Study N-200 October 31, 1996

Memorandum 96-76

Judicial Review of Agency Action: Comments on Revised Tentative Recommendation

Attached is a staff draft of the statutory part of the recommendation on *Judicial Review of Agency Action*, revised to carry out Commission decisions at the last meeting. This Memorandum continues discussion of comments on the revised Tentative Recommendation. It picks up where we left off at the last meeting, and also discusses issues the Commission wanted to revisit.

All the attached letters were reproduced for the last meeting. We kept the earlier pagination of exhibits, so pagination is discontinuous:

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
Elisabeth Brandt, Chief ALJ, Dep't of Health Svcs.	Exhibit pp. 19-21
Ruth Sorensen, County Counsels' Association	Exhibit pp. 24-26
State Bar Committee on Administration of Justice	Exhibit pp. 27-31
Kathleen Yates, Department of General Services	Exhibit pp. 33-35
Steven Bassoff, ACSA, PECG, and CAPS	Exhibit pp. 36-37
Philip Scarfo, Polaroid Corporation	Exhibit pp. 38-39
Louis Green, County Counsel, El Dorado County	Exhibit pp. 40-44

The following issues are discussed in this Memorandum:

STANDING

Standing for Review of Administrative Adjudication

At the September meeting, the Commission preferred the draft alternative with a special standing rule for review of adjudication more restrictive than for other kinds of agency action. The Commission was concerned about a nonparty having standing to seek review of adjudication, particularly in zoning variance cases. There was sentiment to deny standing for review of a zoning variance by a person not a party to the administrative proceeding.

The staff would tighten the draft considered at the last meeting by deleting the provision giving standing broadly to a nonparty in environmental and land use adjudication. This would address the Commission's concern by preventing a neighbor who did not participate in the variance proceeding from obtaining review based purely on private interest standing.

The staff would preserve the limited exception of existing law permitting public interest standing for review of adjudication in Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282 (1975). This case involved approval of a conditional use permit and tentative subdivision map for a planned development. The court held failure to exhaust administrative remedies against agency action affecting the entire town in a proceeding to which a person was not a party does not bar him or her from seeking judicial review to enforce important rights which he or she holds as a member of the public. The court said otherwise the public would be barred from redressing a public wrong, and the town would be burdened in perpetuity with illegal zoning of a substantial area of the community by insulating it from review. (The exhaustion of remedies aspect of the *Environmental Law Fund* case has been limited by later cases, cited in the Comment to Section 1123.240 below.)

Continuing public interest standing to review adjudication will not be completely open-ended because public interest standing and exhaustion of remedies requirements must be satisfied, including the exact issue rule under which the issue on judicial review must have been raised before the agency by someone (subject to exceptions, see Section 1123.350). The requirements for public interest standing are:

— The right must be important and affect the public interest.

— The person must reside or conduct business in the jurisdiction of the agency or meet the requirements for organizational standing.

— The person must adequately protect the public interest.

— The person must have requested the agency to correct the action.

As redrafted, these provisions would look as follows:

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

~~(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. . . . 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 Section 1123.220. 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).

[1123.230 — 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~~ was a party to the proceeding.

(b) The person ~~is~~ was a participant in a the proceeding ~~other than a proceeding described in subdivision (a) and satisfies Section 1123.220 or 1123.230.~~ , and is either interested or the person's participation was authorized by statute or ordinance. This subdivision does not apply to judicial review of 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.

(c) The person has standing under Section 1123.230.

Comment. . . . Subdivision (c) is consistent with Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282 (1975). Thus a person may have public interest standing for judicial review of adjudication if the right to be vindicated is an important one affecting the public interest, the person resides or conducts business in the jurisdiction of the agency or meets the requirements for organizational standing, the person will adequately

protect the public interest, and the person has requested the agency to correct the action and the agency has not done so within a reasonable time. Section 1123.230. Moreover, the requirement of exhaustion of administrative remedies must be satisfied, including the rule that the issue on judicial review must have been raised before the agency by someone. Section 1123.350. See also See & Sage Audubon Soc'y v. Planning Comm'n, 34 Cal. 3d 412, 417-18, 668 P.2d 664, 194 Cal. Rptr. 357 (1983); California Aviation Council v. County of Amador, 200 Cal. App. 3d 337, 246 Cal. Rptr. 110 (1988); Resource Defense Fund v. Local Agency Formation Comm'n, 191 Cal. App. 3d 886, 895, 236 Cal. Rptr. 794, 799 (1987).

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

Comment. Section 1123.250 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.

Public Interest Standing

Mr. Bassoff is concerned the existing public standing in taxpayers suits is being restricted by the proposed requirements that the petitioner must "adequately protect the public interest," and that a request must be made to the agency to correct the action. The Comment to Section 1123.230 says the first of these requirements is drawn from the class action provisions of Rule 23(a) of the Federal Rules of Civil Procedure (representative must "fairly and adequately protect the interests of the class"). This seems like a reasonable requirement, since judicial review will have collateral estoppel effect. Thus the court should have discretion to disqualify a petitioner who, for example, lacks the resources to pursue the judicial review proceeding to a successful conclusion. This requirement also seems reasonable in light of concern of the Attorney General about excessive litigation being engendered by the public interest standing provision. **The staff would not delete the requirement that to have public interest standing the petitioner must adequately protect the public interest.**

The Comment to Section 1123.230 says the requirement of a request to the agency to correct the action is drawn from the California Environmental Quality

Act which requires the objection to be made first to the agency, and from the requirement in shareholder derivative suits that the plaintiff must show an effort to secure corrective action from the board of directors. Pub. Res. Code § 21177; Corp. Code § 800(b)(2). A request to the agency may cause it to take corrective action itself, thus obviating the need for judicial proceedings. **The staff would not delete the requirement of a request to the agency to correct its action.**

EVIDENCE OUTSIDE THE ADMINISTRATIVE RECORD

At the last meeting, there was concern about the staff proposal to permit evidence outside the record only if the evidence was "in existence at the time of the agency proceedings." The Commission asked the staff to give this more thought, and to consider the following: Should the closed record requirement be limited to review of rulemaking? If additional evidence is allowed, should the court be required to remand to the agency for this purpose in every case, or should it have discretion to receive the evidence itself in appropriate cases?

