

A MODERN JUDICIAL REVIEW STATUTE TO REPLACE ADMINISTRATIVE MANDAMUS *

by Michael Asimow

November 1993

CONTENTS

| | |
|--|-----|
| INTRODUCTION | 405 |
| A. REPLACING MANDAMUS | 406 |
| 1. Existing California Law | 406 |
| a. Pleading complexities | 407 |
| b. Limitations on traditional mandamus | 409 |
| c. Distinctions between traditional and administrative mandamus .. | 409 |
| d. When Section 1094.5 applies | 412 |
| 2. Federal Law and Law of Other States | 416 |
| 3. Recommendation | 418 |
| B. PROPER COURT FOR REVIEW | 423 |
| 1. Present Law | 423 |
| 2. Recommendation | 425 |
| C. VENUE FOR JUDICIAL REVIEW | 432 |
| D. STAYS PENDING REVIEW | 435 |
| 1. Existing Law | 435 |
| 2. Recommendation | 436 |

* This report was prepared for the California Law Revision Commission by Professor Michael Asimow. No part of this report may be published without prior written consent of the Commission. This report is an edited version of the original photocopied document.

The Commission assumes no responsibility for any statement made in this report, and no statement in this report is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this report. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

A MODERN JUDICIAL REVIEW STATUTE TO REPLACE ADMINISTRATIVE MANDAMUS

by Michael Asimow*

This is the seventh report prepared by the author for the California Law Revision Commission on revising the adjudication provisions of California's Administrative Procedure Act (APA) and modernizing the system of judicial review of state and local administrative agency action.¹ This report is the last one in the series.²

This report proposes replacement of California's antiquated provision for administrative mandamus, Code of Civil Procedure Section 1094.5. It also recommends dispensing with ordinary mandamus as a method of judicial review of agency action and repealing as well numerous other general and special provisions for obtaining review. The goal is to produce a single, straightforward statute providing the ground rules for judicial review of all forms of state and local agency action. Wherever possible, the normal

* Professor of Law, UCLA Law School, Los Angeles CA 90024. The author welcomes comments on this report. The assistance of Karl S. Engeman, Harold Levinson, and Greg Ogden is greatly appreciated.

1. Previous reports include the following: (1) "Administrative Adjudication: Structural Issues" (Oct. 1989); (2) "Appeals Within the Agency: The Relationship Between Agency Heads and ALJs" (Aug. 1990); (3) "Impartial Adjudicators: Bias, Ex Parte Contacts, and Separation of Functions" (Jan. 1991) — the first three reports were published in revised form as *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 38 UCLA L. Rev. 1067 (1992), reprinted in 25 Cal. L. Revision Comm'n Reports 321 (1995) — (4) *The Adjudication Process* (Oct. 1991), 25 Cal. L. Revision Comm'n Reports 451 (1995); (5) *Judicial Review: Standing and Timing* (Sept. 1992), 27 Cal. L. Revision Comm'n Reports 229 (1997); (6) *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157 (1995), reprinted *supra* p. 309; and (7) this report.

2. The Commission is continuing its administrative law project by evaluating the provisions relating to rulemaking and non-judicial controls over agencies.

rules of civil procedure should apply to judicial review. The underlying objective is to allow litigants and courts to reach and resolve swiftly the substantive issues in dispute, rather than to waste resources disputing tangential procedural issues.

A. REPLACING MANDAMUS

1. Existing California Law

Under existing law, on-the-record *adjudicatory* decisions of state and local government are reviewed by superior courts under the administrative mandamus provision of Section 1094.5. *Regulations* adopted by state agencies are reviewed by superior courts through actions for declaratory judgment.³ A range of miscellaneous agency action is reviewed by traditional mandamus under Section 1085⁴ or by declaratory judgment.⁵

Special review procedures are set forth in the statutes creating many agencies. Decisions of the Public Utilities Commission and of the Review Department of the State Bar Court are reviewed on a discretionary basis by the Supreme Court.⁶ Decisions of several agencies are reviewed initially by courts of appeal (in some cases as a matter of right, in some cases by discretion only).⁷ Agency action can also be reviewed in the context of enforcement actions or criminal actions brought against individuals for violation of regulatory statutes or rules. There are numerous problems with this

