Study N-200 December 11, 1996

Memorandum 96-84

Judicial Review of Agency Action: Local Agency Issues

The staff met with Louis Green, County Counsel for El Dorado County, Dwight Herr, County Counsel for Santa Cruz County, and Buck Delventhal, Deputy City Attorney for the City and County of San Francisco, to discuss the draft statute. The staff plans to discuss only the material below preceded by a bullet [•].

§ 1121. Proceedings to which title does not apply

• Section 1121 exempts local ordinances from the draft statute. Local agency representatives wanted all legislative acts of local agencies exempted. As a compromise, the staff would expand the exemption slightly to include resolutions. This will eliminate the need to distinguish between ordinances and resolutions, which may be difficult: In the absence of statutory or charter provisions to the contrary, a local legislative act may be in the form either of a resolution or an ordinance. 45 Cal. Jur. 3d *Municipalities* § 188, at 302-303 (1978). Although more formality is required for an ordinance than for a resolution, they are quite similar in form. An ordinance need not be in the usual form of an ordinance and need not say "be it ordained," if it amounts in substance to, and is passed with the formality of, an ordinance. Creighton v. Manson, 27 Cal. 613, 629 (1865). If a statute requires a local agency to take legislative action by resolution but the agency's charter requires the action by ordinance, action by ordinance is deemed to comply with the statute. Gov't Code § 50020.

• By limiting the exemption to an ordinance or resolution of a county board of supervisors or city council, the provision would parallel Article XI, Section 7, of the California Constitution which authorizes a "county or city" to make and enforce "ordinances and regulations." **The staff recommends revising subdivision (d) of Section 1121 as follows:**

> 1121. This title does not apply to any of the following:
> . . .
> (d) Judicial review of an ordinance or resolution of a ~~local agency~~ county board of supervisors or city council.

§ 1121.240. Agency action

• Section 1121.240 defines "agency action" broadly to include an agency's failure to perform any duty, function, or activity, discretionary or otherwise. Local agency representatives are concerned about groundless court challenges where the agency in the exercise of sound discretion declines to act or where the act would not be within the agency's authority. Under existing law, a court may compel an agency to exercise its discretion. Lindell Co. v. Board of Permit Appeals, 23 Cal. 2d 303, 315, 144 P.2d 4 (1943). This case involved discretion of the San Francisco Board of Permit Appeals to waive health, safety, and fire regulations as authorized by an emergency wartime ordinance. The court held it could compel the agency to exercise its discretion as authorized but not required by the ordinance, but could not compel it to exercise its discretion in a particular manner. **The staff has no objection to revising Section 1121.240 as follows:**

> 1121.240. "Agency action" means any of the following:
> . . . .
> (c) An agency's performance of~~, or failure to perform,~~ any other duty, function, or activity, discretionary or otherwise.
> (d) An agency's failure to perform any other duty, function, or activity, discretionary or otherwise, the agency is authorized by law to perform.

§ 1121.260. Local agency

Section 1121.260 defines "local agency" by referring to the definition in Government Code Section 54951. Local agency representatives thought it would be helpful to quote the Government Code section in the Comment. **The staff would add the following to the Comment:**

> Under Government Code Section 54951, "local agency" means "a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency."

§ 1122.030. Concurrent agency jurisdiction

Sections 1122.010-1122.040 codify the primary jurisdiction doctrine of existing law under which a claim originally cognizable in the courts may be referred by the court to the responsible administrative agency for its views. Farmers Ins. Exchange v. Superior Court, 2 Cal. 4th 377, 826 P.2d 730, 6 Cal. Rptr. 2d 487 (1992). Although the Comment says the court has "broad" discretion to refer a

matter to an agency, Section 1122.030 says the court may do so "only" if it determines the reference is "clearly" appropriate. According to Professor Asimow,

> the case should be shifted to the agency only if the defendant satisfies the burden of justifying this result. . . . Of course, there may be reasons of judicial efficiency for [sending the case to the agency]; but the defendant must persuade the court that these efficiency claims outweigh the costs, complexities, and delays inherent in shifting a case legitimately in court to an agency where plaintiff must start all over again. Consequently, the presumption in a primary jurisdiction case is that the court should keep the case . . . .

