

Memorandum 96-83

Judicial Review of Agency Action: Draft of Final Recommendation

Attached is a staff draft of the recommendation on *Judicial Review of Agency Action*. Issues to be raised by local agency representatives will be covered in a separate Memorandum. Other issues are discussed below.

EVIDENCE OUTSIDE THE ADMINISTRATIVE RECORD

Attack Solely on Constitutional Grounds

At the last meeting, the Commission approved the staff recommendation to limit the closed record rule of Section 1123.810 to cases where the agency gave interested persons notice and an opportunity to submit oral or written comment, and the agency maintained a record or file of its proceedings. The Commission asked the staff to bring back a provision to apply open record review where the only attack is on constitutional grounds.

The language proposed below to be added to Section 1123.850 (new evidence on judicial review) is limited to an attack based solely on whether the relevant statute or ordinance is unconstitutional. Should the provision be more broadly drafted to apply to any attack on constitutional grounds, whether not an arguably unconstitutional statute or ordinance is involved? The staff is concerned that to provide open record review for any constitutional attack would permit, for example, open record review if a licensee alleges a denial of procedural or substantive due process in a disciplinary case, an exception which might swallow up the basic closed record rule. **The staff seeks comment on this provision from interested persons:**

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~~ in either of the following circumstances:

(1) 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 paragraph does not apply to judicial review of rulemaking.

(2) Judicial review is sought solely on the ground that agency action was taken pursuant to a statute or ordinance that is unconstitutional.

....

State Agency Rulemaking Not Under the APA

At the last meeting, the Commission approved the following addition to Government Code Section 11350 (APA rulemaking):

11350. (a) Any interested Except as provided in subdivisions (d) and (e), a person may obtain a judicial declaration . . . [etc.].

....

(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.

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

The Commission asked the staff to consider whether language like subdivision (d) should be applied to state agency rulemaking not under the APA, such as Water Board regional water quality control plans, State Personnel Board, Industrial Welfare Commission, California community colleges, California State

University, and California Coastal Commission. Rather than trying to put language in all these various statutes, **the staff prefers to add the following to the first paragraph of the Comment to Section 1123.850:**

For rulemaking, no evidence is admissible that was not in existence at the time of the agency proceeding. Gov't Code § 11350 (state agency rulemaking under the Administrative Procedure Act); *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).

CALIFORNIA ENVIRONMENTAL QUALITY ACT

Notice of Last Day for Judicial Review

Section 1123.630 in the draft statute requires the agency in an adjudicative proceeding to give notice to the parties of the date of the last day to petition for judicial review. At the last meeting, the Commission asked the staff to consider whether this works in the context of the California Environmental Quality Act. The Commission was concerned that it may be impossible for the agency to know the applicable limitations period, because it depends on the nature of the challenge, and in some cases runs from filing and not issuance of the notice. Pub. Res. Code § 21167. The Commission was also concerned that the agency could undesirably extend the period for judicial review under CEQA by providing a later date in the notice, perhaps resulting in an estoppel to assert the statute. Local agencies may lack the legal expertise to give accurate advice of the last day for review. These problems may be especially serious where, as is often the case, the agency is not the real party in interest.

The staff considered whether the notice presently required under CEQA might be revised to include a statement about the possible range of time for judicial review — 30 to 180 days depending on the nature of the challenge. However, the staff concludes that, in view of the problems referred to above, it would be better to provide that the notice requirement and limitation periods of the draft statute do not apply to judicial review of CEQA proceedings. **The staff recommends revising Public Resources Code Section 21168 as follows:**

21168. Any (a) Except as provided in subdivision (b), an action or proceeding to attack, review, set aside, void or annul a determination, finding, or decision of a public agency, made as a 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 a public agency, on the grounds of noncompliance with the provisions of this division shall be in accordance with the provisions of Section 1094.5 under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.~~

~~In any such action, the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record.~~

~~(b) Sections 1123.630, 1123.640, and 1123.650 of the Code of Civil Procedure do not apply to judicial review of proceedings under this division.~~

Eliminating Distinction Between Administrative and Traditional Mandamus

At the last meeting, the Commission wanted to be sure the distinction under CEQA between judicial review by administrative mandamus and by traditional mandamus is eliminated and replaced by the single review procedure of the draft statute. This may be done by broadening Public Resources Code Section 21168 as above to delete the reference to “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 a public agency,” and by repealing Public Resources Code Section 21168.5 (traditional mandamus), as set out in selected conforming revisions at page 95 in the attached draft.

CHALLENGES TO PLANNING AND ZONING DECISIONS

Government Code Section 65009, set out in selected conforming revisions at pages 87-89 in the attached draft, has procedural requirements for court challenges to a local legislative body adopting or amending a general or specific plan, regulation attached to a specific plan, or development agreement. It has special exhaustion of remedies rules, special requirements for notice by the agency to the public and by the person bringing the challenge, and short time limits for court challenge, generally within 90 days after the decision of the local legislative body. Other special time limits apply to approvals of low-income housing (within one year, but not earlier than 60 days after notice to the city or county by the person bringing the challenge) and for challenges to the adequacy of the housing element in a general plan (60 days after the report of findings by the State Department of Housing and Community Development). The draft

statute preserves these special time limits and other special provisions in Section 65009.

The attached draft makes the same revisions to Section 65009 as are recommended above for CEQA — to provide that the notice requirement and limitation periods of the draft statute do not apply to judicial review of decisions under Section 65009. **Is this satisfactory?**

Respectfully submitted,

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Staff Counsel

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

RECOMMENDATION

Judicial Review of Agency Action

December 1996

California Law Revision Commission

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December 12, 1996

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

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

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

Respectfully submitted,

Allan L. Fink
Chairperson

JUDICIAL REVIEW OF AGENCY ACTION

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JUDICIAL REVIEW OF AGENCY ACTION

BACKGROUND

This recommendation is submitted as part of the Commission's continuing study of administrative law. The Commission's recommendation on administrative adjudication by state agencies¹ was enacted in 1995.²

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

REPLACING MANDAMUS AND OTHER FORMS OF JUDICIAL REVIEW

Under existing law, on-the-record adjudicatory decisions of state and local government are reviewed by superior courts under the administrative mandamus provisions of Code of Civil Procedure Section 1094.5.⁴ Regulations adopted by state agencies are reviewed by superior courts in actions for declaratory judgment.⁵ Various other agency actions are reviewed by traditional mandamus under Code of Civil Procedure Section 1085⁶ or by declaratory judgment.⁷ Many statutes set forth special review procedures for particular agencies.⁸

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

2. 1995 Cal. Stat. ch. 938.

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

4. Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus 2* (Nov. 1993).

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

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

7. See, e.g., *Californians for Native Salmon Ass'n v. Department of Forestry*, 221 Cal. App. 3d 1419, 271 Cal. Rptr. 270 (1990). Agency action can also be reviewed in the context of enforcement actions or criminal actions brought against individuals for violation of regulatory statutes or rules.

8. Nonadjudicative decisions of the Public Utilities Commission are reviewed by the California Supreme Court. Pub. Util. Code § 1756; Cal. R. Ct. 58. Adjudicative decisions of the PUC are reviewed either by the Supreme Court or courts of appeal. Pub. Util. Code § 1756. Decisions of the Public

There are many problems with this patchwork scheme. First, it is often unclear whether judicial review should be sought by administrative mandamus, traditional mandamus, or declaratory relief. If an action for administrative mandamus can be brought, it must be brought under the administrative mandamus provisions.⁹ Parties regularly file under the wrong provisions. Some cases hold that if the trial court uses the wrong writ, the case must be reversed on appeal so it can be retried under the proper procedure, even if no one objects.¹⁰

Second, it is often difficult to decide which form of mandamus to use because of the problematic distinction between quasi-legislative and quasi-judicial action, especially in local land use planning and environmental decisions. Administrative mandamus is proper to review quasi-judicial action, while traditional mandamus or declaratory relief is proper to review quasi-legislative action.¹¹

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

Both administrative and traditional mandamus involve complex rules of pleading and procedure. The proceeding may be commenced by a petition for issuance of an alternative writ of mandamus or by a notice of motion for a peremptory writ.¹² Trial courts must distinguish between these two forms of mandamus because there are many differences between them, including use of juries,¹³ statutes of

Employment Relations Board and Agricultural Labor Relations Board are reviewed by the courts of appeal. Gov't Code §§ 3520, 3542, 3564; Lab. Code § 1160.8. Decisions of the State Energy Resources Conservation and Development Commission are reviewed in the same manner as decisions of the PUC. Pub. Res. Code § 25531. Decisions of the Department of Alcoholic Beverage Control, Alcoholic Beverage Control Appeals Board, and Workers' Compensation Appeals Board are reviewed either by the Supreme Court or the Court of Appeal. Bus. & Prof. Code §§ 23090, 23090.5; Lab. Code §§ 5950, 5955.

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

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

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

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

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

limitations,¹⁴ exhaustion of remedies,¹⁵ stays,¹⁶ open or closed record,¹⁷ whether the agency must make findings,¹⁸ and scope of review of factual issues.¹⁹

This awkward hybrid is the result of the historical development of judicial review procedures in California. At the time the administrative mandamus concept was devised in 1945, the California Constitution was thought to limit the ability of the Legislature to affect appellate jurisdiction of the courts.²⁰ Since that time, the Constitution has been amended to delete the reference to the “writ of review,” and has been construed to allow the Legislature greater latitude in prescribing appropriate forms of judicial review if court discretion to deny review is preserved.²¹

The Law Revision Commission recommends that the archaic judicial review system that has evolved over the years be replaced by a simple and straightforward statute. The proposed law provides that final state or local agency action²² is reviewable by a petition for review filed with the appropriate court. Common law writs such as mandamus, certiorari, and prohibition, and equitable remedies such as injunction and declaratory judgment, would be replaced for judicial review of agency action by the unified scheme of the proposed law.²³ The proposed law

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

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

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

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

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

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

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

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

22. The proposed law does not apply to judicial review of local agency ordinances. Local agency ordinances will continue to be reviewed by traditional mandamus or by an action for declaratory or injunctive 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).

23. The proposed law preserves the action to prevent an illegal expenditure by a local governmental entity under Section 526a of the Code of Civil Procedure, but applies the new standing provisions to such actions. See generally Asimow, *Judicial Review of Administrative Decision: Standing and Timing* 5 (Sept. 1992); Asimow, *supra* note 4, at 22-23. The proposed law also makes clear that it does not apply where a statute provides for judicial review by a trial de novo, does not apply to an action for refund of taxes under Division 2 of the Revenue and Taxation Code, does not apply to an action under the California Tort Claims Act, does not apply to litigation in which the sole issue is a claim for money damages or compensation if the agency whose action is at issue does not have statutory authority to determine the claim, does not apply to validating proceedings under the Code of Civil Procedure, does not apply to judicial review of a decision of a court, does not apply to judicial review of an award in binding arbitration under Government Code Section 11420.10, does not apply to judicial review of agency proceedings pursuant to a court-ordered

makes clear the court continues to have discretion summarily to deny relief if the petition for review does not present a substantial issue for resolution by the court.²⁴

AGENCIES TO WHICH PROPOSED LAW APPLIES

Existing statutes draw little or no distinction between judicial review of state and local agency action. The proposed law applies to all state and local government agencies, except three that are specifically exempted — the State Bar Court, Public Utilities Commission, and power plant siting decisions of the State Energy Resources Conservation and Development Commission. The State Bar Court is exempted because, under the constitutional doctrine of separation of powers, regulation of attorney discipline is a judicial function where the California Supreme Court has inherent and primary regulatory power.²⁵ The Public Utilities Commission is exempted because recently enacted²⁶ procedures for judicial review of PUC matters are significantly different from the proposed law.²⁷ Power plant siting decisions of the Energy Commission are exempted for reasons similar to the PUC exemption: these decisions are reviewed in the same manner as nonadjudicative decisions of the PUC,²⁸ and are therefore reviewed exclusively in the California Supreme Court.

Under existing law, decisions of some nongovernmental entities are subject to judicial review by administrative mandamus.²⁹ The proposed law generally continues this rule.

reference, and does not limit use of the writ of habeas corpus. The proposed law does apply to judicial review of property taxation under Division 1 of the Revenue and Taxation Code.

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

25. See 1 B. Witkin, *California Procedure Attorneys* §§ 257-58, at 292-93; Cal. R. Ct. 952 (rev. Mar. 15, 1991).

26. 1996 Cal. Stat. ch. 855.

27. Judicial review of nonadjudicative action of the Public Utilities Commission is exclusively in the California Supreme Court. Pub. Util. Code § 1756(a). Procedures for judicial review of adjudicative action of the PUC differ from the proposed law with respect to additional evidence, limitations period, type of relief, standard of review of application of law to fact, and venue. See *id.* §§ 1216, 1353, 1756, 1757, 1757.1, 1758, 1760.

28. Pub. Res. Code § 25531.

29. 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).

RULES OF PROCEDURE

The proposed law provides a few key procedural rules for judicial review, and authorizes the Judicial Council to provide procedural detail by rule not inconsistent with the proposed law. Where no specific rule is applicable, normal rules of civil procedure govern judicial review.³⁰

STANDING TO SEEK JUDICIAL REVIEW

Existing California law on standing to seek judicial review of agency action is mostly uncodified.³¹ A petitioner for administrative or traditional mandamus to review a decision of a state or local agency must be beneficially interested in,³² or aggrieved by,³³ the decision. This requirement is applied in various ways, depending on whether the action being reviewed is administrative adjudication, rulemaking, or quasi-legislative, informal, or ministerial action.

Administrative Adjudication and State Agency Regulations

A person seeking administrative mandamus to review an adjudicative proceeding under the Administrative Procedure Act must have been a party in the adjudicative proceeding.³⁴ A person seeking administrative mandamus to review an adjudicative proceeding not under the Administrative Procedure Act must have been either a party or a person authorized to participate as an interested party.³⁵ The proposed law codifies these rules.

For review of a state agency regulation by declaratory relief, the petitioner must be an interested person,³⁶ i.e., a person subject to or affected by the regulation.³⁷ If a regulation is reviewed by mandamus, the petitioner may have public interest standing by showing that he or she is interested as a citizen in having the law

30. The proposed law provides that Code of Civil Procedure Section 426.30 relating to compulsory cross-complaints, and Section 1013(a) relating to extension of time where notice is mailed, do not apply to a judicial review proceeding.

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

32. Code Civ. Proc. § 1086.

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

34. *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).

35. *Bodinson Mfg. Co. v. California Employment Comm'n*, 17 Cal. 2d 321, 330, 109 P.2d 935, 9041 (1941). Public interest standing may apply to review an adjudication in some cases. See, e.g., *Environmental Law Fund, Inc. v. Town of Corte Madera*, 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282 (1975).

36. Gov't Code § 11350(a).

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

executed and the duty in question enforced.³⁸ The proposed law generally continues these rules.

Quasi-Legislative, Informal, or Ministerial Action

A person seeking traditional mandamus to review agency action other than an adjudicative proceeding or state agency rulemaking must show that a substantial right is affected and that the person will suffer substantial damage if the action is not annulled.³⁹ This requirement is relaxed if a public right is involved and judicial review is sought to enforce a public duty, in which case it is enough that the person seeking review is interested as a citizen in having the laws executed and the public duty enforced.⁴⁰

Private interest standing. By case law, a person has sufficient private interest to confer standing if the agency action is directed to that person, or if the person's interest is over and above that of members of the general public.⁴¹ Non-pecuniary interests such as environmental or esthetic claims are sufficient to meet the private interest test.⁴² Associations such as unions, trade associations, or political associations have standing to sue on behalf of their members.⁴³ But if a person has not suffered some kind of harm from the agency action, the person lacks private interest standing to seek judicial review.⁴⁴ The proposed law codifies these rules.

Under the proposed law, the person seeking review need not personally have objected to the agency action, as long as the issue to be reviewed was raised before the agency by someone.⁴⁵ This avoids the undesirable effect of requiring a person

38. *Green v. Obledo*, 29 Cal. 3d 126, 144-45, 624 P.2d 256, 172 Cal. Rptr. 206 (1981); *American Friends Service Comm. v. Proconier*, 33 Cal. App. 3d 252, 256, 109 Cal. Rptr. 22 (1973). See also discussion under "Public interest standing" in text accompanying notes 48-49.

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

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

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

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

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

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

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

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

The proposed law denies a person who complained to an agency about a professional licensee standing to challenge an agency decision in favor of the licensee.⁴⁶

The proposed law makes clear that a local agency may have private interest standing to seek judicial review of state action, and relaxes the limiting rule that local government has standing for constitutional challenges under the commerce or supremacy clause but not under the due process, equal protection, or contract clauses. There is no sound reason to treat certain constitutional claims differently for standing purposes.⁴⁷

Public interest standing. The proposed law codifies case law in traditional mandamus that a person who lacks private interest standing may nonetheless sue to vindicate the public interest.⁴⁸ This promotes the policy of allowing a citizen to ensure that a government body does not impair or defeat the purpose of legislation establishing a public right. The proposed law adds safeguards to public interest standing by requiring the person to reside or conduct business in the agency's jurisdiction, requires that the person will adequately protect the public interest, and requires the person first to request the agency to correct its action.

