

## Memorandum 97-56

**Judicial Review of Agency Action: SB 209 Amendments**

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Attached is a compilation of amendments to SB 209 approved by the Commission at the April, May, and July meetings, and revised Comments. We are having SB 209 amended to include these. Remaining issues are discussed below. The text of sections shown below is from the last amended version of SB 209. The staff plans to discuss only the material below preceded by a bullet [•].

**Exemption For Underground Regulations of State Agencies**

• At the last meeting, the Commission approved the staff recommendation to exempt underground regulations of state agencies from the draft statute. **The staff has worked over the language, and has included the revisions below in the amendments to SB 209:**

[Code Civ. Proc. §] 1121. (a) This title does not apply to any of the following:

(1) Judicial review of agency action by any of the following means:

(A) Where a statute provides for trial de novo.

(B) Action for refund of taxes or fees under Section 5140 or 5148 of the Revenue and Taxation Code, or under Division 2 (commencing with Section 6001) of the Revenue and Taxation Code.

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

(2) 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.

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

(4) Judicial review of an ordinance, regulation rule, or resolution enacted by a county board of supervisors or city council, that is legislative in nature.

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

(6) Judicial review of a state agency rule alleged to be in violation of Section 11340.5 of the Government Code.

(b) . . . .

[Gov't Code § 11340.5 — as set out in attachment]

[Gov't Code § 11340.8 — as set out in attachment]

[Gov't Code §] 11350. (a) ~~Except as provided in subdivisions (d) and (e), a~~ A person may obtain a judicial declaration as to the validity of any regulation under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. Except as provided in this section, the proceeding is subject to Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. Judicial review of a rule alleged to be in violation of Section 11340.5 is not subject to Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

(b) The regulation may be declared to be invalid for a substantial failure to comply with this chapter, or, in the case of an emergency regulation or order to repeal, upon the ground that the facts recited in the statement do not constitute an emergency within the provisions of Section 11346.1.

(b) (c) 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.

(c) (d) 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 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~~ (e) On judicial review, the court may not require the agency to add to the administrative record an explanation of reasons for a regulation.

(2) ~~No , and 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~~ (f) No deference shall be given by the court to an agency's determination that a regulation of that agency was adopted in substantial compliance with this chapter.

**Comment.** . . . The last sentence of subdivision (a) makes clear Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure does not apply to judicial review of a rule alleged to be in violation of Section 11340.5. Such a rule is subject to judicial review in the same manner as under prior law. See generally 1 G. Ogden, California Public Agency Practice §§ 22.01-22.08.

[Gov't Code § 11350.3 — as set out in attachment]

### **Proceedings in Supreme Court or Court of Appeal**

- Section 1123.510 provides:

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

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

- At the last meeting, it was asked whether subdivision (b) should be expanded to include original superior court jurisdiction exercised under the constitution. **The staff recommends against doing this.** The Legislature has broad power to prescribe the procedure under which courts exercise their constitutional jurisdiction. 2 B. Witkin, California Procedure *Courts* § 175, at 232-33 (4th ed. 1996). There is no reason why the draft statute should be more constitutionally suspect than the existing administrative mandamus statute. Although the administrative mandamus statute authorizes a “writ” of mandamus, the Constitution confers original jurisdiction in “proceedings for extraordinary relief in the nature of mandamus” (Cal. Const. art. VI, § 10), and the draft statute tracks the constitutional language by saying it provides “a proceeding for extraordinary relief in the nature of mandamus” (Section 1121.120). The draft statute also makes clear it does not limit constitutionally mandated court discretion summarily to decline to grant review (Section 1123.110), consistent with a proceeding “in the nature of” mandamus. The staff believes existing mandamus procedures in superior court for judicial review of agency action should be wholly replaced by the draft statute.

- In its latest form, the draft statute applies as follows:
  - It applies to all judicial review proceedings in superior court.
  - It applies to proceedings in the Supreme Court or court of appeal to review decisions of the Public Employment Relations Board (Gov't Code §§ 3520, 3542,

3564, as amended in SB 209), Agricultural Labor Relations Board (Lab. Code § 1160.8, as amended in SB 209), and Workers' Compensation Appeals Board (Lab. Code § 5954, as amended in SB 209), except as provided in statutes governing those agencies.

— It does not apply to other original writ proceedings in the Supreme Court or court of appeal unless applied by rules of court adopted by the Judicial Council (Section 1121, as revised at the April meeting). Perhaps this should be revised to apply the draft statute to all such proceedings.

- The exception for original writ proceedings in the Supreme Court and court of appeal was adopted after the State Bar Committee on Appellate Courts suggested a provision saying the draft statute does not apply to such proceedings. The State Bar Committee did not argue that this was good policy, but merely that it appeared necessary to make clear the Commission's intent to require all judicial review to be in superior court.