Asimow, *Judicial Review of Administrative Decision: Standing and Timing* 69-70 (Sept. 1992). This subject is not addressed by the 1981 Model State Administrative Procedure Act.

Local agency representatives suggest we revise Section 1122.030 to avoid an implication that the court should exercise this discretion sparingly. **The staff agrees, and would revise the section as follows:**

> 1122.030. (a) If an agency has concurrent jurisdiction over the subject matter of the proceeding or an issue in the proceeding, the court shall exercise jurisdiction over the subject matter or issue unless the court in its discretion refers the matter or issue for agency action. The court may exercise its discretion to refer the matter or issue for agency action ~~only~~ if the court determines the reference is ~~clearly~~ appropriate taking into consideration all relevant factors, including, but not limited to, the following:
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> (1) Whether agency expertise is important for proper resolution of a highly technical matter or issue.
>
> (2) Whether the area is so pervasively regulated by the agency that the regulatory scheme should not be subject to judicial interference.
>
> (3) Whether there is a need for uniformity that would be jeopardized by the possibility of conflicting judicial decisions.
>
> (4) Whether there is a need for immediate resolution of the matter, and any delay that would be caused by referral for agency action.
>
> (5) The costs to the parties of additional administrative proceedings.
>
> (6) Whether agency remedies are adequate and whether any delay for agency action would limit judicial remedies, either practically or due to running of statutes of limitation or otherwise.

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

§ 1123.140. Exception to finality and ripeness requirements

Section 1123.140 states an exception to the finality requirement of Section 1123.120 and the ripeness requirement of Section 1123.130. Local agency representatives noted that Sections 1123.120 and 1123.130 state an unqualified rule, and suggested the interaction of these sections be clarified. **The staff recommends revising Section 1123.140 as follows:**

1123.140. ~~A~~ Notwithstanding Sections 1123.120 and 1123.130, 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:

§ 1123.160. Condition of relief

• Under the Planning and Zoning Law, procedural error does not invalidate agency action unless the error was (1) prejudicial, (2) caused substantial injury, and (3) a different result would have been probable if the error had not occurred. Gov't Code § 65010. Local agency representatives suggest we add a general provision to the draft statute drawn from this provision of the Planning and Zoning Law.

• The draft statute already has a provision putting the burden of demonstrating the invalidity of agency action or entitlement to relief on the party asserting the invalidity or entitlement to relief. Section 1123.470. This is a specific application of the general presumption that official duty has been legally performed. Evid. Code § 664; California Administrative Mandamus, *supra*, § 4.157, at 203. Secondly, no one will have standing to challenge agency action unless someone has suffered harm (private interest standing) or an important right affecting the public interest is involved (public interest standing). Sections 1123.220, 1123.230. Thirdly, the draft statute requires the court to give deference to the agency's determination of what procedures are appropriate. Section 1123.460. Greater deference is appropriate under a procedural statute unique to the agency. See Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1247 (1995). Lastly, the draft statute preserves the harmless error provision of the Planning and Zoning Law for judicial review of proceedings under that law. See Section 1121.110

(conflicting or inconsistent statute controls over draft statute). These provisions should address the main concerns of local agency representatives.

• **Should we go further and codify a general harmless error doctrine for procedural error?** Such a provision might look as follows:

> 1123.160. (a) The court may grant relief under this chapter only on grounds specified in Article 4 (commencing with Section 1123.410) for reviewing agency action.
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> (b) The court may grant relief under this chapter from procedural error only if the error was prejudicial, resulted in substantial injury, and a different result was likely if the error had not occurred.