3. Code Civ. Proc. § 1060; Gov't Code § 11350(a). All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

4. See, e.g., *Vernon Fire Fighters v. City of Vernon*, 107 Cal. App. 3d 802, 165 Cal. Rptr. 908 (1980) (Section 1085 mandate to review whether a local rule was an abuse of discretion); *Shuffer v. Board of Trustees*, 67 Cal. App. 3d 208, 136 Cal. Rptr. 527 (1977) (Section 1085 mandate to review non-record adjudicatory academic decision of state college system).

5. See, e.g., *Californians for Native Salmon Ass'n v. Department of Forestry*, 221 Cal. App. 3d 1419, 271 Cal. Rptr. 270 (1990) (agency's general failure to observe environmental policies in issuing timber permits).

6. See Pub. Util. Code § 1756 & Cal. R. Ct. 58 (PUC); Cal. R. Ct. 952 (State Bar Court).

7. See Cal. R. Ct. 57 (Workers' Compensation Appeals Board); Cal. R. Ct. 59 (Agricultural Labor Relations Board & Public Employment Relations Board).

patchwork. Most serious is the antiquated and idiosyncratic nature of the writ of mandamus.⁸

a. Pleading complexities

Mandamus is a world of its own. A petitioner who seeks mandamus begins by serving a petition for issuance of an alternative writ of mandate on the respondent, then filing it in the trial court — the reverse of normal procedure.⁹ The judge may summarily deny the petition even though the respondent has not filed an answer or otherwise appeared.¹⁰ The respondent may file points and authorities in opposition to the issuance of an alternative writ; the court can then refuse to issue the alternative writ.¹¹ Thus mandate contains built-in provisions for a court to abort the review process before the hearing.

The court then issues an alternative writ of mandate, which is served on the respondent. The alternative writ is an order to the agency to show cause why the requested relief should not be granted.¹² The respondent then files a verified document called a

8. See generally 8 B. Witkin, California Procedure *Extraordinary Writs* (3d ed. 1985); 2 G. Ogden, California Public Agency Practice ch. 53 (1992) (excellent summary of writ practice in administrative cases); California Administrative Mandamus (Cal. Cont. Ed. Bar, 2d ed. 1989); Kostka & Robinson, CEB Action Guide — Handling Administrative Mandamus (1993) (51-step process). I use the terms “mandate” and “mandamus” interchangeably in this report.

9. Section 1107; 8 B. Witkin, *supra* note 8, §§ 163-64; Cal. R. Ct. 56(b) (applicable to writs in reviewing courts). For good cause, the court may grant the application ex parte without service on the respondent. Section 1107.

10. *Kingston v. DMV*, 271 Cal. App. 2d 549, 76 Cal. Rptr. 614 (1969) (such summary denial by trial court is a final order and is appealable). But see *Kowis v. Howard*, 3 Cal. 4th 888, 12 Cal. Rptr. 2d 728 (1992) (summary denial of writ by court of appeal is not law of the case). *Kowis* would suggest that summary denial of a petition for an alternative writ is not a final order and would not preclude a petitioner from filing a motion for a peremptory writ.

11. Section 1107; *Wine v. City Council*, 177 Cal. App. 2d 157, 2 Cal. Rptr. 94 (1960); *Patterson v. Board of Supervisors*, 79 Cal. App. 2d 670, 180 P.2d 945 (1947); Kleps, *Certiorarified Mandamus Reviewed: The Courts and California Administrative Decisions — 1949-1959*, 12 Stan. L. Rev. 554, 574 (1960).