- Under existing law, an administrative or traditional mandamus proceeding is ordinarily brought in superior court. However, it may be brought in the Supreme Court or court of appeal if the issues are of great public importance and must be resolved promptly. *Mooney v. Pickett*, 4 Cal. 3d 669, 675, 94 Cal. Rptr. 279, 282 (1971); California Administrative Mandamus § 8.15, at 269 (Cal. Cont. Ed. Bar, 2d ed. 1989). Although there are a few rules of court applicable to mandamus proceedings in the appellate courts (Cal. R. Ct. 56, 57-59), there is no general procedural distinction between mandamus proceedings in the superior court and those in the court of appeal. General rules of pleading and practice in ordinary civil cases apply, except as otherwise provided in the mandamus statutes. California Administrative Mandamus, *supra*, § 8.14, at 268.

- There does not appear to be any constitutional impediment to applying the draft statute to judicial review proceedings in the Supreme Court or court of appeal. As noted above, the Legislature has broad power to prescribe the procedure under which courts exercise their constitutional jurisdiction. If there is a constitutional problem with applying the draft statute to review proceedings in the Supreme Court or court of appeal, the same problem must necessarily exist with applying the draft statute to proceedings in superior court, since the Constitution gives original jurisdiction equally to the superior court, court of appeal, and Supreme Court. See Cal. Const. art. VI, § 10.

- In view of the foregoing, it seems better to apply the draft statute to all judicial review proceedings, whether in the superior court, court of appeal, or

Supreme Court. We could preserve existing appellate rules for the contents of a petition (Cal. R. Ct. 56) by authorizing Judicial Council rules for practice in the Supreme Court or court of appeal even though inconsistent with the draft statute. Cf. Fam. Code § 211 (Judicial Council may adopt family law rules “[n]otwithstanding any other provision of law”). **The staff recommends deleting subdivision (b) from Section 1121, relettering and renumbering the subdivisions and paragraphs in Section 1121, and revising Section 1123.710 as follows:**

1121. . . . [text of subdivision (a) set out above]

~~(b) This title applies to an original proceeding in the Supreme Court or court of appeal under Section 10 of Article VI of the California Constitution only to the extent provided by rules of court adopted by the Judicial Council.~~

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.

(d) The Judicial Council may adopt rules of court governing proceedings in the Supreme Court and courts of appeal for judicial review of agency action, which may be inconsistent with this title.

### **Access to Public Records**

- The Public Records Act permits inspection and copying of public records. Gov’t Code §§ 6250-6265. Government Code Section 6258 authorizes courts to enforce this right by “injunctive or declarative relief or writ of mandate,” and says the “times for responsive pleadings and for hearings in these proceedings shall be set by the judge of the court with the object of securing a decision as to these matters at the earliest possible time.” Section 6259 provides an abbreviated hearing procedure: On petition, the court may order the custodian to disclose the

record or show cause why it should not be disclosed. “The court shall decide the case after examining the record in camera” if not privileged, and “papers filed by the parties and any oral argument and additional evidence as the court may allow.” Because of the special abbreviated hearing procedure under the Public Records Act, the staff would exempt these proceedings from the draft statute. **To do this, the staff recommends adding a subdivision (f) to Section 1121:**

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

. . . . [full text set out above]

(f) Proceedings under the California Public Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

#### **§ 1123.330. Judicial review of a rule**

At the last meeting, the Commission asked the staff to make clear in Section 1123.330 that a regulation may be challenged even though the agency has not commenced an enforcement action. **The staff has included the following language in the amendments to SB 209:**

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

(b) A person may obtain judicial review of a rule whether or not a proceeding to enforce the rule has been commenced.

#### **§ 1123.430. Review of agency factfinding**

At the last meeting, Senator Kopp thought the best way to resolve the issue of standard of review of state agency factfinding is to request an interim hearing by the Senate Judiciary Committee. Senator Kopp has made the request and the Committee is processing it.

#### **§ 1123.640. Time for filing petition for review in other adjudicative proceedings**

At the last meeting, the Commission asked if the inconsistency in references to the date a decision is “announced” or is “effective” was intentional or inadvertent. This was inadvertent, and is corrected in the amendments to SB 209 as follows:

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

(1) . . . .

(2) Until 30 days after the record is delivered to the party if, within 15 days after the decision is effective announced, the party makes a written request to the agency to prepare all or any part of the record, and, within 15 days after being notified of the estimated fee and cost, pays the fee and cost provided in Section 1123.910.

**§ 1123.710. Applicability of rules of practice for civil actions**

**§ 1123.850. New evidence on judicial review**

- At the last meeting, the Commission asked whether under existing law the petitioner may prepare the record, subject to being supplemented by the agency, and, if so, whether that option should be preserved. We have also heard concerns of public employee groups wanting to preserve their ability in traditional mandamus to get an early court hearing on law and motion calendar based on evidentiary material submitted by declaration. In traditional mandamus, the record may be quite limited, consisting of a letter and perhaps little else. The CEB treatise, for example, discussing mandamus generally and not limited to review of agency action, says the petition “should be accompanied by all proper supporting records, papers, affidavits, or other documents.” California Civil Writ Practice § 9.26, at 307 (Cal. Cont. Ed. Bar, 3d ed. 1997).