Administrative Adjudication and Quasi-Legislative Action

Under existing law, extra-record evidence is generally not admissible in judicial review of administrative adjudication or quasi-legislative action. Code Civ. Proc. § 1094.5(e) (administrative adjudication: extra-record evidence permitted if relevant and "in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing"); Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 578, 888 P.2d 1268, 1278, 38 Cal. Rptr. 2d 139, 149 (1995) (quasi-legislative action: extra-record evidence permitted if it "existed *before* the agency made its decision" and "it was not possible in the exercise of reasonable diligence to present this evidence to the agency"). The draft statute generally continues closed record review for these kinds of cases. **The staff thinks the closed record review of the draft statute is satisfactory for adjudication and quasi-legislative action.**

Ministerial or Informal Action

Under existing law, extra-record evidence is freely admissible in judicial review of ministerial or informal action if the facts are in dispute. *Western States*, 9 Cal. 4th at 575-76, 888 P.2d at 1276-77, 38 Cal. Rptr. at 147-48. The draft statute would significantly change existing law by requiring closed record review of ministerial and informal action. Public employee organizations object to this

change. The staff is concerned about this because the administrative record is most likely to be inadequate for ministerial or informal action. See *Western States*, 9 Cal. 4th at 575, 888 P.2d at 1276, 38 Cal. Rptr. 2d at 147 ("often little or no administrative record" for ministerial or informal action); 2 S. Kostka & M. Zischke, Practice Under the California Environmental Quality Act § 23.52, at 968 (Cal. Cont. Ed. Bar 1993) (without a hearing, the record "will not provide an adequate basis for judicial review"). Messrs. Kostka and Zischke say the record will usually be adequate for review if interested parties were given notice and an opportunity to be heard, the agency maintained a record of its proceedings, and its determination was based on evidence in the record. 2 S. Kostka & M. Zischke, *supra*, § 23.53, at 969. The court in *Western States* agreed with this analysis. See 9 Cal. 4th at 575-76, 888 P.2d at 1276-77, 38 Cal. Rptr. 2d at 147-48.

The difficulty of judicial review where the administrative record is likely to be inadequate raises the question whether ministerial or informal action should be excluded from the draft statute, and reviewed instead by traditional mandamus as under existing law. For example, many sections provide for enforcement of bonds "at law or in equity, by suit, action, mandamus, or other proceedings." The staff reported at the July meeting that it planned to conform these bond statutes by replacing "mandamus" with references to the draft statute. The staff has some concern about doing this because there will generally be no administrative record other than the bond itself.

In May v. Board of Directors, 34 Cal. 2d 125, 129, 208 P.2d 661 (1949), the court said mandamus was justified because the issuer had done nothing for more than 15 years to discharge its bond obligations. The court could not have established this fact without receiving evidence, suggesting we should either preserve traditional mandamus to enforce a bond, or should permit receipt of extra-record evidence. Of these alternatives, the staff prefers to relax the closed record requirement along the lines suggested by Messrs. Kostka and Zischke. This will permit use of the draft statute to review ministerial or informal action, consistent with our stated goal of replacing administrative and traditional mandamus with a single, straightforward statute for review of all forms of agency action.

For review of administrative adjudication under existing law, if extra-record evidence is permitted, the court may receive the evidence itself in cases where the court uses independent judgment. Otherwise, the court must remand to the agency to receive the evidence. Code Civ. Proc. § 1094.5(e). For review of quasi-legislative action, the question appears not to have arisen because extra-record

evidence is so seldom admissible: In quasi-legislative action, all evidence submitted is usually included in the record, so there is rarely any basis for asserting that evidence was improperly excluded. 2 S. Kostka & M. Zischke, *supra*, § 23.54, at 971. For review of ministerial or informal action, the court receives the evidence and makes its own determination of factual issues. California Civil Writ Practice § 6.26, at 211 (Cal. Cont. Ed. Bar, 3d ed. 1996).

The staff recommends continuing existing law by limiting closed record review to cases where interested persons were given notice and an opportunity to be heard and the agency maintained a record of its proceedings (most adjudicative and quasi-legislative action). In all other cases (most ministerial and informal action, and where the agency refuses to act), the court would be permitted either to remand to the agency to create a record or to receive the evidence itself:

> 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 if both of the following requirements are satisfied:
>
> (a) The agency gave interested persons notice and an opportunity to be heard.
>
> (b) The agency maintained a record of its proceedings.
>
> (b) If the requirements of subdivision (a) are not satisfied, the court may either receive evidence itself or may remand to the agency to do so.
>
> **Comment.** . . . The closed record rule of subdivision (a) is limited to cases where the agency gave notice and an opportunity to be heard and maintained a record of its proceedings. These requirements will generally be satisfied in most administrative adjudication and quasi-legislative action. In other cases, subdivision (b) makes clear the court may either receive evidence itself or may remand to the agency to receive the evidence. This will apply to most ministerial and informal action. These rules are generally consistent with Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 888 P.2d 1268, 38 Cal. Rptr. 2d 139 (1995).
>
> If the closed record requirement of Section 1123.810(a) applies, the court still has some discretion to remand to the agency. See Section 1123.850(c).

Must Evidence Have Been in Existence at Time of Agency Proceeding?

Under existing law, whether evidence must have been in existence at the time of the agency proceeding to be admissible on judicial review depends on the nature of the proceeding being reviewed:

— For administrative adjudication in a licensing context, courts have allowed evidence of events that took place after the hearing. See, e.g., Elizabeth D. v.

Zolin, 21 Cal. App. 4th 347, 356-57, 25 Cal. Rptr. 2d 852, 856-57 (1993); Toyota of Visalia, Inc. v. New Motor Vehicle Bd., 188 Cal. App. 3d 872, 881-82, 233 Cal. Rptr. 708 (1987); Windigo Mills v. Unemployment Ins. Appeals Bd., 92 Cal. App. 3d 586, 596-97, 155 Cal. Rptr. 63 (1979); Kostka & Zischke, *supra*, § 23.54, at 971-72. The language of these cases does not limit post-hearing evidence to licensing cases. Logically, the same rule would apply in administrative adjudication other than licensing.

— For quasi-legislative action, the evidence must have been in existence at the time of the proceeding. *Western States*, 9 Cal. 4th at 578, 888 P.2d 1268, 38 Cal. Rptr. 2d at 149; see also Gov't Code § 11347.3 (contents of state agency rulemaking file).