The proposed law does not affect the rule that a plaintiff in a taxpayer's suit to restrain illegal or wasteful expenditures⁴⁹ has standing without the need to show any individual harm.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Under existing law, a litigant must fully complete all federal, state, and local administrative remedies before coming to court or defending against administrative enforcement unless an exception to the exhaustion of remedies rule

46. An exception to this rule permits the complaining person to challenge the agency decision if the person was either a party to the administrative proceeding or had a right to become a party under a statute specific to that agency. However, under existing law a complaining person has no general right to become a party to an administrative proceeding. See California Administrative Hearing Practice § 2.45, at 85 (Cal. Cont. Ed. Bar 1984).

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

48. 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. Proconier*, 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (1973). The proposed law requires a person asserting public interest standing to request the agency to correct its action and to show the agency has not done so within a reasonable time.

49. Code Civ. Proc. § 526a.

applies.⁵⁰ The proposed law codifies the exhaustion of remedies rule, including the rule that exhaustion of remedies is jurisdictional rather than discretionary with the court.⁵¹ The proposed law provides exceptions to the exhaustion of remedies rule to the extent administrative remedies are inadequate⁵² or where requiring their exhaustion would result in irreparable harm disproportionate to the public and private benefit from requiring exhaustion.⁵³ The proposed law continues the rule of existing statutes that a litigant is not required to request reconsideration from the agency before seeking judicial review.⁵⁴

The proposed law codifies the rule that, in order to be considered by the reviewing court, the exact issue must first have been presented to the agency. The proposed law reverses existing law by requiring exhaustion of remedies for a local tax assessment alleged to be a nullity. The proposed law eliminates the rule that in an adjudicative proceeding agency denial of a request for a continuance is judicially reviewable immediately.⁵⁵ Judicial review of such matters should not occur until after conclusion of administrative proceedings.⁵⁶

PRIMARY JURISDICTION

Under the doctrine of primary jurisdiction, a case properly filed in court may be shifted to an administrative agency that also has statutory power to resolve some or all of the issues in the case.⁵⁷ Thus the agency makes the initial decision in the case, but the court retains power to review the agency action.

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

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

52. The inadequacy requirement includes and accommodates existing California exceptions to the exhaustion of remedies rule for futility, certain constitutional issues, and lack of notice. Asimow, *supra* note 31, at 62.

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

54. Gov't Code §§ 11523 (Administrative Procedure Act), 19588 (State Personnel Board). However, the common law rule in California may be otherwise. See *Alexander v. State Personnel Board*, 22 Cal. 2d 198, 137 P.2d 433 (1943). This rule would not preclude a litigant from requesting reconsideration or an agency on its own motion from reconsidering.

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

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

57. Asimow, *supra* note 31, at 66. The doctrine of primary jurisdiction must be distinguished from the doctrine of exhaustion of remedies. The rules are different with respect to burden of proof, presumption of jurisdiction, and applicability. *Id.* at 69-70.

The proposed law makes clear the doctrine of primary jurisdiction is distinct from exhaustion of remedies.⁵⁸ It provides that the court should send an entire case, or one or more issues in the case, to an agency for an initial decision only where the Legislature intended that the agency have exclusive or concurrent jurisdiction over that type of case or issue, or where the benefits to the court in doing so outweigh the extra delay and cost to the litigants.⁵⁹

RIPENESS

The ripeness doctrine in administrative law counsels a court to refuse to hear an attack on the validity of an agency rule or policy until the agency takes further action to apply it in a specific fact situation.⁶⁰ The ripeness doctrine is well accepted in California law,⁶¹ and the proposed law codifies it.

STATUTE OF LIMITATIONS FOR REVIEW OF ADJUDICATION

Existing statutes of limitations for judicial review of agency adjudication are scattered and inconsistent.⁶² The limitations period for judicial review of adjudication under the Administrative Procedure Act is 30 days,⁶³ and for judicial review of a local agency decision other than by a school district is 90 days.⁶⁴ Other sections applicable to particular agencies provide different limitations periods for commencing judicial review.⁶⁵ Adjudicatory action not covered by any of these

58. Most California primary jurisdiction cases incorrectly describe the issue as one of exhaustion of remedies. Asimow, *supra* note 31, at 71. The proposed law should clear up much of the confusion.

59. If the agency has concurrent jurisdiction, the party seeking to have the matter or issue referred to the agency must persuade the court that the efficiencies outweigh the cost, complexity, and delay inherent in so doing. Asimow, *supra* note 31, at 70. The court in its discretion may ask the agency to file an amicus brief with its views on the matter as an alternative to sending the case to the agency. And the court's discretion to refer the matter or issue to the agency for action gives courts considerable flexibility in the interests of justice. See *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 391-92, 826 P.2d 730, 6 Cal. Rptr. 2d 487, 496 (1992).

60. Asimow, *supra* note 31, at 83.

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

62. Asimow, *supra* note 31, at 88.

63. Gov't Code § 11523.

64. Code Civ. Proc. § 1094.6(b). Formerly, this provision applied only if the local agency adopted an ordinance making it applicable. Asimow, *supra* note 31, at 89. Now it applies directly without the need for the agency to adopt an ordinance. California Administrative Mandamus, April 1996 Update, § 7.11, at 78 (Cal. Cont. Ed. Bar, 2d ed.).

65. See, e.g., Veh. Code § 14401(a) (90-days after notice of driver's license order); Lab. Code §§ 1160.8 (30 days after ALRB decision), 5950 (45 days for decision of Workers' Compensation Appeals Board); Gov't Code §§ 3542 (30 days for PERB decisions), 19630 (one year for various state personnel decisions), 19815.8 (same), 65907 (90 days for decisions of zoning appeals board); Unemp. Ins. Code § 410 (six months for appeal of decision of Unemployment Insurance Appeals Board); Welf. & Inst. Code § 10962 (one year after notice of decision of Department of Social Services). Various rules on tolling apply to these statutes. See Asimow, *supra* note 31, at 90 n.227.

provisions is subject to the three-year or four-year limitations periods for civil actions generally.⁶⁶

The proposed law continues the 30-day limitations period⁶⁷ for judicial review of adjudication under the Administrative Procedure Act, and generalizes it to apply to most state agency adjudication.⁶⁸ The proposed law continues the 90-day limitations period for local agency adjudication,⁶⁹ except that local agency adjudication under the Administrative Procedure Act will be 30 days as at present.⁷⁰ Special limitations periods under the California Environmental Quality Act⁷¹ and some other provisions⁷² are preserved. Except where a special statute applies, non-adjudicatory action remains subject to the general three or four year limitations period for civil actions.

The proposed law requires the agency to give written notice to the parties of the date by which review must be sought.⁷³ This will be particularly helpful to a party who is not represented by counsel. Failure to give the notice will toll the running

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

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

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

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

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

71. Pub. Res. Code § 21167.

72. The proposed law 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 BCDP 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).

73. The requirement of notice to the party of the time within judicial review must be sought is drawn from existing statutes. See Code Civ. Proc. § 1094.6(f) (local agency action); Unemp. Ins. Code § 410 (notice of right to review); Veh. Code § 14401(b) (notice of right to review). The notice requirement does not apply to proceedings under the California Environmental Quality Act.

of the limitations period up to a maximum of 180 days after the decision is effective.⁷⁴

Under the existing Administrative Procedure Act and the existing statute for judicial review of a local agency decision, when a person seeking judicial review makes a timely request for the agency to prepare the record, the time to petition for review is extended until 30 days after the record is delivered.⁷⁵ The proposed law continues and generalizes this rule.

The proposed law does not change the case law rule that an agency may be estopped to plead the statute of limitations if a party's failure to seek review within the prescribed period was due to misconduct of agency employees.⁷⁶

STANDARD OF REVIEW

Review of Agency Interpretation of Law

Under existing law, courts use independent judgment to review an agency interpretation of law.⁷⁷ This is qualified by the rule that, depending on the context, courts should give great weight to a consistent construction of a statute by the agency responsible for its implementation.⁷⁸ Deference is given to the agency's interpretation if the court finds it appropriate to do so based on a number of factors. These factors are generally of two kinds — factors indicating that the agency has a comparative interpretive advantage over the courts, and factors indicating that the interpretation in question is probably correct.⁷⁹

In the comparative advantage category are factors that assume the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. A court is more likely to defer to an agency's interpretation of its

74. Concerning the effective date of the decision, see *supra* notes 67 and 69.

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

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

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

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

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

own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another. A court is more likely to defer to an agency's interpretation of a statute that the agency enforces than to its interpretation of some other statute, the common law, the constitution, or judicial precedent.⁸⁰

Factors indicating that the interpretation in question is probably correct include the degree to which the agency's interpretation appears to have been carefully considered by responsible agency officials. For example, an interpretation of a statute contained in a regulation adopted after public notice and comment is more deserving of deference than an interpretation contained in an advice letter prepared by a single staff member.⁸¹ Deference is called for if the agency has consistently maintained the interpretation in question, especially if the interpretation is long-standing. A vacillating position, however, is entitled to no deference.⁸² An interpretation is more worthy of deference if it first occurred contemporaneously with enactment of the statute being interpreted.⁸³ Deference may also be appropriate if the Legislature reenacted the statute in question with knowledge of the agency's prior interpretation.⁸⁴

When a court reviews a regulation, it normally separates the issues, exercising independent judgment with appropriate deference on interpretive issues, such as whether the regulation conflicts with the governing statute, but applying the abuse of discretion standard on whether the regulation is reasonably necessary to effectuate the purpose of the statute.⁸⁵

The Commission finds existing law on the standard of review of agency interpretation of law to be generally satisfactory. The proposed law continues

80. Asimow, *supra* note 79, at 1195-96.

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

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

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

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

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

independent judgment review of agency interpretation of law, with appropriate deference to the agency's interpretation.⁸⁶

Review of Agency Application of Law to Fact

In nearly every adjudicatory decision, the agency must apply a legal standard to basic facts.⁸⁷ Under existing law, an application question is reviewed as a question of fact if the basic facts of the case are disputed, whether the dispute concerns matters of direct testimony⁸⁸ or matters of inference from circumstantial evidence.⁸⁹ If there is no dispute of basic facts (whether established by direct or circumstantial evidence) but the application question is disputed, the agency's determination is reviewed as a question of law.⁹⁰ The Commission believes the standard of review of application questions should not turn on whether the basic facts are disputed. It invites manipulation, since a party can control the standard of review by either disputing or stipulating to basic facts.

Application decisions are often treated as precedents for future cases, thus resembling issues of law more than fact. The proposed law treats application questions as questions of law. Reviewing courts would thus exercise independent judgment with appropriate deference for application decisions by administrative agencies. Treating application questions as questions of law avoids having to distinguish between pure questions of law and questions of application, because it is often difficult to know which is which.⁹¹

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

87. Asimow, *supra* note 79, at 1209. For a discussion of what constitutes a basic fact, see text accompanying note 92 *infra*.

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

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

90. See, e.g., *Dimmig v. Workmen's Compensation Appeals Bd.*, 6 Cal. 3d 860, 864-65, 495 P.2d 433, 435-36, 101 Cal. Rptr. 105, 107-108 (1972); *S. G. Borello & Sons v. Department of Indus. Relations*, 48 Cal. 3d 341, 349, 769 P.2d 399, 403, 256 Cal. Rptr. 543, 547 (1989); *Yakov v. Board of Medical Examiners*, 68 Cal. 2d 67, 74 n.7, 64 Cal. Rptr. 785, 791 n.7 (1968). *But see* *Young v. California Unemployment Ins. Appeals Bd.*, 37 Cal. App. 3d 606, 610, 112 Cal. Rptr. 460, 463 (1974).

91. This approach might create the opposite problem of distinguishing application questions from questions of fact, but this distinction should not usually be problematic. Fact questions can be answered without knowing anything of the applicable law. Application questions should not be treated as questions of fact, because it would strip courts of the responsibility for applying the law, and would require courts to ignore important public policy reasons for judicial rather than agency responsibility for applying law to

Review of Agency Fact-Finding

Basic fact-finding involves determining what happened (or will happen in the future), when it happened, the state of mind of the participants, and the like. Some basic facts are established by direct testimony, some by inference from circumstantial evidence. For example, suppose the agency finds from direct or circumstantial evidence that E, an employee of R, was driving home from a night school course at the time of the accident. R paid for the cost of the night school and encouraged but did not require E to take the course. Determinations of basic fact such as these can be made without knowing anything of the applicable law.⁹²

Under existing law, in reviewing factual determinations in an adjudication by an agency not given judicial power by the California Constitution, courts use independent judgment if the proceeding substantially deprives a party's fundamental vested right.⁹³ California is the only jurisdiction in the United States that uses independent judgment so broadly as a standard for judicial review of agency action.⁹⁴

The independent judgment test was imposed by a 1936 California Supreme Court decision on the ground that constitutional doctrines of separation of powers or due process required it.⁹⁵ The test applied to review of fact-finding by state agencies not established by the California Constitution, because it was thought those agencies could not constitutionally exercise judicial power. But courts have subsequently rejected any constitutional basis for the independent judgment test,⁹⁶ so the Legislature or the courts are now free to abolish it. Nonetheless, courts have continued to apply the independent judgment test to decisions of nonconstitutional state agencies where fundamental vested rights are involved. Thus the substantial evidence test is applied to review decisions of constitutional state agencies, and of nonconstitutional state agencies where fundamental vested rights are not involved. Independent judgment review is applied to nonconstitutional state agencies where

fact, a formula for rigidity. Treating them as questions of law with appropriate deference to the agency decision is a formula for flexibility. Asimow, *supra* note 79, at 1217, 1223-24.

92. Asimow, *supra* note 79, at 1211.

93. E.g., *Bixby v. Pierno*, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971); see generally Asimow, *supra*, note 79. *Bixby* involved judicial review of a decision of the Commissioner of Corporations approving a recapitalization plan of a family-owned corporation as "fair, just and equitable," an exercise of agency discretion. *Bixby v. Pierno*, *supra*, 4 Cal. 3d at 150-51. Exercise of agency discretion is subject to abuse of discretion review under the proposed law. See discussion in text accompanying notes 106-12 *infra*. The substantial evidence test of the proposed law for fact-finding applies only to the basic facts underlying the decision, not to application of law to basic facts (reviewed using independent judgment) or to the decision itself.

94. Some states use independent judgment review for particular situations. See, e.g., *Weeks v. Personnel Bd. of Review*, 373 A.2d 176 (R.I. 1977) (discharge of police officer). Colorado uses independent judgment review if a school board dismisses a teacher after the hearing officer recommended retention. Colo. Rev. Stat. § 22-63-302(10)(c) (Supp. 1995). See also Mo. Rev. Stat. § 536.140.2 (1990); Asimow, *supra* note 79, at 1164 n.13.

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

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

substantial vested rights are involved. There is no rational policy basis for distinguishing between agencies established by the constitution and those that are not.

Independent judgment review of state agency adjudication substitutes factual conclusions of a trial judge, often a non-expert generalist, for those of the administrative law judge and agency heads who are usually experienced in their professional field. Especially in cases involving technical material or the clash of expert witnesses, administrative law judges and agency heads are more likely to be in a position to reach the correct decision than a trial judge reviewing the record.⁹⁷

Independent judgment review is inefficient because it requires parties to litigate the peripheral issue of whether or not independent judgment review applies. This involves the loose standard of the degree of “vestedness” and “fundamentalness” of the right affected. Independent judgment review requires closer scrutiny of the record, and the transcript may be lengthy. Independent judgment review also encourages more people to seek judicial review than would do so under a substantial evidence standard.⁹⁸

Except in one limited case, the proposed law eliminates independent judgment review of state agency fact-finding, and instead requires the court to uphold agency findings if supported by substantial evidence in the record as a whole.⁹⁹ Under the exception, if the agency head changes a determination of fact made in an adjudicative proceeding conducted by an administrative law judge employed by the Office of Administrative Hearings, the proposed law preserves independent judgment review of that particular determination of fact. The impact of eliminating independent judgment review of state agency fact-finding will be considerably softened by the Commission’s recommendation to provide independent judgment review of application of law to fact,¹⁰⁰ a question which is involved in virtually every adjudicative decision.¹⁰¹

Under existing law, fact-finding in adjudication by local agencies is reviewed by the same standard as for state agencies that do not derive judicial power from the California Constitution — independent judgment if a fundamental vested right is involved, otherwise substantial evidence.¹⁰² The proposed law continues these

97. Asimow, *supra* note 79, at 1181-82.

98. Asimow, *supra* note 79, at 1184-85.

99. An important benefit of the substantial evidence test is that it greatly broadens the power of the appellate court in appeals from trial court decisions reviewing administrative action. Asimow, *supra* note 79, at 1168-69. The proposed law codifies the existing rule that a person challenging agency action has the burden of persuasion on overturning agency action. See California Administrative Mandamus §§ 4.157, 12.7 (Cal. Cont. Ed. Bar, 2d ed. 1989).