12. Section 1087. The agency can moot the petition by complying with the alternative writ. *Save Oxnard Shores v. California Coastal Comm'n*, 179 Cal. App. 3d 140, 150, 224 Cal. Rptr. 425 (1986).

return (which serves the function either of an answer or a demur-
rer).¹³ Petitioner then can file a replication (or “traverse”), which is
like an answer to the answer and may be needed to avoid admitting
facts alleged in the return.¹⁴ In traditional but not in administrative
mandamus, the statute provides for trial by jury.¹⁵

In practice, apparently many practitioners skip the alternative
writ entirely and begin the case with a motion that a peremptory
writ be issued.¹⁶ Whether or not the case begins with issuance of
an alternative writ, the court’s final judgment is in the form of a
peremptory writ of mandate, potentially enforceable against the
respondent with a fine or, in the case of persistent disobedience,
prison.¹⁷

13. In practice, the return is apparently called an answer or a demurrer. See 8 B. Witkin, *supra* note 8, § 177; 2 G. Ogden, *supra* note 8, § 53.10. Failure to file a return admits the factual allegations in the petition but the matter must still be heard by the court; the peremptory writ cannot be granted by default. Section 1088; Rodriguez v. Municipal Court, 25 Cal. App. 3d 527, 102 Cal. Rptr. 45 (1972).

14. Elliott v. Contractors’ State Licensing Bd., 224 Cal. App. 3d 1048, 1054, 274 Cal. Rptr. 286 (1990); 8 B. Witkin, *supra* note 8, § 182; 2 G. Ogden, *supra* note 8, § 53.12. In *Elliott*, the agency’s return alleged that the licensee had obtained his license by fraud and the licensee failed to allege or prove the contrary. Consequently, the court correctly denied the petition for administrative mandamus on the basis of unclean hands. I believe that it is inappropriate for an agency to raise such arguments at the judicial review stage. I am informed by practitioners that the replication is almost never used in practice.

15. Section 1090. Practitioners inform me that jury trials are very rarely used in mandamus proceedings.

16. The Los Angeles Superior Court encourages this procedure in the absence of a compelling need to appear ex parte. L.A. Superior Court Law and Discovery Manual V-D-2-a. The court can issue a peremptory writ without first issuing an alternative writ where the papers on file adequately address the issues, no factual dispute exists, additional briefing is unnecessary, the opposing party receives ten days notice and an opportunity to oppose this relief, and the court first issues an order that the writ will be issued. If petitioner seeks only a peremptory writ, it need not serve it on the respondent before filing the application. Sections 1088, 1088.5, 1107; Palma v. U. S. Indus. Fasteners, Inc., 36 Cal. 3d 171, 203 Cal. Rptr. 626 (1984) (peremptory writ issued by appellate court). See 2 G. Ogden, *supra* note 8, §§ 53.01[2][c], 53.08.

17. Section 1097 (\$1000 fine); 8 B. Witkin, *supra* note 8, § 192.

b. Limitations on traditional mandamus

Traditional (as opposed to administrative) mandamus is limited by an arcane set of rules. It issues where the plaintiff seeks to enforce a ministerial (i.e., non-discretionary) duty owed by the defendant to the plaintiff¹⁸ and to which plaintiff has a “clear” and “present” right;¹⁹ it also can issue for abuse of discretion, which sometimes is limited to “clear” abuse.²⁰ The writ cannot be issued where there is a plain, speedy, and adequate remedy at law.²¹ These esoteric rules give rise to many difficulties when traditional mandamus is used for the purpose of reviewing agency action.²²

c. Distinctions between traditional and administrative mandamus

In many cases, it is uncertain whether an action should be brought under administrative mandamus (Section 1094.5) or traditional mandamus (Section 1085) or declaratory judgment (Section 1060). An action that could be brought under Section 1094.5 must be brought under that section. People persistently file under the

18. *Gilbert v. State*, 218 Cal. App. 3d 234, 241, 266 Cal. Rptr. 891 (1990); *Harbach v. El Pueblo de Los Angeles State Historical Monument Comm'n*, 14 Cal. App. 3d 828, 92 Cal. Rptr. 757 (1971) (agency had ministerial duty to relocate building within monument after approving resolution and soliciting funds to do so).