Section 1123.850 does not require the evidence to have been in existence at the time of the agency proceeding. 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*. 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. **The staff recommends adding the "in existence" requirement to Government Code Section 11350 (see draft below under "Selected Conforming Revisions").**

The staff would also add the following to the Comment to Section 1123.850:

> Under Section 1123.850, for new evidence to be received in a proceeding for judicial review of quasi-legislative action, the evidence must have been in existence at the time of the agency proceeding. Gov't Code § 11350 (state agency rulemaking); Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 578, 888 P.2d 1268, 1278, 38 Cal. Rptr. 2d 139, 149 (1995) (quasi-legislative action generally).

SECTIONS IN DRAFT STATUTE

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

§ 1120. Application of title

• **Nongovernmental entities.** At the last meeting, the Commission thought the proposed language to apply the draft statute to a private entity where

"[s]tatutory or decisional law requires a hearing, the taking of evidence, and fair procedures, and vests discretion to determine facts in the inferior tribunal, corporation, board, or officer" was too broad. The Commission wanted more emphasis on the public stature or purpose of the private action. Professor Asimow thought the draft statute should apply to private entities only in the kinds of cases where quasi-constitutional issues are implicated, such as involving a physician's hospital privileges or a member's expulsion from a professional organization, but should not apply where the right to a hearing arises out of private contract, such as a contract of employment or a collective bargaining agreement. The Commission asked the staff bring back a revised draft.

1120. ~~Except as provided by statute~~:

(a) ~~This~~ Except as provided by statute, this title governs judicial review of agency action of any of the following entities:

. . .

(b) This title ~~does not apply to~~ governs judicial review of ~~action~~ a decision of a nongovernmental entity if any of the following conditions is satisfied:

(1) A statute expressly so provides.

(2) 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.

(3) The decision is made in an adjudicative proceeding required by law, is quasi-public in nature, and affects fundamental vested rights, and the proceeding is of a kind likely to result in a record sufficient for judicial review.

Comment. . . . Paragraph (1) of subdivision (b) applies this title to judicial review of a decision of a nongovernmental entity if a statute expressly so provides. For a statute applying this title to a nongovernmental entity, see Health & Safety Code § 1339.63 (adjudication by private hospital board).

Paragraph (2) of subdivision (b) 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*].

Paragraph (3) of subdivision (b) is drawn from a portion of the first sentence of Code of Civil Procedure Section 1094.5(a) (decision made in "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") and from 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). The requirement in paragraph (3) that the proceeding be of a kind likely to result in a record sufficient for judicial review is new, and is necessary to avoid the unfairness that might result from applying the closed record requirement of this title. See Sections 1123.810, 1123.850.

Subdivision (b) 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). If this title is not available to review a decision of a nongovernmental entity because the requirements of subdivision (b) 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). If the person seeking review uses the wrong procedure, the court should ordinarily permit amendment of the pleadings to use the proper procedure. See, e.g., Scott v. City of Indian Wells, 6 Cal. 3d 541, 549-50, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972) (reversible error to sustain general demurrer to complaint for declaratory relief without leave to amend when proper remedy is administrative mandamus).

(Subdivision (b) was subdivision (e) in the prior draft. The staff split out part of Section 1120 to make a new Section 1121 for easier readability.)

Review of ministerial or informal action. The staff is recommending above that evidence be freely admissible on review of proceedings where there was no notice or opportunity to be heard or no agency record of the proceedings. This will usually be ministerial or informal action. The staff thinks this is preferable to excluding ministerial and informal action from review under the draft statute.

Many provisions of the draft statute are tailored for review of a proceeding in which evidence is received and determinations of fact are made. For ministerial or informal action, there will rarely be determinations of fact, so, for example, the standard of review of factfinding will be inapplicable. However, a ministerial duty will arise under some provision of law, so the court on review may be required to reexamine agency interpretations of law.

Section 1123.820, prescribing the items to be included in the record, will often not apply to ministerial or informal action. There may be no record at all, but this will be addressed by permitting the court to admit all relevant evidence. In general, the draft statute appears to work satisfactorily for review of ministerial or informal action.

Review of agency inaction. The draft statute applies broadly to review of an agency's "failure to issue a rule or decision," or "failure to perform any other duty, function, or activity, discretionary or otherwise." Sections 1123.110 (review of final agency action), 1121.240 (agency action includes inaction). Under this provision, the court may order the agency to perform a ministerial duty, or may order the agency to exercise its discretion, although the court may not direct the

agency how to exercise its discretion. Section 1121.140. This is consistent with existing law of traditional mandamus. Code Civ. Proc. § 1085 (mandamus may "compel the performance of an act which the law specially enjoins"); California Civil Writ Practice § 3.27, at 69, §§ 6.2-6.23, at 191-209 (Cal. Cont. Ed. Bar, 3d ed. 1996). It is also consistent with the 1981 Model State Administrative Procedure Act (§ 1-102).

Where the agency refuses to act, the staff-recommended provision allowing to court to receive evidence where there was no notice or opportunity to be heard or no agency record of the proceedings should permit the court to resolve the issues presented, the same as under existing traditional mandamus. Some provisions of the draft statute, such as the standard of review of agency factfinding, will not apply, but that does not appear to create serious problems.

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

• At the last meeting, on the question of tolling during a stay, the Commission was concerned about the situation where the agency stays its action to permit judicial review, and thought that in such a case the limitations period should not be tolled indefinitely. In comparison, a stay by a trial court does not extend the time for appeal. The Commission was inclined not to provide for tolling during a stay, and asked the staff to give further thought to this.

• Under the draft statute, the limitations period to review state agency adjudication runs from the effective date of the decision unless a stay is granted. Section 1123.640. This is drawn from existing law for a formal hearing under the Administrative Procedure Act, but fails to pick up the 30-day limitation of existing law on the duration of a stay granted to permit an application for reconsideration. See Gov't Code § 11521(a). **The staff recommends including in Section 1123.640 the 30-day limit of existing law on extension of the limitations period by a stay:**

> 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~~ 30 days after it is delivered or mailed to the person to which the decision is directed, unless under Section 11521 of the Government Code the agency orders a reconsideration of all or part of the case or orders that the decision is effective sooner.