100. See discussion under heading “Review of Agency Application of Law to Fact” in text accompanying notes 87-91 *supra*.

101. Asimow, *supra* note 79, at 1209.

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

rules for local agency adjudication, i.e., proceedings involving an evidentiary hearing to determine a legal interest of a particular person.¹⁰³

Under existing law, quasi-legislative acts are governed by a special standard akin to substantial evidence review.¹⁰⁴ The proposed law applies substantial evidence review of fact-finding in quasi-legislative and other local agency proceedings.¹⁰⁵

Review of Agency Exercise of Discretion

An agency has discretion when the law allows it to choose between several alternative policies or courses of action. Examples include an agency's power to choose a severe or lenient penalty, whether there is good cause to deny a license, whether to grant permission for various sorts of land uses, or to approve a corporate reorganization as fair. An agency might have power to prescribe the permitted level of a toxin in drinking water, to decide whether to favor the environment at the expense of economic development or vice versa, or to decide whom to investigate or charge when resources are limited.¹⁰⁶

Existing law is replete with conflicting doctrines on these important issues. California courts may review agency discretionary decisions on grounds of legality, procedural irregularity, or abuse of discretion despite broad statutory delegations of discretionary authority.¹⁰⁷ Under existing law, the court reviews adjudicative and quasi-legislative action by traditional mandamus generally on a closed record, but in reviewing ministerial or informal action, extra-record evidence is freely admissible if the facts are in dispute.¹⁰⁸ The agency must give

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

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

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

106. Asimow, *supra* note 79, at 1224.

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

108. *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 575-79, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 147-50 (1995); see also discussion under "Closed Record" in text accompanying notes 121-28 *infra*.

reasons for the discretionary action in the case of review of adjudicatory action,¹⁰⁹ but not in the case of quasi-legislative action.¹¹⁰

In reviewing discretionary action, a court first decides whether the agency's choice was legally permissible and whether the agency followed legally required procedures, using independent judgment with appropriate deference.¹¹¹ Within these limits, the agency has power to choose between alternatives, and a court must not substitute its judgment for the agency's, since the Legislature gave discretionary power to the agency, not the court. But the court should reverse if the agency's choice was an abuse of discretion. Review for abuse of discretion consists of two distinct inquiries: the adequacy of the factual underpinning of the discretionary decision, and the rationality of the choice.¹¹²

In reviewing the adequacy of the factual underpinning, it is not clear whether the abuse of discretion test is merely another way to state the substantial evidence test, or whether the substantial evidence test gives the court greater leeway in reviewing the agency decision, but the prevailing view is that they are synonymous.¹¹³ Legislative history of a 1982 enactment¹¹⁴ also suggests that substantial evidence is the appropriate test whenever the issue is the factual basis for agency discretionary action.

The proposed law requires the factual underpinnings of a discretionary decision to be reviewed by the same standards for other fact-finding — generally substantial evidence on the whole record — whether the decision arose out of formal or informal adjudication, quasi-legislative action such as rulemaking, or some other function.¹¹⁵

Review of Agency Procedure

Under existing law, California courts use independent judgment on the question of whether agency action complied with procedural requirements of

109. *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).

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

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

112. Asimow, *supra* note 79, at 1228-29.

113. Asimow, *supra* note 79, at 1229.

114. 1982 Cal. Stat. ch. 1573, § 10 (amending Gov't Code § 11350); Asimow, *supra* note 79, at 1230.

115. The proposed law rejects case law indicating that an exercise of agency discretion can be disturbed only if evidentiary support is "entirely lacking" or that review is less intensive in abuse of discretion cases than in other cases. See generally Asimow, *supra* note 79, at 1240. The proposed law generally provides for review of agency exercise of discretion on a closed record. See discussion under "Closed Record" in text accompanying notes 121-28 *infra*.

statutes or the constitution.¹¹⁶ California courts have occasionally mandated administrative procedures not required by any statute, either in the interest of fair procedures¹¹⁷ or to facilitate judicial review.¹¹⁸

The Commission believes that California courts should retain the power to impose administrative procedures not found in a statute. This power is necessary to prevent procedural unfairness to parties. However, while courts should continue to use independent judgment on procedural issues, they should normally accord considerable deference to agency decisions about how to implement procedural provisions in statutes. Agency expertise is just as relevant in establishing procedure as in fact-finding and determining or applying law and policy.¹¹⁹

The proposed law permits the court to exercise independent judgment in reviewing agency procedures, with deference to the agency's determination of what procedures are appropriate.¹²⁰

CLOSED RECORD

Under existing law, in administrative mandamus¹²¹ to review an adjudicative proceeding, the court may remand to the agency to admit additional evidence only if in the exercise of reasonable diligence the evidence could not have been produced at, or was improperly excluded from, the administrative hearing.¹²² For independent judgment review, the court may either admit the evidence itself or remand if one of those two conditions is satisfied.¹²³

In traditional mandamus to review ministerial or informal action, extra-record evidence is freely admissible if the facts are in dispute.¹²⁴ The court simply takes

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

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

118. *Saleeby v. State Bar*, 39 Cal. 3d 547, 566-68, 702 P.2d 525, 536-38, 216 Cal. Rptr. 367, 378-80 (1985); *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).

119. Asimow, *supra* note 79, at 1246.

120. An agency's procedural choices under a general statute applicable to a variety of agencies, such as the Administrative Procedure Act, should be entitled to less deference than a choice made under a statute unique to that agency. Asimow, *supra* note 79, at 1247. The proposed law provides that the standard of review of agency procedure does not apply to judicial review of state agency rulemaking under the Administrative Procedure Act. The Law Revision Commission is studying this question as part of its administrative rulemaking study.

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

122. Code Civ. Proc. § 1094.5(e).

123. Code Civ. Proc. § 1094.5(e).

124. *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).

evidence and determines the issues.¹²⁵ In traditional mandamus to review quasi-legislative action, extra-record evidence is admissible only if the evidence existed before the agency decision and it was not possible in the exercise of reasonable diligence to present it at the administrative proceeding.¹²⁶

The proposed law codifies a closed record requirement for review of agency action where the agency gave interested persons notice and an opportunity to submit oral or written comment and maintained a record or file of its proceedings. These requirements will generally be satisfied for most administrative adjudication and quasi-legislative action. If these requirements are not satisfied, the court may either receive the evidence itself or remand to the agency to do so. This will apply to most ministerial and informal action.

If the agency failed to give interested persons notice and an opportunity to submit oral or written comment, or did not maintain a record or file of its proceedings, the proposed law permits the court to remand to the agency to reconsider in light of additional evidence that in the exercise of reasonable diligence could not have been produced at, or was improperly excluded from, the agency proceeding.¹²⁷ This is consistent with the agency's role as the primary fact-finder and the court's role as a reviewing body. The court may receive the evidence itself without remanding the case to the agency in any of the following circumstances:

(1) The evidence is needed to decide whether those taking the agency action were improperly constituted as a decisionmaking body or whether there were grounds to disqualify them, whether the procedure or decisionmaking process was unlawful.

(2) The standard of review of an adjudicative proceeding is the independent judgment of the court.

(3) No hearing was held by the agency and the court finds that remand to the agency would be unlikely to result in a better record for review and the interests of economy and efficiency would be served by receiving the evidence itself.¹²⁸

PROPER COURT FOR REVIEW; VENUE

Under existing law, most judicial review of agency action is in superior court.¹²⁹ Either the Supreme Court or the court of appeal reviews decisions of the

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

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

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

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

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

Workers' Compensation Appeals Board,¹³⁰ Department of Alcoholic Beverage Control,¹³¹ and Alcoholic Beverage Control Appeals Board.¹³² The court of appeal reviews decisions of the Agricultural Labor Relations Board¹³³ and Public Employment Relations Board.¹³⁴ The proposed law does not alter this scheme.

Under existing law, venue in superior court for administrative mandamus is in the county where the cause of action arose.¹³⁵ The proposed law adds Sacramento County as an additional permissible county when a state agency is involved.¹³⁶ For judicial review of local agency action, the proposed law provides that venue shall be in the county of jurisdiction of the agency. This is probably not a substantive change, since the cause of action is likely to arise in the county of the local agency's jurisdiction.

STAYS PENDING REVIEW

Under the existing APA, an agency has power to stay its own decision.¹³⁷ Whether or not the agency does so, the superior court has discretion to stay the agency action, but should not impose or continue a stay if to do so would be against the public interest.¹³⁸

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

130. Lab. Code §§ 5950, 5955.

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

132. *Id.*

133. Lab. Code § 1160.8.

134. Gov't Code §§ 3520, 3542, 3564.

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

136. Most state agencies have their headquarters offices in Sacramento. The Sacramento County Superior Court is likely to have or develop expertise in judicial review proceedings. The provision for venue in Sacramento County does not apply to judicial review of a decision of a private hospital board under the proposed law. The proposed law also preserves the special venue rule for review of drivers' license proceedings. See Veh. Code § 13559 (licensee's county of residence).

137. Gov't Code § 11519(b).

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

139. See Code Civ. Proc. § 1094.5(h).

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

The proposed law simplifies this scheme by providing one standard regardless of the type of agency action being reviewed. Under the proposed law, the factors to be considered by the court in determining whether to grant a stay include, in addition to the public interest and the likelihood of success on the merits, the degree to which the applicant for a stay will suffer irreparable injury from denial of a stay and the degree to which the grant of a stay would harm third parties.¹⁴²

COSTS

The proposed law consolidates and generalizes provisions on the fee for preparing a transcript and other portions of the record, recovering costs of suit by the prevailing party, and proceeding in forma pauperis.¹⁴³

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

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

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

143. See Code Civ. Proc. §§ 1094.5(a), 1094.6(c); Gov't Code § 11523. The proposed law continues the existing provision in Code of Civil Procedure Section 1094.5(a) for proceedings in forma pauperis to review an adjudicative proceeding, but does not expand it to apply to review of matters other than adjudication. The proposed law also recodifies Government Code Section 800 (attorney fees where agency action was arbitrary or capricious) in the Code of Civil Procedure without substantive change.

JUDICIAL REVIEW OF AGENCY ACTION

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

2 SEC. ____ Title 2 (commencing with Section 1120) is added to Part 3 of the
3 Code of Civil Procedure to read:

4 **TITLE 2. JUDICIAL REVIEW OF AGENCY ACTION**

5 **CHAPTER 1. GENERAL PROVISIONS**

6 **Article 1. Preliminary Provisions**

7 **§ 1120. Entities to which title applies**

8 1120. (a) Except as provided by statute, this title governs judicial review of
9 agency action of any of the following entities:

10 (1) The state, including any agency or instrumentality of the state, whether
11 exercising executive powers or otherwise.

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

14 (3) A public corporation in the state.

15 (b) This title governs judicial review of a decision of a nongovernmental entity
16 if any of the following conditions is satisfied:

17 (1) A statute expressly so provides.

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

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

24 **Comment.** Section 1120 makes clear that the judicial review provisions of this title apply to
25 actions of local agencies as well as state government. *But see* Section 1121(d) (title does not
26 apply to judicial review of a local agency ordinance). The term “local agency” is defined in
27 Government Code Section 54951. See Section 1121.260 & Comment. The introductory
28 clause of Section 1120 recognizes that some proceedings are exempted by statute from
29 application of this title. See Bus. & Prof. Code § 6089 (State Bar Court); Gov’t Code §
30 11420.10 (award in binding arbitration under Administrative Procedure Act); Pub. Res. Code
31 § 25531.5 (Energy Commission); Pub. Util. Code § 1759 (Public Utilities Commission). See
32 also Gov’t Code § 19576.1 (disciplinary decisions not subject to judicial review). This title
33 also does not apply to proceedings where the substantive right originates in the constitution,
34 such as inverse condemnation. See California Government Tort Liability Practice § 2.97, at
35 181-82 (Cal. Cont. Ed. Bar, 3d ed. 1992). See also Section 1123.160 (condition of relief).

36 Paragraph (1) of subdivision (b) applies this title to judicial review of a decision of a
37 nongovernmental entity if a statute expressly so provides. For a statute applying this title to a
38 nongovernmental entity, see Health & Safety Code § 1339.63 (adjudication by private
39 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).

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) Judicial review of agency action provided by statute 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.

(e) Judicial review of agency proceedings pursuant to a reference to the agency ordered by the court.

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).

Subdivision (e) makes clear this title does not apply where an agency acts as referee in a court-ordered reference. See, e.g., Water Code §§ 2000-2048. However, notwithstanding subdivision (e), Chapter 2 (commencing with Section 1122.010) on primary jurisdiction may still apply. Section 1122.010; see generally *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 451, 658 P.2d 709, 731, 189 Cal. Rptr. 346, 368, *cert. denied*, 464 U.S. 977

(1983); *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 26 Cal. 3d 183, 193-200, 605 P.2d 1, 5-9, 161 Cal. Rptr. 466, 470-74 (1980).

§ 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.

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

3 **§ 1121.140. Exercise of agency discretion**

4 1121.140. Nothing in this title authorizes the court to interfere with a valid
5 exercise of agency discretion or to direct an agency how to exercise its
6 discretion.

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

9 **§ 1121.150. Application of new law**

10 1121.150. (a) This title applies to a proceeding commenced on or after January 1,
11 1998, for judicial review of agency action.

12 (b) The applicable law in effect before January 1, 1998, continues to apply to a
13 proceeding for judicial review of agency action pending on January 1, 1988.

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

16 Subdivision (b) is drawn from a portion of 1981 Model State APA Section 1-108. Pending
17 proceedings for administrative mandamus, declaratory relief, and other proceedings for
18 judicial review of agency action are not governed by this title, but should be completed under
19 the applicable provisions other than this title.

20 Article 2. Definitions

21 **§ 1121.210. Application of definitions**

22 1121.210. Unless the provision or context requires otherwise, the definitions in
23 this article govern the construction of this title.

24 **Comment.** Section 1121.210 limits these definitions to judicial review of agency action.
25 Some parallel provisions may be found in the statutes governing adjudicative proceedings by
26 state agencies. See Gov't Code §§ 11405.10-11405.80 (operative July 1, 1997).

27 **§ 1121.220. Adjudicative proceeding**

28 1121.220. "Adjudicative proceeding" means an evidentiary hearing for
29 determination of facts pursuant to which an agency formulates and issues a
30 decision.

31 **Comment.** Section 1121.220 is drawn from the Administrative Procedure Act. See Gov't
32 Code § 11405.20 (operative July 1, 1997) & Comment ("adjudicative proceeding" defined).
33 See also Sections 1121.230 ("agency" defined), 1121.250 ("decision" defined).

34 **§ 1121.230. Agency**

35 1121.230. (a) "Agency" means a board, bureau, commission, department,
36 division, governmental subdivision or unit of a governmental subdivision, office,
37 officer, or other administrative unit, including the agency head, and one or more
38 members of the agency head or agency employees or other persons directly or
39 indirectly purporting to act on behalf of or under the authority of the agency
40 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

1 concurrent jurisdiction over the subject matter of the proceeding or an issue in
2 the proceeding.

3 **Comment.** Section 1122.010 makes clear that the provisions governing primary
4 jurisdiction come into play only when there is exclusive or concurrent jurisdiction in an
5 agency over a matter that is the subject of a pending judicial proceeding. The introductory
6 clause makes clear this chapter applies, for example, to a judicial proceeding involving a trial
7 de novo. The term “judicial proceeding” is used to mean any proceeding in court, including
8 a civil action or a special proceeding.

9 This chapter deals with original jurisdiction over a matter, rather than with judicial review of
10 previous agency action on the matter. If the matter has previously been the subject of agency
11 action and is currently the subject of judicial review, the governing provisions relating to the
12 court’s jurisdiction are found in Chapter 3 (commencing with Section 1123.110) (judicial
13 review) rather than in this chapter.

14 § 1122.020. Exclusive agency jurisdiction

15 1122.020. If an agency has exclusive jurisdiction over the subject matter of the
16 proceeding or an issue in the proceeding, the court shall decline to exercise
17 jurisdiction over the subject matter or the issue. The court may dismiss the
18 proceeding or retain jurisdiction pending agency action on the matter or issue.

19 **Comment.** Section 1122.020 requires the court to yield primary jurisdiction to an agency
20 if there is a legislative scheme to vest the determination in the agency. Adverse agency action
21 is subject to judicial review. See Section 1122.040 (judicial review following agency action).