19. *Wasko v. California Dep't of Corrections*, 211 Cal. App. 3d 996, 1000, 259 Cal. Rptr. 764 (1989); 8 B. Witkin, *supra* note 8, § 65 *et seq.*

20. *Better Alternatives for Neighborhoods v. Heyman*, 212 Cal. App. 3d 663, 671, 260 Cal. Rptr. 758 (1989); *Thelander v. City of El Monte*, 147 Cal. App. 3d 736, 748, 195 Cal. Rptr. 318 (1983). A local agency rule not reasonably based on the rulemaking record could be invalidated under Section 1085 apparently because adoption of such a rule is an abuse of discretion.

21. Section 1086; *ABI, Inc. v. City of Los Angeles*, 153 Cal. App. 3d 669, 688, 200 Cal. Rptr. 563 (1984) (mandate unavailable where contract action would lie, but exception for cases where there is a dispute as to interpretation of statute); *Culver City v. State Bd. of Equalization*, 29 Cal. App. 3d 602, 105 Cal. Rptr. 602 (1972) (mandamus denied — quasi-contract available); *Wenzler v. Municipal Court*, 235 Cal. App. 2d 128, 45 Cal. Rptr. 54 (1965) (same).

22. See Moskovitz, *Spinning Gold Into Straw: The Ordinary Use of the Extraordinary Writ of Mandamus to Review Quasi-Legislative Actions of California Administrative Agencies*, 20 Santa Clara L. Rev. 351 (1980). This is a forceful and persuasive argument that mandamus is the wrong remedy for the review of quasi-legislative administrative action.

wrong section. Normally, after a skirmish between the parties about which writ was proper, the trial court excuses the error and allows petitioner to proceed under the proper writ.²³ On appeal, however, at least according to some cases, if the trial court used the wrong writ the case must be reversed so the case can be retried under the proper procedure — even if nobody objected!²⁴

Trial courts must distinguish between the writs, since there are numerous differences between Section 1085 and 1094.5 procedure. As already mentioned, juries might be used in traditional mandamus but are not used in administrative mandamus. The statute of limitations is different.²⁵ The rule about exhaustion of remedies is different.²⁶ Section 1094.5 has a clear provision concerning stays;²⁷ the availability of a stay is unclear under Section 1085.²⁸ Section 1094.5 clearly specifies that the administrative decision is reviewed on the record made before the agency.²⁹ Section 1085 is unclear about whether the court should make a new record³⁰ or

23. See, e.g., *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 546, 99 Cal. Rptr. 745 (1972) (P sought declaratory judgment to review grant of conditional use permit, Section 1094.5 was correct remedy).

24. *Eureka Teachers Ass'n v. Board of Educ.*, 199 Cal. App. 3d 353, 244 Cal. Rptr. 240 (1988) (citing conflicting cases on whether the error can be waived).

25. See, e.g., *Griffin Homes, Inc. v. Superior Court*, 229 Cal. App. 3d 991, 1003-07, 280 Cal. Rptr. 792 (1991). Sections 1094.5 and 1094.6 have 30- and 90-day limitation periods; other review statutes have different limitation periods. However, there is no statute of limitations on a Section 1085 mandate proceeding other than the normally applicable three- or four-year statutes or laches. Unfortunately, this difference will remain under the revised statute.

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

27. Section 1094.5(g)-(h).

28. Presumably a petitioner who seeks a stay as part of a Section 1085 action must request a preliminary injunction.

29. In independent judgment cases, the court can admit new evidence if with reasonable diligence it could not have been produced at the administrative hearing or if it was improperly excluded at the administrative hearing. Section 1094.5(e).