(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~~ is satisfied:

(A) ~~A reconsideration~~ 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) Subject to subdivision (d), the time for filing the petition for review is extended for a party:

(1) During any period when a stay of the decision is in effect, not to exceed 30 days, or when the party is seeking reconsideration of the decision pursuant to express statute or rule.

(2) If, within 15 days after the decision is effective, the party makes a written request to the agency to prepare all or any part of the record, until 30 days after the record is delivered to the party.

(d) 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.

§ 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 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 during a stay. **The staff would add to Section 1123.650 a provision like that recommended above for Section 1123.640, extending the time to petition for review if a stay is granted, not to exceed 30 days:**

1123.650. (a) The petition for review of a decision in an adjudicative proceeding, other than a ~~decision~~ petition 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~~ delivered, served, or mailed, whichever is later.

(b) Subject to subdivision (c), the time for filing the petition for review is extended as to a party:

(1) During any period when a stay of the decision is in effect, not to exceed 30 days, or when the party is seeking reconsideration of the decision pursuant to express statute, rule, charter, or ordinance.

(2) If, within 15 days after the decision is announced, the party makes a written request to the agency to prepare all or any part of the record, until 30 days after the record is delivered to the party.

(c) 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.

§ 1123.720. Stay of agency action

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

• **Bid protests.** The Department of General Services says it would help the public contracting community to have a 30-day time limit for requesting a stay of a contract under the Public Contract Code. The Polaroid Corporation also asks for a short limitations period. **The staff would add the following two sections to the Public Contract Code:**

10290.2. Notwithstanding Section 1123.720 of the Code of Civil Procedure, application for a stay of an award, implementation, or performance of a contract under this chapter shall be made not later than 30 days after issuance of a decision by a protest hearing officer.

12114. Notwithstanding Section 1123.720 of the Code of Civil Procedure, application for a stay of an award, implementation, or performance of a contract under this chapter shall be made not later than 30 days after issuance of a decision by a protest hearing officer.

The staff consulted with Kathleen Yates, Staff Counsel for the Department of General Services, in drafting this language.

The Polaroid Corporation suggests a provision preventing a trial court from staying an award of a public contract until final judgment on judicial review. Under existing law, the trial court has discretion to stay agency action before

final judgment if it is not "against the public interest." Code Civ. Proc. 1094.5(g). Section 1123.720 continues this discretion, and says a stay may be granted only if it "will not substantially threaten the public health, safety, or welfare." **The staff would preserve trial court discretion to grant a stay before final judgment.**

Discretionary stay on appeal. The Polaroid Corporation is concerned that subdivisions (e) and (f) of Section 1123.720, permitting an appellate court to order that agency action is or is not stayed during an appeal from superior court, has no guidelines for the appellate court to exercise this authority. However, this merely continues language in the administrative mandamus statute, Code of Civil Procedure Section 1094.5. Moreover, the draft statute contemplates that procedural rules such as these will be provided by Judicial Council rule. See Section 1123.710. **The staff thinks this language is satisfactory as drafted.**

Automatic stay on appeal. The Polaroid Corporation would revise subdivision (f) to say agency action is stayed "if an appeal is taken from a final order granting ~~of~~ relief by the superior court." However, some interlocutory orders may be appealed. See Code Civ. Proc. § 904.1; 9 B. Witkin, California Procedure *Appeals* § 43, at 66 (3d ed. 1985). The draft statute does not prescribe or affect rules for appeal. **The staff thinks this language is satisfactory as drafted.**

§ 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.

§ 1123.830. 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 [1996 Cal. Stat. ch. 928 — SB 1507].

§ 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 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~~ an adjudicative 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

• **Augmentation of record.** 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. Mr. Bolz says this provision should not apply to review of state agency 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 agrees, and would add subdivision (d)(1) to Government Code Section 11350 (state agency rulemaking):**

> (d) Notwithstanding Sections 1123.820 and 1123.850 of the Code of Civil Procedure, on judicial review:
>
> (1) The court may not require the agency to add to the administrative record an explanation of reasons for a regulation.
>
> (2) No evidence is admissible that was not in existence at the time of the agency proceeding under this chapter.

The requirement in subdivision (d)(2) that evidence have been in existence at the time of the agency proceeding is discussed above under "Evidence Outside the Administrative Record."

Standard of review. At the last meeting, the Commission decided to make Section 1123.460 (standard of review of agency procedure) inapplicable to state agency rulemaking. This was to preserve the status quo on the deference to be given to a determination by the Office of Administrative Law on whether state agency rulemaking procedures were followed. The Commission will consider that question in the rulemaking study. The approved language is in Section 1123.460 in the attached draft, but the staff thinks it would be better to put that language in Government Code Section 11350 along with the other exceptions to the draft statute for state agency rulemaking. **The staff would move the provision now in subdivision (b) of Section 1123.460 to subdivision (e) of Section 11350:**

(e) Section 1123.460 of the Code of Civil Procedure does not apply to a proceeding under this section.

The introductory clause of Section 11350 should say "Except as provided in subdivisions (d) and (e)," judicial review shall be under the draft statute.

New evidence on review. Mr. Bolz asked that the Comment to Section 1123.850 say the reasonable diligence provision should be "very" narrowly construed, consistent with *Western States*. **The staff would put this language in the Comment to Government Code Section 11350:**

> For judicial review of rulemaking, the provision in Code of Civil Procedure Section 1123.850(a), permitting new evidence on judicial review if it could not in the exercise of reasonable diligence have been produced in the administrative proceeding, should be very 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, 1278, 38 Cal. Rptr. 2d 139, 149 (1995).

Review of underground regulations. Mr. Bolz suggested making clear that "regulation" in Government Code Section 11350 means a duly adopted regulation, not 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 should be addressed in the Commission's rulemaking study, rather than in the judicial review draft.**

Respectfully submitted,

Robert J. Murphy
Staff Counsel

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. Entities to which title applies

1120. Except as provided by statute:

(a) 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 exercising executive powers 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 to judicial review of action of a nongovernmental entity.