22 § 1122.030. Concurrent agency jurisdiction

23 1122.030. (a) If an agency has concurrent jurisdiction over the subject matter of
24 the proceeding or an issue in the proceeding, the court shall exercise jurisdiction
25 over the subject matter or issue unless the court in its discretion refers the matter
26 or issue for agency action. The court may exercise its discretion to refer the matter
27 or issue for agency action only if the court determines the reference is clearly
28 appropriate taking into consideration all relevant factors including, but not limited
29 to, the following:

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

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

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

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

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

39 (6) Whether agency remedies are adequate and whether any delay for agency
40 action would limit judicial remedies, either practically or due to running of statutes
41 of limitation or otherwise.

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

44 (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. 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.

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 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).

Section 1123.220 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.

1 Standing of a person to obtain judicial review under this section is not limited to private
2 persons, but extends to public entities as well, whether state or local. See Section 1121.280
3 (“person” includes governmental subdivision). See also Bus. & Prof. Code § 23090
4 (Department of Alcoholic Beverage Control may get judicial review of decision of Alcoholic
5 Beverage Control Appeals Board); *Martin v. Alcoholic Beverage Control Appeals Bd.*, 52 Cal.
6 2d 238, 243, 340 P.2d 1, 4 (1959) (same); Veh. Code § 3058 (DMV may get judicial review
7 of order of New Motor Vehicle Board); *Tieberg v. Superior Court*, 243 Cal. App. 2d 277,
8 283, 52 Cal. Rptr. 33, 37 (1966) (Director of Department of Employment may get judicial
9 review of decision of Unemployment Insurance Appeals Board, a division of that
10 department); *Los Angeles County Dep’t of Health Serv. v. Kennedy*, 163 Cal. App. 3d 799,
11 209 Cal. Rptr. 595 (1984) (county department of health services may get judicial review of
12 decision of county civil service commission); *County of Los Angeles v. Tax Appeals Bd. No.*
13 *2*, 267 Cal. App. 2d 830, 834, 73 Cal. Rptr. 469, 471 (1968) (county may get judicial review
14 of tax appeals board decision); *County of Contra Costa v. Social Welfare Bd.*, 199 Cal. App.
15 2d 468, 471, 18 Cal. Rptr. 573, 575 (1962) (county may get judicial review of State Social
16 Welfare Board decision ordering county to reinstate welfare benefits); *Board of Permit*
17 *Appeals v. Central Permit Bureau*, 186 Cal. App. 2d 633, 9 Cal. Rptr. 83 (1960) (local permit
18 appeals board may get traditional mandamus against inferior agency that did not comply with
19 its decision). *But cf. Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal. 3d 1, 719 P.2d
20 987, 227 Cal. Rptr. 391 (1986) (city or county standing to challenge state action as violating
21 federal constitutional rights).

22 If a person is authorized by statute or ordinance to file a complaint with the agency and the
23 complaint is rejected, the person is “interested” within the meaning of Section 1123.220.
24 *Covert v. State Bd. of Equalization*, 29 Cal. 2d 125, 130, 173 P.2d 545 (1946). See also *Spear*
25 *v. Board of Medical Examiners*, 146 Cal. App. 2d 207, 303 P.2d 886 (1956) (standing to
26 challenge agency refusal to file charges of person expressly authorized by statute to file
27 complaint).

28 § 1123.230. Public interest standing

29 1123.230. Whether or not a person has standing under Section 1123.220, a
30 person has standing to obtain judicial review of agency action that concerns an
31 important right affecting the public interest if all of the following conditions are
32 satisfied:

33 (a) The person resides or conducts business in the jurisdiction of the agency or
34 is an organization that has a member that resides or conducts business in the
35 jurisdiction of the agency and the agency action is germane to the purposes of
36 the organization.

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

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

46 **Comment.** Section 1123.230 governs public interest standing for judicial review of agency
47 action other than adjudication. For special rules governing standing for judicial review of a

1 decision in an adjudicative proceeding, see Section 1123.240. See also Section 1121.240
2 (“agency action” defined).

3 Section 1123.230 codifies California case law that a member of the public may obtain
4 judicial review of agency action (or inaction) to implement the public right to enforce a
5 public duty. See, e.g., *Green v. Obledo*, 29 Cal. 3d 126, 144-45, 624 P.2d 256, 172 Cal. Rptr.
6 206 (1981); *Hollman v. Warren*, 32 Cal. 2d 351, 196 P.2d 562 (1948); *Board of Social*
7 *Welfare v. County of Los Angeles*, 27 Cal. 2d 98, 162 P.2d 627 (1945); *California Homeless*
8 *& Housing Coalition v. Anderson*, 31 Cal. App. 4th 450, 37 Cal. Rptr. 2d 639 (1995);
9 *Environmental Law Fund, Inc. v. Town of Corte Madera*, 49 Cal. App. 3d 105, 122 Cal. Rptr.
10 282 (1975); *American Friends Service Committee v. Proconier*, 33 Cal. App. 3d 252, 109
11 Cal. Rptr. 22 (1973).

12 Section 1123.230 supersedes the standing rules of Section 526a (taxpayer actions). Under
13 Section 1123.230 a person, whether or not a taxpayer within the jurisdiction, has standing to
14 obtain judicial review, including restraining and preventing illegal expenditure or injury by a
15 public entity, if the general public interest requirements of this section are satisfied.

16 Section 1123.230 applies to all types of relief sought, whether pecuniary or nonpecuniary,
17 injunctive or declaratory, or otherwise. The test for standing under this section is whether
18 there is a duty owed to the general public or a large class of persons. A person may have
19 standing under the section to have the law enforced in the public interest, regardless of any
20 private interest or personal adverse effect.

21 The limitations in subdivisions (a)-(c) are drawn loosely from other provisions of state and
22 federal law. See, e.g., Section 1021.5 (attorney fees in public interest litigation); Section
23 1123.220 & Comment (private interest standing); first portion of Section 526a (taxpayer
24 within jurisdiction); Corp. Code § 800(b)(2) (allegation in shareholder derivative action of
25 efforts to secure action from board); Fed. R. Civ. Proc. 23(a) (representative must fairly and
26 adequately protect interests of class). The requirement in subdivision (c) of a request to the
27 agency does not supersede the California Environmental Quality Act. See Section 1121.110
28 (conflicting or inconsistent statute controls); Pub. Res. Code § 21177 (objection may be oral
29 or written).

30 § 1123.240. Standing for review of decision in adjudicative proceeding

31 1123.240. Notwithstanding any other provision of this article, a person does
32 not have standing to obtain judicial review of a decision in an adjudicative
33 proceeding unless one of the following conditions is satisfied:

34 (a) The person was a party to the proceeding.

35 (b) The person was a participant in the proceeding, and is either interested or
36 the person’s participation was authorized by statute or ordinance. This
37 subdivision does not apply to judicial review of a proceeding under the formal
38 hearing provisions of the Administrative Procedure Act, Chapter 5 (commencing
39 with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

40 (c) The person has standing under Section 1123.230.

41 **Comment.** Section 1123.240 provides special rules for standing to obtain judicial review of
42 a decision in an adjudicative proceeding. Standing to obtain judicial review of other agency
43 actions is governed by Sections 1123.220 (private interest standing) and 1123.230 (public
44 interest standing). Special statutes governing standing requirements for judicial review of an
45 agency decision prevail over this section. Section 1123.210 (standing expressly provided by
46 statute); see, e.g., Pub. Res. Code § 30801 (judicial review of decision of Coastal Commission
47 by “any aggrieved person”).

48 Subdivision (a) governs standing to challenge a decision in an adjudicative proceeding
49 under the Administrative Procedure Act. The provision is thus limited primarily to a state

1 agency adjudication where an evidentiary hearing for determination of facts is statutorily or
2 constitutionally required for formulation and issuance of a decision. See Gov't Code §§
3 11410.10-11410.50 (application of administrative adjudication provisions of Administrative
4 Procedure Act) (operative July 1, 1997).

5 A party to an adjudicative proceeding under the Administrative Procedure Act includes the
6 person to whom the agency action is directed and any other person named as a party or
7 allowed to intervene in the proceeding. Section 1121.270 ("party" defined). This codifies
8 existing law. See, e.g., *Temescal Water Co. v. Department of Public Works*, 44 Cal. 2d 90, 279
9 P. 2d 1 (1955); *Covert v. State Bd. of Equalization*, 29 Cal. 2d 125, 173 P. 2d 545 (1946).
10 Under this test, a complainant or victim who is not made a party does not have standing. A
11 nonparty who might otherwise have private or public interest standing under Section
12 1123.220 or 1123.230 would not have standing to obtain judicial review of a decision under
13 the Administrative Procedure Act.

14 Subdivision (b) applies to a decision in an adjudicative proceeding other than a proceeding
15 subject to the Administrative Procedure Act. Under this provision, a person does not have
16 standing to obtain judicial review unless the person both (1) was a participant in the
17 proceeding and (2) satisfies the requirements of either Section 1123.220 (private interest
18 standing) or Section 1123.230 (public interest standing). Participation may include appearing
19 and testifying, submitting written comments, or other appropriate activity that indicates a
20 direct involvement in the agency action.

21 Subdivision (c) is consistent with *Environmental Law Fund, Inc. v. Town of Corte Madera*,
22 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282 (1975). Thus a person may have public interest
23 standing for judicial review of adjudication if the right to be vindicated is an important one
24 affecting the public interest, the person resides or conducts business in the jurisdiction of the
25 agency or meets the requirements for organizational standing, the person will adequately
26 protect the public interest, and the person has requested the agency to correct the action and
27 the agency has not done so within a reasonable time. Section 1123.230. Moreover, the
28 requirement of exhaustion of administrative remedies must be satisfied, including the rule that
29 the issue on judicial review must have been raised before the agency by someone. Section
30 1123.350. See also *See & Sage Audubon Soc'y v. Planning Comm'n*, 34 Cal. 3d 412, 417-
31 18, 668 P.2d 664, 194 Cal. Rptr. 357 (1983); *California Aviation Council v. County of*
32 *Amador*, 200 Cal. App. 3d 337, 246 Cal. Rptr. 110 (1988); *Resource Defense Fund v. Local*
33 *Agency Formation Comm'n*, 191 Cal. App. 3d 886, 895, 236 Cal. Rptr. 794, 799 (1987).

34 § 1123.250. Organizational standing

35 1123.250. An organization that does not otherwise have standing under this
36 article has standing if a person who has standing is a member of the organization,
37 or a nonmember the organization is required to represent, and the agency action
38 is related to the purposes of the organization, and the person consents.

39 **Comment.** Section 1123.250 codifies case law giving an incorporated or unincorporated
40 association, such as a trade union or neighborhood association, standing to obtain judicial
41 review on behalf of its members. See, e.g., *Professional Fire Fighters, Inc. v. City of Los*
42 *Angeles*, 60 Cal. 2d 276, 384 P. 2d 158, 32 Cal. Rptr. 830 (1963); *Residents of Beverly Glen,*
43 *Inc. v. City of Los Angeles*, 34 Cal. App. 3d 117, 109 Cal. Rptr. 724 (1973). This principle
44 extends to standing of the organization to obtain judicial review where a nonmember is
45 adversely affected, as where a trade union is required to represent the interests of
46 nonmembers.

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).

1 *Futility.* The exhaustion requirement is excused under subdivision (b) if it is certain, not
2 merely probable, that the agency would deny the requested relief. See *Ogo Assocs. v. City of*
3 *Torrance*, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (1974).

4 *Irreparable harm.* Subdivision (c) codifies the existing narrow case law exception to the
5 exhaustion of remedies requirement where exhaustion would result in irreparable harm
6 disproportionate to the benefit derived from requiring exhaustion. The standard is drawn
7 from 1981 Model State APA Section 5-107(3), but expands the factors to be considered to
8 include private as well as public benefit.

9 *Lack of notice.* Lack of sufficient or timely notice of the agency proceeding is an excuse
10 under subdivision (d). See *Environmental Law Fund v. Town of Corte Madera*, 49 Cal. App.
11 3d 105, 113-14, 122 Cal. Rptr. 282, 286 (1975).

12 *Lack of subject matter jurisdiction.* Subdivision (e) recognizes an exception to the
13 exhaustion requirement where the challenge is to the agency's subject matter jurisdiction in
14 the proceeding. See, e.g., *County of Contra Costa v. State of California*, 177 Cal. App. 3d 62,
15 73, 222 Cal. Rptr. 750, 758 (1986).

16 *Constitutional issues.* Under subdivision (f) administrative remedies need not be exhausted
17 for a challenge to a statute, regulation, or procedure as unconstitutional on its face. See, e.g.,
18 *Horn v. County of Ventura*, 24 Cal. 3d 605, 611, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979);
19 *Chevrolet Motor Div. v. New Motor Vehicle Bd.*, 146 Cal. App. 3d 533, 539, 194 Cal. Rptr.
20 270 (1983). There is no exception for a challenge to a provision as applied, even though
21 phrased in constitutional terms.

22 **§ 1123.350. Exact issue rule**

23 1123.350. (a) Except as provided in subdivision (b), a person may not obtain
24 judicial review of an issue that was not raised before the agency either by the
25 person seeking judicial review or by another person.

26 (b) The court may permit judicial review of an issue that was not raised before
27 the agency if any of the following conditions is satisfied:

28 (1) The agency did not have jurisdiction to grant an adequate remedy based on
29 a determination of the issue.

30 (2) The person did not know and was under no duty to discover, or was under
31 a duty to discover but could not reasonably have discovered, facts giving rise to
32 the issue.

33 (3) The agency action subject to judicial review is a rule and the person has not
34 been a party in an adjudicative proceeding that provided an adequate
35 opportunity to raise the issue.

36 (4) The agency action subject to judicial review is a decision in an adjudicative
37 proceeding and the person was not adequately notified of the adjudicative
38 proceeding. If a statute or rule requires the person to maintain an address with the
39 agency, adequate notice includes notice given to the person at the address
40 maintained with the agency.

41 (5) The interests of justice would be served by judicial resolution of an issue
42 arising from a change in controlling law occurring after the agency action or from
43 agency action occurring after the person exhausted the last feasible opportunity
44 to seek relief from the agency.

45 **Comment.** Subdivision (a) of Section 1123.350 codifies the case law exact issue rule. See,
46 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

1 agency's interpretation of law. See *Bodinson Mfg. Co. v. California Employment Comm'n*,
2 17 Cal. 2d 321, 325-26, 109 P.2d 935 (1941).

3 The deference due the agency's determination does not override the ultimate authority of
4 the court to substitute its own judgment for that of the agency under the standard of
5 subdivision (a), especially when constitutional questions are involved. See *People v. Louis*, 42
6 Cal. 3d 969, 987, 728 P.2d 180, 232 Cal. Rptr. 110 (1986); Cal. Const. art. III, § 3.5.

7 Under subdivision (a)(1), although the court uses independent judgment in deciding
8 whether agency action, or the statute or regulation on which the agency action is based, is
9 unconstitutional as applied, the standard of review of the underlying factfinding is prescribed
10 in Section 1123.430 (substantial evidence).

11 Subdivision (a)(2) continues a portion of former Section 1094.5(b) (respondent has
12 proceeded without or in excess of jurisdiction).

13 Subdivision (a)(3), providing for judicial relief if the agency has not decided all issues
14 requiring resolution, deals with the possibility that the reviewing court may dispose of the case
15 on the basis of issues that were not considered by the agency. An example would arise if the
16 court had to decide on the facial constitutionality of the agency's enabling statute where an
17 agency is precluded from passing on the question. This provision is not intended to authorize
18 the reviewing court initially to decide issues that are within the agency's primary jurisdiction
19 — such issues should first be decided by the agency, subject to the standards of judicial
20 review provided in this article.

21 Subdivision (a)(5) changes case law that an issue of application of law to fact is treated for
22 purposes of judicial review as an issue of fact, if the facts in the case (or inferences to be
23 drawn from the facts) are disputed. See *S. G. Borello & Sons, Inc. v. Dept. of Industrial*
24 *Relations*, 48 Cal. 3d 341, 349, 769 P.2d 399, 256 Cal. Rptr. 543 (1989). Subdivision (a)(5)
25 broadens and applies to all application issues the case law rule that undisputed facts and
26 inferences are treated as issues of law. See *Halaco Engineering Co. v. South Central Coast*
27 *Regional Comm'n*, 42 Cal. 3d 52, 74-77, 720 P.2d 15, 227 Cal. Rptr. 667 (1986). Agency
28 application of law to facts should not be confused with basic fact-finding. Typical findings of
29 facts include determinations of what happened or will happen in the future, when it happened,
30 and what the state of mind of the participants was. These findings may be subject to
31 substantial evidence review under Section 1123.430 or 1123.440. After fact-finding, the
32 agency must decide abstract legal issues that can be resolved without knowing anything of the
33 basic facts in the case. Finally, the agency must apply the general law to the basic facts, a
34 situation-specific application of law which will be subject to independent judgment review
35 under Section 1123.420. See Asimow, *The Scope of Judicial Review of Decisions of*
36 *California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1211-12 (1995).