30. See Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157 1226-27 (1995) (reprinted

whether it should be limited to the record made before the agency or whether it should start with that record and then permit it to be supplemented by new evidence. Probably a declaratory judgment action is tried on a new record. The requirement that an agency make findings is not the same under the two writ sections.³¹ Of particular importance, the scope of review of factual issues is different between the two sections; Section 1094.5 calls for a choice between independent judgment and substantial evidence.³² The scope of review of factual determinations under Section 1085 is unclear; it might be identical to substantial evidence or it might be a highly deferential “no evidence” standard.³³

supra, 27 Cal. L. Revision Comm'n Reports 309); Del Mar Terrace Conservancy, Inc. v. City Council of San Diego, 10 Cal. App. 4th 712, 725-26, 741-44, 12 Cal. Rptr. 2d 785 (1992) (trial court should have admitted new evidence in 1085 proceeding but error not prejudicial); L.A. Superior Court Law and Discovery Manual V-D-5 (in mandamus proceeding not under Section 1094.5 evidence can be in form of declarations, deposition or, in court's discretion, oral testimony).

31. See, e.g., California Aviation Council v. City of Ceres, 9 Cal. App. 4th 1384, 12 Cal. Rptr. 2d 163 (1992) (land use decision adjudicatory so better findings required); Eureka Teachers Ass'n v. Board of Educ., 199 Cal. App. 3d 353, 244 Cal. Rptr. 240 (1988).

32. The scope of review issue is discussed in Asimow, *supra* note 30.

33. Strumsky v. San Diego County Employees Ret. Ass'n, 11 Cal. 3d 28, 34 n.2, 112 Cal. Rptr. 805 (1974). See Shapell Indus., Inc. v. Governing Bd., 1 Cal. App. 4th 218, 232-33, 1 Cal. Rptr. 2d 818 (1992) (courts must review evidence in case reviewing legislative action but more deferentially than in case of adjudicatory action); Taylor Bus Serv. v. San Diego Bd. of Educ., 195 Cal. App. 3d 1331, 1340, 241 Cal. Rptr. 379 (1988) (scope of review under Section 1085 mandamus is “entirely lacking in evidence”—which means “substantial evidence”!). My previous study on scope of review recommended unifying the scope of review of factual determinations underlying discretionary decisions. The scope of review should not vary as between adjudicatory and legislative actions, but appropriate deference should be given to factual determinations based on the agency's expertise; for example, courts must be cautious about second-guessing agency factual determinations that are technical in nature or which involve economic or scientific guesswork or predictions. See Asimow, *supra* note 30, at 1241-42.

d. When Section 1094.5 applies

Whether a particular case falls under Section 1094.5 or Section 1085 depends on several factors.

First, Section 1094.5 applies only where “by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination in the determination of facts is vested in” the agency.³⁴ Where a statute, a regulation, or the constitution calls only for some agency procedure but not explicitly for a formal hearing, it is unclear whether Section 1094.5 is available. Some cases imply a right to a hearing from statutes that provide only for an “administrative appeal” or some such term; others do not.³⁵ A

34. See Civil Serv. Comm'n v. Velez, 14 Cal. App. 4th 115, 17 Cal. Rptr. 2d 490 (1993) (Section 1094.5 applicable to claim that agency denied a hearing when one was required).

35. Statute requires on-the-record hearing, so Section 1094.5 applies: Eureka Teachers Ass'n v. Board of Educ., 199 Cal. App. 3d 353, 244 Cal. Rptr. 240 (1988) (teacher's right to appeal a grade change by superintendent was a right to hearing — Section 1094.5 applies); Chavez v. Civil Serv. Comm'n, 86 Cal. App. 3d 324, 150 Cal. Rptr. 197 (1978) (right of “appeal” means a required hearing — Section 1094.5 available); Jean v. Civil Serv. Comm'n, 71 Cal. App. 3d 101, 139 Cal. Rptr. 303 (1977) (hearing implied from statute that permits dismissal only for cause — Section 1094.5 applies).