§ 1123.320. Administrative review of adjudicative proceeding

Section 1123.320 provides that, in an adjudicative proceeding, administrative remedies are deemed exhausted if no higher level of review is available within the agency, whether or not a rehearing or lower level of review is available within the agency, unless a statute or regulation requires a petition for rehearing or other administrative review. Local agency representatives would like to deny or limit attorney fees if a rehearing or other administrative review is permitted but the person seeking review does not use the permissive procedure.

Attorneys' fees in review of administrative proceeding. The prevailing party in judicial review proceedings may obtain reasonable attorney fees at $100 per hour, not to exceed $7,500, for arbitrary or capricious action of a public agency in an administrative proceeding. Gov't Code § 800 (to be continued in the draft statute as Section 1123.950). The following important limitations apply to attorney fees under this statute:

— Attorneys' fees are recoverable under the statute only if the complaining person is "personally obligated" to pay the fees to his or her attorney. California Administrative Mandamus § 8.37, at 288 (Cal. Cont. Ed. Bar, 2d ed. 1989). This would appear to prevent a barratrous attorney from finding a nominal plaintiff to support an award of attorney fees.

— The statute does not impose liability on public entities for performance of purely legislative functions such as enacting a regulation or ordinance, no matter how unwise the enactment may be. Reeves v. Burbank, 94 Cal. App. 3d 770, 777, 156 Cal. Rptr. 667 (1979).

— The statute does not impose liability on public entities if there is a bona fide dispute over the proper interpretation and application of a law. *Id.*

— The issue of arbitrary or capricious conduct should be raised as early as possible at the administrative level to preserve it for judicial review. California Administrative Mandamus, *supra*, § 1.23, at 26.

These limitations seem like adequate protection against abuse. Given the incentive for parties to raise the arbitrary or capricious issue as early as possible in the administrative proceeding, it seems unnecessary to add the additional requirement of seeking a rehearing or reconsideration before the agency if it is not otherwise required. **The staff would not require a petition for rehearing or reconsideration as a condition of attorneys' fees under this provision.**

Attorneys' fees for private attorney general. Attorneys' fees may be awarded under the private attorney general doctrine. Code Civ. Proc. § 1021.5; California Administrative Mandamus, *supra*, § 1.25, at 28. Under this statute, attorneys' fees may be awarded to the successful party in an action that results in enforcement of an important right affecting the public interest if significant benefit is conferred on the public and the financial burden of private enforcement makes the award appropriate. *Id.* There is no general requirement that a private party try to get public enforcement before filing a lawsuit for which fees will be sought. California Attorney Fee Awards § 4.33 (Cal. Cont. Ed. Bar 1995). However, the California Environmental Quality Act requires service on the California Attorney General. Pub. Res. Code § 21167.7. Failure to do so has barred recovery of fees under this statute because service might have convinced the Attorney General to carry the burden of suit. Schwartz v. City of Rosemead, 155 Cal. App. 3d 547, 561, 202 Cal. Rptr. 400 (1984).

Attorneys' fees may not be awarded under this statute if the economic interests of the plaintiff are sufficient motivation for bringing the action. Fees may be awarded only if the anticipated costs of suit are out of proportion to the plaintiff's individual stake. California Licensed Foresters Ass'n v. State Bd. of Forestry, 30 Cal. App. 4th 562, 35 Cal. Rptr. 2d 396 (1994).

The staff is reluctant to require an application for administrative rehearing or reconsideration as a condition of fees under the private attorney general statute. That would go well beyond the scope of the judicial review study, and would likely engender controversy having nothing to do with the merits of the judicial review draft. **If something like this is to be proposed, the staff suggests it be the subject of a separate study.**

§ 1123.350. Exact issue rule

Section 1123.350(b) provides an exception to the exact issue rule by permitting judicial review of an issue not raised before the agency in an adjudicative proceeding if the person was not adequately notified of the proceeding. Local agency representatives suggest we add the following to permit judicial review if:

> the person was not adequately notified of the adjudicative proceeding. For the purpose of this paragraph, notice of the proceeding given in compliance with a statute is adequate notice. If a statute or rule requires the person to maintain an address with the agency, adequate notice includes notice given to the person at the address maintained with the agency.