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

43 Under subdivision (b), Section 1123.420 does not affect case law under which legal
44 interpretations by the Public Employment Relations Board, Agricultural Labor Relations
45 Board, or Workers' Compensation Appeals Board of statutes within their area of expertise
46 have been given special deference. See, e.g., *Banning Teachers Ass'n v. Public Employment*
47 *Relations Bd.*, 44 Cal. 3d 799, 804, 750 P.2d 313, 244 Cal. Rptr. 671 (1988); *Agricultural*
48 *Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 400, 411, 546 P.2d 687, 128 Cal.
49 *Rptr.* 183 (1976); *Judson Steel Corp. v. Workers' Compensation Appeals Bd.*, 22 Cal. 3d 658,
50 668, 586 P.2d 564, 150 Cal. Rptr. 250 (1978); *Agricultural Labor Relations Bd. v. Superior*
51 *Court*, 48 Cal. App. 4th 1489, 56 Cal. Rptr. 2d 409 (1996); *United Farm Workers v.*
52 *Agricultural Labor Relations Bd.*, 41 Cal. App. 4th 303, 48 Cal. Rptr. 2d 696, 703 (1995).

1 **§ 1123.430. Review of agency fact finding**

2 1123.430. (a) Except as provided in Section 1123.440, the standard for judicial
3 review of whether agency action is based on an erroneous determination of fact
4 made or implied by the agency is whether the agency's determination is
5 supported by substantial evidence in the light of the whole record.

6 (b) If the factual basis for a decision in a state agency adjudication includes a
7 determination of the presiding officer based substantially on the credibility of a
8 witness, the court shall give great weight to the determination to the extent the
9 determination identifies the observed demeanor, manner, or attitude of the witness
10 that supports it.

11 (c) Notwithstanding any other provision of this section, the standard for judicial
12 review of a determination of fact made by an administrative law judge employed
13 by the Office of Administrative Hearings that is changed by the agency head is
14 the independent judgment of the court whether the agency's determination of
15 that fact is supported by the weight of the evidence.

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

18 Subdivision (a) eliminates for state agencies the rule of former Section 1094.5(c),
19 providing for independent judgment review in cases where "authorized by law." The former
20 standard was interpreted to provide for independent judgment review where a fundamental
21 vested right is involved. *Bixby v. Pierno*, 4 Cal. 3d 130, 144, 481 P.2d 242, 93 Cal. Rptr. 234
22 (1971); see generally Asimow, *The Scope of Judicial Review of Decisions of California*
23 *Administrative Agencies*, 42 UCLA L. Rev. 1157, 1161-76 (1995).

24 The substantial evidence test of subdivision (a) is not a toothless standard which calls for the
25 court merely to rubber stamp an agency's finding if there is any evidence to support it: The
26 court must examine the evidence in the record both supporting and opposing the agency's
27 findings. *Bixby v. Pierno*, *supra*. If a reasonable person could have made the agency's
28 findings, the court must sustain them. But if the agency head comes to a different conclusion
29 about credibility than the administrative law judge, the substantiality of the evidence
30 supporting the agency's decision is called into question. *Cf.* Gov't Code § 11425.50
31 (operative July 1, 1997).

32 In an adjudicative proceeding to which Government Code Section 11425.50 applies, the
33 court must give great weight to a determination of the presiding officer based substantially on
34 the credibility of a witness to the extent the determination identifies the observed demeanor,
35 manner, or attitude of the witness that supports it. Gov't Code § 11425.50(b). Government
36 Code Section 11425.50 applies to adjudications of most state agencies (see Gov't Code §
37 11410.20 & Comment) and to adjudications of state and local agencies that voluntarily apply
38 the section to the proceeding. See Gov't Code § 11410.40.

39 **§ 1123.440. Review of fact finding in local agency adjudication**

40 1123.440. The standard for judicial review of whether a decision of a local
41 agency in an adjudicative proceeding is based on an erroneous determination of
42 fact made or implied by the agency is:

43 (a) In cases in which the court is authorized by law to exercise its independent
44 judgment on the evidence, the independent judgment of the court whether the
45 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.

1 **Comment.** Section 1123.470 codifies existing law. See California Administrative
2 Mandamus §§ 4.157, 12.7 (Cal. Cont. Ed. Bar, 2d ed. 1989). It is drawn from 1981 Model
3 State APA Section 5-116(a)(1).

4 Article 5. Superior Court Jurisdiction and Venue

5 **§ 1123.510. Superior court jurisdiction**

6 1123.510. (a) Except as otherwise provided by statute, jurisdiction for judicial
7 review under this chapter is in the superior court.

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

11 **Comment.** Section 1123.510 is drawn from 1981 Model State APA Section 5-104,
12 alternative A. Under prior law, except where the issues were of great public importance and
13 had to be resolved promptly or where otherwise provided by statute, the superior court was
14 the proper court for administrative mandamus proceedings. See *Mooney v. Pickett*, 4 Cal. 3d
15 669, 674-75, 483 P.2d 1231, 94 Cal. Rptr. 279 (1971). Although the Supreme Court and
16 courts of appeal may exercise original mandamus jurisdiction in exceptional circumstances,
17 the superior court is in a better position to determine questions of fact than is an appellate
18 tribunal and is therefore the preferred court. *Roma Macaroni Factory v. Giambastiani*, 219
19 Cal. 435, 437, 27 P.2d 371 (1933).

20 The introductory clause of Section 1123.510 recognizes that statutes applicable to
21 particular proceedings provide that judicial review is in the court of appeal or Supreme Court.
22 See Bus. & Prof. Code § 23090 (Alcoholic Beverage Control Appeals Board and Department
23 of Alcoholic Beverage Control); Gov't Code §§ 3520(c), 3542(c), 3564(c) (Public
24 Employment Relations Board); Lab. Code §§ 1160.8 (Agricultural Labor Relations Board),
25 5950 (Workers' Compensation Appeals Board).

26 **§ 1123.520. Superior court venue**

27 1123.520. (a) Except as otherwise provided by statute, the proper county for
28 judicial review under this chapter is:

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

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

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

36 **Comment.** Subdivision (a)(1) of Section 1123.520 continues prior law for judicial review
37 of state agency action, with the addition of Sacramento County. See Code Civ. Proc. §
38 393(1)(b); California Administrative Mandamus § 8.16, at 269 (Cal. Cont. Ed. Bar, 2d ed.
39 1989); *Duval v. Contractors State License Bd.*, 125 Cal. App. 2d 532, 271 P.2d 194 (1954).
40 Subdivision (a)(2) is new, but is probably not a substantive change, since the cause of action is
41 likely to arise in the county of the local agency's jurisdiction.

42 Under subdivision (b), a case filed in the wrong county should not be dismissed, but should
43 be transferred to the proper county. See Sections 1123.710(a) (applicability of rules of
44 practice for civil actions), 396b. *Cf. Padilla v. Department of Alcoholic Beverage Control*, 43
45 Cal. App. 4th 1151, 51 Cal. Rptr. 2d 133 (1996) (transfer from court lacking jurisdiction).

1 The venue rules of Section 1123.520 are subject to a conflicting or inconsistent statute
2 applicable to a particular entity (Section 1121.110), such as Business and Professions Code
3 Section 2019 (venue for proceedings against the Medical Board of California). For venue of
4 judicial review of a decision of a private hospital board, see Health & Safety Code §
5 1339.63(b).

6 Article 6. Petition for Review; Time Limits

7 § 1123.610. Petition for review

8 1123.610. (a) A person seeking judicial review of agency action may initiate
9 judicial review by filing a petition for review with the court.

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

12 (c) The petitioner shall cause a copy of the petition for review to be served on
13 the parties in the same manner as service of a summons in a civil action.

14 **Comment.** Subdivision (a) of Section 1123.610 supersedes the first sentence of former
15 Government Code Section 11523.

16 Subdivision (b) codifies existing practice. See California Administrative Mandamus §§ 6.1-
17 6.3, at 225-27 (Cal. Cont. Ed. Bar, 2d ed. 1989). Although the petition may name the agency
18 head as a respondent by title, subdivision (b) makes clear “agency” does not include
19 individual employees of the agency. See Sections 1121.230 (“agency” defined), 1121.210
20 (definitions vary as required by the provision).

21 Subdivision (c) continues existing practice. See California Administrative Mandamus §§
22 8.48, 9.17, 9.23, at 298-99, 320, 326 (Cal. Cont. Ed. Bar 1989). Since the petition for review
23 serves the purpose of the alternative writ of mandamus or notice of motion under prior law, a
24 summons is not required. See California Administrative Mandamus, *supra*, §§ 9.8, 9.21, at
25 315, 324.

26 § 1123.620. Contents of petition for review

27 1123.620. The petition for review shall state all of the following:

28 (a) The name of the petitioner.

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

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

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

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

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

37 (g) The reasons why relief should be granted.

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

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

40 § 1123.630. Notice to parties of last day to file petition for review

41 1123.630. In addition to any notice of agency action required by statute, in an
42 adjudicative proceeding, the agency shall in the decision or otherwise give notice

1 to the parties in substantially the following form: “The last day to file a petition
2 with a court for review of the decision is [date] unless the time is extended as
3 provided by law.”

4 **Comment.** Section 1123.630 is drawn from and generalizes former Code of Civil
5 Procedure Section 1094.6(f). See also Unemp. Ins. Code § 410; Veh. Code § 14401(b). For
6 provisions extending the time to petition for review, see Sections 1123.640, 1123.650. An
7 agency notice that erroneously shows a date that is too soon does not shorten the period for
8 review, since the substantive rules in Sections 1123.640 or 1123.650 govern. If the notice
9 erroneously shows a date that is later than the last day to petition for review and the petition is
10 filed before that later date, the agency may be estopped to assert that the time has expired.
11 See *Ginns v. Savage*, 61 Cal. 2d 520, 523-25, 393 P.2d 689, 39 Cal. Rptr. 377 (1964).

12 The introductory clause of Section 1123.630 makes clear that notice of agency action
13 required by other special provisions do not override this section. Special provisions include
14 those for judicial review of an administratively-issued withholding order for taxes (Code Civ.
15 Proc. § 706.075), for an assessment due from a producer under a commodity marketing
16 program (Food & Agric. Code §§ 59234.5, 60016), for denial by a county of disability
17 retirement (Gov’t Code § 31725), and under the California Environmental Quality Act (Pub.
18 Res. Code §§ 21108 (state agency), 21152 (local agency)). See Section 1121.110
19 (conflicting or inconsistent statute controls).

20 **§ 1123.640. Time for filing petition for review in adjudication of state agency and formal**
21 **adjudication of local agency**

22 1123.640. (a) The petition for review of a decision of a state agency in an
23 adjudicative proceeding, and of a decision of any agency in a proceeding under
24 Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of
25 the Government Code, shall be filed not later than 30 days after the decision is
26 effective or after the notice required by Section 1123.630 is delivered, served, or
27 mailed, whichever is later.

28 (b) For the purpose of this section:

29 (1) A decision in a proceeding under Chapter 5 (commencing with Section
30 11500) of Part 1 of Division 3 of Title 2 of the Government Code is effective at
31 the time provided in Section 11519 of the Government Code.

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

37 (A) Reconsideration is ordered within that time pursuant to express statute or
38 rule.

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

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

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

43 (1) During any period when the party is seeking reconsideration of the decision
44 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), California Environmental Quality Act (Pub. Res. Code § 21167), 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 special statutes on the effective date of a decision, see Educ. Code §§ 94323, 94933; Gov’t Code § 8670.68; Health & Safety Code §§ 443.37, 25187, 25514.6, 108900, 111855, 111940, 128775; Ins. Code §§ 1858.6, 12414.19; Pub. Res. Code § 2774.2; 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. For special provisions on effective date, see Educ. Code §§ 94323, 94933; Gov’t Code § 8670.68; Health & Safety Code §§ 443.37, 25514.6, 108900, 111855, 111940, 128775; Ins. Code §§ 728, 1858.6, 12414.19; Pub. Res. Code § 2774.2. 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 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 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 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). Section 1123.650 does not override special limitations periods applicable to particular proceedings, such as for 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 a local legislative body adopting or amending a general or specific plan, regulation attached to a specific plan, or development agreement (Gov't Code § 65009), or a 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). See Section 1121.110 (conflicting or inconsistent statute controls).

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

1 provision applied only to a decision of a licensed hospital or state agency made after a
2 hearing under the formal hearing provisions of the Administrative Procedure Act.

3 Subdivision (b)(1) requires more than a conclusion that a possible viable defense exists.
4 The court must make a preliminary assessment of the merits of the judicial review proceeding
5 and conclude that the petitioner is likely to obtain relief in that proceeding. Medical Bd. of
6 California v. Superior Court, 227 Cal. App. 3d 1458, 1461, 278 Cal. Rptr. 247 (1991); Board
7 of Medical Quality Assurance v. Superior Court, 114 Cal. App. 3d 272, 276, 170 Cal. Rptr.
8 468 (1980).

9 Subdivision (c) continues a portion of the second sentence and all of the third sentence of
10 former Section 1094.5(g), and a portion of the second sentence and all of the third sentence
11 of former Section 1094.5(h)(1).

12 Subdivision (d) codifies case law. See Venice Canals Resident Home Owners Ass'n v.
13 Superior Court, 72 Cal. App. 3d 675, 140 Cal. Rptr. 361 (1977) (stay conditioned on posting
14 bond).

15 Subdivision (e) continues the fourth and fifth sentences of former Section 1094.5(g) and
16 the first and second sentences of former Section 1094.5(h)(3).

17 The first sentence of subdivision (f) continues the sixth sentence of former Section
18 1094.5(g) and the third sentence of former Section 1094.5(h)(3). The introductory clause of
19 the first sentence recognizes that statutes may provide special stay rules for particular
20 proceedings. See, e.g., Section 1110a (proceedings concerning irrigation water). The second
21 sentence of subdivision (f) is drawn from Section 1110b, and replaces Section 1110b for
22 judicial review proceedings under this title.

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

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

28 **§ 1123.730. Type of relief**

29 1123.730. (a) Subject to subdivision (c), the court may grant appropriate relief
30 justified by the general set of facts alleged in the petition for review, whether
31 mandatory, injunctive, or declaratory, preliminary or final, temporary or permanent,
32 equitable or legal. In granting relief, the court may order agency action required
33 by law, order agency exercise of discretion required by law, set aside or modify
34 agency action, enjoin or stay the effectiveness of agency action, remand the
35 matter for further proceedings, render a declaratory judgment, or take any other
36 action that is authorized and appropriate. The court may grant necessary ancillary
37 relief to redress the effects of official action wrongfully taken or withheld.

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

41 (c) In reviewing a decision in a proceeding in a state agency adjudication
42 subject to Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3
43 of Title 2 of the Government Code, the court shall enter judgment either
44 commanding the agency to set aside the decision or denying relief. If the
45 judgment commands that the decision be set aside, the court may order
46 reconsideration of the case in light of the court's opinion and judgment and may
47 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). 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.

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. (a) 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:

(1) The agency gave interested persons notice and an opportunity to submit oral or written comment.

(2) The agency maintained a record or file of its proceedings.

(b) If the requirements of subdivision (a) are not satisfied, the court may either receive evidence itself or remand to the agency to do so..

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).

The closed record rule of subdivision (a) is limited to cases where the agency gave notice and an opportunity to submit oral or written comment, and maintained a record or file 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).

§ 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

1 administrative record for judicial review a brief explanation of the reasons for the
2 agency action to the extent necessary for proper judicial review.

3 **Comment.** Section 1123.820 is drawn from 1981 Model State APA Section 5-115(a), (d),
4 (f)-(g). For authority to augment the administrative record for judicial review, see Section
5 1123.850 (new evidence on judicial review). The administrative record for judicial review is
6 related but not necessarily identical to the record of agency proceedings that is prepared and
7 maintained by the agency. The administrative record for judicial review specified in this
8 section is subject to the provisions of this section on shortening, summarizing, or organizing
9 the record, or stipulation to an agreed or settled statement of the parties. Subdivision (c).

10 Subdivision (a) supersedes the seventh sentence of former Government Code Section
11 11523 (judicial review of formal adjudicative proceedings under Administrative Procedure
12 Act). In the case of an adjudicative proceeding, the record will include the final decision and
13 all notices and orders issued by the agency (subdivision (a)(1)), any proposed decision by an
14 administrative law judge (subdivision (a)(2)), the pleadings, the exhibits admitted or rejected,
15 and the written evidence and any other papers in the case (subdivision (a)(3)), and a transcript
16 of all proceedings (subdivision (a)(4)).

17 Treatment of the record in the case of electronic reporting of proceedings in subdivision
18 (a)(4) is derived from Rule 980.5 of the California Rules of Court (electronic recording as
19 official record of proceedings).

20 The requirement of a table of contents in subdivision (a)(6) is drawn from Government
21 Code Section 11347.3 (rulemaking). The affidavit requirement may be satisfied by a
22 declaration under penalty of perjury. Code Civ. Proc. § 2015.5.