Statute does not require an on-the-record hearing so Section 1094.5 does not apply: Saleeby v. State Bar, 39 Cal. 3d 547, 560-62, 216 Cal. Rptr. 367 (1985) (Bar's failure to provide for hearings in its rules concerning client security fund was quasi-legislative — Section 1085 applies even though plaintiff seeks a hearing); Keeler v. Superior Court, 46 Cal. 2d 596, 297 P.2d 967 (1956) (no hearing required for 10-day suspension); Taylor Bus Serv. v. San Diego Bd. of Educ., 195 Cal. App. 3d 1331, 1340, 241 Cal. Rptr. 379 (1988) (in case of bid rejected for nonresponsiveness, due process applies but does not require a hearing — review is under Section 1085 — contra for bid rejected for non-responsibility); Wasko v. Department of Corrections, 211 Cal. App. 3d 996, 1001-02, 259 Cal. Rptr. 764 (1989) (prisoner's right to appeal decision relating to his welfare does not require a hearing — Section 1094.5 does not apply); Marina County Water Dist. v. State Water Resources Control Bd., 163 Cal. App. 3d 132, 209 Cal. Rptr. 212 (1984) (hearing was discretionary, not required); Weary v. Civil Serv. Comm'n, 140 Cal. App. 3d 189, 189 Cal. Rptr. 442 (1983) (hearing on employee performance rating was discretionary rather than required — Section 1094.5 inapplicable); Lightweight Processing Co. v. County of Ventura, 133 Cal. App. 3d 1042, 1048, 184 Cal. Rptr. 479 (1982) (“appeal” not equivalent to a hearing — declaratory judgment, not Section 1094.5, is proper writ to test decision requiring environmental impact statement); Shuffer v. Board of Trustees, 67

new judicial review statute should eliminate the need to decide whether the statute called for some sort of on-the-record hearing; judicial review of adjudicatory decisions would be the same regardless of whether a formal hearing was provided. However, the adjudication sections of the new APA draft will probably preserve this distinction, for they apply only if a statute or constitution calls for the sort of on-the-record hearing to which Section 1094.5 presently applies.³⁶

If Section 1094.5 does not apply because no hearing is required and no other remedy is available, a plaintiff must fall back on traditional mandate under Section 1085. But then petitioner must confront the barriers to traditional mandamus, such as the requirement that mandamus applies only in the case of deprivation of a clear legal right or an abuse of discretion.³⁷ If traditional mandate is unavailable for these reasons, the case falls through the cracks and is unreviewable.

Cal. App. 3d 208, 136 Cal. Rptr. 527 (1977) (Section 1085 appropriate to review academic decision of state university); Royal Convalescent Hosp. v. State Bd. of Control, 99 Cal. App. 3d 788, 160 Cal. Rptr. 458 (1979) (Board of Control not required to provide hearing on rejected claim — Section 1094.5 unavailable). Still unclear is whether the right to an “administrative appeal” in the Public Safety Officers Procedural Bill of Rights triggers Section 1094.5 review; more than likely, it does. See Gov’t Code § 3304(b).

36. See Section 641.110(a) in administrative adjudication draft attached to staff memorandum 92-70 (Oct. 9, 1992). [Ed. note. This provision is now in Government Code Section 11410.10.]

37. See Wasko v. Department of Corrections, 211 Cal. App. 3d 996, 1002, 259 Cal. Rptr. 764 (1989) (neither Section 1094.5 nor Section 1085 available to review prison decision); Weary v. Civil Serv. Comm’n, 140 Cal. App. 3d 189, 189 Cal. Rptr. 442 (1983); Taylor v. California State Personnel Bd., *supra* note 35 (short suspension — statutory procedures do not amount to a required “hearing” so Section 1094.5 not available and Section 1085 inapplicable without a “clear” abuse of discretion). *Contra* Los Angeles County Dep’t of Parks & Recreation v. Civil Serv. Comm’n, 8 Cal. App. 4th 273, 278, 10 Cal. Rptr. 2d 150 (1992) (substantial evidence review regardless of whether Section 1094.5 or 1085 applies); Coelho v. State Personnel Bd., 209 Cal. App. 3d 968, 257 Cal. Rptr. 557 (1989) (suspension without substantial evidence is clear abuse of discretion under Section 1085).