- Section 1123.850(c) permits the court to receive evidence in addition to that in the administrative record “if 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.” The petitioner is not required to request the administrative record — Section 1123.830 merely requires the record to be prepared “[o]n request of the petitioner.”

- In existing traditional mandamus, the petitioner may elect not to request the record, and may present evidence by testimony or declaration. California School Employees Ass’n v. Del Norte Unified School Dist., 2 Cal. App. 4th 1396, 1405, 4 Cal. Rptr. 35, 39-40 (1992). Section 1123.710 in the draft statute applies rules of practice for ordinary civil actions in Part 2 (commencing with Section 307) of the Code of Civil Procedure. But CCP provisions relating to testimony, affidavits, and declarations are found in Articles 1 (commencing with Section 2002) and 2 (commencing with Section 2009) of Chapter 3 of Title 3 (production of evidence) of Part 4 of the Code of Civil Procedure. **The staff recommends making clear**

**these provisions continue to apply in judicial review proceedings by adding the following to Section 1123.710:**

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 , and Articles 1 (commencing with Section 2002) and 2 (commencing with Section 2009) of Chapter 3 of Title 3 of Part 4, apply 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.

• **The staff also recommends adding the following to the Comment to Section 1123.850:**

**Comment.** . . . The court has broad discretion to receive the evidence by oral testimony or by declaration. *California School Employees Ass'n v. Del Norte Unified School Dist.*, 2 Cal. App. 4th 1396, 1405, 4 Cal. Rptr. 35, 39-40 (1992); see also Section 1123.710 (rules of civil practice apply).

Respectfully submitted,

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Staff Counsel

August 26, 1997

COMMISSION-APPROVED AMENDMENTS TO SB 209  
AS AMENDED IN SENATE APRIL 16, 1997

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

(1) Judicial review of agency action by any of the following means:

(A) Where a statute provides for trial de novo.

(B) Action for refund of taxes or fees under Section 5140 or 5148 of the Revenue and Taxation Code, or under Division 2 (commencing with Section 6001) of the Revenue and Taxation Code.

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

(2) 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.

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

(4) Judicial review of an ordinance, regulation rule, or resolution, enacted by a county board of supervisors or city council, that is legislative in nature.

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

(6) Judicial review of a state agency rule alleged to be in violation of Section 11340.5 of the Government Code.

(b) This title applies to an original proceeding in the Supreme Court or court of appeal under Section 10 of Article VI of the California Constitution only to the extent provided by rules of court adopted by the Judicial Council.

1121.150. (a) This title applies to a proceeding commenced on or after January 1, ~~1998~~ 1999, for judicial review of agency action.

(b) The applicable law in effect before January 1, ~~1998~~ 1999, continues to apply to a proceeding for judicial review of agency action pending on January 1, ~~1998~~ 1999.

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~~ Nothing in this title limits court discretion conferred by Article VI of the California Constitution summarily to decline to grant judicial review if the petition for review does not present a substantial issue for resolution by the court.

1123.120. A (a) Except as provided in subdivision (b), a person may not obtain judicial review of agency action unless the agency action is final.

(b) A person may obtain judicial review of agency action that is not final if all of the following conditions are satisfied:

(1) It appears likely that the person will be able to obtain judicial review of the agency action when it becomes final.

(2) The issue is fit for immediate judicial review.

(3) Postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.

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

~~1123.140. Notwithstanding Section 1123.120 and subject to 1123.130, a person may obtain judicial review of agency action that is not final 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.~~

~~(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.~~

~~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.~~

~~(b) The court may grant relief under this chapter from procedural error only if the error was prejudicial.~~

~~1123.230. Whether or not a person has standing under Section 1123.220:~~

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

~~(b) Notwithstanding subdivision (a), a person has standing to obtain judicial review of a regulation adopted pursuant to the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, if the regulation concerns an important right affecting the public interest.~~

~~1123.310. (a) 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.~~

(b) For the purpose of subdivision (a), an administrative remedy is available within a public agency only if the remedy is provided by statute or rule.

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 rule requires a petition for rehearing or other administrative review.

1123.330. (a) A person may obtain judicial review of rulemaking a rule notwithstanding the person's failure to ~~do either of the following~~:

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

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

(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~~ a rule whether or not a proceeding to enforce the rule has been commenced.

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 rule, or procedure is facially unconstitutional.

1123.350. (a) Except as provided in subdivision (b), if exhaustion of administrative remedies is required, a person may not obtain judicial review of an issue that was not raised before the agency either by the person seeking judicial review or by another person.

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

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

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

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

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

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

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

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

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

1123.630. (a) The petition for review of a decision of an agency, other than a local agency, in an adjudicative proceeding, and of a decision of a local agency in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, shall be filed not later than 30 days after the decision is effective or after the notice required by ~~subdivision (e)~~ Section 1123.650 is delivered, served, or mailed, whichever is later.

