual and legal basis for the decision as to each of the principal controverted issues.

(b) The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. If the factual basis for the decision includes a determination of the presiding officer based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on ~~judicial~~ administrative review the ~~court~~ agency shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

(c) . . . .

Comment. Subdivision (b) of Section 11425.50 is amended to apply to the reviewing agency the requirement that great weight be given to factual determinations of the presiding officer based on credibility, consistent with requiring the court on judicial review to do the same. The former requirement in subdivision (b) that the court give great weight on judicial review to determinations of the presiding officer based on credibility is continued in Code of Civil Procedure Section 1123.430(b). Subdivision (b) requires the agency to give great weight to factual determinations, but not to application of law to fact.

• **Comment of DHS.** The Department of Health Services would broaden application of independent judgment review when an ALJ's finding of fact is changed by the agency head by deleting the requirement that the presiding

officer must be employed by the Office of Administrative Hearings. Although DHS uses in-house ALJs, it says its proceedings have the formality of APA hearings. The staff has no problem with the DHS suggestion if it is narrowly drafted. We ought not apply this rule to all state agency adjudication, because many are quite informal and involve presiding officers who are not attorneys, such as in DMV licensing proceedings.

• **The staff would adopt the DHS suggestion by expanding subdivision (c) of Section 1123.430 to apply to an in-house presiding officer:**

> (c) 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 agency's determination of that fact is supported by the weight of the evidence if the original determination of fact was made by a presiding officer who is an incumbent administrative law judge as defined by the State Personnel Board for each class specification for Administrative Law Judge.

§ 1123.450. Review of agency exercise of discretion

Section 1123.450 continues existing abuse of discretion review of agency exercise of discretion. The State Bar Committee on Administration of Justice supports this provision.

The County Counsels' Association is concerned about application of independent judgment review of legal questions to adoption of local ordinances, citing California Teachers Ass'n v. Ingwerson, 46 Cal. App. 4th 860, 866-67, 53 Cal. Rptr. 2d 917 (1996). This case involved mandamus to compel the county to adopt a fiscal plan that did not include a reduction in pay or salary freeze for certified employees. The appellate court properly treated this as involving local agency discretion, subject to abuse of discretion review. Section 1123.450 continues this rule. To the extent questions of law are involved, independent judgment review with appropriate deference would apply under Section 1123.420, but the discretionary decision itself is reviewed under the abuse of discretion standard of Section 1123.450.

• A staff note under Section 1123.450 asks whether subdivision (b) should be deleted as unnecessary, and its substance put in the Comment. Mr. Bolz suggests keeping subdivision (b) because it helps clarify complex issues. However, the staff is concerned that subdivision (b) states the obvious and, if kept here, similar

language will have to be included in Section 1123.460 (review of agency procedure) as well. T**he staff believes subdivision (b) should be deleted and its substance put in the Comment** where it will serve equally well to clarify the interrelationship of Section 1123.450 with Sections 1123.420 and 1123.430.

> 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), and subject to Section 1123.440, to the extent agency exercise of discretion 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.** . . . The standard of review of agency fact-finding in connection with an exercise of discretion is prescribed by the appropriate section in this article. See Sections 1123.430-1123.440 .

The County Counsels' Association is concerned about the statement in the Comment that, although a court must be deferential to findings of legislative fact, the court "can still legitimately review the rationality of legislative fact finding in light of the evidence in the whole record," saying this is not existing law. The staff believes this is existing law. For example, in Guidotti v. County of Yolo, 214 Cal. App. 3d 1552, 1561-63, 271 Cal. Rptr. 858, 863-64 (1986), the court reviewed a county's discretionary action setting the level of general relief. By law, the county must provide general relief at a level that permits a recipient to meet basic needs for food and shelter. The court scrutinized the county's study of housing costs to see whether it provided a reasonable basis for the decision. Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1230 (1995). The court in *Guidotti* said its "task is to determine whether there is evidentiary support in the record before the Board for their action in setting the grant levels." 214 Cal. App. 3d at 1562.

The County Counsels' Association says legislative fact-finding is not generally required, citing Ensign Bickford Realty Corp. v. City Council. **The staff would address this by revising the Comment as follows:**

> Nevertheless, a court can still legitimately review the rationality of legislative fact finding, if any, in light of the evidence in the whole record. Nothing in this title requires the agency to make findings of fact if such findings are not otherwise required. See, e.g.,

Ensign Bickford Realty Corp. v. City Council, 68 Cal. App. 3d 467, 473, 137 Cal. Rptr. 304 (1977) (findings not required for legislative act). *But see* Gov't Code § 11425.50 (findings required in state agency adjudication).

The Comment to Section 1123.450 refers to the "Federal APA." The U. S. Code citation is provided in the Comment to Section 1120. Mr. Bolz suggests providing either the U. S. Code citation or a cross-reference to the Comment to Section 1120 wherever this short form is used. The short form is used in the Comments to only two sections — Sections 1123.450 and 1123.460. **The staff would put the U. S. Code citations in these two Comments.**

§ 1123.460. Review of agency procedure

Section 1123.460 codifies existing law on independent judgment of the court and the deference due agency determination of procedures. The State Bar Committee on Administration of Justice supports this provision.

Mr. Bolz is concerned the language providing for independent judgment review of whether the agency engaged in an unlawful procedure or decisionmaking process or failed to follow prescribed procedure might be applied in the rulemaking context to overturn the rule of the *Engelmann* case that an agency determination that it was not required to follow APA rulemaking procedures was of "no significance." **The staff would address this in the Comment as follows:**

> Section 1123.460 merely prescribes the standard of review of an agency's determination of its procedures, but it does not affect the legal significance of the determination. Thus Section 1123.460 does not change the rule of Engelmann v. State Bd. of Educ., 2 Cal. App. 4th 47, 59, 3 Cal. Rptr. 2d 264, 272 (1992), that an agency determination that it was not required to follow the rulemaking procedures of the Administrative Procedure Act was of "no significance."

Mr. Bolz also suggests the Comment cite California authority for the statement that the section codifies existing law. **The staff would add the following to the Comment:** See California Hotel & Motel Ass'n v. Industrial Welfare Comm'n, 25 Cal. 3d 200, 209-216, 157 Cal. Rptr. 453, 457-58 (1982); City of Fairfield v. Superior Court, 14 Cal. 3d 768, 776, 122 Cal. Rptr. 543, 547 (1975).

§ 1123.520. Superior court venue

• Section 1123.520 continues existing venue for review of state agency action, with the addition of Sacramento County. The existing administrative mandamus statute has no venue provisions, so venue rules for civil actions apply — generally in the county where the cause of action arose. California Administrative Mandamus, *supra*, § 8.16, at 269. Professor Asimow recommended superior court venue be either in Sacramento County or, if the agency is represented by the Attorney General, in counties where the AG has an office (Sacramento, Los Angeles, San Francisco, and San Diego). He thought superior court judges in small counties are probably inexperienced in administrative law, and consolidating judicial review in a few large counties would permit development of judicial expertise, avoid possible local bias, and minimize forum-shopping. Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus* 38-39 (Nov. 1993). The Commission rejected this approach out of concern that limiting venue to a few large counties would often be inconvenient for private parties, and might result in a pro-agency bias.

• The State Bar Committee on Administration of Justice and the Attorney General take opposing views on venue. CAJ opposes adding Sacramento County as an additional proper place of venue because it will be inconvenient for private parties. The AG, on the other hand, renews his suggestion that venue be limited to a few large counties to permit specialization and development of judicial expertise. **Does the Commission wish to reconsider?**

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

• The existing 90-day limitations period to review a local agency decision is tolled while the affected person pursues available administrative remedies, such as applying for a hearing. Farmer v. City of Inglewood, 134 Cal. App. 3d 130, 141, 185 Cal. Rptr. 9 (1982). The implication is that the limitations period is tolled while a stay is in effect. *Cf.* Gov't Code § 11519 (stay delays effective date of decision under APA). **The staff would add to Section 1123.650 a provision like that in Section 1123.640, extending the time to petition for review if a stay is granted**:

> 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 a stay of the decision is in effect, or when the party is seeking reconsideration of the decision pursuant to express statute, regulation, charter, or ordinance, but in no case shall a petition for review of a decision described in subdivision (a) be filed later than one hundred eighty days after the decision is announced or reconsideration is rejected, whichever is later.

§ 1123.710. Applicability of rules of practice for civil actions

• At the May meeting, the Commission asked the staff to consider whether the five-day extension of time in Code of Civil Procedure Section 1013(a) where notice is mailed applies to the draft statute. Section 1013(a) provides in part that:

> any period of notice and any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five days, upon service by mail, if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States, but the extension shall not apply to extend the time for filing notice of intention to move for new trial, notice of intention to move to vacate judgment pursuant to Section 663a, or notice of appeal. This extension applies in the absence of a specific exception provided for by this section or other statute or rule of court. . . .

• The staff made clear in Section 1123.710 that Section 1013(a) does not apply, with the hope of drawing comment. Section 1013 has been held not to apply to administrative mandamus to review local agency action under Code of Civil Procedure Section 1094.6. Tielsch v. City of Anaheim, 160 Cal. App. 3d 576, 206 Cal. Rptr. 740 (1984). It is unclear whether Section 1013 applies to administrative mandamus to review state agency action under Code of Civil Procedure Section 1094.5, California Administrative Mandamus, *supra*, § 7.4, at 242, but it is "reasonably well settled that section 1013 does not extend statutes of limitation." Tielsch v. City of Anaheim, *supra*, at 578.

• Under the draft statute, the rules for determining the last date on which a petition for review may be filed are complex. Section 1123.640 requires a petition for review of a decision of a state agency in an adjudicative proceeding, and of a

local agency in a proceeding under the formal adjudication provisions of the Administrative Procedure Act, to be filed not later than 30 days after the decision is effective or after the agency gives the required notice to the parties, whichever is later. Section 1123.650 requires a petition for review of all other decisions to be filed not later than 90 days after the decision is announced or the required notice is given. Section 1123.640 extends the time while a stay is in effect or while a party seeks reconsideration, but in no case may the petition be filed later than 180 days after the decision is effective. Section 1123.650 extends the time while a party seeks reconsideration but, unless revised as suggested above, makes no mention of the effect of a stay. In no case may the petition be filed later than 180 days after the decision is announced or reconsideration is rejected, whichever is later. During a stay or while a party seeks reconsideration, it will be impossible to know the last day to petition for review. If delay because of mailing is thought to impose an unacceptably short time to petition for review, the staff would prefer to change the 30-day time limit to 35 days, rather than applying the extension provisions of Section 1013(a). **The staff recommends the Commission approve the provision in Section 1123.710 making Section 1013(a) inapplicable to the limitations periods in Sections 1123.640 and 1123.650.**

§ 1123.720. Stay of agency action

The State Bar Committee on Administration of Justice supports this section.

§ 1123.730. Type of relief

Section 1123.730 gives the court broad authority to grant appropriate relief, except that for a state agency adjudication subject to the new Government Code provisions including the administrative adjudication bill of rights, relief is limited to a "judgment either commanding the agency to set aside the decision or denying relief." The Department of Health Services wants the narrower remedy to apply to all its adjudications. Section 1123.730(c) does this as drafted. We would make this clear by adding the following to the Comment: "Subdivision (c) applies to state agency adjudications subject to Government Code Sections 11400-11470.50. These provisions apply to all state agency adjudications unless specifically excepted. Gov't Code § 11410.20 and Comment."

§ 1123.820. Contents of administrative record

Section 1123.820(a) specifies the contents of the administrative record. The County Counsels' Association says there is no administrative record for

legislative acts, citing Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 140, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976). However, this statement appears incorrect. *Birkenfeld* concerned judicial review of a local initiative measure adopting rent control. Plaintiff argued that the initiative process was "precluded by the unavailability to the electorate of factfinding procedures by which a legislative body can ascertain the existence of facts" to justify rent control. The court said the initiative process "is free from any such factfinding prerequisite," and the measure "must be deemed to have been enacted on the basis of any state of facts supporting it that reasonably can be conceived." 17 Cal. 3d at 145. And "the existence of 'constitutional facts' upon which the validity of an enactment depends . . . is presumed in the absence of any showing to the contrary." *Id.* at 160. In *Birkenfeld*, the administrative record consisted of the initiative measure and its recitals of the public emergency justifying it. *Id.* at 161-64. If the measure is by the legislative body itself, the administrative record consists of the material considered by it in making its decision. See, e.g., Guidotti v. County of Yolo, 214 Cal. App. 3d 1552, 1561-63, 271 Cal. Rptr. 858, 863-64 (1986) (administrative record consisted of county study of housing costs supporting discretionary action setting level of general relief).

• Section 1123.820(d) permits the court to require the agency to add to the administrative record its reasons for its action as needed for proper review. Herb Bolz of the Office of Administrative Law says this provision should not apply to review of rulemaking. Government Code Section 11347.3 has a detailed statement of what is required in a rulemaking file, and requires an affidavit of an agency official that the record is complete and "the date upon which the record was closed." Mr. Bolz says the rulemaking file ought not to be supplemented, because the agency should be required to give a complete statement of reasons for proposing a regulation at the outset of the rulemaking proceeding, and should not be allowed to add material to the record at a later date. **The staff has no objection to this proposal, and would revise Section 1123.820 as follows:**

> (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. <u>This subdivision does not apply to judicial review of state agency rulemaking under the Administrative Procedure Act, Chapter 3.5 (commencing with</u>

Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

The County Counsels' Association is concerned this provision may permit a court to require a local agency to explain why it did or did not adopt an ordinance. **The staff would add the following to the Comment:**

> Subdivision (d) does not permit an inquiry into the mental processes of agency personnel to determine how the administrative decision was reached. See, e.g., City of Fairfield v. Superior Court, 14 Cal. 3d 768, 772, 537 P.2d 375, 122 Cal. Rptr. 543 (1975); County of Los Angeles v. Superior Court, 13 Cal. 3d 721, 532 P.2d 495, 119 Cal. Rptr. 631 (1975).