A second factor in deciding whether a case falls under Section 1094.5 or Section 1085 is the problematic distinction between quasi-legislative and quasi-judicial action. Section 1094.5 applies only to cases that are considered quasi-judicial; quasi-legislative agency action is reviewed under Section 1085 or 1060.³⁸ While the adjudication/legislation distinction is clear at the poles,³⁹ there is a large middle ground where the distinction is not clear at all.⁴⁰ The cases are muddled, particularly in connection with local land use planning and environmental decisions.⁴¹

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

39. Adjudicatory matters affect an individual as determined by facts peculiar to the individual, whereas legislative decisions involve the adoption of a broad, generally applicable rule of conduct on the basis of public policy. *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d 205, 118 Cal. Rptr. 146 (1974) (adoption of general zoning ordinance is legislative); *Meridian Ocean Sys., Inc. v. California State Lands Comm'n*, 222 Cal. App. 3d 153, 271 Cal. Rptr. 445 (1990) (general decision to exempt geophysical research from EIR requirements is legislative even though triggered by particular application). Alternatively, a legislative action is the formulation of a rule to be applied to future cases, while an adjudicatory act involves the application of such a rule to a specific set of existing facts. *Strumsky v. San Diego County Employees Ret. Ass'n*, 11 Cal. 3d 28, 34 n.2, 112 Cal. Rptr. 805 (1974).

40. See, e.g., *California Radioactive Materials Management Forum v. Department of Health Servs.*, 15 Cal. App. 4th 841, 19 Cal. Rptr. 2d 357, 371 (1993), which deals with the appropriate administrative procedure for the licensing of a low-level radioactive waste disposal facility. Holding that DHS was not required by the ambiguous statute to hold an APA-type adjudicative hearing, the court declared that the case presented a mixture of quasi-judicial and quasi-legislative functions.

41. A sampling of decisions considered adjudicative: *Horn v. County of Ventura*, 24 Cal. 3d 605, 613-16, 156 Cal. Rptr. 718 (1979) (adoption of a tentative subdivision map filed by individual developer); *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 517, 113 Cal. Rptr. 836 (1974) (zoning variance); *California Aviation Council v. City of Ceres*, 9 Cal. App. 4th 1384, 12 Cal. Rptr. 2d 163 (1992) (adoption of ordinance approving road corridor); *Pacifica Corp. v. City of Camarillo*, 149 Cal. App. 3d 168, 196 Cal. Rptr. 670 (1983) (allocation of residential development rights to competing applicants); *Patterson v. Central Coast Regional Comm'n*, 58 Cal. App. 3d 833, 130 Cal. Rptr. 169 (1976) (application for coastal development permit).

Decisions considered legislative: *Arnel Dev. Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 169 Cal. Rptr. 904 (1980) (zoning ordinance preventing development of a single property); *Del Mar Terrace Conservancy, Inc. v. City Council*,

A new statute should strive to avoid the legislative/adjudicative distinction wherever possible.⁴² Unfortunately, my recommendations do not completely avoid the distinction; the statute of limitations on judicial review turns on whether a decision is adjudicatory⁴³ as does the determination of whether procedural due process applies.⁴⁴

10 Cal. App. 4th 712, 726-29, 12 Cal. Rptr. 2d 785 (1992) (decision to certify environmental impact statement as complete and to proceed with road building project); Joint Council of Interns & Residents v. Board of Supervisors, 210 Cal. App. 3d 1202, 1209-12, 258 Cal. Rptr. 762 (1989) (decision that contracting out jobs is cost-effective); Oceanside Marina Towers Ass'n v. Oceanside Community Dev. Comm'n, 187 Cal. App. 3d 735, 231 Cal. Rptr. 910 (1987) (selection of site for public improvement); Karlson v. City of Camarillo, 100 Cal. App. 3d 789, 798-99, 161 Cal. Rptr. 260 (1980) (amendment of general plan to rezone particular property); Marina County Water Dist. v. State Water Resources Control Bd., 163 Cal. App. 3d 132, 209 Cal. Rptr. 212 (1984) (water quality control plan); Consaul v. City of San Diego, 6 Cal. App. 3d 1781, 8 Cal. Rptr. 2d 762 (1992) (rezoning of property, even a single parcel, to prevent development — unclear to court whether decision in question was legislative or adjudicative); Wilson v. Hidden Valley Mun. Water Dist., 256 Cal. App. 2d 271, 63 Cal. Rptr. 889 (1967) (application to exclude property from water district legislative since issues were political).