(b) For the purpose of this section:

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

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

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

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

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

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

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

(2) Until 30 days after the record is delivered to the party 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, within 15 days after being notified of the estimated fee and cost, pays the fee and cost provided in Section 1123.910.

(d) In no case shall a petition for review of a decision described in subdivision (a) be filed later than 180 days after the decision is effective.

~~(e) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), the agency shall in the decision or otherwise give notice to the parties in substantially the following form: "The last day to file a petition with a court for review of the decision is [date] unless another statute provides a longer period or the time is extended as provided by law."~~

1123.640. (a) The petition for review of a decision in an adjudicative proceeding, other than a petition governed by Section 1123.630, shall be filed not later than 90 days after the decision is announced or after the notice required by ~~subdivision (d)~~ Section 1123.650 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) Until 30 days after the record is delivered to the party if, within 15 days after the decision is effective announced, the party makes a written request to the agency to prepare all or any part of the record, and, within 15 days after being notified of the estimated fee and cost, pays the fee and cost provided in Section 1123.910.

(c) In no case shall a petition for review of a decision described in subdivision (a) be filed later than 180 days after the decision is announced or reconsideration is rejected, whichever is later.

~~(d) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), 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 may be as early as 90 days after the decision is announced, or in the case of a decision pursuant to environmental laws, as early as 30 days after the time begins to run."~~

1123.650. In addition to any other 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] unless the time is extended as provided by law."

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

(b) The court may award damages or compensation, subject to any of the following that are applicable:

(1) Division 3.6 (commencing with Section 810) of the Government Code.

(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.

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

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

(e) If the court sets aside or modifies agency action or remands the matter for further proceedings, the court may make any interlocutory order necessary to preserve the interests of the parties and the public pending further proceedings or agency action.

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) 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.

(7) Any other matter expressly prescribed for inclusion in the administrative record by rules of court adopted by the Judicial Council.

(b) The administrative record for judicial review of a regulation adopted under the rulemaking under portion of the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, is the file of the rulemaking proceeding prescribed by Section 11347.3 of the Government Code.

(c) By stipulation of all parties to judicial review proceedings, the administrative record for judicial review may be shortened, summarized, or organized, or may be an agreed or settled statement of the parties, in accordance with the rules applicable to the record on appeal in judicial proceedings.

(d) If an explanation of reasons for the agency action is not otherwise included in the administrative record, the court may require the agency to add to the administrative record for judicial review a brief explanation of the reasons for the agency action to the extent necessary for proper judicial review.

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 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 decisionmaking body, or grounds for disqualification, of those taking the agency action, or (ii) unlawfulness of procedure or of decisionmaking process.

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

(c) Whether or not the evidence is described in subdivision (a), the court may receive evidence in addition to that contained in the administrative record for judicial review without remanding the case if no hearing was held by the agency, and the court finds that 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. This subdivision does not apply to judicial review of rulemaking a rule.

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

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

[Gov't Code §] 11340.5. (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

(b) If the office is notified of, or on its own ; learns of , the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation as defined in subdivision (g) of Section 11342.

(c) The office shall do all of the following:

(1) File its determination upon issuance with the Secretary of State.

(2) Make its determination known to the agency, the Governor, and the Legislature.

(3) Publish its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

(4) Make its determination available to the public and the courts.

(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published. Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure does not apply to the proceeding.

(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

(1) The court or administrative agency proceeding involves the party that sought the determination from the office.

(2) The proceeding began prior to the party's request for the office's determination.

(3) At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that is the legal basis for the adjudicatory action is a regulation as defined in subdivision (g) of Section 11342.

[Gov't Code §] 11340.8. Notwithstanding Section 11350, nothing in Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure creates any exceptions to this article or to Article 2 (commencing with Section 11342), Article 3 (commencing with Section 11343), Article 4 (commencing with Section

11344), Article 5 (commencing with Section 11346), Article 6 (commencing with Section 11349), Article 7 (commencing with Section 11349.7), or Article 9 (commencing with Section 11351) of this chapter.

[Gov't Code §] 11350. (a) ~~Except as provided in subdivisions (d) and (e), a~~ A person may obtain a judicial declaration as to the validity of any regulation under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. Except as provided in this section, the proceeding is subject to Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. Judicial review of a rule alleged to be in violation of Section 11340.5 is not subject to Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

(b) The regulation may be declared to be invalid for a substantial failure to comply with this chapter, or, in the case of an emergency regulation or order to repeal, upon the ground that the facts recited in the statement do not constitute an emergency within the provisions of Section 11346.1.

(b) (c) 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.

(e) (d) 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 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 (e) On judicial review, the court may not require the agency to add to the administrative record an explanation of reasons for a regulation.~~

(2) ~~No , and 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~~ (f) No deference shall be given by the court to an agency's determination that a regulation of that agency was adopted in substantial compliance with this chapter.