§ 1123.830. Preparation of record

Mr. Bolz says the requirement in Section 1123.830 that the record be prepared by the agency on request of the petitioner for review does not quite fit for rulemaking where the record is already complete at the time of review. **The staff would add the following to the Comment:**

> Although subdivision (a) requires the agency to prepare the record on request of the petitioner for review, in state agency rulemaking under the Administrative Procedure Act, the file is already complete at the time of review. See Gov't Code § 11347.3.

§ 1123.840. Disposal of administrative record

Mr. Bolz suggests we add something like the following to the Comment. **The staff has no objection:**

> Rulemaking records should be carefully safeguarded by the agency. Concerning retention of rulemaking records by the Secretary of State, see Gov't Code §§ 11347.3, 12223.5, 14755 [Senate Bill 1507].

§ 1123.850. New evidence on judicial review

• Section 1123.850(a) says that, if there is relevant evidence that could not in the exercise of reasonable diligence have been produced in the administrative proceeding or was improperly excluded, the court may remand to the agency for reconsideration in light of that evidence. Mr. Bolz is concerned this might permit a court to reopen a completed rulemaking proceeding, contrary to Government Code Section 11347.3 and Western States Petroleum Ass'n v. Superior Court, 9

Cal. 4th 559, 578, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 149 (1995), a case involving judicial review of state agency rulemaking. Mr. Bolz would codify the requirement in *Western States* that the evidence the agency may consider on remand must have been in existence before the agency made its decision. Otherwise a petitioner for review might be able to allege later-discovered evidence and thus finality might never be assured. See Western States, *supra*. **The staff would add this limitation:**

> 1123.850. (a) If the court finds that there is relevant evidence in existence at the time of the agency proceedings and 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.

Mr. Bolz would also revise the Comment to say the reasonable diligence provision should be "very" narrowly construed. **The staff has no objection, since this is the language used in *Western States*.**

§ 1123.940. Proceedings in forma pauperis

• Section 1123.940 requires the agency to pay for the transcript if the petitioner is proceeding in forma pauperis. This continues existing provisions in the administrative mandamus statute for adjudication, and generalizes them to apply to judicial review of all forms of agency action. The County Counsels' Association is concerned this will impose significant new costs on local government. *Cf.* Rohnert Park v. Superior Court, 146 Cal. App. 3d 420, 193 Cal. Rptr. 33 (1983) (forma pauperis statute and rules do not require free reporter's transcript on appeal). We prefer to avoid provisions in the draft statute that will have significant fiscal implications. **The staff recommends continuing existing law by limiting this provision to adjudication, and not extending it to agency action now reviewed by traditional mandamus:**

> 1123.940. Notwithstanding any other provision of this article, if, in an adjudicative proceeding, 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~~ proceeding, the cost of preparing the transcript shall be borne by the agency.

SELECTED CONFORMING REVISIONS

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

Mr. Bolz suggested we make clear that "regulation" as used in Government Code Section 11350 means a duly adopted regulation, and does not include such things as an underground regulation. He says this has been the historic interpretation of Section 11350, and is clear from other language in Section 11350. The staff discussed this with Mr. Bolz, and concluded that this would not affect judicial review since, under the draft statute, all standards of general application are reviewable, subject to limitations such as the ripeness requirement. **The staff believes this would be better addressed in the Commission's rulemaking study, rather than in the judicial review draft.**

Respectfully submitted,

Robert J. Murphy
Staff Counsel

State of California

Office of the Attorney General

Daniel E. Lungren
Attorney General

July 31, 1996

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

RE: Commission's May 1996 Revised Tentative Recommendation:
Judicial Review of Agency Action

Dear Commission Members:

Thank you for this opportunity to offer my views on the May 1996 Revised Tentative Recommendation, which is currently before the Commission.

Although, as discussed below, I retain the concern expressed in my comments on earlier Commission drafts that a total overhaul of the judicial review statutes may not be prudent or necessary, I strongly support the recommendation that independent judgment review of state agency fact-finding be eliminated. (Section 1123.430). Since state agency hearings will soon be subject to the procedural fairness requirements of the new Administrative Procedure Act, it is appropriate to afford the factual findings of these agencies some degree of deference. Substantial evidence review provides this deference without abdicating the judiciary's responsibility to curb abuses.

Moreover, the current system is less than rational. Various decisions - disability determinations being one example - are subject to independent judgment review when made by a constitutional agency, and substantial evidence review when made by other agencies. The current system also generates unnecessary litigation due to the shifting and blurred judicial definitions of "fundamental vested right" (which triggers independent judgment review).

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Finally, all other states, and the federal government, use some form of substantial evidence review, and have operated fairly and effectively using that test. California's system should likewise operate fairly and effectively without independent judgment review of state agency fact-finding.

I suggest one technical change. The recommendation proposes that the independent judgment test be retained where an agency changes an Office of Administrative Hearings Administrative Law Judge's finding of fact. (Section 1123.430, subdivision (b).) The recommendation's language should more clearly state that independent review would only apply to the changed finding; unchanged findings would still be reviewed under the substantial evidence test.[1] Increased clarity is needed because the introduction to the recommendation may be read, erroneously, as stating that if any finding of fact is changed, all findings are reviewed under the independent judgment test. (See May 1996 Revised Tentative Recommendation, p. 16, lines 17-20.) Applying independent judgment review to all findings in such a case, however, makes no sense; unaltered findings should be afforded the deference of the substantial evidence test.

In addition, I continue to believe that changes in current law regarding venue and standing are warranted. I prefer the Commission's original approach to venue, under which state agency decisions would be reviewed in Sacramento, or, where representation is provided by my office, in counties where such an office is located. Administrative law, especially as it pertains to state agency practices, is highly specialized. Fair, efficient and consistent application of the law is promoted by assigning these cases to courts that are familiar with this area of the law. I likewise continue to believe that both the current law and the Commission's proposed revisions regarding standing (see section 1123.210, et seq.) are too broad. I suggest that the narrower federal approach, which includes the requirement that a litigant be injured in fact, would benefit the California courts and public.

---

[1]Adding the following underlined words would accomplish this:

"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 agency's determination of that particular fact is supported by the weight of the evidence."

Finally, I remain concerned that it may not be wise to enact an omnibus approach to judicial review. Revamping procedures which have been in place for over 50 years will no doubt lead to confusion and litigation as the new laws are implemented. It is not clear that the benefits of omnibus changes justify those costs.

As before, I appreciate your consideration of these views.

Sincerely,

DANIEL E. LUNGREN
Attorney General

Judicial Council of California
Administrative Office of the Courts
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June 27, 1996

Robert J. Murphy, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Dear Mr. Murphy,

The Judicial Council Civil and Small Claims Advisory Committee reviewed the Commission's May 1966 Revised Tentative Recommendation on *Judicial Review of Agency Action*. The Committee does not see an immediate need to adopt rules of court to implement the proposed statute. Therefore they see no need to delay the statute's operative date for one year. The Committee noted that judges should be informed about the statute and the new procedures when it is enacted.

As you know, the Judicial Council developed the original administrative mandamus procedures in 1945. The Commission is to be commended for undertaking this important and complex project fifty years later. The straightforward statute that you propose to replace what has become a confusing judicial review system will assist in the effective administration of justice.

Please keep us informed of progress of the proposal. We will be happy to review any further revisions of the statute that may be developed by the Commission.

Very truly yours,

Cara Vonk

Cara M. Vonk
Attorney

cc: Hon. Owen Lee Kwong, Chair
Michael Bergeisen, General Counsel

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STATE OF CALIFORNIA - STATE AND CONSUMER SERVICES AGENCY PETE WILSON, *Governor*

DEPARTMENT OF GENERAL SERVICES
OFFICE OF ADMINISTRATIVE HEARINGS
501 J STREET, SUITE 230 (916) 445-4926
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May 28, 1996

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

Dear Nat:

Re: DEFERENCE

This is to amplify on our conversation at the most recent meeting of the Law Revision Commission. I raised the issue of the dual standards relating to agency deference to factual findings made by administrative law judges that presently exists and will continue when the new APA becomes operative on July 1, 1997.

Specifically, Senate Bill 609, Chapter 708 (1995), amended section 2335 of the Business and Professions Code to provide that in cases before the Division of Medical Quality of the Medical Board of California and the California Board of Podiatric Medicine, when considering a proposed decision by an ALJ, these entities "shall give great weight to the findings of fact of the administrative law judge, except to the extent those findings are controverted by new evidence."

At present, there is no similar deference required in other licensing matters heard by the Office of Administrative Hearings. Moreover, as you know Senate Bill 523 contains within the administrative adjudication bill of rights a provision that requires a court to give great weight to findings by the administrative law judge (or any presiding officer) but only those based substantially on the determination of credibility of witnesses and where demeanor assessment is involved and identified in the decision. There is no provision within the formal hearing provisions that requires agencies to defer to findings of fact of any sort made by an ALJ sitting on their behalf.

Presumably, a party affected by the agency's reversal of findings based on credibility assessment would have to resort to judicial review for relief which is very costly and time consuming. The best that can be said of this process is that

agencies might be reticent to modify affected findings because of the likelihood of reversal in the Superior Court; but this may be small comfort to a party who must absorb the cost of bringing that appeal.

This situation presents at least two problems. The first is the obvious inconsistency in the treatment of factual findings by regulatory agencies in cases which logically should be subject to the same rules in this area. I do not venture an opinion as to whether this rises to the level of an equal protection violation but the issue is one which is almost certain to arise. Second, Senate Bill 523 requires deference by a court and nothing is mentioned about what deference, if any, is owed by the regulatory agency.

My recollection is that this issue was discussed at length by the Law Revision Commission on several occasions with input from a number of counsel representing regulatory agencies, the Attorney General's office, and private counsel representing licensees. On each such occasion, the consensus of the Commission was to adopt what Professor Asimow described as the Universal Camera rule which presumably is set forth in section 11425.50 quoted in part above. However, the discussions always dealt with appropriate deference by agencies and not reviewing courts.

I do not have a specific suggestion for remedying the current inconsistency outlined above and that which will occur on July 1 of next year. I do not advocate any particular deference standard - only that there be consistency among procedures with which regulatory agencies review factual determinations by Administrative Law Judges in formal proceedings governed by the Administrative Procedure Act. I believe the Law Revision Commission is in a unique position to remedy the present situation and that such remedial action is consistent with the Commission's goal of providing greater consistency to administrative adjudication.

Thank you for consideration of this issue. If you have questions or need clarification, please call or write me.

Very truly yours,

KARL S. ENGEMAN
Director

KSE:sw

TO: Bob Murphy Date 22 August 1996

FROM: Herb Bolz, OAL

RE: Judicial Review TR--Article 8 "Record for Judicial Review"

Section 1123.820(d)

Add a sentence stating that this provision (drawn from the law governing administrative adjudication) *does not apply* to state agency rulemaking proceedings conducted pursuant to the APA. In current law, agencies subject to the rulemaking part of the APA are required to prepare a statement of reasons in support of each rulemaking. This statement of reasons--part of the administrative record prepared in support of a proposed regulation--is correctly specified in subdivision (b) as the APA rulemaking file.

It is not desirable to permit this record to be supplemented for two reasons. First, the rulemaking system is designed so that the adopting agency must lay its cards on the table at the outset of the rulemaking proceeding: it must state its reasons for proposing the regulation in the *initial* statement of reasons. Government Code section 11346.2(b). This not only encourages the agency to think through the problem carefully but also assists the public in analyzing and commenting upon the proposed regulation.

Second, the final administrative record is designed to be comprehensive, especially where the rationale for an adopted regulation is concerned. At the conclusion of the rulemaking process, just prior to submission to OAL, the adopting agency prepares the updated *final* statement of reasons for inclusion in the rulemaking file. It does not seem logical to permit a court to allow an agency to add material to such a record. Such a relaxed supplementation policy would tend to detract from the idea that the rulemaking process should be the "main event"--that all significant supporting and opposing reasons and evidence should be brought forward *in the rule adoption process*--not held back for use in litigation, if necessary.

Section 1123.830

This section explains clearly how to prepare the record of an *adjudicatory* proceeding. However, the section may muddy the water insofar as a *rulemaking* record is concerned. As noted in 1123.820(b), Government Code section

11347.3 mandates that, for regulations adopted pursuant to the APA, the administrative record be prepared and closed prior to submission of the regulatory package to OAL. Thus, it seems anomalous for 1123.820 (a)(2) to state that "the administrative record shall be *prepared* by the agency" (emphasis added) following the request of a petitioner.

We suggest that either the text or comment (or both) of 1123.820 be supplemented to make clearer how the section applies when a petitioner files a court challenge to a state agency regulation adopted per the APA.

Note that Government Code section 11347.3(c) states that the rulemaking record "shall be made available by the agency to the public, and to the courts on connection with the review of the regulation."

Section 1123.840

OAL and the Attorney General have recommend that rulemaking records be permanently retained, because litigation concerning a regulation may occur at any time. Even repealed regulations may continue to govern the disposition of earlier transactions and events.

Current legislation sponsored by the law librarians is seeking to ensure that all rulemaking records are permanently retained by the Secretary of State.

Thus, it would probably be a good idea to mention in the comment to 1123.840 that rulemaking records must be carefully safeguarded. If a rulemaking agency makes the mistake of forwarding the only existing copy of a rulemaking file to a court, it would be best if the court did not destroy what might be an irreplaceable document.