The problem with this language is that, for state agency adjudication not under the formal adjudication provisions of the Administrative Procedure Act, the administrative adjudication bill of rights merely requires that "notice" be given, without further elaboration. Gov't Code § 11425.10. Thus the notice required by Section 11425.10 adds nothing to requirement in Section 1123.350 that the person be "adequately notified." The formal adjudication provisions of the APA require service on the respondent of the accusation. Gov't Code § 11505. It seems obvious that service will satisfy Section 1123.350 without the need to add the suggested language.

Perhaps there are statutes requiring notice in local agency adjudication not under the formal adjudication provisions of the APA that would make the suggested language useful. **The staff will ask local agency representatives to refer us to these statutes, if there are any.**

§ 1123.410. Standards of review of agency action
§ 1123.420. Review of agency interpretation or application of law

• Local agency representatives were concerned the provision in Section 1123.420 for independent judgment review of "[w]hether the agency has erroneously applied the law to the facts" might swallow up abuse of discretion review under Section 1123.450 of an exercise of agency discretion. We discussed the possibility of replacing the quoted language with language drawn from the existing administrative mandamus statute that abuse of discretion is established if "the order or decision is not supported by the findings, or the findings are not supported by the evidence." Code Civ. Proc. § 1094.5(b). But this language appears to have nothing to do with application of law to facts, e.g., was the

driver negligent or was the employee acting in the course and scope of employment? Rather it appears to deal with the connection between the evidence and the findings of fact, and between the findings of fact and law and the ultimate decision. See Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 514-17, 522 P.2d 12, 113 Cal. Rptr. 836 (1974); California Administrative Mandamus, *supra*, § 4.127, at 174, § 4.92, at 153, § 4.101, at 159, § 4.111, at 165-66. Perhaps the application language would be clearer, and more acceptable to local agencies, if it were revised as follows:

> 1123.420. 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:
>
> . . . .
>
> (5) Whether the agency has erroneously ~~applied the law to~~ characterized the legal consequences of the facts.

• **The staff is not sure this is an improvement.**

• We also discussed possibly adding language to Section 1123.420 to say "nothing in this section is intended to interfere with abuse of discretion review of an exercise of agency discretion under Section 1123.450." However, if we put this in one section, to avoid a possible negative implication we would have to add this language to all the other standard of review sections as well. The staff believes the present statutory language is satisfactory, especially when read with the Comments. Also Section 1121.140 says "[n]othing in this title authorizes the court to interfere with a valid exercise of agency discretion or to direct an agency how to exercise its discretion."

• **The staff would address this concern by adding the following to the Comments:**

> **Comment to Section 1123.410:** The appropriate review standard of this article to be applied by the court depends on the issue being considered. For example, in exercising discretion, an agency may be called upon to interpret a statute, to determine basic facts, to apply the law to the facts, and to make the discretionary decision. In reviewing this action, the court would use the standard of Section 1123.420 (independent judgment with appropriate deference) in reviewing the statutory interpretation and the application of the law to the facts, the standard of Section 1123.430 (substantial evidence) or 1123.440 (substantial evidence or independent judgment) in reviewing the determination of basic

facts, and the standard of Section 1123.450 (abuse of discretion) in reviewing the exercise of discretion.

Comment to Section 1123.420: Agency application of law to facts under paragraph (5) of subdivision (a) should not be confused with an exercise of discretion that is based on a choice or judgment. See the Comment to Section 1123.450. Typical exercises of discretion include whether to impose a severe or lenient penalty, whether there is cause to deny a license, whether a particular land use should be permitted, and whether a corporate reorganization is fair. Asimow, *supra*, at 1224. The standard of review for an exercise of discretion is provided in Section 1123.450.