[Gov't Code §] 11350.3. Any interested A person may obtain a judicial declaration under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure as to the validity of a regulation which the office has disapproved or ordered repealed pursuant to Section 11349.3, 11349.6, or 11349.7 ~~by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure.~~ The court may declare the regulation valid if it determines that the regulation meets the standards set forth in Section 11349.1 and that the agency has complied with this chapter. If the court so determines, it may order the office to immediately file the regulation with the Secretary of State.

[Gov't Code §] 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.

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

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

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

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

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

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

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

(5) To attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit.

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

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

(1) It is brought in support of the development of housing which meet the requirements for housing for persons and families with low or moderate incomes 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 Sections 65700 and 65803, or any other provision of law, this section shall apply to charter cities.

(g) Except as provided in 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, regulation rule, or resolution , enacted by a county board of supervisors or city council , that is legislative in nature.

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

[Pub. Res. Code §] 21168. (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 on the grounds of noncompliance with this division shall be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. The court shall not exercise its independent judgment on the evidence, but shall determine only whether the act or decision is supported by substantial evidence in light of the whole record.

(b) Sections 1123.470, 1123.630 and , 1123.640 , and 1123.650 of the Code of Civil Procedure do not apply to judicial review of proceedings under this division.

SEC. 54. (a) This act applies to a proceeding commenced on or after January 1, ~~1998~~ 1999, for judicial review of agency action.

(b) The applicable law in effect before January 1, ~~1998~~ 1999, continues to apply to a proceeding for judicial review of agency action pending on January 1, ~~1998~~ 1999.

## REVISED COMMENTS TO REPORT ON JUDICIAL REVIEW OF AGENCY ACTION (SENATE BILL 209)

### **Code Civ. Proc. § 1120. Entities to which title applies**

**Comment.** Section 1120 makes clear that the judicial review provisions of this title apply to actions of local agencies as well as state government. *But see* Section 1121(a)(4) (title does not apply to a legislative ordinance, regulation, or resolution enacted by a county board of supervisors or city council). The term “local agency” is defined in Government Code Section 54951. See Section 1121.260 & Comment. The introductory clause of Section 1120 recognizes that some proceedings are exempted by statute from application of this title. See Bus. & Prof. Code § 6089 (State Bar Court); Gov’t Code § 11420.10 (award in binding arbitration under Administrative Procedure Act); Pub. Res. Code § 25531.5 (Energy Commission); Pub. Util. Code § 1768 (Public Utilities Commission). See also Gov’t Code § 19576.1 (disciplinary decisions not subject to judicial review). This title also does not apply to proceedings where the substantive right originates in the constitution, such as inverse condemnation. See California Government Tort Liability Practice § 2.97, at 181-82 (Cal. Cont. Ed. Bar, 3d ed. 1992). See also Section 1123.160 (condition of relief).

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

Paragraph (2) of subdivision (b) recognizes that Government Code Sections 11400-11470.50 apply to some private entities. See Gov’t Code § 11410.60 (1997 Cal. Stat. ch. xxx) [SB 68, administrative adjudication by quasi-public entities].

Paragraph (3) of subdivision (b) is drawn from a portion of the first sentence of former 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).

### **Code Civ. Proc. § 1121. Proceedings to which title does not apply**

**Comment.** Under subdivision (a)(1)(A) 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)(1)(B) exempts from this title actions for refund of taxes under Section 5140 or 5148 of, or Division 2 of, the Revenue and Taxation Code, but does not generally exempt property taxation under Division 1 of that code. 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 & 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 & 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). See also Cal. Const. art. XIII, § 32 (courts may not prevent or enjoin collection of any tax).

Subdivision (a)(1)(C) provides that this title does not apply to an action brought under the California Tort Claims Act. However, subdivision (a)(1)(C) 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 (a)(2), 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 (a)(4) provides that this title does not apply to judicial review of a legislative ordinance, rule, or resolution of a county board of supervisors or city council. It does apply, however, to an ordinance, rule, or resolution that is administrative or executive in character. An ordinance, rule, or resolution may be legislative in nature, or they may be of an administrative or executive character. *Hopping v. Council of Richmond*, 170 Cal. 605, 610, 150 Pac. 977 (1915) (legislative resolution); *Valentine v. Town of Ross*, 39 Cal. App. 3d 954, 957, 114 Cal. Rptr. 678 (1974) (administrative resolution). See generally 38 Cal. Jur. 3d *Initiative and Referendum* § 4 (1977). Matters exempted from this title by subdivision (a)(4) remain subject to judicial review by traditional mandamus or by an action for injunctive or declaratory relief. See, e.g., *Karlson v. City of Camarillo*, 100 Cal. App. 3d 789, 798, 161 Cal. Rptr. 260 (1980) (mandamus to review amendment of city's general plan); cf. *Guidotti v. County of Yolo*, 214 Cal. App. 3d 1552, 1561-63, 271 Cal. Rptr. 858, 863-64 (1986) (declaratory and injunctive relief and mandamus to review setting by county of levels of general relief). If a proceeding is brought under this title to review

ministerial or informal action and a separate proceeding for traditional mandamus is brought to review a legislative ordinance, regulation, or resolution upon which the action is based, the two proceedings may be consolidated by the court under Section 1048. See Section 1123.710.