23 Subdivision (d) supersedes the case law requirement of *Topanga Ass'n for a Scenic*
24 *Community v. County of Los Angeles*, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836
25 (1974), that adjudicative decisions reviewed under former Section 1094.5 be explained, and
26 extends it to other agency action such as rulemaking and discretionary action. The court
27 should not require an explanation of the agency action if it is not necessary for proper
28 judicial review, for example if the explanation is obvious. A decision in an adjudicative
29 proceeding under the Administrative Procedure Act must include a statement of the factual
30 and legal basis for the decision. Gov't Code § 11425.50 (decision) (operative July 1, 1997).

31 If there is an issue of completeness of the administrative record, the court may permit
32 limited discovery of the agency file for the purpose of determining the accuracy of the
33 affidavit of completeness. See Section 1123.710(c) (discovery in judicial review proceeding).
34 A party is not entitled to discovery of material in the agency file that is privileged. See, e.g.,
35 Gov't Code § 6254 (exemptions from California Public Records Act). Moreover, the
36 administrative record reflects the actual documents that are the basis of the agency action.
37 Except as provided in subdivision (d), the agency cannot be ordered to prepare a document
38 that does not exist, such as a summary of an oral ex parte contact in a case where the contact
39 is permissible and no other documentation requirement exists. If judicial review reveals that
40 the agency action is not supported by the record, the court may grant appropriate relief,
41 including setting aside, modifying, enjoining, or staying the agency action, or remanding for
42 further proceedings. Section 1123.730.

43 § 1123.830. Preparation of record

44 1123.830. (a) On request of the petitioner for the administrative record for
45 judicial review of agency action:

46 (1) If the agency action is a decision in an adjudicative proceeding required to
47 be conducted by an administrative law judge employed by the Office of
48 Administrative Hearings, the administrative record shall be prepared by the Office
49 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.

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.

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. 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.

§ 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

1 disqualification, of those taking the agency action, or (ii) unlawfulness of
2 procedure or of decision making process.

3 (2) The agency action is a decision in an adjudicative proceeding and the
4 evidence relates to an issue for which the standard of review is the independent
5 judgment of the court.

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

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

17 (e) Nothing in this section precludes the court from taking judicial notice of a
18 decision designated by the agency as a precedent decision pursuant to Section
19 11425.60 of the Government Code.

20 **Comment.** Subdivision (a) of Section 1123.850 supersedes former Section 1094.5(e),
21 which permitted the court to admit evidence without remanding the case in cases in which the
22 court was authorized by law to exercise its independent judgment on the evidence. Under this
23 section and Section 1123.810, the court is limited to evidence in the administrative record
24 except under subdivision (b). The provision in subdivision (a) permitting new evidence that
25 could not in the exercise of reasonable diligence have been produced in the administrative
26 proceeding should be narrowly construed. Such evidence is admissible only in rare instances.
27 See *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 578, 888 P.2d 1268, 38
28 Cal. Rptr. 2d 139, 149 (1995).

29 Subdivision (b)(1) is drawn from 1981 Model State APA Section 5-114(a)(1)-(2). It
30 permits the court to receive evidence, subject to a number of conditions. First, evidence may
31 be received only if it is likely to contribute to the court's determination of the validity of
32 agency action under one or more of the standards set forth in Sections 1123.410-1123.460.
33 Second, it identifies some specific issues that may be addressed, if necessary, by new evidence.
34 Since subdivision (b)(1) permits the court to receive disputed evidence only if needed to
35 decide disputed "issues," this provision is applicable only with regard to "issues" that are
36 properly before the court. See Section 1123.350 on limitation of new issues.

37 Subdivision (b)(2) applies to judicial review of agency interpretation of law or application
38 of law to facts under Section 1123.420, and to fact finding in local agency proceedings to
39 which the independent judgment standard applies under Section 1123.440. Admission of
40 evidence under this provision is discretionary with the court.

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

42 Subdivision (d) is drawn from 1981 Model State APA Section 5-104(c), alternative B.
43 Statutes that provide for judicial review in the court of appeal or Supreme Court are: Bus. &
44 Prof. Code § 23090 (Alcoholic Beverage Control Appeals Board and Department of
45 Alcoholic Beverage Control); Gov't Code §§ 3520(c), 3542(c), 3564(c) (Public Employment
46 Relations Board); Lab. Code §§ 1160.8 (Agricultural Labor Relations Board), 5950
47 (Workers' Compensation Appeals Board).

48 Section 1123.850 deals only with admissibility of new evidence on issues involved in the
49 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.

Section 1123.850 does not address the question of whether the evidence must have been in existence at the time of the agency proceeding. For state agency rulemaking, this is governed by Government Code Section 11350. For other action, it is governed by case law. See, e.g., *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); *Elizabeth D. v. Zolin*, 21 Cal. App. 4th 347, 356-57, 25 Cal. Rptr. 2d 852, 856-57 (1993) (administrative adjudication); *Toyota of Visalia, Inc. v. New Motor Vehicle Bd.*, 188 Cal. App. 3d 872, 881-82, 233 Cal. Rptr. 708 (1987) (same); *Windigo Mills v. Unemployment Ins. Appeals Bd.*, 92 Cal. App. 3d 586, 596-97, 155 Cal. Rptr. 63 (1979) (same).

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

1 reinstated if the petitioner fails to pay all of the costs required under Section
2 1123.920.

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

5 **§ 1123.940. Proceedings in forma pauperis**

6 1123.940. Notwithstanding any other provision of this article, if the petitioner
7 has proceeded pursuant to Section 68511.3 of the Government Code and the
8 Rules of Court implementing that section and if the transcript is necessary to a
9 proper review of an adjudicative proceeding, the cost of preparing the transcript
10 shall be borne by the agency.

11 **Comment.** Section 1123.940 continues the substance of the fourth sentence of subdivision
12 (a) of former Section 1094.5 (proceedings in forma pauperis).

13 **§ 1123.950. Attorney fees in action to review administrative proceeding**

14 1123.950. (a) If it is shown that an agency decision under state law was the
15 result of arbitrary or capricious action or conduct by an agency or officer in an
16 official capacity, the petitioner if the petitioner prevails on judicial review may
17 collect reasonable attorney's fees, computed at one hundred dollars (\$100) per
18 hour, but not to exceed seven thousand five hundred dollars (\$7,500), where the
19 petitioner is personally obligated to pay the fees, from the agency, in addition to
20 any other relief granted or other costs awarded.

21 (b) This section is ancillary only, and does not create a new cause of action.

22 (c) Refusal by an agency or officer to admit liability pursuant to a contract of
23 insurance is not arbitrary or capricious action or conduct within the meaning of
24 this section.

25 (d) This section does not apply to judicial review of actions of the State Board
26 of Control or of a private hospital board.

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

1 SELECTED CONFORMING REVISIONS

2 STATE BAR COURT

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

4 6089. Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil
5 Procedure does not apply to judicial review of proceedings of the State Bar
6 Court.

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

9 ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

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

11 23090. Any person affected by a final order of the board, including the
12 department, may, ~~within the time limit specified in this section, apply to petition~~
13 the Supreme Court or to the court of appeal for the appellate district in which the
14 proceeding arose, for a ~~writ of~~ judicial review of such the final order. The
15 application for writ of review ~~shall be made within 30 days after filing of the final~~
16 order of the board.

17 **Comment.** Section 23090 is amended to change the application for a writ of review to a
18 petition for judicial review, consistent with Code of Civil Procedure Section 1123.610, and to
19 delete the 30-day time limit formerly prescribed in this section. Under Code of Civil
20 Procedure Section 1123.640, the petition for review must be filed not later than 30 days after
21 the decision is effective. A decision is effective 30 days after it is delivered or mailed to the
22 respondent, unless the agency orders that it shall become effective sooner. Gov't Code §
23 11519.

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

25 ~~23090.1. The writ of review shall be made returnable at a time and place then or~~
26 ~~thereafter specified by court order and shall direct the board to certify the whole~~
27 ~~record of the department in the case to the court within the time specified. No~~
28 ~~new or additional evidence shall be introduced in such court, but the cause shall~~
29 ~~be heard on the whole record of the department as certified to by the board.~~

30 **Comment.** Section 23090.1 is repealed because it is superseded by the judicial review
31 provisions of the Code of Civil Procedure. See Section 23090.4. The provision in the first
32 sentence for the return of the writ of review is superseded by Code of Civil Procedure Section
33 1123.710 (applicability of rules of practice for civil actions). The provision in the first
34 sentence for the record of the department is superseded by Code of Civil Procedure Section
35 1123.820 (contents of administrative record). The second sentence is superseded by Code of
36 Civil Procedure Sections 1123.810 (administrative record exclusive basis for judicial review)
37 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~~

1 officer thereof, or any agent, or other person, acting in its behalf, either by a
2 citizen resident therein, or by a corporation, who is assessed for and is liable to
3 pay, or, within one year before the commencement of the action, has paid, a tax
4 therein. under Title 2 (commencing with Section 1120) of Part 3.

5 (b) This section does not affect any right of action in favor of a county, city,
6 town, or city and county, or any public officer; provided that no injunction shall
7 be granted restraining the offering for sale, sale, or issuance of any municipal
8 bonds for public improvements or public utilities.

9 (c) ~~An action~~ A proceeding brought pursuant to this section to enjoin a public
10 improvement project shall take special precedence over all civil matters on the
11 calendar of the court except those matters to which equal precedence on the
12 calendar is granted by law.

13 **Comment.** Section 526a is amended to conform to judicial review provisions. See Sections
14 1120-1123.950. Under the judicial review provisions, the petitioner must show entitlement to
15 relief on a ground specified in Sections 1123.410-1123.460. See Section 1123.160. The
16 petition for review must name the agency as respondent or the agency head by title, not
17 individual employees of the agency. Section 1123.610. Standing rules are provided in
18 Sections 1123.210-1123.240.

19 VALIDATING PROCEEDINGS

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

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

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

25 WRIT OF MANDATE

26 **Code Civ. Proc. § 1085 (amended). Writ of mandate**

27 1085. It ~~(a)~~ Subject to subdivision (b), a writ of mandate may be issued by any
28 court, except a municipal ~~or justice~~ court, to any inferior tribunal, corporation,
29 board, or person, to compel the performance of an act which the law specially
30 enjoins, as a duty resulting from an office, trust, or station; or to compel the
31 admission of a party to the use and enjoyment of a right or office to which ~~he~~ the
32 party is entitled, and from which ~~he~~ the party is unlawfully precluded by ~~such~~ the
33 inferior tribunal, corporation, board or person.

34 (b) Judicial review of agency action to which Title 2 (commencing with Section
35 1120) applies shall be under that title, and not under this chapter.

36 **Comment.** Section 1085 is amended to add subdivision (b) and to make other technical
37 revisions. The former reference to a justice court is deleted, because justice courts have been
38 abolished. See Cal. Const. art. VI, § 1.

1 **Code Civ. Proc. § 1085.5 (repealed). Action of Director of Food and Agriculture**

2 ~~1085.5. Notwithstanding this chapter, in any action or proceeding to attack,~~
3 ~~review, set aside, void, or annul the activity of the Director of Food and~~
4 ~~Agriculture under Division 4 (commencing with Section 5001) or Division 5~~
5 ~~(commencing with Section 9101) of the Food and Agricultural Code, the~~
6 ~~procedure for issuance of a writ of mandate shall be in accordance with Chapter~~
7 ~~1.5 (commencing with Section 5051) of Part 1 of Division 4 of that code.~~

8 **Comment.** Section 1085.5 is repealed as obsolete, since Sections 5051-5064 of the Food
9 and Agricultural Code have been repealed.

10 **Code Civ. Proc. § 1094.5 (repealed). Administrative mandamus**

11 ~~1094.5. (a) Where the writ is issued for the purpose of inquiring into the validity~~
12 ~~of any final administrative order or decision made as the result of a proceeding in~~
13 ~~which by law a hearing is required to be given, evidence is required to be taken,~~
14 ~~and discretion in the determination of facts is vested in the inferior tribunal,~~
15 ~~corporation, board, or officer, the case shall be heard by the court sitting without~~
16 ~~a jury. All or part of the record of the proceedings before the inferior tribunal,~~
17 ~~corporation, board, or officer may be filed with the petition, may be filed with~~
18 ~~respondent's points and authorities, or may be ordered to be filed by the court.~~
19 ~~Except when otherwise prescribed by statute, the cost of preparing the record~~
20 ~~shall be borne by the petitioner. Where the petitioner has proceeded pursuant to~~
21 ~~Section 68511.3 of the Government Code and the Rules of Court implementing~~
22 ~~that section and where the transcript is necessary to a proper review of the~~
23 ~~administrative proceedings, the cost of preparing the transcript shall be borne by~~
24 ~~the respondent. Where the party seeking the writ has proceeded pursuant to~~
25 ~~Section 1088.5, the administrative record shall be filed as expeditiously as~~
26 ~~possible, and may be filed with the petition, or by the respondent after payment of~~
27 ~~the costs by the petitioner, where required, or as otherwise directed by the court.~~
28 ~~If the expense of preparing all or any part of the record has been borne by the~~
29 ~~prevailing party, the expense shall be taxable as costs.~~

30 ~~(b) The inquiry in such a case shall extend to the questions whether the~~
31 ~~respondent has proceeded without, or in excess of jurisdiction; whether there was~~
32 ~~a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of~~
33 ~~discretion is established if the respondent has not proceeded in the manner~~
34 ~~required by law, the order or decision is not supported by the findings, or the~~
35 ~~findings are not supported by the evidence.~~

36 ~~(c) Where it is claimed that the findings are not supported by the evidence, in~~
37 ~~cases in which the court is authorized by law to exercise its independent~~
38 ~~judgment on the evidence, abuse of discretion is established if the court~~
39 ~~determines that the findings are not supported by the weight of the evidence. In~~
40 ~~all other cases, abuse of discretion is established if the court determines that the~~
41 ~~findings are not supported by substantial evidence in the light of the whole~~
42 ~~record.~~

1 ~~(d) Notwithstanding subdivision (c), in cases arising from private hospital~~
2 ~~boards or boards of directors of districts organized pursuant to The Local~~
3 ~~Hospital District Law, Division 23 (commencing with Section 32000) of the~~
4 ~~Health and Safety Code or governing bodies of municipal hospitals formed~~
5 ~~pursuant to Article 7 (commencing with Section 37600) or Article 8 (commencing~~
6 ~~with Section 37650) of Chapter 5 of Division 3 of Title 4 of the Government~~
7 ~~Code, abuse of discretion is established if the court determines that the findings~~
8 ~~are not supported by substantial evidence in the light of the whole record.~~
9 ~~However, in all cases in which the petition alleges discriminatory actions~~
10 ~~prohibited by Section 1316 of the Health and Safety Code, and the plaintiff~~
11 ~~makes a preliminary showing of substantial evidence in support of that allegation,~~
12 ~~the court shall exercise its independent judgment on the evidence and abuse of~~
13 ~~discretion shall be established if the court determines that the findings are not~~
14 ~~supported by the weight of the evidence.~~

15 ~~(e) Where the court finds that there is relevant evidence which, in the exercise~~
16 ~~of reasonable diligence, could not have been produced or which was improperly~~
17 ~~excluded at the hearing before respondent, it may enter judgment as provided in~~
18 ~~subdivision (f) remanding the case to be reconsidered in the light of that~~
19 ~~evidence; or, in cases in which the court is authorized by law to exercise its~~
20 ~~independent judgment on the evidence, the court may admit the evidence at the~~
21 ~~hearing on the writ without remanding the case.~~

22 ~~(f) The court shall enter judgment either commanding respondent to set aside~~
23 ~~the order or decision, or denying the writ. Where the judgment commands that~~
24 ~~the order or decision be set aside, it may order the reconsideration of the case in~~
25 ~~the light of the court's opinion and judgment and may order respondent to take~~
26 ~~such further action as is specially enjoined upon it by law, but the judgment shall~~
27 ~~not limit or control in any way the discretion legally vested in the respondent.~~

28 ~~(g) Except as provided in subdivision (h), the court in which proceedings under~~
29 ~~this section are instituted may stay the operation of the administrative order or~~
30 ~~decision pending the judgment of the court, or until the filing of a notice of~~
31 ~~appeal from the judgment or until the expiration of the time for filing the notice,~~
32 ~~whichever occurs first. However, no such stay shall be imposed or continued if~~
33 ~~the court is satisfied that it is against the public interest; provided that the~~
34 ~~application for the stay shall be accompanied by proof of service of a copy of the~~
35 ~~application on the respondent. Service shall be made in the manner provided by~~
36 ~~Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with~~
37 ~~Section 1010) of Title 14 of Part 2. If an appeal is taken from a denial of the writ,~~
38 ~~the order or decision of the agency shall not be stayed except upon the order of~~
39 ~~the court to which the appeal is taken. However, in cases where a stay is in effect~~
40 ~~at the time of filing the notice of appeal, the stay shall be continued by operation~~
41 ~~of law for a period of 20 days from the filing of the notice. If an appeal is taken~~
42 ~~from the granting of the writ, the order or decision of the agency is stayed~~
43 ~~pending the determination of the appeal unless the court to which the appeal is~~

1 taken shall otherwise order. Where any final administrative order or decision is
2 the subject of proceedings under this section, if the petition shall have been filed
3 while the penalty imposed is in full force and effect, the determination shall not be
4 considered to have become moot in cases where the penalty imposed by the
5 administrative agency has been completed or complied with during the pendency
6 of the proceedings.