Lou Green agreed to furnish us with case citations. We will include relevant cases in the Comment when we have them to make clear we are not changing existing law on the standard of review of agency discretion.

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

• Section 1123.630 requires the agency in an adjudicative proceeding to give notice to the parties of the last day to file a petition for judicial review. This provision comes from Code of Civil Procedure Section 1094.6, which requires local agencies to give notice in an adjudicative proceeding "that the time within which judicial review must be sought is governed by this section."

• Local agency representatives say this does not work for zoning and land use cases that are properly classed as adjudicative, because there are various time limits for review of planning and zoning matters. For example, under Government Code Section 65009, the time limit may be 60 days or one year, and is measured from various events, depending on the nature of the proceeding. Under the California Environmental Quality Act, the time limit may be 30 days or 180 days from various events, depending on the nature of the proceeding. It is, of course, impossible to know beforehand on what grounds agency action will be challenged. The staff believes this point is well taken. **The staff recommends revising Section 1123.630 as follows:**

1123.630. In addition to any notice of agency action required by statute, in an adjudicative proceeding, the agency shall in the decision or otherwise give notice to the parties in substantially the following form: "The last day to file a petition with a court for review of the decision ~~is [date]~~ may be as early as 30 days from the date of this notice, depending on the applicable statute, unless the time is extended as provided by law."

The staff considered whether there should be two notice provisions, one for state agencies and one for local agencies, but concluded that would not be helpful since the complex time limits under the California Environmental Quality Act may apply either to state or local agencies. See Pub. Res. Code §§ 21108 (state agency), 21152 (local agency), 21167.

If the Commission approves this revision, the staff will recheck the many other statutes to make sure they work properly in conjunction with this provision.

§ 1123.730. Type of relief

• Section 1123.730(b) permits the court to award damages or compensation, subject to the California Tort Claims Act, if applicable, and to other express statute. Local agency representatives note that Government Code Section 935 permits local public entities to impose claims requirements by charter, ordinance, or regulation, and that this should be recognized in Section 1123.730. **The staff agrees, and recommends revising subdivision (b) as follows:**

> (b) The court may award damages or compensation, subject to any of the following that are applicable:
>
> (1) Division 3.6 (commencing with Section 810) of the Government Code~~, if applicable, and to other~~ .
>
> (2) The procedure for a claim against a local agency prescribed in a charter, ordinance, or regulation adopted pursuant to Section 935 of the Government Code.
>
> (3) Other express statute.

§ 1123.810. Administrative record exclusive basis for judicial review
§ 1123.850. New evidence on judicial review

• Local agency representatives are concerned the draft statute may go too far in imposing a closed record requirement. In cases where the closed record requirement applies, they are concerned they will have to build a more elaborate administrative record to anticipate and guard against a possible challenge, greatly increasing the time, effort, and expense of many local agency proceedings. We have heard similar concerns from public employee representatives. The Attorney General's Office is not in complete agreement with this view, and will send us comment sometime after the December meeting.

• For the purpose of open or closed record review, the draft statute does not distinguish between the various kinds of agency action being reviewed, whether adjudicative, quasi-legislative, ministerial, or informal. The draft statute permits

all relevant extra-record evidence to be received if the agency either did not give interested persons notice and an opportunity to submit oral or written comment, or did not maintain a record or file of its proceedings. In other cases, extra-record evidence is admissible only if it was improperly excluded by the agency, or in the exercise of reasonable diligence could not have been presented to the agency. In view of this, it appears the draft statute will not have a drastic effect on existing law. The following summarizes the effect the draft statute will have on existing law:

• **Extra-record evidence freely admissible:** In traditional mandamus to review ministerial or informal action, extra-record evidence is freely admissible if the facts are in dispute. Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 575-76, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 147-48 (1995). The court may conduct a full trial, receiving testimony and other evidence, including a hearing on any question of fact. California Civil Writ Practice § 6.27, at 212 (Cal. Cont. Ed. Bar, 3d ed. 1996). The draft statute continues open record review of ministerial or informal action where the agency did not give notice and an opportunity to comment, which will probably be true in most such cases.