Subdivision (a)(5) 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 (a)(5), 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). See also Water Code § 2504 (title does not apply to statutory adjudication under specified Water Code provisions).

Subdivision (b) recognizes the rulemaking authority of the Judicial Council. See Cal. Const. art. VI, § 6 (rules of practice and procedure). See also Section 1123.510(b) (jurisdictional rules of this title do not interfere with original writ jurisdiction of Supreme Court or court of appeal).

### **Code Civ. Proc. § 1123.110. Requirements for judicial review**

**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), 1123.210 (standing), 1123.310 (exhaustion of administrative remedies), 1123.630-1123.640 (time for filing petition for review of decision in adjudicative proceeding). The ripeness requirement mentioned in subdivision (a) is not codified in this title, but is found in case law. See, e.g., *Pacific Legal Foundation v. California Coastal Comm’n*, 33 Cal. 3d 158, 655 P.2d 306, 188 Cal. Rptr. 104 (1982) (challenge to Commission’s public access guidelines); *Planning & Conservation League v. Department of Fish & Game*, 54 Cal. App. 4th 140, 62 Cal. Rptr. 2d 510, 513-14 (1997) (facial challenge to emergency management measures permit); *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) (judicial review of rulemaking). See generally 5 B. Witkin, *California Procedure Pleading* § 815, at 270-72 (4th ed. 1997).

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) recognizes that the California Constitution may confer court discretion summarily to decline to grant judicial review. See *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 24 Cal. 3d 335, 351, 595 P.2d 579, 156 Cal. Rptr. 1 (1979). This 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 Educ.*, 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).

### **Code Civ. Proc. § 1123.120. Finality**

**Comment.** Subdivision (a) of 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.

Subdivision (b) codifies an exception to the finality requirement 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, the hardship to the person from deferring review, and the public interest in granting or deferring review. See, e.g., *BKHN, Inc. v. Department of Health Servs.*, 3 Cal. App. 4th 301, 4 Cal. Rptr. 2d 188 (1992); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

#### **Code Civ. Proc. § 1123.160. Condition of relief**

**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 has erroneously interpreted the law.
- (2) Whether agency action is based on an erroneous determination of fact made or implied by the agency.
- (3) Whether agency action is a proper exercise of discretion.
- (4) Whether the agency has engaged in an unlawful procedure or decisionmaking process, or has failed to follow prescribed procedure.
- (5) Whether the persons taking the agency action were improperly constituted as a decisionmaking body or subject to disqualification.

In addition to the grounds specified in Article 4 (Sections 1123.410-1123.470), for judicial review of adjudication or ministerial or informal action, the court must determine that the error was prejudicial. See, e.g., *Guilbert v. Regents of the University of California*, 93 Cal. App. 3d 233, 241, 155 Cal. Rptr. 583 (1979) (administrative mandamus: “[t]here is a generally accepted principle that the appellant must show prejudicial error affecting his interests in order to prevail on appeal”); *Neto v. Conselho Amor da Sociedade No. 41*, 18 Cal. App. 234, 239, 122 Pac. 973 (1912) (traditional mandamus: writ “not issued on mere technical grounds,” but is to “prevent substantial injury”).

#### **Code Civ. Proc. § 1123.230. Public interest standing**

**Comment.** Section 1123.230 governs public interest standing for judicial review of agency action other than adjudication. For special rules governing standing for judicial review of a decision in an adjudicative proceeding, see Section 1123.240. See also Section 1121.240 (“agency action” defined).

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

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

Section 1123.230 applies to all types of relief sought, whether pecuniary or nonpecuniary, injunctive or declaratory, or otherwise. The test for standing under this section is whether there is

a duty owed to the general public or a large class of persons. A person may have standing under the section to have the law enforced in the public interest, regardless of any private interest or personal adverse effect.

#### **Code Civ. Proc. § 1123.310. Exhaustion required**

**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).

Subdivision (b) codifies *Lopez v. Civil Service Comm’n*, 232 Cal. App. 3d 307, 314, 283 Cal. Rptr. 447 (1991). For a private association, an “available” administrative remedy is one provided by internal procedures of the association. *Westlake Community Hosp. v. Superior Court*, 17 Cal. 3d 465, 474, 131 Cal. Rptr. 90, 94 (1976).

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 & 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.

#### **Code Civ. Proc. § 1123.330. Judicial review of a rule**

**Comment.** Subdivision (a) of Section 1123.330 continues the former second sentence of subdivision (a) of Government Code Section 11350, and generalizes it to apply to local agencies as well as state agencies. See Sections 1120 (application of title), 1121.230 (“agency” defined), 1121.290 (“rule” defined). The petition to the agency referred to in subdivision (a) is authorized by Government Code Section 11340.6.

Subdivision (b) continues existing law. See 1 G. Ogden, *California Public Agency Practice* § 22.01 (rev. June 1989).