Comment. Section 1120 makes clear that the judicial review provisions of this title apply to actions of local agencies as well as state government. *But see* Section 1121(d) (title does not apply to judicial review of a local agency ordinance). The term "local agency" is defined in Government Code Section 54951. See Section 1121.260 & Comment. The introductory clause of Section 1120 recognizes that some proceedings are exempted by statute from application of this title. See Bus. & Prof. Code § 6089 (State Bar Court); Gov't Code § 11420.10 (award in binding arbitration under Administrative Procedure Act); Pub. Res. Code § 25531.5 (Energy Commission); Pub. Util. Code § 1759 (Public Utilities Commission). See also Gov't Code § 19576.1 (disciplinary decisions not subject to judicial review). 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). See also Section 1123.160 (condition of relief).

Subdivision (e) recognizes that another statute may apply this title to a nongovernmental entity. See Health & Safety Code § 1339.63 (adjudication by private hospital board).

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).

§ 1121. Proceedings to which title does not apply

1121. This title does not apply to any of the following:

(a) 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.

(b) 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.

(c) Judicial review of a decision of a court.

(d) Judicial review of an ordinance of a local agency.

Comment. Under subdivision (a)(1) of Section 1121, 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 (a)(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 (a)(3) provides that this title does not apply to an action brought under the California Tort Claims Act. However, subdivision (a)(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 (b), 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).

Subdivision (d) makes clear this title does not apply to judicial review of an ordinance of a local agency. Ordinances of local agencies remain subject to judicial review by traditional

mandamus or by an action for injunctive or declaratory relief. See, e.g., Carlton Santee Corp. v. Padre Dam Mun. Water Dist., 120 Cal. App. 3d 14, 18-19, 174 Cal. Rptr. 413 (1981) (mandamus to review validity of water district ordinance); 2 G. Ogden, California Public Agency Practice § 50.02[3][a] (1996).

§ 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. Application of new law

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 a proceeding for judicial review of agency action pending on January 1, 1988.

Comment. Subdivision (a) of Section 1121.150 applies this title to a proceeding commenced on or after the operative date.

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 that 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 the whole or a part of an agency regulation (including a "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.

Comment. Section 1121.290 is drawn from 1981 Model State APA Section 1-102(10) and Government Code Section 11342(g). 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 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 (this title does not apply to local agency ordinance), 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 1121, 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 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 review of 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.

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. 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).

§ 1123.320. 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).

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 do either of the following:

(1) Participate in the rulemaking proceeding on which the rule is based.

(2) Petition the agency promulgating the rule for, or otherwise to seek, amendment, repeal, or reconsideration of the rule after it has become final.

(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)(2) 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, agency action shall be judicially reviewed under the standards 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); Grier v. Kizer, 219 Cal. App. 3d 422, 434, 268 Cal. Rptr. 244 (1990) (deference to OAL interpretation of statute it enforces); 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); Agricultural Labor Relations Bd. v. Superior Court, __ Cal. App. 4th __, __ Cal. Rptr. 2d __ (1996) [96 Daily Journal D.A.R. 10512, 10518 (Aug. 29, 1996)]; 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) 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.

(c) Notwithstanding 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. 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. 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.

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.* 5 U.S.C. § 701(a)(2) (federal APA).

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.

Section 1123.450 continues a portion of former Section 1094.5(b) (prejudicial abuse of discretion). It clarifies the standards for court determination of abuse of discretion but does 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 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).

The standard of review of agency factfinding in connection with an exercise of discretion is prescribed by the appropriate section in this article. See Sections 1123.430-1123.440.

§ 1123.460. Review of agency procedure

1123.460. (a) 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:

(1) Whether the agency has engaged in an unlawful procedure or decisionmaking process, or has failed to follow prescribed procedure.

(2) Whether the persons taking the agency action were improperly constituted as a decisionmaking body or subject to disqualification.

(b) This section does not apply to state agency rulemaking.

Comment. Subdivision (a) of Section 1123.460 codifies existing law concerning the independent judgment of the court and the deference due agency determination of procedures. *Cf.* 5 U.S.C. § 706(2)(D) (federal APA); Mathews v. Eldridge, 424 U.S. 319 (1976).

Subdivision (a) is drawn from 1981 Model State APA Section 5-116(c)(5)-(6). It continues a portion of former Section 1094.5(b) (inquiry of the court extends to questions whether there has been a fair trial or the agency has not proceeded in the manner required by law). One example of an agency's failure to follow prescribed procedure is the agency's failure to act within the prescribed time upon a matter submitted to the agency. Subdivision (b) leaves case law undisturbed on the standard of review of state agency rulemaking.

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 or entitlement to relief is on the party asserting the invalidity or entitlement to relief.

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).

§ 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 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 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) Subject to subdivision (d), the time for filing the petition for review is extended for a party:

(1) During any period when the party is seeking reconsideration of the decision pursuant to express statute or rule.

(2) If, within 15 days after the decision is effective, the party makes a written request to the agency to prepare all or any part of the record, until 30 days after the record is delivered to the party.

(d) 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 judicial review of an administratively-issued withholding order for taxes (Code Civ. Proc. § 706.075), notice of deficiency of an assessment due from a producer under a commodity marketing program (Food & Agric. Code §§ 59234.5, 60016), State Personnel Board (Gov't Code § 19630), Department of Personnel Administration (Gov't Code § 19815.8), cancellation by a city or county of a contract limiting use of agricultural land under the Williamson Act (Gov't Code § 51286), California Environmental Quality Act (Pub. Res. Code § 21167), decision of local legislative body adopting or amending a general or specific plan, regulation attached to a specific plan, or development agreement (Gov't Code § 65009), cease and desist order of the San Francisco Bay Conservation and Development Commission and complaint by BCDC for administrative civil liability (Gov't Code §§ 66639, 66641.7), Unemployment Insurance Appeals Board (Unemp. Ins. Code §§ 410, 1243), certain driver's license orders (Veh. Code § 14401(a)), or 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) Subject to subdivision (c), the time for filing the petition for review is extended as to a party:

(1) During any period when the party is seeking reconsideration of the decision pursuant to express statute, rule, charter, or ordinance.

(2) If, within 15 days after the decision is effective, the party makes a written request to the agency to prepare all or any part of the record, until 30 days after the record is delivered to the party.

(c) 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 judicial 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 evidence relates to an issue for which the standard of review 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 under Section 1123.420, and to fact finding in local agency proceedings to which the independent judgment standard applies under Section 1123.440. 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).

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 parties.

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

STATE BAR COURT

Bus. & Prof. Code § 6089 (added). Inapplicability of Code of Civil Procedure

6089. Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure does not apply to judicial review of proceedings of the State Bar Court.