Section 1123.850

We suggest replacing subdivision (a) of section 1123.850 with the following, in order (1) to more fully reflect the holding in WSPA (9 Cal.4th at 578) and (2) to avoid adversely affecting the finality of quasi-legislature rulemaking proceedings. As pointed out at p. 578 of WSPA, we want to inter alia avoid creating a situation in which a party opposed to an adopted regulation can go to

court repeatedly to obtain an order "reopening the rulemaking proceedings."

new language

(a) The court may enter judgment remanding the case for reconsideration in light of extra-record evidence if the court finds that all of the following conditions have been met:

(1) [the evidence is relevant,] **NB: this item is intended to reflect the discussion in WSPA at pp. 570-74; we are not certain whether or not it needs to included in the text of this section.**

(2) the evidence existed before the agency made its decision, and,

(3) it was not possible in the exercise of reasonable diligence to present this evidence to the agency before the decision was made [so that it could be considered and included in the administrative record].

Comment

Third sentence in comment. Add the word "very" in front of "narrowly construed"--following WSPA, 9 Cal.4th at 578.

TO: Bob Murphy Date 28 August 1996

FROM: Herb Bolz, OAL

RE: Judicial Review TR-second set of suggestions

Section 1120(a)(1)

Change "executive department" to "executive branch." Branch is clearer. See p. 32 of exhibits to Memo 96-38 (OAL letter suggesting replacement of "department" in Government Code section 11342).

Section 1121.290

If you pull out subdivision (a) as you mentioned earlier, we suggest that you retain the word "statement" in (b), following the MAPA section. We think that the objections made to the word "statement" reflect a misunderstanding of the intended scope of the new statute. The comment to section 1121.240 states that "there are no exclusions from [the] all-encompassing definition" of "agency action." Thus, if an agency action does not fall within the term "rule," it is nonetheless covered by the broad definition of "agency action" in section 1121.40, and subject to judicial review if the statutory limitations are satisfied.

Section 1123.240

The text contains two subdivision (a)'s. The comment refers to (b)(1) and (b)(2), but the text lacks such subdivisions.

Section 1123.310

New comment paragraph 3 suggested:

This chapter does not require that a person seeking judicial review of a rule exhaust administrative remedies by participating in the rulemaking proceeding on which the rule is based. See section 1123.330 (judicial review of rulemaking). However, this chapter does prohibit judicial review of (1) proposed regulations (section 1123.130), (2) regulations that have been preliminarily adopted, but are not yet final (section 1123.120), and (3) adopted regulations that have not yet been applied (section 1123.130).

Section 1123.330(a)

Article 3 should expressly state that "a petitioner for judicial review of a rule need not have participated in the rulemaking proceeding on which the rule is based." Asimow I (Standing and Timing), n. 27; Model Act sec. 5-107(1). The current subdivision (a) does not clearly address this issue; the comment does not refer either to (1) the Model Act section or (2) generally to the need to broadly exempt challenges to regulations from the exhaustion requirement. Section 1123.350(b)(3) touches upon one aspect of the rulemaking/exhaustion issue, but does not seem be either clear or broad enough.

One possible way of fixing the problem would be to revise section 1123.330 as follows:

1123.330. (a) A person may obtain judicial review of rulemaking notwithstanding the person's failure to either participate in the rulemaking proceeding upon which the rule is based or to petition the agency promulgating the rule for, or otherwise seek, amendment, repeal, or reconsideration of the rule after it has become final.

Section 1123.450

First Issue

The final sentence in paragraph 1 of the comment reads "Cf. Federal APA sec. 701(a)(2)."

It would be helpful to also provide the U. S. Code citation. Many California attorneys reading the comment may not otherwise know how to quickly find this provision of federal law.

Having devoted time to reading through the entire Tentative Recommendation, including comments, I discovered earlier this month that the tenth paragraph of the comment to section 1120, the first section in the new chapter, contains an explanation of what is meant by "Federal APA" and a U.S. Code citation. I had not previously been aware of this Law Revision convention.

Either of two approaches would make this "Federal APA" reference more user friendly. First, add the U.S. cite to each comment. Or, second, refer readers back to the tenth paragraph of the comment to section 1120.

Second Issue

On page 47, you ask whether subdivision (b) should be retained. We recommend keeping it. It helps to clarify some complex issues.

Section 1123.460

Subdivision (a) appears to encompass failure to comply with required *rulemaking* procedures. The third paragraph of the comment states that the court decides how much deference to given the "agency's determination of appropriate procedures." This appears to reject the holding of the California Court of Appeal that an agency's determination that it was *not* required to follow APA rulemaking procedures was of "no significance." Engelmann v. State Board of Education (1992) 2 Cal.App.4th 47, 56 & 59. Cf. Grier v. Kizer (1990) 219 Cal.App.3d 422, 434 (OAL determination that agency rule is subject to rulemaking APA is entitled to great weight because OAL is agency charged with enforcement and interpretation of APA).

We suggest revising section 1123.460 to make clear that the procedures referred to are limited to procedures that are part of one particular agency's enabling act or regulations.

Paragraph 1 of the comment states this section "codifies existing law," but then proceeds to cite two *federal* authorities. We suggest that Engelmann and Grier exemplify existing *California* law insofar we are dealing with interpretation of the rulemaking APA by state regulatory agencies, and that these cases be cited in the comment.

As currently written, section 1123.460 appears to be a significant change in existing law, one which will affect all persons regulated by California state agencies. If such a change is considered desirable, we suggest that the issue be highlighted in a future Commission document and that input be solicited from private sector parties.

Government Code Section 11350

We believe that this section was intended to apply solely to judicial review of duly adopted regulations (adopted pursuant to the APA). See, for instance, the clear reference to the rulemaking file prescribed by the APA in subdivision (b). We suggest that it be made clear that section 11350 applies solely to duly adopted regulations. Sections 1121.240 and 1121.290 make clear that agency rules that have not been duly adopted are subject to judicial review under the new statute.

STATE OF CALIFORNIA PETE WILSON, Governor

CALIFORNIA STATE PERSONNEL BOARD
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May 13, 1996

Colin Wied, Chairperson
and Commission Members
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Judicial Review of Agency Action

Dear Commissioners:

I have reviewed the most recent Tentative Recommendation of the California Law Revision Commission ("Commission"), Memorandum 96-26, concerning the topic of judicial review of administrative agency action. I applaud the Commission's efforts in taking on such a large and complex task and look forward to implementation of an improved judicial review process in the future.

I am, however, concerned, by one of the provisions of the proposal concerning the standard of review to be applied to review of agency interpretation or application of law for state agency administrative decisions, specifically section 1123.420. I understand that section is currently drafted as follows:

> (1) The standard for judicial review of any 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:
>
> > (a) Whether the agency action, or the statute or regulation on which the agency action is based, is unconstitutional on its face or as applied.
> >
> > (b) Whether the agency acted beyond the jurisdiction conferred by the constitution, a statute, or a regulation.
> >
> > (c) Whether the agency has decided all issues requiring resolution.
> >
> > (d) Whether the agency has erroneously interpreted the law.
> >
> > (e) Whether the agency has erroneously applied the law to the facts.

> (2) 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.

I question why the Commission deems it necessary to alter the current "substantial evidence" standard of review applied by the courts to all decisions of the State Personnel Board ("SPB" or "Board"), a standard which has been established and fairly applied for over 40 years.

The SPB was established in the California Constitution by constitutional amendment in 1934 (Former Art. XXIV, stats. 1935) to be an independent administrative body to oversee the newly-established civil service system. At that time, the Board was vested with, among other things, jurisdiction over all dismissals, demotions and suspensions of state civil service employees. In 1970, by another vote of the people of California, Article XXIV was superseded by present Article VII, which establishes that the SPB shall enforce the civil service statutes and, by majority vote of all of its members, "...review disciplinary actions." [Article VII, section 3(a).]

In reviewing disciplinary actions, the Board acts as an adjudicative body, conducting evidentiary hearings of disciplinary appeals and issuing decisions thereon. Government Code sections 19578 and 19582. As such, the Board acts much as a trial court would in an ordinary judicial proceeding. Department of Parks and Recreation v. State Personnel Board (1991) 233 Cal.App.3d 813. Decisions on appeals of disciplinary actions constitute the majority of SPB decisions subject to judicial review in the superior court. Such decisions would be most affected by adoption of section 1123.420.

Over 40 years ago in Boren v. State Personnel Board (1951) 37 Cal.2d 634, the California Supreme Court adopted the current standard of review which applies to adjudicatory decisions of the SPB. In Boren, the court determined that since the adjudicative powers of the SPB are derived directly from the California Constitution, its decisions could be reviewed by both writs of mandate or certiorari, requiring that the trial courts apply the substantial evidence standard to factual findings made by the SPB. This standard of judicial review has been consistently followed by the courts since that time. Most recently, in Coleman v. Department of Personnel Administration (1991) 52 Cal.3d 1102,1125, the California Supreme Court reaffirmed the rule that decisions of the State Personnel Board are reviewable under the substantial evidence standard, even if the interest at issue is vested. [See

also Nelson v. Department of Corrections (1952) 110 Cal.App.2d 331; Genser v. State Personnel Board (1952) 112 Cal.App.2d 77; Stewart v. State Personnel Board (1967) 250 Cal.App.2d 445.]

Courts have further determined that because of the SPB's standing as a constitutional body with adjudicative powers, its decisions are entitled to judicial deference. (Department of Parks and Recreation, supra, at page 823.) As to an adjudicative decision of the SPB, courts are required to view the record in the light most favorable to the decision of the Board. [Ibid.; Washington v. State Personnel Board (1981) 127 Cal.App.3d 636, 640.] Of particular significance, in this instance, is the fact that courts have required deference to the SPB on issues which involve application of facts to law. For example, the courts have often deferred to the SPB's judgment on whether a particular set of facts constitutes an alleged cause for discipline as set forth in Government Code §19572. (Byrne v. State Personnel Board (1960) 179 Cal.App.2d 576, 583.)

The legislature has also recognized the SPB's special expertise as well as the beneficial effects of consistency by enacting Government Code §19582.5 which authorizes the Board to designate certain of its decisions as precedents.

We believe that the adoption of section 1123.420, as presently drafted, will have a negative impact on the resolution of SPB disciplinary appeals by, among other things, 1) diminishing the quality of decisions in this area by eliminating the great deference traditionally given to SPB's expertise in civil service disciplinary disputes; 2) increasing the number of persons seeking an opportunity to have their disciplinary appeal decisions litigated in superior court; and 3) decreasing the uniformity and consistency of decisions in this area by replacing that consistency with the uncertainty that would attend a system that allows a myriad of trial courts with different levels of experience in civil service law to issue decisions based on their independent judgment.

We note that on page nine of the most recent memorandum on the Revised Tentative Recommendation on Judicial Review of Agency Action, Memorandum No. 96-26 dated March 26, 1996, the Department of Industrial Relations pointed out to the Commission that section 1123.420 alters the standard of review of SPB decisions. In the memorandum, the Commission notes that this was a deliberate policy decision of the Commission, not inadvertent, noting that application of fact to law questions often contain important policy issues and that such application questions are easier to distinguish from pure questions of fact than from pure questions of law.

The Board respectfully disagrees. We believe that the SPB, after more than 60 years in the business of effectively administering the civil service system under authority of the constitution, is in the best position to make important policy decisions affecting civil service employees.

We note that the proposed statute exempts the three other labor law agencies in state service from the statutory standard of review of questions of law: the Agricultural Labor Relations Board, the Public Employment Relations Board, and Workers' Compensation Appeals Board. The Commission states that:

> These labor agencies are exempted because they must accommodate conflicting and contentious economic interests, and the Legislature appears to have wanted legal interpretations by these agencies within their expertise to be given greater deference by the courts.

The SPB likewise issues decisions that accommodate conflicting and contentious economic interests: the employees who appeal to the Board allege that they have been unlawfully deprived of their property interest in their jobs; the state employers have taken adverse action pursuant to their fiscal responsibility to assure that their civil service employees are efficient, effective contributors to that employer's mission.

As noted above, the California Constitution has vested authority to review disciplinary actions in the SPB; the legislature has granted authority to the SPB to make policy through its precedential decisions. There is no real justification for treating the SPB any differently than the other labor agencies that are exempt from the proposed legislation: SPB's decisions should continue to be accorded the deference they have always received.

In conclusion, the Board would like to see the present standard of review given SPB's decisions continued, either by exempting SPB from section 1123.420, or by providing that decisions of the SPB will continue to be reviewed under the substantial evidence test.

If you wish to discuss the Board's concerns in greater detail, you may contact me at 801 Capitol Mall, MS 53, Sacramento, CA., 95814 or by telephone at the number listed below.

Sincerely,

Elise S. Rose

ELISE S. ROSE
Chief Counsel
(916) 653-1403
TDD (916) 653-1498

cc: Members of the State Personnel Board

CLCR.JA

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY

PETE WILSON, Governor

DEPARTMENT OF HEALTH SERVICES
OFFICE OF ADMINISTRATIVE HEARINGS AND APPEALS
923 12TH STREET, SUITE 201
SACRAMENTO, CA 95814
(916) 322-5603
(916) 323-4477 (FAX)

July 18, 1996

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Subject: Comments of Department of Health Services, Office of Administrative Hearings and Appeals, on the tentative recommendation entitled "Judicial Review of Agency Action" (May 1996 draft)

Dear Mr. Sterling:

Thank you for the opportunity to comment on the latest draft of the recommendation, which is of significant importance to this Office. Before moving on to specific items, I would like to reiterate once again that, overall, this recommendation is a big step in the right direction, with significant improvements over current law.

Our specific comments relate to sections 1123.240, 1123.430, and 1123.730. The concern relating to each section arises from the same issue. Each section assumes that the only formal adjudicatory hearings conducted by state agencies are under the Administrative Procedure Act (APA) and/or conducted exclusively before the Office of Administrative Hearings (OAH). That presents a problem for this Office, which conducts formal adjudicatory proceedings which are not under the APA, as well as APA proceedings which are not before OAH.

Our formal adjudicatory proceedings have all of the formality of APA proceedings, but because they involve audits and rate setting, the procedural steps of the APA do not fit them. For example, the basic document on which the case proceeds may be a "Statement of Disputed Issues" filed by the provider of services after an audit report has been issued, instead of an Accusation. It is therefore not likely that these proceedings will ever use all of the APA procedures, even under the new APA.