#### **Code Civ. Proc. § 1123.420. Review of agency interpretation of law**

**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 agency interpretation 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 Admin.*, 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). The court shall give no deference to a state agency regulation that should have been, but was not, adopted in compliance with the rulemaking portion of the Administrative Procedure Act, or to a determination of the issuing agency that compliance with the APA was not required. Gov't Code § 11350(f).

Under subdivision (a), the question of the appropriate degree of judicial deference to the agency interpretation of law is treated as “a continuum with nonreviewability at one end and independent judgment at the other.” See *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 575-76, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 147-48 (1995). Subdivision (a) is consistent with and continues the substance of cases saying courts must accept statutory interpretation by an agency within its expertise unless “clearly erroneous” as that standard was applied in *Nipper v. California Auto. Assigned Risk Plan*, 19 Cal. 3d 35, 45, 560 P.2d 743, 136 Cal. Rptr. 854 (1977) (courts respect “administrative interpretations of a law and, unless clearly erroneous, have deemed them significant factors in ascertaining statutory meaning and purpose”). The “clearly erroneous” standard was another way of requiring the courts in exercising independent judgment to give appropriate deference to the agency’s interpretation of law. See *Bodinson Mfg. Co. v. California Employment Comm’n*, 17 Cal. 2d 321, 325-26, 109 P.2d 935 (1941).

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

Agency interpretation of law under subdivision (a) may include such questions as whether agency action, or the statute or regulation on which it is based, is unconstitutional, whether the agency acted beyond its jurisdiction, and whether the agency decided all issues requiring resolution.

Section 1123.420 does not deal with the question of agency application of law to fact. Thus this title does not affect existing law on this question. See, e.g., *S. G. Borello & Sons, Inc. v. Department of Indus. Relations*, 48 Cal. 3d 341, 349, 769 P.2d 399, 256 Cal. Rptr. 543 (1989); *Halaco Engineering Co. v. South Central Coast Regional Comm’n*, 42 Cal. 3d 52, 74-77, 720 P.2d 15, 227 Cal. Rptr. 667 (1986); Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1213-14 (1995).

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

## **Code Civ. Proc. § 1123.450. Review of agency exercise 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).

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 Indus. 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 Bhd. of Elec. 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 Bhd. of Elec. Workers, Local 889 v. Department of Indus. 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 Bd. 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, the standard of review of those factual determinations is provided in Section 1123.430 or, for local agency adjudication, in Section 1123.440. 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. 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 factfinding 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).

### **Code Civ. Proc. § 1123.460. Review of agency procedure**

**Comment.** 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). Section 1123.460 is drawn from 1981 Model State APA Section 5-116(c)(5)-(6). It continues a portion of former Section 1094.5(b) (inquiry of the court extends to questions whether there has been a fair trial or the agency has not proceeded in the manner required by law). One example of an agency's failure to follow prescribed procedure is the agency's failure to act within the prescribed time upon a matter submitted to the agency.

As used in subdivision (a), "unfair" procedures are not limited to those that offend due process or violate a statute. This rejects the rule of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978) (courts may not require agencies engaged in rulemaking to take procedural steps not required by constitution or statute).

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.

For a special rule for judicial review of state agency rulemaking, see Gov't Code § 11350.

### **Code Civ. Proc. § 1123.630. Time for filing petition for review in adjudication of agency other than local agency and formal adjudication of local agency**

**Comment.** Section 1123.630 provides a limitation period for initiating judicial review of specified agency adjudicative decisions. See Section 1121.250 ("decision" defined). See also Section 1123.640 (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. The provision in subdivision (c)(2) making the extension of time during preparation of the record contingent on payment of the fee is drawn from former Government Code Section 11523. See also Sections 12-12b (computation of time).

Subdivision (a) supersedes the second sentence of former Government Code Section 11523 (30 days). It also unifies review periods formerly found in various special statutes. See, e.g., Gov't Code § 3542 (Public Employment Relations Board); Lab. Code §§ 1160.8 (Agricultural Labor Relations Board), 5950 (Workers' Compensation Appeals Board); Veh. Code § 13559 (Department of Motor Vehicles).

Section 1123.630 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), 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). Section 1123.630 does not apply to proceedings under the California Environmental Quality Act. Pub. Res. Code § 21168(b).

If the petition for review includes a claim for damages subject to the claims requirements of the California Tort Claims Act (see Section 1123.730(b) and Comment), a petition for review alleging the pending claim should be filed within the time provided in this section, and later amended when the claim is rejected to allege that fact. California Administrative Mandamus § 1.13, at 13 (Cal. Cont. Ed. Bar, 2d ed. 1989).

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 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 §§ 728, 1858.6, 12414.19; Pub. Res. Code § 2774.2; Veh. Code § 13953. Judicial review may only be had of a final decision. Section 1123.120.

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)).