7 (h) (1) The court in which proceedings under this section are instituted may stay
8 the operation of the administrative order or decision of any licensed hospital or
9 any state agency made after a hearing required by statute to be conducted under
10 the provisions of the Administrative Procedure Act, as set forth in Chapter 5
11 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the
12 Government Code, conducted by the agency itself or an administrative law judge
13 on the staff of the Office of Administrative Hearings pending the judgment of the
14 court, or until the filing of a notice of appeal from the judgment or until the
15 expiration of the time for filing the notice, whichever occurs first. However, the
16 stay shall not be imposed or continued unless the court is satisfied that the public
17 interest will not suffer and that the licensed hospital or agency is unlikely to
18 prevail ultimately on the merits; and provided further that the application for the
19 stay shall be accompanied by proof of service of a copy of the application on the
20 respondent. Service shall be made in the manner provided by Title 5 (commencing
21 with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title
22 14 of Part 2.

23 (2) The standard set forth in this subdivision for obtaining a stay shall apply to
24 any administrative order or decision of an agency which issues licenses pursuant
25 to Division 2 (commencing with Section 500) of the Business and Professions
26 Code or pursuant to the Osteopathic Initiative Act or the Chiropractic Initiative
27 Act. With respect to orders or decisions of other state agencies, the standard in
28 this subdivision shall apply only when the agency has adopted the proposed
29 decision of the administrative law judge in its entirety or has adopted the
30 proposed decision but reduced the proposed penalty pursuant to subdivision (b)
31 of Section 11517 of the Government Code; otherwise the standard in subdivision
32 (g) shall apply.

33 (3) If an appeal is taken from a denial of the writ, the order or decision of the
34 hospital or agency shall not be stayed except upon the order of the court to
35 which the appeal is taken. However, in cases where a stay is in effect at the time
36 of filing the notice of appeal, the stay shall be continued by operation of law for a
37 period of 20 days from the filing of the notice. If an appeal is taken from the
38 granting of the writ, the order or decision of the hospital or agency is stayed
39 pending the determination of the appeal unless the court to which the appeal is
40 taken shall otherwise order. Where any final administrative order or decision is
41 the subject of proceedings under this section, if the petition shall have been filed
42 while the penalty imposed is in full force and effect, the determination shall not be
43 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

1 to Section 1094.5 of this code only if the petition for writ of mandate pursuant to
2 such section is filed within the time limits specified in this section.

3 (b) Any such petition shall be filed not later than the 90th day following the
4 date on which the decision becomes final. If there is no provision for
5 reconsideration of the decision, or for a written decision or written findings
6 supporting the decision, in any applicable provision of any statute, charter, or rule,
7 for the purposes of this section, the decision is final on the date it is announced. If
8 the decision is not announced at the close of the hearing, the date, time, and place
9 of the announcement of the decision shall be announced at the hearing. If there is
10 a provision for reconsideration, the decision is final for purposes of this section
11 upon the expiration of the period during which such reconsideration can be
12 sought; provided, that if reconsideration is sought pursuant to any such provision
13 the decision is final for the purposes of this section on the date that
14 reconsideration is rejected. If there is a provision for a written decision or written
15 findings, the decision is final for purposes of this section upon the date it is mailed
16 by first-class mail, postage prepaid, including a copy of the affidavit or certificate
17 of mailing, to the party seeking the writ. Subdivision (a) of Section 1013 does not
18 apply to extend the time, following deposit in the mail of the decision or findings,
19 within which a petition shall be filed.

20 (c) The complete record of the proceedings shall be prepared by the local
21 agency or its commission, board, officer, or agent which made the decision and
22 shall be delivered to the petitioner within 190 days after he has filed a written
23 request therefor. The local agency may recover from the petitioner its actual costs
24 for transcribing or otherwise preparing the record. Such record shall include the
25 transcript of the proceedings, all pleadings, all notices and orders, any proposed
26 decision by a hearing officer, the final decision, all admitted exhibits, all rejected
27 exhibits in the possession of the local agency or its commission, board, officer, or
28 agent, all written evidence, and any other papers in the case.

29 (d) If the petitioner files a request for the record as specified in subdivision (c)
30 within 10 days after the date the decision becomes final as provided in
31 subdivision (b), the time within which a petition pursuant to Section 1094.5 may
32 be filed shall be extended to not later than the 30th day following the date on
33 which the record is either personally delivered or mailed to the petitioner or his
34 attorney of record, if he has one.

35 (e) As used in this section, decision means a decision subject to review pursuant
36 to Section 1094.5, suspending, demoting, or dismissing an officer or employee,
37 revoking, or denying an application for a permit, license, or other entitlement, or
38 denying an application for any retirement benefit or allowance.

39 (f) In making a final decision as defined in subdivision (e), the local agency shall
40 provide notice to the party that the time within which judicial review must be
41 sought is governed by this section.

42 As used in this subdivision, "party" means an officer or employee who has
43 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

1 Civil Procedure governing standard of review of questions of application of law to facts and
2 of pure questions of law, so existing case law will continue to apply to the board. See Code
3 Civ. Proc. § 1123.420(c) & Comment.

4 The former second sentence of subdivision (c) which required the petition to be filed within
5 30 days after issuance of the board's final order, order denying reconsideration, or order
6 joining in the request for judicial review, is superseded by Code of Civil Procedure Section
7 1123.640. Under that section, the petition for review must be filed not later than 30 days after
8 the decision is effective. A decision is effective 30 days after it is delivered or mailed to the
9 respondent, unless the agency orders that it shall become effective sooner. Gov't Code §
10 11519.

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

12 3542. (a) No employer or employee organization shall have the right to judicial
13 review of a unit determination except: (1) when the board in response to a
14 petition from an employer or employee organization, agrees that the case is one of
15 special importance and joins in the request for such review; or (2) when the issue
16 is raised as a defense to an unfair practice complaint. A board order directing an
17 election shall not be stayed pending judicial review.

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

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

25 (c) ~~Such~~ The petition shall be filed in the district court of appeal in the appellate
26 district where the unit determination or unfair practice dispute occurred. ~~The~~
27 ~~petition shall be filed within 30 days after issuance of the board's final order,~~
28 ~~order denying reconsideration, or order joining in the request for judicial review,~~
29 ~~as applicable.~~ Upon the filing of ~~such~~ the petition, the court shall cause notice to
30 be served upon the board and thereupon shall have jurisdiction of the
31 proceeding. The board shall file in the court the record of the proceeding, certified
32 by the board, within 10 days after the clerk's notice unless ~~such~~ the time is
33 extended by the court for good cause shown. The court shall have jurisdiction to
34 grant to the board ~~such~~ any temporary relief or restraining order it deems just and
35 proper and in like manner to make and enter a decree enforcing, modifying, or
36 setting aside the order of the board. ~~The findings of the board with respect to~~
37 ~~questions of fact, including ultimate facts, if supported by substantial evidence on~~
38 ~~the record considered as a whole, are conclusive.~~ The provisions of Title ~~1~~
39 ~~(commencing with Section 1067)~~ Title 2 (commencing with Section 1120) of Part
40 3 of the Code of Civil Procedure ~~relating to writs shall, except where specifically~~
41 ~~superseded herein, apply to proceedings pursuant to this section.~~

42 (d) If the time to petition for ~~extraordinary relief from judicial review~~ of a board
43 decision has expired, the board may seek enforcement of any final decision or
44 order in a ~~district~~ court of appeal or a superior court in the appellate district where

1 the unit determination or unfair practice case occurred. The board shall respond
2 within 10 days to any inquiry from a party to the action as to why the board has
3 not sought court enforcement of the final decision or order. If the response does
4 not indicate that there has been compliance with the board's final decision or
5 order, the board shall seek enforcement of the final decision or order upon the
6 request of the party. The board shall file in the court the record of the proceeding,
7 certified by the board, and appropriate evidence disclosing the failure to comply
8 with the decision or order. If, after hearing, the court determines that the order
9 was issued pursuant to procedures established by the board and that the person
10 or entity refuses to comply with the order, the court shall enforce such the order
11 ~~by writ of mandamus~~ appropriate process. The court shall not review the merits of
12 the order.

13 **Comment.** Section 3542 is amended to make judicial review of the Public Employment
14 Relations Board subject to the provisions for judicial review in the Code of Civil Procedure,
15 except as provided in this section. Special provisions of this section prevail over general
16 provisions of the Code of Civil Procedure governing judicial review. See Code of Civil
17 Procedure Section 1121.110 (conflicting or inconsistent statute controls). The board is
18 exempt from the provision in the Code of Civil Procedure governing standard of review of
19 questions of application of law to facts and of pure questions of law, so existing case law will
20 continue to apply to the board. See Code Civ. Proc. § 1123.420(c) & Comment.

21 The former second sentence of subdivision (c) which required the petition to be filed within
22 30 days after issuance of the board's final order, order denying reconsideration, or order
23 joining in the request for judicial review, is superseded by Code of Civil Procedure Section
24 1123.640. Under that section, the petition for review must be filed not later than 30 days after
25 the decision is effective. A decision is effective 30 days after it is delivered or mailed to the
26 respondent, unless the agency orders that it shall become effective sooner. Gov't Code §
27 11519.

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

30 3564. (a) No employer or employee organization shall have the right to judicial
31 review of a unit determination except: (1) when the board in response to a
32 petition from an employer or employee organization, agrees that the case is one of
33 special importance and joins in the request for such review; or (2) when the issue
34 is raised as a defense to an unfair practice complaint. A board order directing an
35 election shall not be stayed pending judicial review.

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

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

43 (c) Such The petition shall be filed in the district court of appeal in the appellate
44 district where the unit determination or unfair practice dispute occurred. The
45 petition shall be filed within 30 days after issuance of the board's final order,

1 ~~order denying reconsideration, or order joining in the request for judicial review,~~
2 ~~as applicable.~~ Upon the filing of such the petition, the court shall cause notice to
3 be served upon the board and thereupon shall have jurisdiction of the
4 proceeding. The board shall file in the court the record of the proceeding, certified
5 by the board, within 10 days after the clerk's notice unless ~~such~~ the time is
6 extended by the court for good cause shown. The court shall have jurisdiction to
7 grant to the board ~~such~~ any temporary relief or restraining order it deems just and
8 proper and in like manner to make and enter a decree enforcing, modifying, or
9 setting aside the order of the board. ~~The findings of the board with respect to~~
10 ~~questions of fact, including ultimate facts, if supported by substantial evidence on~~
11 ~~the record considered as a whole, are conclusive.~~ The provisions of Title ~~1~~
12 ~~(commencing with Section 1067)~~ Title 2 (commencing with Section 1120) of Part
13 3 of the Code of Civil Procedure ~~relating to writs~~ shall, except where specifically
14 superseded herein, apply to proceedings pursuant to this section.

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

23 **Comment.** Section 3564 is amended to make judicial review of the Public Employment
24 Relations Board subject to the provisions for judicial review in the Code of Civil Procedure.
25 The board is exempt from the provision in the Code of Civil Procedure governing standard of
26 review of questions of application of law to facts and of pure questions of law, so existing case
27 law will continue to apply to the board. See Code Civ. Proc. § 1123.420(c) & Comment.

28 The former second sentence of subdivision (c) which required the petition to be filed within
29 30 days after issuance of the board's final order, order denying reconsideration, or order
30 joining in the request for judicial review, is superseded by Code of Civil Procedure Section
31 1123.640. Under that section, the petition for review must be filed not later than 30 days after
32 the decision is effective. A decision is effective 30 days after it is delivered or mailed to the
33 respondent, unless the agency orders that it shall become effective sooner. Gov't Code §
34 11519.

ADMINISTRATIVE PROCEDURE ACT — RULEMAKING

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

36 11350. (a) ~~Any interested~~ Except as provided in subdivisions (d) and (e), a
37 person may obtain a judicial declaration as to the validity of any regulation by
38 bringing an action for declaratory relief in the superior court in accordance with
39 under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil
40 Procedure. The right to a judicial determination shall not be affected either by the
41 failure to petition or to seek reconsideration of a petition filed pursuant to Section
42 11347.1 before the agency promulgating the regulations. The regulation may be
43

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.~~

(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.

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

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).

Subdivision (d) codifies one aspect of *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), and is consistent with Section 11347.3 which prescribes the contents of the rulemaking file and requires an affidavit of an agency official that the record is complete and the date on which the record was closed.

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

1 adopted as a regulation pursuant to Chapter 3.5 (commencing with Section
2 11340).

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

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

11 ~~11523. Judicial review may be had by filing a petition for a writ of mandate in~~
12 ~~accordance with the provisions of the Code of Civil Procedure, subject, however,~~
13 ~~to the statutes relating to the particular agency. Except as otherwise provided in~~
14 ~~this section, the petition shall be filed within 30 days after the last day on which~~
15 ~~reconsideration can be ordered. The right to petition shall not be affected by the~~
16 ~~failure to seek reconsideration before the agency. On request of the petitioner for~~
17 ~~a record of the proceedings, the complete record of the proceedings, or the parts~~
18 ~~thereof as are designated by the petitioner in the request, shall be prepared by the~~
19 ~~Office of Administrative Hearings or the agency and shall be delivered to~~
20 ~~petitioner, within 30 days after the request, which time shall be extended for good~~
21 ~~cause shown, upon the payment of the fee specified in Section 69950 for the~~
22 ~~transcript, the cost of preparation of other portions of the record and for~~
23 ~~certification thereof. Thereafter, the remaining balance of any costs or charges for~~
24 ~~the preparation of the record shall be assessed against the petitioner whenever~~
25 ~~the agency prevails on judicial review following trial of the cause. These costs or~~
26 ~~charges constitute a debt of the petitioner which is collectible by the agency in~~
27 ~~the same manner as in the case of an obligation under a contract, and no license~~
28 ~~shall be renewed or reinstated where the petitioner has failed to pay all of these~~
29 ~~costs or charges. The complete record includes the pleadings, all notices and~~
30 ~~orders issued by the agency, any proposed decision by an administrative law~~
31 ~~judge, the final decision, a transcript of all proceedings, the exhibits admitted or~~
32 ~~rejected, the written evidence and any other papers in the case. Where petitioner,~~
33 ~~within 10 days after the last day on which reconsideration can be ordered,~~
34 ~~requests the agency to prepare all or any part of the record the time within which~~
35 ~~a petition may be filed shall be extended until 30 days after its delivery to him or~~
36 ~~her. The agency may file with the court the original of any document in the~~
37 ~~record in lieu of a copy thereof. In the event that the petitioner prevails in~~
38 ~~overturning the administrative decision following judicial review, the agency shall~~
39 ~~reimburse the petitioner for all costs of transcript preparation, compilation of the~~
40 ~~record, and certification.~~

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

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

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

5 The first portion of the fourth sentence is continued in Code of Civil Procedure Section
6 1123.830 (preparation of record). The last portion of the fourth sentence is continued in
7 substance in Code of Civil Procedure Section 1123.910 (fee for preparing record).

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

10 The first portion of the sixth sentence is omitted as unnecessary, since under Section
11 1123.920(b) the cost of the record is recoverable by the prevailing party, and under general
12 rules of civil procedure costs of suit are included in the judgment. See Code Civ. Proc. §
13 1034(a); Cal. Ct. R. 870(b)(4). The last portion of the sixth sentence is continued in Code of
14 Civil Procedure Section 1123.930.

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

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

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

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

23 **Gov't Code § 11524 (amended). Continuances**

24 11524. (a) The agency may grant continuances. When an administrative law
25 judge of the Office of Administrative Hearings has been assigned to the hearing,
26 no continuance may be granted except by him or her or by the presiding judge of
27 the appropriate regional office of the Office of Administrative Hearings, for good
28 cause shown.

29 (b) When seeking a continuance, a party shall apply for the continuance within
30 10 working days following the time the party discovered or reasonably should
31 have discovered the event or occurrence which establishes the good cause for
32 the continuance. A continuance may be granted for good cause after the 10
33 working days have lapsed if the party seeking the continuance is not responsible
34 for and has made a good faith effort to prevent the condition or event
35 establishing the good cause.