Our APA proceedings are heard here rather than at OAH because the Department of Health Services desires to have shorter time lines for the setting of cases for hearing than OAH is able to accommodate. Also, we believe that having Administrative Law Judges with considerable subject matter expertise hear these cases is very beneficial.

Against this background, we discuss the individual sections.

Section 1123.240: As this Department previously commented, there should be no right of court review of a formal adjudicative proceeding except at the request of a party to the proceeding. This suggestion was accepted as valid. However, the solution was to limit judicial review to the parties only in cases to review APA proceedings. As discussed above, this presents a problem for those of our cases which have all of the formality of APA proceedings but cannot be fit into the full APA procedural framework.

Our suggestion to remedy this problem is the following: Instead of the currently proposed subsection 1123.240(a), substitute the following language:

> "(a) The person is a party to a proceeding to which Article 6 (commencing with Section 11425.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code applies."

This is a reference to the Administrative Adjudication Bill of Rights. It is very likely that any truly formal adjudication will use the Bill of Rights as a part of the applicable procedure, even if the more technical procedural portions of the APA are not used. This more narrow reference to the APA would ensure that the types of proceedings with which we are concerned do not fall through the procedural cracks on judicial review.

Section 1123.430: We suggest removing "employed by the Office of Administrative Hearings" after the words "administrative law judge." There is no technical or equitable reason why the same rule should not apply if the Administrative Law Judge is employed by the agency itself. This Office uses precisely the same (and sometimes even stricter) protocols for handling of Proposed Decisions (to be adopted or alternated by the Director) as does OAH. The various Directors of this Department have certainly consistently received counselling that courts look with extreme disfavor on fact finding by persons who had no opportunity to see the witnesses. The public would not likely accept the result which is inadvertently created by the current language -- that an agency can have the benefit of the more protective standard if it uses an in-house Administrative Law Judge rather than one employed by OAH.

Section 1123.730: Subsection (c) limits the type of relief that can be granted on judicial review in APA proceedings more narrowly than in other proceedings. We believe that the narrower standard should apply to all proceedings in which individual rights are formally adjudicated, whether or not the exact procedure of the APA is used. That is the current law, and the comment does not suggest a basis for changing the current law in this area.

Perhaps here, also, a reference to the Administrative Adjudication Bill of Rights instead of to the full APA would be a useful device for avoiding too narrow an interpretation. Certainly, the current language would produce very awkward results, allowing some of our final decisions, which are currently reviewable only under Code of Civil Procedure (CCP) section 1094.5 to be reviewed as if they were "ordinary" mandate cases under CCP section 1085.

Thank you for your consideration of these points, which are of significant importance to this Office and to the Department of Health Services in general.

Very truly yours,

Elisabeth C. Brandt
Chief Administrative Law Judge

DAVID PARKER HALL
PRINCIPAL ATTORNEY

STATE OF CALIFORNIA

Court of Appeal

THIRD APPELLATE DISTRICT
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TELEPHONE: (916) 654-0275

August 13, 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Revised tentative recommendation to replace existing procedures for judicial review of agency action

The California Law Revision Commission has invited comment on its revised tentative recommendation to replace existing procedures for judicial review of agency action with a single statute. Inter alia, the Commission intends to clarify the standard of review.

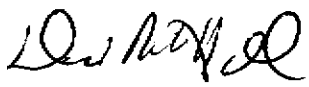
Pursuant to proposed Code of Civil Procedure section 1123.420, the independent judgment standard of judicial review is to be utilized in reviewing agency interpretation or application of law, with the exception that the section does not apply to three of the four regulatory agencies over which the courts of appeal can exercise original jurisdiction: the Public Employment Relations Board, Agricultural Labor Relations Board and Workers' Compensation Appeals Board. I direct your attention to the omission of the fourth such agency, the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board (see proposed Code of Civ. Proc., § 1123.510, subd. (b); proposed Bus. & Prof. Code, § 23090, et seq.), which presumably would be subject to the independent judgment standard of judicial review with no special deference to the agency within its area of expertise.

I recognize the omission may be the product of the absence of any express, unequivocal case law affording special deference to the Department of Alcoholic Beverage Control and Alcoholic Beverage Control Appeals Board, but to my knowledge there is also no case law clearly declining to afford that Department and Board the same deference afforded the other three Boards over which the courts of appeal can exercise original jurisdiction. (Cf. Miller Brewing Co. v. Department of Alcoholic Beverage Control (1988) 204 Cal.App.3d 5, 13-14; California Beer & Wine Wholesalers Assn. v. Department of Alcoholic Beverage Control (1988) 201 Cal.App.3d 100, 106-107.)

I submit the Commission should further consider the propriety of excluding the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board from subdivision (b) of proposed Code of Civil Procedure section 1123.420.

Thank you for your consideration.

Sincerely,



DAVID PARKER HALL
Principal Attorney

County Counsels' Association of California

Ruth Sorensen
Executive Director, County Counsels' Association of California
Coordinator, Litigation Coordination Program, California State Association of Counties

August 21, 1996

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

RE: Commission's May 1996 Revised Tentative Recommendation "Judicial Review of Agency Action"

Dear Commission Members:

This is to submit some preliminary comments on behalf of the California County Counsels' Association on the May 1996 Revised Tentative Recommendation on "Judicial Review of Agency Action", and to request that consideration by the Commission of this proposal be deferred to allow a fuller examination of its impact on local government.

The California County Counsels Association is comprised of the chief civil attorneys for the 58 counties in the State. The members of the Association are directly interested in litigation and legislation which would affect the judicial review of legislative, quasi-legislative, quasi-judicial, and administrative actions of county government. The Association only recently became aware of the Law Review Commission's consideration of a complete rewrite of the provisions for the judicial review of State and local agency actions. A Committee of the Association has preliminarily reviewed the current proposal and has major concerns regarding the scope and magnitude of the changes which would be made in the judicial review of the actions of local government if the proposal became law. These concerns are discussed below.

The stated objective of the Commission is to recommend "that the archaic judicial review system that has evolved over the years be replaced by a simple and straightforward statute." Certainly, some of the procedural remedies such as certiorari and prohibition are archaic and arcane in nature, and a consolidation of those procedures with more familiar procedures would simplify the practice of law. However, the simple "one size fits all" approach of the current proposal for all types of legislative, quasi-legislative, quasi-judicial, and administrative actions of local government would at best create rather than eliminate confusion, and at worst would result in a separation of powers violation of the Constitutional legislative authority of counties and cities. The proposal fails to recognize that cities and counties have not only quasi-legislative power like a State agency in the adoption of regulations, but that cities and counties also are granted pure legislative power by the California Constitution to adopt laws. Article XI, Section 7

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of the California Constitution empower cities and counties to "make and enforce within its limits all local, police, sanitary, and other ordinances, and regulations not in conflict with general laws". Charter cities are granted broader authority by Article XI, Section 5 of the California Constitution to adopt local laws in conflict with State law as long as the subject matter is a municipal affair rather than one of statewide concern. *Johnson v. Bradley* (1992) 4 Cal. 4th 389; *DeVita v. County of Napa* (1995) 9 Cal. 4th 763. The California Supreme Court has broadly construed the constitutional grant of police power to cities and counties, and indicated that the local legislative authority is as inclusive as that which may be exercised by the State Legislature. *Birkenfeld v. City of Berkeley* (1976) 17 Cal. 3d 129, 140. When cities and counties are exercising their legislative authority, it would be just as improper to subject those legislative acts to the judicial review procedures and standards of the current proposal as it would be to attempt to apply those requirements to the adoption of statutes by the State Legislature.

The blurring of the distinction between the judicial review of local legislative acts (i.e. the adoption of ordinances) and of State quasi-legislative acts (i.e. the adoption of regulations by a State agency) and quasi-judicial decisions results from the following provisions of the current proposal:

1. "Rule" is defined in Section 1121.290 to include both regulations and ordinances. "Agency action" is defined in Section 1121.240 to include both the adoption or failure to adopt any rule or decision. Accordingly, whenever the term "rule" or "agency action" is used in the various statutory provisions it includes the local legislative act of adopting or failing to adopt an ordinance. This is contrary to the commonly understood meaning of "rule" and fails to distinguish clearly between the different procedures and standards of judicial review which apply to legislative as opposed to quasi-legislative and other types of acts.

2. An "independent judgment" test with "appropriate" deference is established in Section 1123.420 for all types of agency actions, including the adoption of or failure to adopt ordinances. This independent judgment test is stated to expressly include claims that the adoption or failure to adopt an ordinance was based on an incomplete determination of the issues by the agency, and claims that there was an erroneous application of the law to the facts by the agency. Litigation would be likely to ensue to determine whether these independent judgment provisions have displaced the abuse of discretion standard used by courts for many decades for the review of legislative acts and whether any such change would result in a violation of the separation of powers between the judicial and the legislative branches of government. *California Teachers Assn. v. Ingwerson* (1996) 46 Cal. App. 4th 860, 866-867.

3. The proposed provision in Section 1123.820(d) authorizing a Court to require a brief explanation of reasons for the adoption or failure to adopt an ordinance also invites judicial encroachment into the legislative power of cities and counties.

4. The Comment under Section 1123.450 states that a "Court can still legitimately review the rationality of legislative fact-finding in light of the evidence in the whole record". This has never been the law for legislative acts as opposed to quasi-legislative acts. Under existing law, the determination of the issue whether the exercise of legislative authority is arbitrary and

capricious, which is the general standard for judicial review of ordinances and statutes, is not confined to the record of the legislative proceeding nor is legislative fact-finding generally required. *Ensign Bickford Realty Corp. v. City Council of the City of Livermore* (1977) 68 C. A. 3d 467.

5. The requirement of Section 1123.820(a) for the production of an "administrative record" for any "agency action" again ignores the important distinction between legislative and administrative acts. There is no "administrative record" for legislative acts. This is most evident when the legislative power is exercised by the voters through initiative, but is equally true for the adoption of laws by the legislative body. See *Birkenfeld v. City of Berkeley, supra.*

6. The allowance by Section 1123.94 of an *in forma pauperis* challenge to regulations and ordinances as well as to decisions, would require agencies to pay for the transcript costs of actions challenging the adoption or alleged failure to adopt ordinances. This could be a significant new mandated cost on local agencies whenever they hold lengthy public hearings on proposed ordinances, and would appear to be an unjustified extension of the existing provision which only requires local agencies to pay for the transcripts of administrative hearings for persons unable to pay for them. Whereas an administrative decision generally only directly affects an individual or a few individuals who may not be able to afford a transcript, the legislative act of adopting an ordinance generally affects a large number of persons so that it is highly unlikely that a publicly financed transcript would be necessary to provide a reasonable opportunity for interested persons to challenge the adoption or alleged failure to adopt an ordinance or regulation.

Due to the shortness of the time the County Counsels' Association has had to review this proposal, this letter does not contain a complete statement of the comments and specific recommendations of the Association on this proposal. It is our understanding that the League of California Cities has also not completed their review of the proposal. It is therefore requested that the Commission delay further consideration of the current proposal to allow additional review by local government and to further consider the impacts of the proposal on the judicial review of local government actions, including legislative acts.

Sincerely,

Ruth Sorensen

Ruth Sorensen

cc: Joanne Speers, League of California Cities
Daniel L. Siegel, Attorney General's Office
County Counsels

THE COMMITTEE ON ADMINISTRATION OF JUSTICE
THE STATE BAR OF CALIFORNIA

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

August 23, 1996

BY FACSIMILE

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

Re: California Law Revision Commission's Revised Tentative Recommendation on Judicial Review of Agency Action (Recommendations")

Dear Ladies and Gentlemen:

The Committee on Administration of Justice (CAJ) of the State Bar has considered the Recommendations at several meetings of both the North and South sections. Following are CAJ's views.

1. **Petition for Review of Agency Action**

CAJ supports replacing the present different methods for seeking judicial review with a single method called Petition for Review of Agency Action, because of the simplicity and uniformity that can result.

2. **Standing for Appeal**

The provision in the Recommendations that the person seeking review need not have objected below, but rather have some public interest standing or other grounds to bring the proceeding, is beneficial and CAJ supports this.

3. **Exhaustion of Administrative Remedies**

CAJ supports the proposal in the Recommendations to codify existing caselaw on this point.

4. **Denial of Request for Continuance**

The two sections of CAJ took different positions on whether there should be immediate appeal available where a request for continuance is denied. The North opposes this part of the Recommendations, as the full CAJ had done in 1995, on the ground that the prejudicial effects of having to proceed without continuance can rarely be cured after the matter is heard on its merits. The South supports the Recommendation with the view that it would not have a substantive impact.

5. **Statute of Limitations for Review of Administrative Adjudication**

The proposed law makes a uniform 30-day limitations period for judicial review under the Administrative Procedure Act (APA) apply to most state agency adjudications. The 90-day limitations period for local agency adjudications is retained, as are certain other limitations periods which are unique to certain agencies. The proposed law also requires the agency to give written notice to the parties of a date by which review must be sought, or the limitations period is tolled up to 180 days after the decision. CAJ supports the provision because of the written notice requirement and because it believes the uniformity of is desirable.

6. **Standard of Review**

A. **Review of Agency Interpretation of Law**

The Recommendations now would adopt in a "Comment" to the statute a principle that statutory interpretation by an agency within its expertise should be given deference by the courts unless "clearly erroneous". CAJ believes this is inconsistent with the independent judgment test, which CAJ has consistently supported, and therefore opposes the inclusion of the Comment language. CAJ recommends changing the comma after "Court" on line 3, page 32 of the Recommendations, to a semi-colon and deleting the remainder of the sentence starting with the phrase "giving deference to...."

B. **Review of Agency Application of Law to Fact**

The Recommendations propose that if there is no dispute of basic facts on the record and the dispute revolves around the application of law to those facts, the agency's determination should be reviewed as a question of law. This in effect provides for independent review of the agency action, and CAJ supports the proposal.