#### **Code Civ. Proc. § 1123.640. Time for filing petition for review in other adjudicative proceedings**

**Comment.** Section 1123.640 continues the 90-day limitations period for local agency adjudication in former Section 1094.6(b). The provision in subdivision (b)(2) making the extension of time during preparation of the record contingent on payment of the fee and cost is drawn from former Government Code Section 11523. See also Sections 12-12b (computation of time).

Section 1123.640 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), decision of a local legislative body adopting or amending a general or specific plan, zoning ordinance, 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). Section 1123.640 does not apply to proceedings under the California Environmental Quality Act. Pub. Res. Code § 21168(b).

If the petition for review includes a claim for damages subject to the claims requirements of the California Tort Claims Act (see Section 1123.730(b) and Comment), a petition for review alleging the pending claim should be filed within the time provided in this section, and later amended when the claim is rejected to allege that fact. California Administrative Mandamus § 1.13, at 13 (Cal. Cont. Ed. Bar, 2d ed. 1989).

#### **Code Civ. Proc. § 1123.650. Notice to parties of last day to file petition for review**

Section 1123.650 is drawn from and generalizes former Code of Civil Procedure Section 1094.6(f). See also Unemp. Ins. Code § 410; Veh. Code § 14401(b). The introductory clause of Section 1123.650 makes clear that notice of agency action required by other special provisions do not override this section. Special provisions include those for judicial review of an administratively-issued withholding order for taxes (Code Civ. Proc. § 706.075), for an assessment due from a producer under a commodity marketing program (Food & Agric. Code §§ 59234.5, 60016), for denial by a county of disability retirement (Gov't Code § 31725), and under the California Environmental Quality Act (Pub. Res. Code §§ 21108 (state agency), 21152 (local agency)). See Section 1121.110 (conflicting or inconsistent statute controls).

For provisions extending the time to petition for review, see Sections 1123.630, 1123.640. An agency notice that erroneously shows a date that is too soon does not shorten the period for review, since the substantive rules in Section 1123.630 govern. If the notice erroneously shows a date that is later than the last day to petition for review and the petition is filed before that later date, the agency may be estopped to assert that the time has expired. See *Ginns v. Savage*, 61 Cal. 2d 520, 523-25, 393 P.2d 689, 39 Cal. Rptr. 377 (1964).

### **Code Civ. Proc. § 1123.730. Type of relief**

**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 v. 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.

### **Gov't Code § 11340.5 (amended). Adoption of guidelines, bulletins, and manuals as regulations**

**Comment.** Section 11340.5 is amended to make clear that the judicial review provisions of the Code of Civil Procedure do not apply to a petition pursuant to this section.

### **Gov't Code § 11340.8 (added). Effect of Code of Civil Procedure**

**Comment.** Section 11340.8 is new and makes clear that specified provisions of the Code of Civil Procedure do not create exceptions to this chapter other than Article 8 (judicial review).

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

**Comment.** Section 11350 is amended to recognize that judicial review of duly adopted state 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(a) (judicial review of rulemaking). The last sentence of subdivision (a) makes clear Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure does not apply to judicial review of a rule alleged to be in violation of Section 11340.5. Such a rule is subject to judicial review in the same manner as under prior law. See generally 1 G. Ogden, California Public Agency Practice §§ 22.01-22.08.

The former second sentence of former subdivision (b)(2) (now subdivision (c)(2)) is continued in Code of Civil Procedure Section 1123.820(b) (contents of administrative record).

Subdivision (e) 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.

**Gov't Code § 11350.3 (amended). Judicial declaration as to validity of disapproved or repealed regulation**

**Comment.** Section 11350.3 is amended to make clear that the judicial review provisions of the Code of Civil Procedure apply to review of a regulation which the Office of Administrative Law has disapproved or ordered repealed.

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

**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. §§ 1120-1123.950. Paragraph (1) of subdivision (j) is consistent with Code of Civil Procedure Section 1121(a)(4). Under paragraph (2) of subdivision (j), the time limits and notice provisions of Code of Civil Procedure Sections 1123.630, 1123.640, and 1123.650 do not apply to proceedings governed by this section.

**SELECTED CONFORMING REVISIONS**

**Code Civ. Proc. § 1094.6 (repealed). Review of local agency decision**

**Comment.** Subdivision (a) and the first sentence of subdivision (b) of former Section 1094.6 are superseded by Sections 1121.230 (“agency” defined), 1121.260 (“local agency” defined), 1123.120 (finality), and 1123.640 (time for filing petition for review). 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 1123.640 (time for filing petition for review).

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 (notice of last day for filing petition for review) and 1121.270 (“party” defined). Subdivision (g) is not continued.

**Pub. Res. Proc. § 21168 (amended). Conduct of proceeding**

**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.

Under subdivision (b), some provisions of the judicial review statute do not apply to review of proceedings under this division. Because Section 1123.470 on burden of proof does not apply to review of proceedings under this division, existing law continues to apply. See, e.g., *Davidon Homes v. City of San Jose*, 54 Cal. App. 4th 106, 62 Cal. Rptr. 2d 612, 617-18 (1997).