• **Extra-record evidence admissible only if it could not have been produced in the agency proceeding:** In administrative mandamus 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. Code Civ. Proc. § 1094.5(e). The court may receive such evidence itself for independent judgment review. *Id.* The draft statute continues the limited open record review of this rule if the agency gives notice to interested persons and an opportunity for them to comment. This will be true for most administrative adjudication.

• **Extra-record evidence admissible only if it existed before the agency decision and could not have been produced in the agency proceeding:** 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 to the agency. Western States, 9 Cal. 4th at 978, 38 Cal. Rptr. 2d at 149. The draft statute continues this rule if the agency gives notice to interested persons and an opportunity for them to comment. This will be true for most quasi-legislative action.

• Local agency representatives were concerned the provision for closed record review where the agency gives notice is so broad it would apply to virtually every action of a local agency's legislative body, because the Brown Act requires meetings of the legislative body of a local agency to be open and public, requires the agenda to be posted, and permits members of the public to address the legislative body. Gov't Code §§ 54953, 54954.2, 54954.3. The draft statute would provide closed record review for such proceedings, with the very consequences feared by local agency representatives.

• However, closed record review under the draft statute will be considerably softened by the following:

— The draft statute does not apply to local agency ordinances, and the staff is recommending above that it not apply to local agency resolutions.

— The closed record requirement of the draft statute will not apply to most ministerial or informal action, because presumably there will be no notice given for most such action.

• This does not address the concern of local agency representatives that quasi-legislative action of a local legislative body that is neither an ordinance nor a resolution will be subject to closed record review because of the posted notice required by the Brown Act. However, existing law requires closed record review of all quasi-legislative action whether or not under CEQA (Western States, 9 Cal. 4th at 574, 578, 38 Cal. Rptr. 2d at 146, 149), Professor Asimow recommended closed record review of quasi-legislative action, and the Commission has been reluctant to depart from *Western States* by expanding open record review.

• We discussed the possibility of limiting the general closed rule of Section 1123.810 to state agencies. This may go too far in undercutting *Western States*. In general, the staff prefers to have general rules applicable to state and local agencies alike. Local agency proceedings are extremely varied, but so are those of state agencies. On the other hand, local agencies may lack the resources and legal expertise available to state agencies. **Does the Commission wish to revisit this, and consider open record review of non-CEQA quasi-legislative action of a local legislative body?**

§ 1123.820. Contents of administrative record

• Section 1123.820 requires the administrative record to include a "table of contents that identifies each item contained in the record." Local agency representatives say this requirement may be extremely burdensome in some

cases, such as where the record consists of many boxes full of material. They argue that the petitioner can select and identify material in the record to be relied on in the review proceeding.

• The Comment says the requirement of a table of contents is drawn from the provision for contents of the record in a rulemaking proceeding. See Gov't Code § 11347.3. There is no existing requirement of a table of contents in the record under the formal adjudication provisions of the APA. See Gov't Code § 11523; California Administrative Mandamus, *supra*, § 8.1, at 255. For traditional mandamus, all portions of the record should be labeled as exhibits and described in the petition, referring to exhibit number and page. Apparently a table of contents is required only for proceedings in the court of appeal or California Supreme Court. Cal. R. Ct. 56(d); California Civil Writ Practice, *supra*, § 7.48, at 263-65.