C. **Review of Agency Fact Finding**

The Recommendations propose to eliminate independent judgment as a standard for review of agency fact-finding. It would instead require the court to uphold agency findings if supported by "substantial evidence" in the record as a whole.

The Comment to Section 1123.430 (Review of Agency Fact Finding) states the application of the substantial evidence standard as follows:

> "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, then the administrative law judge, the substantiality of the evidence supporting the agency's decision is called into question."

While members voiced some concerns whether constitutional issues would arise in situations where substantial vested rights are affected, CAJ voted to support the proposed change.

D. **Review of Agency Exercise of Discretion**

This section concerns the standard of review for action taken by an agency in the exercise of its discretion. The proposed statute sets "abuse of discretion" as the standard. It also provides that to the extent that agency action required the exercise of discretion, based on a determination of fact made or implied by the agency, the substantial evidence standard would apply. The Recommendations state that in reviewing discretionary action, the court would use independent judgment with appropriate deference to decide whether the agency's choice was legally permissible and whether the agency followed legally required procedures. However, the statute itself uses "abuse of discretion" standard.

The Recommendations (and the Comment to Section 1123.450) describe an analysis of "abuse of discretion" as a two-step inquiry: (1) whether the factual underpinnings of a decision are supported by substantial evidence; (2) as to any discretionary action of the agency based on a choice or judgment, whether the agency action is unreasonable, arbitrary or capricious. CAJ supports the proposal, although a number of members suggest that the two-step inquiry be incorporated into the statute itself.

E. Review of Agency Procedure

Current law requires California courts to use independent judgment on the question whether agency action complies with procedural requirements of California statutes or the Constitution. The Recommendations would have courts continue to use independent judgment on procedural issues, but give deference to agency decisions regarding procedural provisions and statutes or about the propriety of the body making the decision.

CAJ supports the proposal which this appears to codify a requirement of deference to the review of agency procedures, and gives latitude to the court on how much deference to give.

7. Proper Court for Review; Venue

The proposed law changes the venue requirements from the county where the cause of action arose to include Sacramento County as an additional permissible county when a state agency is involved. For judicial review of local agency action, venue remains in the county of jurisdiction of the agency. CAJ is concerned that actions could be brought by agencies in Sacramento even though there was no contact with the parties or activity involved, and even though it might be distant from the residence of the individual affected. CAJ therefore opposes this proposal in the Recommendations.

8. Stays Pending Review

The Recommendations propose simplifying the scheme for granting stays by imposing one uniform standard regardless of the type of agency action being reviewed. Several factors, including the public interest and likelihood of success on the merits, as well as the degree to which the applicant for a stay will suffer irreparable injury from denial and the degree to which the grant of a stay would

harm third parties, are applied. Because this removes the existing difference for stays in medical and certain other cases, CAJ supports the provision.

Very truly yours,

Denis T. Rice for the Committee on
the Administration of Justice

DTR:rkn
062095/f-666666:/36/215386

cc: Curtis E.A. Karnow, Chair
Robert C. Vanderet, Vice Chair
Monroe Baer, Staff Attorney

CSEA California School Employees Association

August 6, 1996

Allan Fink, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: **Comment on Revised Tentative Recommendation Judicial Review of Agency Action**

Dear Chairperson Fink and Members of the Commission:

California School Employees Association (CSEA) represents over 175,000 public employees in California, almost all employed by local agencies such as school and community college districts. CSEA thanks the Commission for its decision to retain independent judgment review of factfinding by a local agency when the administrative adjudicatory decision affects a fundamental vested right.

CSEA has previously urged the Commission to retain the current independent judgment test for all agencies unless the lowered level of judicial scrutiny was accompanied by guarantees of adequate safeguards in the administrative procedures. This is the same approach followed by the California Supreme Court in Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Board (1979) 24 Cal.3d 335.

In Tex-Cal, the Court did not approve substantial evidence review until after it was assured that the administrative adjudication subject to review mandated adequate due process safeguards, including the separation of prosecutorial from adjudicatory functions. (Id. at p. 345.)

Prior to considering any change in the standards for judicial review of state agency action, the Commission followed this same approach by carefully reviewing the Administrative Procedure Act (APA), broadening its scope and recommending a mandatory "Administrative Adjudication Bill of Rights," which has now been enacted. (Gov. Code §§ 11425.10 - 11435.65.)

Unfortunately, the Commission departed from its initial goal of developing a "one-size-fits-all" procedure for administrative adjudication. Several exemptions from the safeguards were written into the Commission's recommendation that resulted in SB-523 (1995, Kopp). Under the circumstances, the Commission should ensure that the standards for judicial review are not lowered, in any case for any agency, unless accompanied by guarantees of adequate safeguards in the agency's administrative procedures.

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Given that the Revised Tentative Recommendation does not change the standard of review for local agencies, CSEA's concerns focus on one exemption created for the Department of Motor Vehicles (DMV). Vehicle Code section 14112 exempts proceedings for issuance, denial, revocation, or suspension of a driver's license from the separation of functions requirement of the Administrative Bill of Rights.

The DMV is probably the state agency where administrative proceedings result in the most perceptions of unfairness. (See, e.g., "Due Process and the DMV," The Recorder, February 22, 1991, p. 1.) The Commission resolved CSEA's main concern by limiting the exemption to license proceedings, as opposed to schoolbus and ambulance operation certificate proceedings, but independent judgment review should be preserved for all adjudications that lack adequate safeguards, particularly something so critical to due process as the separation of functions. The DMV should be required to take the bitter with the sweet.

CSEA appreciates the care with which the Commission has developed its recommendations concerning both state agency administrative adjudication and judicial review. While CSEA's proposals have not always been adopted, they have always been given full and fair consideration. Thank you for your courtesy and cooperation.

Sincerely,

William C. Heath
Deputy Chief Counsel

cc: Michael R. Clancy, CC
Barbara Howard, DGR

...wch\law-rev\fink.ltr

STATE OF CALIFORNIA

PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

August 14, 1996

The Honorable Colin Wied, Chair
California Law Revision Commission
4000 Middlefield Rd. D-1
Palo Alto, CA 94303

VIA FEDERAL EXPRESS

Re: Judicial Review of Agency Action -- Revised Tentative Recommendation

Dear Mr. Wied:

At its meeting on August 2, 1996, the California Public Utilities Commission (CPUC) considered the revised tentative recommendation of the Law Revision Commission (LRC) on judicial review of agency action. The CPUC voted unanimously not to oppose the LRC's recommendation to include review of the CPUC's highway carrier licensing actions in the new judicial review statute. However, the CPUC also voted unanimously to request a change in the proposal so that review of these actions would take place in a single state court of appeal, rather than in superior courts throughout the state. The CPUC also authorized its Legal Division to recommend other revisions of a more technical nature.

There are several reasons why the class of cases covered by the current LRC proposal should be subject to review in a single court of appeal. First, while the filing of an application for rehearing will not be required before judicial review of the actions of most agencies under the LRC proposal, it will be required before review of the CPUC's actions. In responding to an application for rehearing the CPUC can, and does, correct legal error and narrow the issues for judicial review. This should make superior court review an unnecessary extra step. Indeed, under the current LRC proposal a number of state agencies are not subject to superior court review. These agencies include the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board which, like the CPUC, are constitutional agencies.

Second, there is a need for uniformity of decision and the development of court expertise, that can best be accomplished by providing for review in a single court of appeal. This is especially true with regard to the initial licensing of passenger stage corporations (PSCs), which is covered by the current LRC proposal. The granting or denying of initial licenses to passenger stage corporations (PSCs) involves consideration of whether the public convenience and necessity requires the proposed service (see Pub. Util. Code § 1031), which is essentially a policymaking function. Undue or excessive judicial interference with this CPUC policymaking function will best be

minimized by lodging judicial review in a single court of appeal which, over time, will develop expertise in the area.

Avoiding inconsistent decisions by different courts is also important, among other reasons because such decisions will stimulate appeals, thereby increasing delay in final determinations. For example, under the LRC proposal there may well be lower court review of the acceptability of various insurance filings made with the CPUC. Because the same rules generally apply to insurance filings made on behalf of all highway carriers, it is important that any judicial decisions concerning what kind of filings are acceptable be uniform throughout the state. This can best be achieved by providing for review in a single court of appeal. Concerns for uniformity and court expertise will become even more important if additional kinds of CPUC actions should become subject to the proposed judicial review statute.

The CPUC's Legal Division also recommends that the LRC clarify the time within which a person must seek judicial review of CPUC highway carrier licensing actions. Under current law, a party must apply for judicial review of a CPUC decision within 30 days after the CPUC mails its decision denying rehearing (or within 30 days after the CPUC mails its decision on rehearing, if the application for rehearing was granted). (Pub. Util. Code § 1756.) This provision provides a clear deadline for filing for review.

Under the LRC's current proposal, <u>if</u> the CPUC has conducted an <u>evidentiary hearing</u>, the time limit for filing for judicial review would be 30 days after the effective date of the decision or 30 days after the CPUC mails the notice required by proposed § 1123.630, whichever occurs later. (See proposed § 1123.640(a).) However, where there has been no evidentiary hearing (or if the CPUC fails to provide the notice required by proposed § 1123.630), there apparently would be <u>no</u> statute of limitations for filing for judicial review. We believe this uncertainty is <u>not</u> desirable.

Proposed § 1123.640(c) adds further uncertainty. Under that subdivision, the time for filing for judicial review is extended while a party is seeking reconsideration of the decision pursuant to statute, but judicial review must be sought no later than 180 days after the decision is effective. It is not clear whether the statutorily required application for rehearing before the CPUC (Pub. Util. Code § 1731) would fall within the term "reconsideration". If it does, then under certain circumstances a person might be <u>required</u> to petition for judicial review <u>before</u>

the CPUC had finally acted on the application for rehearing.[1] We submit that a party should never be required to seek judicial review of CPUC decision while an application for rehearing, or rehearing, is still pending before the agency.

These uncertainties could be clarified in several different ways. First, the existing time limit for filing for court review, contained in Pub. Util. Code § 1756, could continue to apply to those CPUC highway carrier licensing actions subject to the new judicial review statute. Alternatively, the time limit contained in proposed § 1123.640(a) and (b) could apply to those CPUC highway carrier licensing actions that are "adjudicative proceedings" and a statute of limitations for those highway carrier licensing actions that are not adjudicative proceedings could be added to the proposed statute or to the Public Utilities Code. Under this alternative, it should be made clear that an application for rehearing to the CPUC does not seek "reconsideration" within the meaning of proposed § 1123.640(c).

The CPUC Legal Division has a number of other relatively technical concerns about the drafting of the proposed statute. However, Legal Division Staff wishes to discuss these matters with LRC staff before forwarding any written comments. The Legal Division will forward any additional comments it may have as soon as possible.

In summary, the CPUC requests that the Law Revision Commission further revise its proposal, so that the CPUC highway carrier licensing actions subject to the new judicial review statute would be reviewed in a single court of appeal. This change would recognize the role of the mandatory application for rehearing process before the CPUC It would also promote the development of judicial expertise and avoid inconsistency of decisions. The CPUC Legal Division also requests modification of the proposal so that the statute of limitations for filing for court review of CPUC highway carrier licensing actions will be clear in all cases (not just in adjudicative proceedings).

Sincerely,

Peter Arth, Jr.
General Counsel

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1 Pub. Util. Code § 1733 already permits a party who has filed an application for rehearing to seek judicial review 60 days after filing the application if the CPUC has not stayed the effective date of the order.

SOUTHERN CALIFORNIA EDISON
An EDISON INTERNATIONAL Company

Julie A. Miller
Attorney

July 29, 1996

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Re: Subject: N-200; Tentative Recommendations Regarding Judicial Review of Agency Action

Dear Commissioners:

Southern California Edison Company has followed with great interest the California Law Revision Commission's work in reforming the California Administrative Procedure Act ("APA") as well as your efforts to streamline the law regarding judicial review of agency action. We agree with your view that California's provisions for judicial review of agency actions are antiquated, and should be replaced with a single, straightforward statute for judicial review of all forms of state and local agency action.

The Law Revision Commission should seriously consider whether California Public Utilities Commission ("CPUC") decisions should be subject to a broadened scope of judicial review. Currently only the California Supreme Court reviews CPUC decisions, and then only by discretionary writ. When the present system of judicial review of Commission decisions was enacted in 1915, there were seven justices on the Supreme Court and nine appellate justices. In the early 1900's, the Supreme Court issued a written opinion on almost every CPUC case. Today, the Legislature has increased the number of appellate justices to approximately 86 justices. SB 874 as sponsored by Senator Calderon, will further increase the number of appellate justices by nine. Yet the Supreme Court continues with seven justices to hear the burgeoning number of cases from the lower courts.

The only agencies in the state reviewed by the California Supreme Court directly are the CPUC, the State Bar Court, and the CEC (for siting decisions). Most agency actions are reviewed in superior court or in the court of appeals. Due to the Supreme Court's workload, it rarely reviews CPUC decisions. In the last five years, the Supreme Court has issued no opinions reviewing Commission decisions, except for one recent decision involving the State Assembly versus the PUC. There is effectively no review at the Supreme Court.

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Today, the CPUC is the only public utilities commission in the nation, with the exception of that in West Virginia, where there is no judicial review as of right.

Edison supports allowing appeal of Commission decisions as of right in the Courts of Appeal with a standard of review that gives appropriate deference to agency policymaking. The standard of review should be 'substantial evidence' or 'arbitrary and capricious', depending on the type of matter being reviewed. As you are aware, the California Supreme Court's standard of review is extremely narrow. Under Pub. Util. Code § 1757 and Camp Meeker,[1/] it is limited to whether the CPUC has regularly pursued its authority, including whether the decision is constitutional. The findings of the Commission are final and not reviewable.