Comment. Section 6089 makes clear the judicial review provisions in the Code of Civil Procedure do not apply to the State Bar Court.

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 entitlement to relief 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.

VALIDATING PROCEEDINGS

Code Civ. Proc. § 871 (added). Inapplicability of Title 2 of Part 3

871. Title 2 (commencing with Section 1120) of Part 3 does not apply to proceedings under this chapter.

Comment. Section 871 makes clear the judicial review provisions in Title 2 of Part 3 do not apply to proceedings under this chapter.

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.

☞ **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 § 11420.10 (amended). ADR authorized

11420.10. (a) An agency, with the consent of all the parties, may refer a dispute that is the subject of an adjudicative proceeding for resolution by any of the following means:

(1) Mediation by a neutral mediator.

(2) Binding arbitration by a neutral arbitrator. An award in a binding arbitration is subject to judicial review in the manner provided in Chapter 4 (commencing with Section 1285) of Title 9 of Part 3 of the Code of Civil Procedure. Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure does not apply to judicial review of an award in binding arbitration under this section.

(3) Nonbinding arbitration by a neutral arbitrator. The arbitrator's decision in a nonbinding arbitration is final unless within 30 days after the arbitrator delivers the award to the agency head a party requests that the agency conduct a de novo adjudicative proceeding. If the decision in the de novo proceeding is not more favorable to the party electing the de novo proceeding, the party shall pay the costs and fees specified in Section 1141.21 of the Code of Civil Procedure insofar as applicable in the adjudicative proceeding.

(b) If another statute requires mediation or arbitration in an adjudicative proceeding, that statute prevails over this section.

(c) This section does not apply in an adjudicative proceeding to the extent an agency by regulation provides that this section is not applicable in a proceeding of the agency.

Comment. Section 11420.10 is amended to make clear the judicial review provisions of the Code of Civil Procedure do not apply to binding arbitration under this section.

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) The statement of the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. The presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence.

(d) Nothing in this section limits the information that may be contained in the decision, including a summary of evidence relied on.

(e) A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340).

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.

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

~~11523. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in~~

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

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

The second sentence is superseded by Code of Civil Procedure Section 1123.640 (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).

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).

STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

Pub. Res. Code § 25531.5 (added). Inapplicability of Code of Civil Procedure

25531.5. Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure does not apply to judicial review of a decision of the commission on an application of an electric utility for certification of a site and related facility under this code.

Comment. Section 25531.5 makes clear the judicial review provisions of the Code of Civil Procedure do not apply to power plant siting decisions of the Energy Commission under this code.

PUBLIC UTILITIES COMMISSION

Pub. Util. Code § 1768 (added). Inapplicability of Code of Civil Procedure

1768. Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure does not apply to judicial review of proceedings of the commission under this code.

Comment. Section 1768 makes clear the judicial review provisions of the Code of Civil Procedure do not apply to proceedings of the Public Utilities Commission under this code.

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.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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).

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). Application of new law

SEC. ___. (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 a proceeding for judicial review of agency action pending on January 1, 1988.

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.

DEPARTMENT OF HEALTH SERVICES
OFFICE OF ADMINISTRATIVE HEARINGS AND APPEALS
923 12TH STREET, SUITE 201
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(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

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
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(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

State of California

State and Consumer Services Agency

Memorandum

Date : September 5, 1996

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

From : *Kathleen A. Yates, Staff Counsel III*
DEPARTMENT OF GENERAL SERVICES
OFFICE OF LEGAL SERVICES
1325 J STREET, SUITE 1911
SACRAMENTO CA 95814

Subject: **REVISED TENTATIVE RECOMMENDATION ON JUDICIAL REVIEW OF AGENCY ACTION**

On behalf of the Department of General Services (DGS) I would like to provide the Commission with the following comments. The DGS, pursuant to its authority in the Public Contract Code at sections 10343, 10345, 10376 and 10378, conducts non-Administrative Procedure Act (APA) bid protest hearings to review services and consulting service contract awards made by state agencies. Additionally, the DGS is an interested party in the non-APA bid protest hearings conducted by the Board of Control to review contract awards for purchase of commodities, equipment, information technology goods and services, and telecommunications goods and services pursuant to Public Contract Code sections 10306 and 12102.

We have experienced litigation and court review of DGS decisions on protests of other state agency contract awards, as well as litigation and court review of Board of Control decisions on protests of DGS proposed contract awards. Under the current system we have experienced difficulties with the fact that there is no time within which a writ must be filed or a stay of contract implementation must be requested. Based upon this experience we appreciate the time deadline provided in section 1123.640(b)(2) of the Revised Tentative Recommendation for filing of a petition for review. However there is no time deadline for a request of a stay of the agency decision. The stay provisions in section 1123.720 of the Revised Tentative Recommendation do not assist us in the situation where a contract award is made after the resolution of the protest by either the DGS or the Board of Control, then a petition for review is filed and sometime after that a stay of contract implementation is requested. It would assist the public contracting community if there were a deadline by which a complaining party were required to request a stay.

Attached please find suggested language providing a 30 day window in which to request a stay of contract performance in this situation.

Please contact me at ATSS 8-492-5948, or the public number, (916) 322-5948, if you wish to discuss this matter further. Thank you for your consideration of our comments.

Attachment

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§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 subdivisions (g), *(h)*, 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.

(h) A stay of contract performance must be requested within 30 days after issuance of a decision of a protest hearing officer.

ASSOCIATION OF CALIFORNIA
STATE ATTORNEYS AND
ADMINISTRATIVE LAW JUDGES

PROFESSIONAL ENGINEERS
IN CALIFORNIA GOVERNMENT

California Association of
Professional Scientists

September 11, 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-1827

Re: Judicial Review of Agency Action

Dear Commission Members:

I am writing on behalf of the Association of California State Attorneys and Administrative Law Judges (ACSA), the Professional Engineers in California Government (PECG), and the California Association of Professional Scientists (CAPS) to express their views concerning the September 1996 Staff Draft Recommendation.

ACSA, PECG, and CAPS represent state employees in their labor relations with the State of California, and regularly deal with the State Personnel Board, the Public Employment Relations Board, the Public Employees' Retirement System, and the Department of Personnel Administration in providing representation to their members.