• The staff thinks local agency representatives have made a good case to delete the table of contents requirement. The requirement should be preserved for judicial review of rulemaking. **The staff recommends deleting the requirement of a table of contents in Section 1123.820, and revising Government Code Section 11350 (rulemaking) to make clear the record for review includes the table of contents required by Government Code Section 11347.3.**

• Local agency representatives suggested adding a requirement that the record be paginated. **The staff would address this by adding a paragraph to subdivision (a) to say the record consists of:**

> (6) Any other matter prescribed by rules of court adopted by the Judicial Council.

Fee for Preparation of the Record

• Section 1123.910 requires the agency to charge the petitioner the fee provided in Government Code Section 69950 for the transcript (70 cents for each 100 words for the original), and the reasonable cost of preparing other portions of the record and for certifying it. This comes from the formal adjudication provisions of the APA. Gov't Code § 11523. Section 11523 says the agency shall be delivered "upon payment of the fee specified in Section 69950." This means the fee must be paid before the record is delivered. California Administrative Mandamus, *supra*, § 8.9, at 263.

• Local agency representatives say that, unless the fee is paid in advance, they often experience problems collecting it, and suggest including a requirement that the fee be paid in advance to get the benefit of the tolling provision of Section 1123.640 or 1123.650. This suggestion seems sound. The staff recommends continuing the existing requirement for formal APA adjudication of payment in advance of the cost of preparing the record, and generalizing it to apply to all judicial review proceedings. **The staff recommends revising Sections 1123.640, 1123.650, and 1123.830 as follows:**

> 1123.640. . . .
> (c) Subject to subdivision (d), the time for filing the petition for review is extended for a party:
> (1) [while seeking reconsideration]
> (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 and pays the fee provided in Section 1123.910, until 30 days after the record is delivered to the party.
>
> 1123.650. . . .
> (b) Subject to subdivision (c), the time for filing the petition for review is extended ~~as to~~ for a party:
> (1) [while seeking reconsideration]
> (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 and pays the fee provided in Section 1123.910, until 30 days after the record is delivered to the party.
>
> 1123.830. . . .
> (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 and payment of the fee provided in Section 1123.910 in an adjudicative proceeding involving an evidentiary hearing of 10 days or less.
> (2) Within 60 days after the request and payment of the fee provided in Section 1123.910 in a nonadjudicative proceeding, or in an adjudicative proceeding involving an evidentiary hearing of more than 10 days.

Notice to Agency as a Condition of Judicial Review

• Under the open meeting provisions of the Brown Act, before a person may seek mandamus to review action of a legislative body of a local agency, the person must make a demand to the local legislative body to correct the action. Gov't Code § 54960.1. Local agency representatives suggest we add a general

provision to the draft statute requiring a demand to the agency to correct its action (or inaction?) before seeking judicial review.

• The draft statute already requires a request to the agency to correct its action for public interest standing. Section 1123.230.

• Secondly, the draft statute requires exhaustion of administrative remedies, but makes clear that in an adjudicative proceeding administrative remedies are deemed exhausted if no higher level of review is available within the agency, whether or not a rehearing or lower level of review is available within the agency unless a statute or regulation requires a petition for rehearing or other administrative review. Section 1123.320. Thus a local agency could require a petition for rehearing as a condition of judicial review.

• Thirdly, the draft statute generally requires the issue on review to have been raised before the agency by someone. Section 1123.50. This prevents a challenge to agency action where the objection is raised for the first time in court.

• Lastly, the draft statute preserves the demand provision of the Brown Act. Section 1121.110 (conflicting or inconsistent statute controls over draft statute).

• The requirement of a demand for correction seems sound in the Brown Act context, because the complaint is that the agency acted in secret, and so the complaining party could have had no opportunity to be heard before the agency action. However, for adjudication and for other action where the public did have an opportunity to participate and where the issue on review must have been raised before the agency, the demand requirement seems like a useless hurdle that would add delay and expense to the proceeding, and would be a significant departure from existing law. **The staff would not include a general requirement of a demand on the agency to correct its action as a condition of judicial review in every case.**

Respectfully submitted,

Robert J. Murphy
Staff Counsel