Edison also supports applying the tenets of the Administrative Procedures Act to the CPUC. In conjunction with the APA, judicial review would allow the development of a uniform body of appellate law applicable to all agencies in the state. This is more efficient than specialized rules that are understood only by agency specialists.

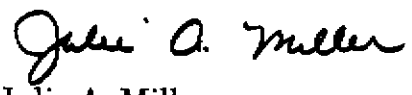
We recognize that the appellate review process also creates the potential for increasing uncertainty in the CPUC's decisionmaking process. Parties may seek to stay, or reverse a CPUC decision in order to delay implementation of a CPUC decision. However, there are several factors that would mitigate this. SB 1322 provides that "under no circumstances shall the Supreme Court or Court of Appeal stay or suspend any order or decision by the Commission authorizing an increase or decrease in rates or changing any rate classification." In addition, Pub. Util. Code §1762 requires that the court must certify that "great or irreparable harm would otherwise result to the petitioner" and specify the nature of the damage, based on evidence submitted to the court after 5 days notice and hearing. Further, the party seeking a stay must file a suspending bond. These requirements, which are also in SB 1322, have proved sufficiently formidable that the last time that a PUC decision was stayed was twenty-four years ago.[2/] Finally, the present provisions of Article VI, Section 19 of the California Constitution requires that Appellate Courts decide cases within 90 days of submission.

1/ Camp Meeker Water System, Inc. v. Public Utilities Commission, 51 Cal. 3d 845, 274 Cal. Rptr. 678 (1990).

2/ The last time a PUC decision was stayed by the Supreme Court pursuant to Pub. Util. Code § 1762 was in 1972. City of Los Angeles v. Public Utility Commission, 7 Cal. 3d 331, 102 Cal. Rptr. 103 (1972). The Court issued a partial stay providing that all sums collected by PT&T pursuant to the rate authorized by the CPUC decision would be subject to refund in whole or in part upon order of the Court should the CPUC's decision by annulled or modified. (Federal income tax expense decision.)

The CPUC has special powers. But where there is great power there is and obligation to ensure that the process is fair in terms both in appearance as well as fact. We support your efforts to develop uniform, well-understood procedures, uniformly construed. However, the real benefit to judicial review, is not that decisions will be reviewed, but the fact that the availability of the remedy will improve the decisionmaking process.

Very truly yours,



Julie A. Miller

Enclosures

JAM:jam:LW962110.050

Date: Sun, 2 Jun 96 01:13:08 UT
From: "Gregory Tanner" <Greg149@msn.com>
To: comment@clrc.ca.gov
Subject: Judicial review of Administrative decisions
Status: RO
X-Status:

As I understand it, the recommendation, in part, is to change the standard of review of administrative decisions from an independent judgment standard when a property interest is involved to a substantial evidence standard. If this is the case, I believe such a change would be a travesty!!! It would leave citizens with virtually no recourse to overturn unfair administrative actions, since it would be nearly impossible to overturn such action under a substantial evidence standard. When a property interest is involved, simple justice requires further protection from administrative functionaries capricious actions. Please respond to my comments. Greg Tanner
Greg149@msn.com

PEPPERDINE UNIVERSITY

SCHOOL OF LAW

July 15, 1996

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, Ca 94303-4739

Re: Revised tentative Recommendation on Judicial Review of Agency Action

Dear Nat:

I am writing to support the May 1996 revised tentative recommendation on Judicial Review of Agency Action. There are many reasons to support the recommendation. First, the recommendation replaces an antiquated, procedurally complex (even Byzantine) administrative mandamus judicial review statute with a modern procedurally clear judicial review statute. Litigants and the courts will no longer have to worry over such complex procedural issues as to whether they have chosen the right type of mandamus review to obtain judicial review of the actions of an administrative agency. This statute makes it much easier to focus on the substantive issues that are in litigation between the parties, rather than focusing on arcane procedural issues. Further, this modern statute makes it harder for litigants to have their judicial review proceedings derailed by procedural complexity. Second, the recommendation codifies case law on many important topics such as standing, exhaustion of administrative remedies, ripeness, and primary jurisdiction. This is very helpful to litigants and the courts in deciding issue that will arise under the new statute. Third, the recommendation jettisons the independent judgment standard of judicial review of fact finding (except for cases in which the agency head changes a fact determination made by an OAH ALJ in an adjudicative proceeding), and replaces it with the much better substantial evidence standard of review. Finally, the recommendation modernizes the law on judicial review of agency action in California, a significant achievement that should allow the courts and litigants in administrative law cases to do their jobs much better and more efficiently.

Very Truly Yours,

Gregory L. Ogden
Professor of Law

MALIBU, CALIFORNIA 90263-4611 ☐ TELEPHONE 310/456-4611 ☐ FAX 310/456-4266

California Law Revision Commission
4000 Middlefield Road, Rm. D-1
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Philip A. Conti C-86098
High Desert State Prison
P.O. Box 3030, D7/206
Susanville, CA 96130

August 5, 1996

Commissioners:

First, I commend the Commission for its effort and compliment Professor M. Asimow for his voluminous contribution. The enormity of the State of California and the complexity of its legal structure could well use reformulation in this as well as other areas, facilitating simplicity, effeciency and, not least of all, access. The evolution of our modern democratic society has proceeded in fits and starts, but it should never be lost sight of that perhaps the most important function of the judicial branch is its role as the last bastion of relief for an individual against the tyranny of the Leviathon.

The May 1996 tentative recommendation should assist the legislature in adopting, rejecting or modifying the proposals by providing a guideline and reference resource which explains and helps clarify historical development of rules and provisions for review, identifies problem areas and brings to light various incongruities in need of resolvement. The prefatory background material makes allusion to the Commission's continuing mandate (1987 Stat. res. ch. 47 and 1995 Stat. res. ch. 87) and its previous work involving "administative adjudication" (adopted 1995 stat. ch. 938). That revision of the Government Code together with 1994 stat. ch. 1039, directing rules and regulations toward adoption of "performance standards" instead of "prescriptive" measures, should alleviate the need to decipher "technical violations" and ease the strain on the judiciary. Like the painting of the Golden Gate bridge, regulatory revision is a never ending chore; work will now have to proceed apace.

The recommendations could elaborate upon and thus make beneficial use of that insightful panoramic perspective gained through the Commission's previous endeavor, feedback from the current work and identification of foreseeable areas in need of improvement to portray a sense of continuity. Additionally, more emphasis on how the current recommendations integrate with the various existing codes, especially the APA, would be helpful. Including commentary concerning the impact upon and the extent of consultation and coordination with other bodies, such as the Commission currently studying the proposed revision of the state constitution as well as the Judicial Council, may also be considered.

Here I must express a couple of misgivings with the recommendations as well as with the existing scheme. It is my feeling that a substantial evidence standard of review off a closed record in matters affecting "fundamental" rights is too strict a burden which has the potential to foreclose direct relief in serious matters and all too easily leads substantiation to possible consequent collateral damages. And although I endorse those provisions which will afford standing upon an interested party affected by "rule" changes who previously did not challenge the rule, it is not clear that the recommendations will provide an adequate avenue for judicial recourse in the event of re-interpretation or internal modification of agency "operating procedures" or other less-than-regulatory policy devices (see eg. proposed CCP § 1121.140).

Finally, if the Commission can make available to me copies of Professor Asimow's Judicial Review of Administrative Decisions: Standing and Timing and his The Scope of Judicial Review of Decisions of California's Administrative Agencies then I would be sincerely appreciative.

Respectively,
Philip Conte

#N-200

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

RECOMMENDATION

Judicial Review of Agency Action

September 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
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(415) 494-1335 FAX: (415) 494-1827

CALIFORNIA LAW REVISION COMMISSION
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September 12, 1996

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

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.

This study was conducted pursuant to Resolution Chapter 38 of the Statutes of 1996.

Respectfully submitted,

Allan L. Fink
Chairperson

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 in 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 particular 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, does not apply to an action for refund of taxes under Division 2 of the Revenue and Taxation Code, does not apply to an action under the California Tort Claims Act, does not apply to litigation in which the sole issue is a claim for money damages or compensation if the agency whose action is at issue does not have statutory authority to determine the claim, does not apply to validating proceedings under the Code of Civil Procedure, does not apply to judicial review of a decision of a court, does not apply to judicial review of an award in binding arbitration under Government Code Section 11420.10, does not apply to judicial review of action of a nongovernmental entity except a decision of a private hospital board in an adjudicative proceeding, and does not limit use of the writ of habeas corpus. The proposed law does apply to judicial review of property taxation under Division 1 of the Revenue and Taxation Code.

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, and Section 1013(a) relating to extension of time where notice is mailed, do 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 that a substantial right is affected and that the person 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.

Under the proposed law, the person seeking review need not personally have objected to the agency action, as long as the issue to be reviewed was raised before the agency by someone.[40] This avoids the undesirable effect of requiring a person

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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).

seeking review to associate in the review process another person who did protest to the agency but is not now interested in the judicial review proceeding.

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.[41]

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. There is no sound reason to treat certain constitutional claims differently for standing purposes.[42]

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.[43] 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[44] 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.[45] 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. 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. However, under existing law a complaining person has no general right to become a party to an administrative proceeding. See California Administrative Hearing Practice § 2.45, at 85 (Cal. Cont. Ed. Bar 1984).

42. Asimow, *supra* note 26, at 13 n.31. The proposed law does not adopt the federal or Model Act zone of interest test. See generally *id*. at 13-15.

43. 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.

44. Code Civ. Proc. § 526a.

45. 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.[46] The proposed law provides exceptions to the exhaustion of remedies rule to the extent administrative remedies are inadequate[47] or where requiring their exhaustion would result in irreparable harm disproportionate to the public and private benefit from requiring exhaustion.[48] 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.[49]

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. The proposed law eliminates the rule that in an adjudicative proceeding agency denial of a request for a continuance is judicially reviewable immediately.[50] Judicial review of such matters should not occur until after conclusion of administrative proceedings.[51]

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.[52] 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.[53] It provides that the court should send an entire

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46. "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).

47. 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.

48. 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.

49. 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.

50. 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.

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. 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.

53. Most California primary jurisdiction cases incorrectly describe the issue as one of exhaustion of remedies. Asimow, *supra* note 26, at 71. The proposed law should clear up much of the confusion.

case, or one or more issues in the case, to an agency for an initial decision only where the Legislature intended that the agency have exclusive or concurrent jurisdiction over that type of case or issue, or where the benefits to the court in doing so outweigh the extra delay and cost to the litigants.[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]

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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 1996 Update, § 7.11, at 78 (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.

The proposed law continues the 30-day limitations period[62] for judicial review of adjudication under the Administrative Procedure Act, and generalizes it to apply to most state agency adjudication.[63] The proposed law continues the 90-day limitations period for local agency adjudication,[64] except that local agency adjudication under the Administrative Procedure Act will be 30 days as at present.[65] Special limitations periods under the California Environmental Quality Act[66] are preserved. Non-adjudicatory action remains subject to the general three or four year limitations period 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.[67] This will be particularly helpful to a party who is not represented by counsel. Failure to give the notice will toll the running of the limitations period up to a maximum of 180 days after the decision is effective.[68]

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.[69] Under the proposed law, the time to petition for review is not extended by a request for the record. Although the petition should allege facts showing entitlement to relief,[70] the record

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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 proposed law preserves a few limitations periods that are longer than the period prescribed in the proposed law: one-year for review of certain state personnel decisions, Gov't Code 19630, six months for review of decisions of the Unemployment Insurance Appeals Board, Unemp. Ins. Code § 410, 90 days for review of certain drivers' license orders, Veh. Code § 14401(a), and one year for review of a welfare decision of the Department of Social Services, Welf. & Inst. Code § 10962.

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

65. 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).

66. Pub. Res. Code § 21167.

67. The requirement of notice to the party of the time within judicial review must be sought is drawn from existing statutes. See Code Civ. Proc. § 1094.6(f) (local agency action); Unemp. Ins. Code § 410 (notice of right to review); Veh. Code § 14401(b) (notice of right to review).

68. Concerning the effective date of the decision, see *supra* notes 62 and 64.

69. 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.

70. Under existing law, a petition for a writ of mandamus must allege specific facts showing entitlement to relief. If it does not, it is subject to general demurrer or summary denial. Gong v. City of Fremont, 250 Cal. App. 2d 568, 573, 58 Cal. Rptr. 664 (1967); 2 G. Ogden, California Public Agency Practice § 53.04[1][a] (1995). The proposed law makes clear 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. See note 23 *supra*.

is not essential at the pleading stage. The times for filing briefs will be provided by Judicial Council rule, the same as for civil appellate practice.[71]

The proposed law does not change 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.[72]

STANDARD OF REVIEW

Review of Agency Interpretation of Law

Under existing law, courts use independent judgment to review an agency interpretation of law.[73] 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.[74] 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.[75]

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.[76]

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71. See Code Civ. Proc. § 901; Cal. R. Ct. 2(a), 122(a).

72. See Ginns v. Savage, 61 Cal. 2d 520, 393 P.2d 689, 39 Cal. Rptr. 377 (1964).

73. 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).

74. 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).

75. Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1195 (1995).

76. Asimow, *supra* note 75, at 1195-96.

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.[77] 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.[78] An interpretation is more worthy of deference if it first occurred contemporaneously with enactment of the statute being interpreted.[79] Deference may also be appropriate if the Legislature reenacted the statute in question with knowledge of the agency's prior interpretation.[80]

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.[81]

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.[82]

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

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

79. 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).

80. 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).

81. 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).

82. 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

Review of Agency Application of Law to Fact

In nearly every adjudicatory decision, the agency must apply a legal standard to basic facts.[83] 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[84] or matters of inference from circumstantial evidence.[85] 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.[86] 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.[87]

Review of Agency Fact-Finding

Basic fact-finding involves determining what happened (or will happen in the future), when it happened, the state of mind of the participants, and the like. Some basic facts are established by direct testimony, some by inference from circumstantial evidence. For example, suppose the agency finds from direct or circumstantial evidence that E, an employee of R, was driving home from a night school course at the time of the accident. R paid for the cost of the night school

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appears to have wanted legal interpretations by these agencies within their regulatory authority to be given greater deference by the courts.