Section 1123.640 provides that a petition for review of a state agency decision be filed within 30 days after notice of the decision is made. The comment to this section states that the State Personnel Board is exempt from the 30 day limitation period. The time limits found in Government Code Section 19630 will continue to apply to decisions of the State Personnel Board. However, the draft recommendation does not state whether the time limits found in Government Code Section 19815.8 concerning decisions of the Department of Personnel Administration will remain. ACSA, PECG, and CAPS recommend that the time limits found in Government Code Section 19815.8 continue to apply to decisions of the Department of Personnel Administration.

ACSA, PECG, and CAPS are also concerned about the matter of "standing" as provided in Section 1123.230. Section 1123.230 eliminates a taxpayer's action under Code of Civil Procedure Section 526a. As drafted, a person must be able to demonstrate that he/she "will adequately protect the public interest" and must also make a request that an agency correct the action, and

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CAPS: 660 J Street, Suite 480, Sacramento, CA 95814 · (916) 441-2629 FAX (916) 442-4182

wait at least 30 days for the agency to reply before challenging the agency action. The comment to this section does not indicate how one demonstrates that he/she will adequately protect the public, or why the procedural requirement of making a written request for the agency to correct the action is necessary. If subdivision (a) of Section 1123.230 is satisfied, then a person should have "standing" to pursue an important right affecting the public interest.

The final concern of ACSA, PECG, and CAPS is the use of the substantial evidence test to review matters involving a fundamental vested right. The court decisions concerning fundamental vested rights recognize the significance of the particular right involved in a given case, and therefore have ruled that decisions must be reviewed by the independent judgment test. The draft recommendation also recognizes this by providing for use of the independent judgment test when local agency decisions involve fundamental vested rights. ACSA, PECG, and CAPS believe that when state agencies make decisions affecting fundamental vested rights, courts should review those decisions by the independent judgment test, especially decisions of the PERS and DPA.

Thank you for consideration of these issues. If you have any questions or need clarification, please contact me.

Very truly yours,

Steven B. Bassoff
Labor Relations Counsel
ACSA, PECG, and CAPS

POLAROID CORPORATION

PHILIP J. SCARFO
GENERAL MANAGER
ID CARD SOLUTIONS

TELEPHONE: 617-386-6228
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September 12, 1996

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

RE: Revised Tentative Recommendation on Judicial Review of Agency Action

Dear Mr. Sterling:

Polaroid Corporation, a vendor and proposed vendor of advanced technology goods and services to various state agencies, wishes to comment on certain legislation which the Commission is considering. We have reviewed and appreciate the comments of the Department of General Services raising issues of concern to the agency primarily responsible for managing the state's acquisition activities. The following comments add additional detail and address issues of concern to vendors, such as Polaroid, who may be awarded contracts by a state agency, successfully defend the award as lawful and appropriate before the Board of Control in a protest hearing conducted pursuant to Public Contract Code section 12102 (h) , enter into a contract with the state which compels the vendor immediately to perform and then, months and millions of dollars after commencing performance, face a petition for review and an application to stay, not the Board of Control's decision, but the decision of the contracting agency to award the contract in the first place.

On behalf of Polaroid, we offer the following comments as to proposed section 1123.720 of the Code of Civil Procedure, titled "Stay of Agency Action."

1. Subsection (b) begins with the words "Subject to subdivision (g)." Although "subject to" often has an understood legal meaning, it is awkward, and not quite precise. We suggest that the introductory phase instead be "Except as provided in subsection."

2. Subsection (e) authorizes the court to which an appeal is taken to impose a stay of agency action, even if the agency prevailed at the trial court level, without setting forth any guidelines by which the appellate court should determine to impose a stay. We suggest that the Commission consider adding requirements that the appellate court conclude that a stay is in the public interest, that a stay will not adversely affect other private parties more than it will help the party in whose favor the stay is issued, and that a stay will issue only upon the appellate court's

satisfaction that adequate security has been posted or is otherwise available to protect parties who are adversely affected by the stay.

3 Subsection (f) contains awkward language. The introductory language would read better if it said "Except as otherwise provided by statute." Instead of " a granting of relief" which appears in both sentences of subsection (f), we suggest "a final order granting relief." Like subsection (e), this subsection sets forth no standards by which the appellate court is to make its determination. The Commission may wish to add standards providing that the appellate court must find that relief from stay is in the public interest. The Commission also may wish to give an appellate preference to the time within which an appeal will be heard in cases where agency action has been stayed.

4. Vendors have experienced problems with review of agency actions in two other areas. First, the statute of limitations for seeking review of agency action is murky; there needs to be a short and clearly-established statute of limitations. Second, after a protest hearing, the agency and the vendor want to enter their contract and begin work. The contracting process will have great uncertainty if on-going contracts can be halted before a judgment has become final. Thus we suggest that the Commission consider adding a subsection which states that, following the agency decision denying a protest, a performance of a contract may not be stayed base on review of the agency decision denying the protest, until a judgment has become final.

We thank you for your consideration of these points.

Sincerely,

Philip J. Scarfo

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Legal Assistants
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October 7, 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-1827

VIA FACSIMILE: (415) 494-1827 and U.S. MAIL

Re: Judicial Review of Local Agency Action

Honorable Chairman and Commission Members:

I am writing on behalf of the County Counsels' Association of California and the California State Association of Counties to provide our joint response to the above-referenced item. We appreciate the Commission's recognition of the vital interest we and our clients, the counties of California, have in this matter. This letter addresses a fundamental issue raised by the current proposal. We expect to provide additional comments on more technical aspects of the proposal prior to your November meeting in Sacramento.

Summary:

Our primary concern is that the proposed legislation threatens to significantly alter the standard of review applied to legislative acts of local agencies as well as the evidentiary procedures used in reviewing such actions. The result would be to greatly expand the scope of judicial power at the expense of local legislative power.

Like the state, local agencies act in both legislative and administrative capacities. The current proposal does not apply to acts of the state performed by the Legislature. It does, however, extend to the legislative acts of the governing bodies of local agencies. These actions include legislative enactments ranging from adoption of a general plan to guide the future development of an agency to ordinances adopted for the protection of the public health, safety and welfare.