36 ~~(c) In the event that an application for a continuance by a party is denied by an~~
37 ~~administrative law judge of the Office of Administrative Hearings, and the party~~
38 ~~seeks judicial review thereof, the party shall, within 10 working days of the denial,~~
39 ~~make application for appropriate judicial relief in the superior court or be barred~~
40 ~~from judicial review thereof as a matter of jurisdiction. A party applying for~~
41 ~~judicial relief from the denial shall give notice to the agency and other parties.~~
42 ~~Notwithstanding Section 1010 of the Code of Civil Procedure, the notice may be~~
43 ~~either oral at the time of the denial of application for a continuance or written at~~
44 ~~the same time application is made in court for judicial relief. This subdivision does~~
45 ~~not apply to the Department of Alcoholic Beverage Control.~~

1 **Comment.** Section 11524 is amended to delete the provision for immediate review of
2 denial of a continuance. Standard principles of finality and exhaustion of administrative
3 remedies apply to this and other preliminary decisions in adjudicative proceeding. See, e.g.,
4 Code Civ. Proc. § 1123.310 (exhaustion required).

5 STATE PERSONNEL BOARD AND DEPARTMENT OF PERSONNEL
6 ADMINISTRATION

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

8 19576.1. (a) Effective January 1, 1996, notwithstanding Section 19576, this
9 section shall apply only to state employees in State Bargaining Unit 5.

10 (b) Whenever an answer is filed by an employee who has been suspended
11 without pay for five days or less or who has received a formal reprimand or up to
12 a five percent reduction in pay for five months or less, the Department of
13 Personnel Administration or its authorized representative shall make an
14 investigation, with or without a hearing, as it deems necessary. However, if he or
15 she receives one of the cited actions in more than three instances in any 12-month
16 period, he or she, upon each additional action within the same 12-month period,
17 shall be afforded a hearing before the State Personnel Board if he or she files an
18 answer to the action.

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

25 (d) Disciplinary action taken pursuant to this section is not subject to Sections
26 19180, 19574.1, 19574.2, 19575, 19575.5, 19579, 19580, 19581, 19581.5, 19582,
27 19583, and 19587, or to State Personnel Board Rules 51.1 to 51.9, inclusive, 52,
28 and 52.1 to 52.5, inclusive. Disciplinary action taken pursuant to this section is
29 not subject to judicial review.

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

37 **Comment.** Section 19576.1 is amended to add the second sentence to subdivision (d). This
38 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 as defined in Section 1121.250 of the Code of Civil Procedure, other than by 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.

Section 54963 applies to agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person. Code Civ. Proc. § 1121.250.

Gov't Code § 65009 (amended). Actions challenging local government decisions

65009. (a)(1) The Legislature finds and declares that there currently is a housing crisis in California and it is essential to reduce delays and restraints upon expeditiously completing housing projects.

(2) The Legislature further finds and declares that a legal action challenging a decision of a city, county, or city and county has a chilling effect on the confidence with which property owners and local governments can proceed with projects. Legal actions filed to attack, review, set aside, void, or annul a decision of a city, county, or city and county pursuant to this division can prevent the completion of needed developments even though the projects have received required governmental approvals.

(3) The purpose of this section is to provide certainty for property owners and local governments regarding decisions made pursuant to this division.

(b)(1) In an action or proceeding to attack, review, set aside, void, or annul a finding, determination, or decision of a public agency made pursuant to this title at a properly noticed public hearing, the issues raised shall be limited to those raised in the public hearing or in written correspondence delivered to the public agency prior to, or at, the public hearing, except where the court finds either of the following:

(A) The issue could not have been raised at the public hearing by persons exercising reasonable diligence.

(B) The body conducting the public hearing prevented the issue from being raised at the public hearing.

1 (2) If a public agency desires the provisions of this subdivision to apply to a
2 matter, it shall include in any public notice issued pursuant to this title a notice
3 substantially stating all of the following: “If you challenge the (nature of the
4 proposed action) in court, you may be limited to raising only those issues you or
5 someone else raised at the public hearing described in this notice, or in written
6 correspondence delivered to the (public entity conducting the hearing) at, or
7 prior to, the public hearing.”

8 (3) The application of this subdivision to causes of action brought pursuant to
9 subdivision (d) applies only to the final action taken in response to the notice to
10 the city or county clerk. If no final action is taken, then the issue raised in the
11 cause of action brought pursuant to subdivision (d) shall be limited to those
12 matters presented at a properly noticed public hearing or to those matters
13 specified in the notice given to the city or county clerk pursuant to subdivision
14 (d), or both.

15 (c) Except as provided in subdivisions (d) and (i), no action or proceeding shall
16 be maintained in any of the following cases by any person unless the action or
17 proceeding is commenced and service is made on the legislative body within 90
18 days after the legislative body’s decision:

19 (1) To attack, review, set aside, void, or annul the decision of a legislative body
20 to adopt or amend a general or specific plan. This paragraph does not apply
21 where an action is brought based upon the complete absence of a general plan or
22 a mandatory element thereof, but does apply to an action attacking a general plan
23 or mandatory element thereof on the basis that it is inadequate.

24 (2) To attack, review, set aside, void, or annul the decision of a legislative body
25 to adopt or amend a zoning ordinance.

26 (3) To determine the reasonableness, legality, or validity of any decision to
27 adopt or amend any regulation attached to a specific plan.

28 (4) To attack, review, set aside, void, or annul the decision of a legislative body
29 to adopt, amend, or modify a development agreement. An action or proceeding to
30 attack, review, set aside, void, or annul the decisions of a legislative body to
31 adopt, amend, or modify a development agreement shall only extend to the
32 specific portion of the development agreement that is the subject of the adoption,
33 amendment, or modification. This paragraph applies to development agreements,
34 amendments, and modifications adopted on or after January 1, 1996.

35 (5) Concerning any of the proceedings, acts, or determinations taken, done, or
36 made prior to any of the decisions listed in paragraphs (1), (2), (3), and (4).

37 (d) An action or proceeding shall be commenced and the legislative body
38 served within one year after the accrual of the cause of action as provided in this
39 subdivision, if the action or proceeding meets both of the following requirements:

40 (1) It is brought in support of the development of housing which meet the
41 requirements for housing for persons and families with low or moderate incomes
42 set forth in Section 65915.

(2) It is brought with respect to actions taken pursuant to Article 10.6 (commencing with Section 65580) of Chapter 3 of this division, pursuant to Section 65589.5, 65863.6, 65915, or 66474.2 or pursuant to Chapter 4.2 (commencing with Section 65913).

A cause of action brought pursuant to this subdivision shall not be maintained until 60 days have expired following notice to the city or county clerk by the party bringing the cause of action, or his or her representative, specifying the deficiencies of the general plan, specific plan, or zoning ordinance. A cause of action brought pursuant to this subdivision shall accrue 60 days after notice is filed or the legislative body takes a final action in response to the notice, whichever occurs first. A notice or cause of action brought by one party pursuant to this subdivision shall not bar filing of a notice and initiation of a cause of action by any other party.

(e) Upon the expiration of the time limits provided for in this section, all persons are barred from any further action or proceeding.

(f) Notwithstanding Section 65700, this section shall apply to charter cities.

(g) Except as provided in ~~subdivision~~ subdivisions (d) and (j), this section shall not affect any law prescribing or authorizing a shorter period of limitation than that specified herein.

(h) Except as provided in paragraph (4) of subdivision (c), this section shall be applicable to those decisions of the legislative body of a city, county, or city and county made pursuant to this division on or after January 1, 1984.

(i) Where the action or proceeding challenges the adequacy of a housing element, the action or proceeding may be initiated up to 60 days following the date the Department of Housing and Community Development reports its findings concerning the housing element pursuant to subdivision (h) of Section 65585.

(j) A challenge to action of a public agency under this section shall be brought under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure, except as follows:

(1) This subdivision does not apply to judicial review of an ordinance of a local agency.

(2) Sections 1123.630, 1123.640, and 1123.650 of the Code of Civil Procedure do not apply to proceedings governed by this section.

Comment. Section 65009 is amended to add subdivision (j) to make clear that judicial review under this section shall be under the judicial review provisions of the Code of Civil Procedure. See Code Civ. Proc. §§ 11020-1123.950. Paragraph (1) of subdivision (j) is consistent with Code of Civil Procedure Section 1121(d). Under paragraph (2) of subdivision (j), the notice provision of Code of Civil Procedure Section 1123.630 and the time limits of Code of Civil Procedure Sections 1123.640 and 1123.650 do not apply to proceedings governed by this section.

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~~

1 ~~fact if supported by substantial evidence on the record considered as a whole~~
2 ~~shall in like manner be conclusive.~~

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

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

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

15 The former second sentence of Section 1160.8 which required the petition to be filed
16 within 30 days from the date of issuance of the board's order is superseded by Code of Civil
17 Procedure Section 1123.640. Under that section, the petition for review must be filed not later
18 than 30 days after the decision is effective. A decision is effective 30 days after it is delivered
19 or mailed to the respondent, unless the agency orders that it shall become effective sooner.
20 Gov't Code § 11519.

21 WORKERS' COMPENSATION APPEALS BOARD

22 **Lab. Code § 5950 (amended). Judicial review**

23 5950. Any person affected by an order, decision, or award of the appeals board
24 may, ~~within the time limit specified in this section, apply to petition the Supreme~~
25 ~~Court or to the court of appeal for the appellate district in which he the person~~
26 ~~resides, for a writ of judicial review, for the purpose of inquiring into and~~
27 ~~determining the lawfulness of the original order, decision, or award or of the order,~~
28 ~~decision, or award following reconsideration. The application for writ of review~~
29 ~~must be made within 45 days after a petition for reconsideration is denied, or, if a~~
30 ~~petition is granted or reconsideration is had on the appeal board's own motion,~~
31 ~~within 45 days after the filing of the order, decision, or award following~~
32 ~~reconsideration.~~

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

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

39 5951. ~~The writ of review shall be made returnable at a time and place then or~~
40 ~~thereafter specified by court order and shall direct the appeals board to certify its~~
41 ~~record in the case to the court within the time therein specified. No new or~~

1 ~~additional evidence shall be introduced in such court, but the cause shall be heard~~
2 ~~on the record of the appeals board as certified to by it.~~

3 **Comment.** Section 5951 is repealed because it is superseded by the judicial review
4 provisions of the Code of Civil Procedure. See Section 5954. The provision in the first
5 sentence for the return of the writ of review is superseded by Code of Civil Procedure Section
6 1123.710 (applicability of rules of practice for civil actions). The provision in the first
7 sentence for the record of the department is superseded by Code of Civil Procedure Section
8 1123.820 (contents of administrative record). The second sentence is superseded by Code of
9 Civil Procedure Sections 1123.810 (administrative record exclusive basis for judicial review)
10 and 1123.850 (new evidence on judicial review).

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

12 ~~5952. The review by the court shall not be extended further than to determine,~~
13 ~~based upon the entire record which shall be certified by the appeals board,~~
14 ~~whether:~~

- 15 ~~(a) The appeals board acted without or in excess of its powers.~~
16 ~~(b) The order, decision, or award was procured by fraud.~~
17 ~~(c) The order, decision, or award was unreasonable.~~
18 ~~(d) The order, decision, or award was not supported by substantial evidence.~~
19 ~~(e) If findings of fact are made, such findings of fact support the order, decision,~~
20 ~~or award under review.~~

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

23 **Comment.** Subdivisions (a) through (d) of former Section 5952 are superseded by Code of
24 Civil Procedure Sections 1123.410-1123.460. See also Code Civ. Proc. § 1123.160
25 (condition of relief).

26 Subdivision (e) is superseded by Code of Civil Procedure Section 1123.840 (disposal of
27 administrative record). The last sentence is superseded by Code of Civil Procedure Sections
28 1123.420 (interpretation or application of law) and 1123.850 (new evidence). Nothing in the
29 Code of Civil Procedure provisions or in this article permits the court to hold a trial de novo.

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

31 ~~5953. The findings and conclusions of the appeals board on questions of fact~~
32 ~~are conclusive and final and are not subject to review. Such questions of fact~~
33 ~~shall include ultimate facts and the findings and conclusions of the appeals board.~~
34 ~~The parties to a judicial review proceeding are the appeals board and each party~~
35 ~~to the action or proceeding before the appeals board shall have the right to~~
36 ~~appear in the review proceeding. Upon the hearing, the court shall enter~~
37 ~~judgment either affirming or annulling the order, decision, or award, or the court~~
38 ~~may remand the case for further proceedings before the appeals board whose~~
39 ~~interest is adverse to the petitioner for judicial review.~~

40 **Comment.** Section 5953 is largely superseded by the judicial review provisions of the Code
41 of Civil Procedure. See Section 5954. The first sentence is superseded by Code of Civil
42 Procedure Section 1123.430 (review of fact-finding). The second sentence is superseded by
43 Code of Civil Procedure Section 1123.420 (review of interpretation or application of law).
44 The fourth sentence is superseded by Code of Civil Procedure Section 1123.730 (type of
45 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).

CALIFORNIA ENVIRONMENTAL QUALITY ACT

Pub. Res. Code § 21168 (amended). Conduct of proceeding

21168. Any action or proceeding to attack, review, set aside, void or annul a determination, finding, or decision of a public agency, ~~made as a 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 a public agency, on the grounds of noncompliance with the provisions of this division shall be in accordance with the provisions of Section 1094.5 under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.~~

~~In any such action, the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record.~~

Comment. Section 21168 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference to “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 a public agency” is deleted so that Section 21168 will apply both to proceedings formerly reviewed by administrative mandamus and to those formerly reviewed by traditional mandamus.

The former last sentence of Section 21168 for substantial evidence review is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review).

Pub. Res. Code § 21168.5 (repealed). Inquiry limited to prejudicial abuse of discretion

~~21168.5. In any action or proceeding, other than an action or proceeding under Section 21168, to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.~~

Comment. Section 21168.5, which applied to traditional mandamus, is superseded by Section 21168. Under Section 21168, both administrative and traditional mandamus under prior law are replaced by the new judicial review statute. See Code Civ. Proc. §§ 1120-1123.950. The provision of former Section 21168.5 limiting the inquiry to prejudicial abuse of discretion is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review). Discretionary action is now reviewed using the standard of Code of Civil Procedure Section 1123.450 (abuse of discretion).

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

1 Code of Civil Procedure. In addition to the relief authorized under Title 2, the
2 court may order the department to rescind the order of suspension or revocation
3 and return, or reissue a new license to, the person.

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

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

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

11 14401. (a) Any action brought in a court of competent jurisdiction to review
12 any order of the department refusing, canceling, placing on probation,
13 suspending, or revoking the privilege of a person to operate a motor vehicle shall
14 be commenced within 90 days from the date the order is noticed.

15 (b) Upon final completion of all administrative appeals, the person whose
16 driving privilege was refused, canceled, placed on probation, suspended, or
17 revoked shall be given written notice by the department of his or her right to a
18 review by a court pursuant to subdivision (a) under Title 2 (commencing with
19 Section 1120) of Part 3 of the Code of Civil Procedure.

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

23 DEPARTMENT OF SOCIAL SERVICES

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

25 10962. The applicant or recipient or the affected county, within one year after
26 receiving notice of the director's final decision, may file a petition ~~with the~~
27 ~~superior court, for review under the provisions of Section 1094.5 Title 2~~
28 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure;
29 ~~praying for a review of the entire proceedings in the matter, upon questions of~~
30 ~~law involved in the case. Such . The review, if granted, shall be the exclusive~~
31 ~~remedy available to the applicant or recipient or county for review of the~~
32 ~~director's decision. The director shall be the sole respondent in such the~~
33 ~~proceedings. Immediately upon being served the director shall serve a copy of the~~
34 ~~petition on the other party entitled to judicial review and such that party shall~~
35 ~~have the right to intervene in the proceedings.~~

36 No filing fee shall be required for the filing of a petition for review pursuant to
37 this section. ~~Any such petition to the superior court~~ The proceeding for judicial
38 review shall be entitled to a preference in setting a date for hearing ~~on the~~
39 ~~petition.~~ No bond shall be required in the case of any petition for review, nor in
40 any appeal ~~therefrom~~ from the decision of the superior court. The applicant or

1 recipient shall be entitled to reasonable attorney's fees and costs, if he obtains a
2 decision in his favor the applicant or recipient obtains a favorable decision.

3 **Comment.** Section 10962 is amended to make judicial review of a welfare decision of the
4 Department of Social Services subject to the judicial review provisions in the Code of Civil
5 Procedure. Judicial review is in the superior court. Code Civ. Proc. § 1123.510. The scope of
6 review is prescribed in Code of Civil Procedure Sections 1123.410-1123.460. See also Code
7 Civ. Proc. § 1123.160 (condition of relief).

8 Special provisions of this section prevail over general provisions of the Code of Civil
9 Procedure governing judicial review. See Code Civ. Proc. § 1121.110 (conflicting or
10 inconsistent statute controls).

11 UNCODIFIED

12 **Uncodified (added). Severability**

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

16 **Uncodified (added). Application of new law**

17 SEC. _____. (a) This title applies to a proceeding commenced on or after January
18 1, 1998, for judicial review of agency action.

19 (b) The applicable law in effect before January 1, 1998, continues to apply to a
20 proceeding for judicial review of agency action pending on January 1, 1988.
21