83. Asimow, *supra* note 75, at 1209. For a discussion of what constitutes a basic fact, see text accompanying note 88 *infra*.

84. 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).

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

86. 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 606, 610, 112 Cal. Rptr. 460, 463 (1974).

87. 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 75, at 1217, 1223-24.

and encouraged but did not require E to take the course. Determinations of basic fact such as these can be made without knowing anything of the applicable law.[88]

Under existing law, in reviewing factual determinations in an adjudication by 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.[89] California is the only jurisdiction in the United States that uses independent judgment so broadly as a standard for judicial review of agency action.[90]

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.[91] 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,[92] 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 adjudication substitutes factual conclusions of a trial judge, often a non-expert generalist, for those of the administrative law judge and agency heads who are usually experienced in their professional field. Especially in cases involving technical material or the clash of

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88. Asimow, *supra* note 75, at 1211.

89. E.g., Bixby v. Pierno, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971); see generally Asimow, *supra*, note 75. *Bixby* involved judicial review of a decision of the Commissioner of Corporations approving a recapitalization plan of a family-owned corporation as "fair, just and equitable," an exercise of agency discretion. Bixby v. Pierno, *supra*, 4 Cal. 3d at 150-51. Exercise of agency discretion is subject to abuse of discretion review under the proposed law. See discussion in text accompanying notes 102-12 *infra*. The substantial evidence test of the proposed law for fact-finding applies only to the basic facts underlying the decision, not to application of law to basic facts (reviewed using independent judgment) or to the decision itself.

90. 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 75, at 1164 n.13.

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

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

expert witnesses, administrative law judges and agency heads are more likely to be in a position to reach the correct decision than a trial judge reviewing the record.[93]

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. Independent judgment review requires closer scrutiny of 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.[94]

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.[95] Under the exception, 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 proposed law preserves independent judgment review of that particular determination of fact. 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,[96] a question which is involved in virtually every adjudicative decision.[97]

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.[98] 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.[99]

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93. Asimow, *supra* note 75, at 1181-82.

94. Asimow, *supra* note 75, at 1184-85.

95. 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 75, 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).

96. See discussion under heading "Review of Agency Application of Law to Fact" in text accompanying notes 83-87 *supra*.

97. Asimow, *supra* note 75, at 1209.

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

99. 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

Under existing law, quasi-legislative acts are governed by a special standard akin to substantial evidence review.[100] The proposed law applies substantial evidence review of fact-finding in quasi-legislative and other local agency proceedings.[101]

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.[102]

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.[103] Under existing law, the court reviews 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.[104] The agency must give reasons for the discretionary action in the case of review of adjudicatory action,[105] but not in the case of quasi-legislative action.[106]

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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.

100. See Knox v. City of Orland, 4 Cal. 4th 132, 145-49, 841 P.2d 144, 152-55, 14 Cal. Rptr. 2d 159, 167-70 (1992) (levy of special assessment); Dawson v. Town of Los Altos Hills, 16 Cal. 3d 676, 684-85, 688, 547 P.2d 1377, 129 Cal. Rptr. 97 (1976) (creation of special assessment district).

101. Such other proceedings include ministerial or informal action not involving an evidentiary hearing to determine the legal interest of a particular person. Formal findings of fact would be unusual. in such proceedings.

102. Asimow, *supra* note 75, at 1224.

103. 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).

104. 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 118-25 *infra*.

105. 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).

106. 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).

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.[107] 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.[108]

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.[109] Legislative history of a 1982 enactment[110] 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 reviewed by the same standards for other fact-finding — generally substantial evidence on the whole record[111] — whether the decision arose out of formal or informal adjudication, quasi-legislative action such as rulemaking, or some other function.[112]

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.[113] California courts have occasionally mandated

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107. 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).

108. Asimow, *supra* note 75, at 1228-29.

109. Asimow, *supra* note 75, at 1229.

110. 1982 Cal. Stat. ch. 1573, § 10 (amending Gov't Code § 11350); Asimow, *supra* note 75, at 1230.

111. For a discretionary decision in local agency adjudication, such as fixing a penalty, the standard of review is independent judgment if a fundamental vested right is affected. See discussion in text accompanying notes 98-99 *supra*.

112. 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 75, 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 118-25 *infra*.

113. 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).

administrative procedures not required by any statute, either in the interest of fair procedures[114] or to facilitate judicial review.[115]

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.[116]

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.[117]

CLOSED RECORD

Under existing law, in administrative mandamus[118] 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.[119] For independent judgment review, the court may either admit the evidence itself or remand if one of those two conditions is satisfied.[120]

In traditional mandamus to review ministerial or informal action, extra-record evidence is freely admissible if the facts are in dispute.[121] The court simply takes evidence and determines the issues.[122] In traditional mandamus to review quasi-legislative action, extra-record evidence is admissible only if the evidence existed

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

115. 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).

116. Asimow, *supra* note 75, at 1246.

117. 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 75, at 1247.

118. 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).

119. Code Civ. Proc. § 1094.5(e).

120. Code Civ. Proc. § 1094.5(e).

121. 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).

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

before the agency decision and it was not possible in the exercise of reasonable diligence to present it at the administrative proceeding.[123]

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.[124] This is consistent with the agency's role as the primary fact-finder and the court's role as a reviewing body. 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.[125]

PROPER COURT FOR REVIEW; VENUE

Under existing law, most judicial review of agency action is in superior court.[126] The Supreme Court reviews decisions of the Public Utilities Commission[127] and State Energy Resources Conservation and Development Commission.[128] Either the Supreme Court or the court of appeal reviews decisions of the Workers' Compensation Appeals Board,[129] Department of Alcoholic

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

124. 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.

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

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

127. 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.

128. 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.

129. Lab. Code §§ 5950, 5955.

Beverage Control,[130] and Alcoholic Beverage Control Appeals Board.[131] The court of appeal reviews decisions of the Agricultural Labor Relations Board[132] and Public Employment Relations Board.[133] The proposed law does not alter this scheme.[134]

Under existing law, venue in superior court for administrative mandamus is in the county where the cause of action arose.[135] The proposed law adds Sacramento County as an additional permissible county when a state agency is involved.[136] For judicial review of local agency action, the proposed law provides that venue shall be in the county of jurisdiction of the agency. This is 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.[137] 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.[138]

A stricter standard applies in medical, osteopathic, or chiropractic cases in which a hearing was provided under the APA. The stricter standard also applies to non-health care APA cases in which the agency head adopts the proposed decision of the administrative law judge in its entirety or adopts the decision and reduces the penalty. Under the stricter standard, a stay should not be granted unless the court is satisfied that the public interest will not suffer and the agency is unlikely to prevail ultimately on the merits.[139] The court may condition a stay order on the posting of a bond.

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

131. *Id.*

132. Lab. Code § 1160.8.

133. Gov't Code §§ 3520, 3542, 3564.

134. 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*.

135. 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).

136. Most state agencies have their headquarters offices in Sacramento. The Sacramento County Superior Court is likely to have or develop expertise in judicial review proceedings. 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. The proposed law also preserves the special venue rule for review of drivers' license proceedings. See Veh. Code § 13559 (licensee's county of residence).

137. Gov't Code § 11519(b).

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

139. See Code Civ. Proc. § 1094.5(h).

If the trial court denies the writ of mandamus and a stay is in effect, the appellate court can continue the stay.[140] If the trial court grants the writ, the agency action is stayed pending appeal unless the appellate court orders otherwise.[141]

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.[142]

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.[143]

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140. 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).

141. 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.

142. 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.

143. See Code Civ. Proc. §§ 1094.5(a), 1094.6(c); Gov't Code § 11523. The proposed law also recodifies Government Code Section 800 (attorney fees where agency action was arbitrary or capricious) in the Code of Civil Procedure without substantive change.

JUDICIAL REVIEW OF AGENCY ACTION

CONTENTS

CODE OF CIVIL PROCEDURE

PART 3. OF SPECIAL PROCEEDINGS OF A CIVIL NATURE

Code Civ. Proc. §§ 1120-1123.950 (added). Judicial review of agency action

SEC. ___. 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) Trial de novo.

(2) Action for refund of taxes under Division 2 (commencing with Section 6001) of the Revenue and Taxation Code.

(3) 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. 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 & Agric. 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) exempts from this title actions for refund of taxes under Division 2 of the Revenue and Taxation Code, but does not exempt property taxation under Division 1. This is consistent with existing law under which judicial review of a property tax assessment is not by trial de novo, but is based on the administrative record. See Bret Harte Inn, Inc. v. City and County of San Francisco, 16 Cal. 3d 14, 544 P.2d 1354, 127 Cal. Rptr. 154 (1976); DeLuz Homes, Inc. v. County of San Diego, 45 Cal. 2d 546, 290 P.2d 544 (1955); Prudential Ins. Co. v. City and County of San Francisco, 191 Cal. App. 3d 1142, 236 Cal. Rptr. 869 (1987); Kaiser Center, Inc. v. County of Alameda, 189 Cal. App. 3d 978, 234 Cal. Rptr. 603 (1987); Trailer Train Co. v. State Bd. of Equalization, 180 Cal. App. 3d 565, 225 Cal. Rptr. 717 (1986); Hunt-Wesson Foods, Inc. v. County of Alameda, 41 Cal. App. 3d 163, 116 Cal. Rptr. 160 (1974); Westlake Farms, Inc. v. County of Kings, 39 Cal. App. 3d 179, 114 Cal. Rptr. 137 (1974).

Subdivision (b)(3) provides that this title does not apply to an action brought under the California Tort Claims Act. However, subdivision (b)(3) 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 1123.730(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). However, this title does apply to compel an agency to pay a claim that has been allowed and is required to be paid. Gov't Code § 942.

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. This title does apply to denial by the Department of Health Services of a claim by a health care provider where the department has statutory authority to determine such claims. See, e.g., Welf. & Inst. Code §§ 14103.6, 14103.7. Judicial review of denial of such a claim is under this title and not, for example, in small claims court. See Section 1121.120 (this title provides exclusive procedure for judicial review of agency action).

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 Health & Safety Code § 1339.63 (adjudication by private hospital board).

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

This title also does not apply to proceedings where the substantive right originates in the constitution, such as inverse condemnation. See California Government Tort Liability Practice § 2.97, at 181-82 (Cal. Cont. Ed. Bar, 3d ed. 1992).

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. Conflicting or inconsistent statute controls

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

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

§ 1121.120. Other forms of judicial review replaced

1121.120. (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 1121.120 is drawn from 1981 Model State APA Section 5-101. By establishing this title as the exclusive method for judicial review of agency action, Section 1121.120 continues and broadens the effect of former Section 1094.5. See, e.g., Viso v. State, 92 Cal. App. 3d 15, 21, 154 Cal. Rptr. 580, 584 (1979). Subdivision (a) implements the original writ jurisdiction given by Article VI, Section 10, of the California Constitution (original jurisdiction for extraordinary relief in the nature of mandamus). Nothing in this title limits the original writ jurisdiction of the courts. *Cf.* Section 1123.510(b).

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).

§ 1121.130. Injunctive relief ancillary

1121.130. Injunctive relief is ancillary to and may be used as a supplemental remedy in connection with a proceeding under this title.

Comment. Section 1121.130 makes clear that the procedures for injunctive relief may be used in a proceeding under this title. See Section 1123.730 (injunctive relief authorized).

§ 1121.140. Exercise of agency discretion

1121.140. 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 1121.140 is drawn from 1981 Model State APA Section 1-116(c)(8)(i), and is consistent with the last clause in former Section 1094.5(f).

§ 1121.150. Operative date; application to pending proceedings

1121.150. (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 1121.150 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 Section 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. (a) "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.

(b) When this title applies to judicial review of decision of a nongovernmental entity, "agency" includes such an entity.

Comment. Section 1121.230 is drawn from the Administrative Procedure Act. See Gov't Code § 11405.30 (operative July 1, 1997) & Comment ("agency" defined). Subdivision (a) is broadly drawn to subject all governmental units to this title unless expressly excepted by Section 1120.

§ 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 Sections 1121.230 ("agency" defined), 1123.160 (condition of relief).

§ 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. (a) As it relates to agency proceedings, "party" 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, "party" 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 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 Section 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 orders 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 standard 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. See 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 (judicial review of agency rule), 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). See also Section 1121.120 (judicial review as proceeding for extraordinary relief in the nature of mandamus).

§ 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). Agency action is typically not final if the agency intends the action to be preliminary, preparatory, procedural, or intermediate with regard to subsequent 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, 707-08, 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). See also Section 1121.290 ("rule" defined). For an exception to the requirement of ripeness, see Section 1123.140. 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. An issue is fit for immediate judicial review if it is primarily legal rather than factual in nature and can be adequately reviewed in the absence of concrete application by the agency. Under this language the court must assess and balance the fitness of the issues for immediate judicial review against hardship to the person from deferring 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 1121.120. 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 (a) merely requires a person be "interested" to seek judicial review. Thus if a person has sufficient interest in the subject matter, the person may seek judicial review even though the person did not personally participate in the agency proceeding. See Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 267-68, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972). However, in most cases the exhaustion of remedies rule requires the issue to be reviewed to have been raised before the agency by someone. See Section 1123.350.

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.

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. See also 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 to have the law enforced in the public interest, regardless of any private interest or personal adverse effect.

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 1121.110 (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. 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 (a) governs standing to challenge a decision in an adjudicative proceeding under the Administrative Procedure Act. The provision is thus limited primarily to a state agency adjudication where an evidentiary hearing for determination of facts is statutorily or constitutionally required for formulation and issuance of a decision. See Gov't Code §§ 11410.10-11410.50 (application of administrative adjudication provisions of Administrative Procedure Act) (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) 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 §§ 1731-1736 (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 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 (a), 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 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 for state agencies 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 determination is supported by the weight of the evidence.