What distinguishes these legislative actions from administrative or quasi-judicial acts is that, in reaching

legislative decisions, local agencies exercise their judgment to make broad policy decisions to further the public health, safety and welfare. The process does not involve formal fact-finding, nor the application of well-defined standards to the facts of specific situations to determine a required course of action as is the case in administrative proceedings.

The application of the current proposal to legislative acts of local agencies threatens long-standing procedures which derive from constitutional standards and which maintain the proper balance between the jurisdiction of the courts and that of local legislative bodies under the doctrine of separation of powers.

Historically, discretionary acts of local agencies have been subject to review under traditional mandamus (Code of Civil Procedure Section 1085). The standard of review is an "abuse of discretion" or "arbitrary and capricious" standard. The discretion of the local agency will be disturbed only if the action is arbitrary and capricious; that is, no rational basis for the action can be established. Proceedings normally are not limited to the record and the action of the agency is upheld if <u>any</u> rational basis can be conceived, whether or not it was set forth as the basis for the action in the record.

Since review of legislative acts often is not limited to the record and typically findings of fact are not required, the issue of an "independent judgment" standard is not really pertinent. As to the court's review of the evidence presented to it, the rule is clear that the court is to determine whether any rational basis to uphold the action can be conceived. The court is not to substitute its judgment for that of the local legislative body. We have concerns as to how the proposal would affect both the substantive and procedural aspects of this process.

<u>Standard of Review</u>:

The counties are firm in their position that all legislative acts of local agencies should be reviewable only under an "abuse of discretion" standard. At your September 12, 1996 meeting, Mr. Murphy noted the intent of the drafters of the proposal that discretionary actions of local agencies be subject to the "abuse of discretion" standard set forth in section 1123.450 of the proposal. However, we note the uncertainty caused by section 1123.420 which applies the "independent judgment" standard to several types of challenges which could be brought against legislative actions of local agencies.

Because the term "rule" is defined to include a local agency ordinance (Section 1121.290(c)), and "agency action" includes a "rule" as well as "[a]n agency's performance of, or failure to perform, any other duty, function, or activity, discretionary or otherwise", Section 1123.420 could easily be interpreted to apply an independent judgment standard to the adoption of, or alleged

failure to adopt, local agency ordinances and other legislative acts. This result, either intended or inadvertent, is unacceptable.

While a revision of the draft to ensure that legislative acts of local agencies would be reviewed under the standards currently in effect is feasible, the complexity of the task, as well as uncertainty as to how the vast existing body of case law will be applied to the proposed legislation prompts the County Counsels' Association and the California State Association of Counties to urge the Commission to modify the definitions sections of the proposal to expressly exclude legislative acts of local agencies from the provisions of the proposal and to allow those actions to continue to be reviewed under ordinary mandamus or declaratory relief.

Procedural Issues:

Another problem arises procedurally which complicates the task of incorporating local legislative decisions within the scope of the proposal while retaining current standards for review. The proposal contemplates an administrative mandamus type of review. Section 1123.810 provides that, with limited exceptions, "the administrative record is the exclusive basis for judicial review of agency action."[1] Under current law, upon reviewing the validity of a legislative action, the court may entertain evidence outside of the record and is to uphold the act if any rational basis for the act can be conceived, whether or not it appears in the record. Limiting review of legislative acts to "on the record review" would be a major circumscription of the legislative powers of local agencies.[2]

Similarly, Section 1123.850 prohibits a court from admitting evidence on judicial review without remanding the case, except in certain limited circumstances. This also is an administrative mandamus procedure at odds with current practices in ordinary mandamus applicable to review of legislative acts.

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[1]The comment under this section states that it codifies existing practice, citing to Beverly Hills Fed. Sav. & Loan Ass'n v. Superior Court, 259 Cal.App.2d 306, 324 (1968). However, that case involved an administrative mandamus action to review a denial by the Savings and Loan Commissioner of an application to operate a branch office. Application of strict "on the record" review of legislative actions currently reviewed in ordinary rather than administrative mandamus would be an immense change in current law and practice.

[2]Since most legislative actions do not require formal fact-finding and involve broad exercise of judgment by political bodies, this change would also require substantial changes in the procedures before the local agencies in order to make such review effective.

Section 1123.820(d) provides:

> (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.

This may be appropriate for review of an administrative or quasi-judicial action in which the agency is required to make findings of fact adequate to allow a reviewing court to understand the rationale for the decision. It is totally inappropriate, however, in review of a legislative action which is an exercise of broad discretion, which does not require findings of fact, and which may be sustained on any rational basis, whether or not articulated by the decision-making body. Furthermore, this provision could lead to judicial inquiry into the thought processes of legislative decision-makers, a practice uniformly condemned under present law except in certain cases involving illegal motivation such as racial discrimination.

These examples demonstrate why the inclusion of local legislative actions in the current proposal will result in major changes in existing law which are adverse to the well-established deference shown by the courts to the legislative acts of local agencies. The only way to avoid this result is to re-create within the proposal a form of review comparable to ordinary mandamus. This obviously is a fruitless effort which would produce none of the benefits sought by the proposal. This is especially true since the remedies of ordinary mandamus and declaratory relief must remain in existence because the proposal does not purport to cover legislative acts of the state.

Even though the standard of review issue may be susceptible to clarification, the procedural concerns of the local agencies are not. They can only be addressed through major revisions which would basically replicate current ordinary mandamus procedures in the new legislation to no productive end.

Recommendation:

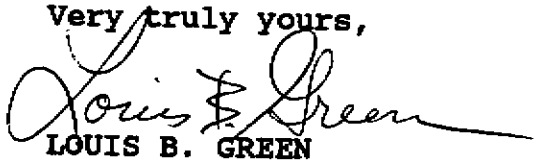
For these reasons, the County Counsels' Association of California and the California State Association of Counties recommend that:

1. The definition of "rule" contained in Section 1121.290 be amended by deleting subsection (c) which reads: "(c) A local agency ordinance."; and,

2. Section 1121.240, definition of "agency action", should be amended to add subsection (d) to read: "(d) 'Agency action' does not include any legislative action of a local agency."

Thank you for your consideration and courtesy. As mentioned previously, this letter reflects a fundamental concern of the counties relative to the import of the proposal on legislative acts. We expect to provide addition comment on the application of the proposal to other forms of local agency action for your November meeting, and to have a representative at that meeting to respond to any questions on any of these issues.

Very truly yours,



LOUIS B. GREEN
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