(b) In all other cases, whether the determination 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 agency exercise of discretion is based on a determination of fact made or implied by the agency, the standard for judicial review is that provided in Section 1123.430 or Section 1123.440, as appropriate.

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. See Section 1123.430. However, 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 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) (applicability of rules of practice for civil actions), 396b. *Cf.* Padilla v. Department of Alcoholic Beverage Control, 43 Cal. App. 4th 1151, 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 1121.110), such as Business and Professions Code Section 2019 (venue for proceedings against the Medical Board of California). For venue of judicial review of a decision of a private hospital board, see Health & Safety Code § 1339.63(b).

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 Government Code Section 11523.

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 1121.230 ("agency" defined), 1121.210 (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 last day to file petition for review

1123.630. In an adjudicative proceeding, the agency shall in the decision or otherwise give notice to the parties in substantially the following form: "The last day to file a petition with a court for review of the decision is [date] unless the time is extended as provided by law."

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). For provisions extending the time to petition for review, see Sections 1123.640, 1123.650. An agency notice that erroneously shows a date that is too soon does not shorten the period for review, since the substantive rules in Sections 1123.640 or 1123.650 govern. If the notice erroneously shows a date that is later than the last day to petition for review and the petition is filed before that later date, the agency may be estopped to assert that the time has expired. See Ginns v. Savage, 61 Cal. 2d 520, 523-25, 393 P.2d 689, 39 Cal. Rptr. 377 (1964).

§ 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 delivered, served, or mailed, 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.

(D) A different effective date is provided by statute or regulation.

(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, but in no case shall a petition for review of a decision described in subdivision (a) 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 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), 65907 (local zoning appeals board); Lab. Code §§ 1160.8 (Agricultural Labor Relations Board), 5950 (Workers' Compensation Appeals Board); Veh. Code § 13559 (Department of Motor Vehicles).

Section 1123.640 does not override special limitations periods statutorily preserved for policy reasons, such as for the State Personnel Board (Gov't Code § 19630), under the California Environmental Quality Act (Pub. Res. Code § 21167), for the Unemployment Insurance Appeals Board (Unemp. Ins. Code §§ 410, 1243), for certain driver's license orders (Veh. Code § 14401(a)), or for welfare decisions of the Department of Social Services (Welf. & Inst. Code § 10962). See Section 1121.110 (conflicting or inconsistent statute controls). For a special statute on the effective date of a decision, see Veh. Code § 13953.

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 a 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)).

§ 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, but in no case shall a petition for review of a decision described in subdivision (a) 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) The following provisions of Part 2 (commencing with Section 307) do not apply to a proceeding under this title:

(1) Section 426.30.

(2) Subdivision (a) of Section 1013.

(c) 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).

Under subdivision (b)(1), the compulsory cross-complaint provisions of Section 426.30 do not apply to judicial review under this title.

Subdivision (b)(2) provides that the provisions of Section 1013(a) for extension of time when notice is mailed do not apply to judicial review under this title. This continues prior law for judicial review of local agency action under former Section 1094.6. Tielsch v. City of Anaheim, 160 Cal. App. 3d 576, 206 Cal. Rptr. 740 (1984). Prior law was unclear whether Section 1013(a) applied to judical review of state agency proceedings under former Section 1094.5. See California Administrative Mandamus § 7.4, at 242 (Cal. Cont. Ed. Bar, 2d ed. 1989). For statutes providing that Section 1013 does apply, see Lab. Code § 98.2; Veh. Code § 40230. These statutes prevail over Section 1123.710(b)(2). See Section 1121.110 (conflicting or inconsistent statute controls)

Subdivision (c)(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 (c)(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 parties or others.

(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 a formal 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 in a 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.

(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 1121.120 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 1121.140.

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(c) (discovery in judicial review proceeding). 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.

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

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. See Section 1123.420. Admission of evidence 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.

Subdivision (e) makes clear this section does not prevent the court from taking judicial notice of a precedent decision. See Evid. Code § 452.

For a special rule requiring the court to consider all relevant evidence, see Water Code § 1813. This special rule prevails over Section 1123.850. See Section 1121.120 (conflicting or inconsistent statute controls).

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 an agency decision under 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 or of a private hospital board.

Comment. Section 1123.950 continues former Government Code Section 800. See also Sections 1121.230 ("agency" defined), 1121.250 ("decision" defined).

SELECTED CONFORMING REVISIONS

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 § 1121.110 (conflicting or inconsistent statute controls). Copies of pleadings in judicial review proceedings must be served on the parties. See Code Civ. Proc. §§ 1123.610 (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). Writ of mandate

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 under 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). 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 Health and Safety Code Sections 1339.62-1339.64.

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 1121.140 (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).

☞ **Note.** Conforming revisions to the many statutes that refer to Code of Civil Procedure Section 1094.5 are 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.

☞ **Note.** Conforming revisions to the statutes that refer to Government Code Section 800 are 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 1121.110 (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 1121.110 (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

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).

LOCAL AGENCIES

Gov't Code § 54963 (added). Decision; judicial review

54963. (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 54963 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.

PRIVATE HOSPITAL BOARDS

Health & Safety Code §§ 1339.62-1339.64 (added). Judicial review

Article 12. Judicial Review of Decision of Private Hospital Board

§ 1339.62. Definitions

1339.62. As used in this article:

(a) "Adjudicative proceeding" is defined in Section 1121.220 of the Code of Civil Procedure.

(b) "Decision" is defined in Section 1121.250 of the Code of Civil Procedure.

Comment. Section 1339.62 applies definitions applicable to the judicial review provisions in the Code of Civil Procedure.

§ 1339.63. Judicial review; venue

1339.63. (a) Judicial review of a decision of a private hospital board in an adjudicative proceeding shall be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

(b) The proper county for judicial review of a decision of a private hospital board in an adjudicative proceeding is determined under Title 4 (commencing with Section 392) of Part 2 of the Code of Civil Procedure.

Comment. Subdivision (a) of Section 1339.63 continues the effect of former Code of Civil Procedure Section 1094.5(d). See also Anton v. San Antonio Community Hospital, 19 Cal. 3d 802, 815-20, 567 P.2d 1162, 140 Cal. Rptr. 442 (1979) (administrative mandamus available to review action by private hospital board).

Subdivision (b) continues the substance of existing law. See Code Civ. Proc. § 1109; California Administrative Mandamus § 8.16, at 269 (Cal. Cont. Ed. Bar, 2d ed. 1989). See also Sections 1339.62 ("adjudicative proceeding" and "decision" defined); 1339.64 (standard of review of fact-finding).

Judicial review of a decision of a public hospital is also under Code of Civil Procedure Sections 1120-1123.950. See Code Civ. Proc. §§ 1120 (title applies to judicial review of agency action), 1121.130 ("agency" broadly defined to include all governmental entities).

§ 1339.64. Standard of review of fact finding

1339.64. The standard for judicial review of whether a decision 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.

Comment. Section 1339.64 continues former Code of Civil Procedure Section 1094.5(d), except that the independent judgment standard of review of alleged discriminatory action under Section 1316 is not continued.

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. § 1121.110 (conflicting or inconsistent statute controls). Copies of pleadings in judicial review proceedings must be served on the parties. See Code Civ. Proc. §§ 1123.610 (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. § 1121.110 (conflicting or inconsistent statute prevails).

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

6000. The operation of any order, decision, or award of the appeals board under the provisions of this division or any judgment entered thereon, shall not at any time be stayed by the court to which petition is made for ~~a writ of~~ 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. § 1121.110 (conflicting or inconsistent statute prevails).

PUBLIC UTILITIES COMMISSION

Pub. Util. Code § 1768 (added). Judicial review of regulation of highway carriers

1768. Notwithstanding any other provision of this article, judicial review of the issuance, denial, suspension, or revocation of the following, or the imposition of any penalty on the holder of the certificate, permit, registration, or license, shall be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure:

(a) A certificate of public convenience and necessity for a passenger stage corporation pursuant to Article 2 (commencing with Section 1031) of Chapter 5.

(b) 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.

(c) 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.

(d) Registration of an interstate or foreign highway carrier pursuant to Chapter 2 (commencing with Section 3901) of Division 2.

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

(f) Registration of an integrated intermodal small package carrier pursuant to Chapter 2.7 (commencing with Section 4120) of Division 2.

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

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

(i) 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 1768 makes judicial review of specified regulation of highway carriers subject to general provisions in the Code of Civil Procedure for review of agency action. Such review is in superior court rather than the Supreme Court. Code Civ. Proc. § 1123.510. Judicial review under Section 1768 is subject to other provisions of this code, such as the requirement that the person seeking judicial review must first apply for rehearing under Section 1731, and that the person may not rely in court on a ground for review not set forth in the application for rehearing as required by Section 1732, Code Civ. Proc. § 1121.110 (conflicting or inconsistent statute controls).

☞ **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 and other bills affecting the PUC.

PROPERTY TAXATION

Rev. & Tax. Code § 2954 (amended). Assessee's challenge by writ

2954. (a) An assessee may challenge a seizure of property made pursuant to Section 2953 by petitioning for ~~a writ of prohibition or writ of mandate in the superior court~~ review under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure alleging:

(1) That there are no grounds for the seizure;

(2) That the declaration of the tax collector is untrue or inaccurate; and

(3) That there are and will be sufficient funds to pay the taxes prior to the date such taxes become delinquent.

(b) As a condition of maintaining the ~~special~~ review proceedings ~~for a writ~~, the assessee shall file with the tax collector a bond sufficient to pay the taxes and all fees and charges actually incurred by the tax collector as a result of the seizure, and shall furnish proof of the bond with the court. Upon the filing of the bond, the tax collector shall release the property to the assessee.

Comment. Section 2954 is amended to make judicial review under the section subject to general provisions in the Code of Civil Procedure for review of agency action.

Rev. & Tax. Code § 2955 (technical amendment). Recovery of costs by assessee

2955. If the assessee prevails in the ~~special~~ review proceeding ~~for a writ~~ under Section 2954, the assessee is entitled to recover from the county all costs, including attorney's fees, incurred by virtue of the seizure and subsequent actions, and the tax collector shall bear the costs of seizure and any fees and expenses of keeping the seized property. If, however, subsequent to the date the taxes in question become delinquent, the taxes are not paid in full and it becomes necessary for the tax collector to seize property of the assessee in payment of the taxes or to commence an action against the assessee for recovery of the taxes, in addition to all taxes and delinquent penalties, the assessee shall reimburse the county for all costs incurred at the time of the original seizure and all other costs charged to the tax collector or the county as a result of the original seizure and any subsequent actions.

Comment. Section 2955 is amended to recognize that judicial review under Section 2954 is subject to general provisions in the Code of Civil Procedure for review of agency action.

Rev. & Tax. Code § 2956 (technical amendment). Precedence for court hearing

2956. In all ~~special~~ review proceedings ~~for a writ~~ brought under this article, all courts in which such proceedings are pending shall, upon the request of any party thereto, give such proceedings precedence over all other civil actions and proceedings, except actions and proceedings to which special precedence is otherwise given by law, in the matter of the setting of them for hearing or trial and in their hearing or trial, to the end that all such proceedings shall be quickly heard and determined.

Comment. Section 2956 is amended to recognize that judicial review under this article is subject to general provisions in the Code of Civil Procedure for review of agency action.

Rev. & Tax. Code § 5140 (amended). Action for refund of property taxes

5140. The person who paid the tax, his or her guardian or conservator, the executor of his or her will, or the administrator of his or her estate may ~~bring an action only in the superior court~~ petition for judicial review under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure against a county or a city to recover a tax which the board of supervisors of the county or the city council of the city has refused to refund on a claim filed pursuant to Article 1 (commencing with Section 5096) of this chapter. No other person may bring such an action; but if another should do so, judgment shall not be rendered for the plaintiff.

Comment. Section 5140 is amended to make actions for refund of property taxes subject to provisions in the Code of Civil Procedure for judicial review of agency action. This is consistent with case law under which judicial review of property taxes is on the administrative record, not a trial de novo. See Bret Harte Inn, Inc. v. City and County of San Francisco, 16 Cal. 3d 14, 544 P.2d 1354, 127 Cal. Rptr. 154 (1976); DeLuz Homes, Inc. v. County of San

Diego, 45 Cal. 2d 546, 290 P.2d 544 (1955); Prudential Ins. Co. v. City and County of San Francisco, 191 Cal. App. 3d 11452, 236 Cal. Rptr. 869 (1987); Kaiser Center, Inc. v. County of Alameda, 189 Cal. App. 3d 978, 234 Cal. Rptr. 603 (1987); Trailer Train Co. v. State Bd. of Equalization, 180 Cal. App. 3d 565, 225 Cal. Rptr. 717 (1986); Hunt-Wesson Foods, Inc. v. County of Alameda, 41 Cal. App. 3d 163, 116 Cal. Rptr. 160 (1974); Westlake Farms, Inc. v. County of Kings, 39 Cal. App. 3d 179, 114 Cal. Rptr. 137 (1974).

STATE BOARD OF EQUALIZATION

Rev. & Tax. Code § 7279.6 (amended). Judicial review

7279.6. An arbitrary and capricious action of the board in implementing the provisions of this chapter shall be reviewable ~~by writ~~ under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

Comment. Section 7279.6 is amended to make judicial review under the section subject to general provisions in the Code of Civil Procedure for review of agency action.

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. Subdivision (b) of Section 14401 is amended to recognize that judicial review is under Code of Civil Procedure Sections 1120-1123.950. See Code Civ. Proc. § 1120 (application of title).

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 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. § 1121.110 (conflicting or inconsistent statute controls).

UNCODIFIED

Uncodified (added). Severability

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

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

SEC. ___. (a) Except as provided in this section, this act becomes operative on January 1, 1999.

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

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