The Supreme Court majority in *Arnel* seems to concede that there is not much logic to this body of law but that it is important to have well-settled categories to avoid even more confusion in the law.

42. I hope the Law Revision Commission will recommend a statute unifying the scope of review for both legislative and adjudicative action so it will not be necessary to draw the distinction for determining scope of review. See Asimow, *supra* note 30, at 1240-41.

43. See proposed Sections 1123.630-1123.640 in the Commission's recommendation on *Judicial Review of Agency Action*, beginning *supra* p. 45, stating a 30- or 90-day limitation period on review of a decision in an adjudicative proceeding but no statute of limitations on non-adjudicatory action. "Decision" is defined in Section 1121.250 as "an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." Probably the comment to Section 1121.250 should state that the existing body of law on the legislation-adjudication distinction is intended to be preserved.

44. Horn v. County of Ventura, 24 Cal. 3d at 613-16. Numerous other issues, such as the application of administrative res judicata, also turn on the distinction.

2. Federal Law and Law of Other States

In federal practice, common law writs have never played a significant role. In most cases federal statutes relating to specific agencies explicitly define the procedure for obtaining review. Where such specific guidance is lacking, review is normally sought through an action for an injunction or declaratory judgment. There is normally no need to pursue such questions as whether action is quasi-judicial or quasi-legislative. By statute, mandamus is also available,⁴⁵ but there are many unsettled questions about federal mandamus practice. Practitioners are advised to avoid mandamus since injunction and declaratory judgment are not encumbered by technical limitations and are usually adequate to obtain any desired relief.⁴⁶

Older judicial review statutes of other states show mixed success in shedding the complexities of the common law writs. Many states still use the common law writ system.⁴⁷ In New York, review is sought through an Article 78 proceeding in lieu of the writs of certiorari, mandamus, and prohibition.⁴⁸ However, all of the ancient rules and distinctions of writ practice are preserved in Article 78 proceedings, so a large amount of complexity and confusion remain; for a variety of purposes the courts must continue to distinguish administrative, quasi-legislative and quasi-judicial proceedings.⁴⁹ New York's judicial review statute should not be emulated.

45. 28 U.S.C. § 1361.

46. 4 K. Davis, *Administrative Law Treatise* § 23.11 (2d ed. 1983).

47. B. Schwartz, *Administrative Law* 584 (3d ed. 1991). New Jersey allows judicial review of agency action through the writ of certiorari. *Ward v. Keenan*, 70 A.2d 77 (N.J. 1949). Apparently it has successfully avoided the complexities of common law writ practice. Schwartz, *supra* at 585-86.

48. N.Y. Civ. Prac. L. & R. § 7801 *et seq.* (McKinney 1981 & Supp. 1993).

49. Since Article 78 dates back to 1937, it was actually a pioneering effort. See Weintraub, *Statutory Procedures Governing Judicial Review of Administrative Action: From State Writs to Article 78 of the Civil Practice Law and Rules*, 38 St. Johns L. Rev. 86 (1963); McLaughlin, "Practice Commentary," 7B McKinney's Consolidated Laws of N.Y. Ann. 25-38 (1981). As an example of the unsatisfactory character of Article 78, see *Lakeland Water Dist. v. Onondaga County Water Authority*, 24 N.Y.2d 400, 301 N.Y.S.2d 1 (1969) (Article 78

The 1961 Model State APA, on which the law of numerous states is based, provides for judicial review of rules through an action for declaratory judgment and for review of formal adjudication through an appeal; it makes no provision for review of informal adjudication.⁵⁰ Illinois permits review by petition to the circuit court but only if the enabling statute of the particular agency adopts the provisions of the Review Act; moreover the statute apparently applies only to adjudicatory decisions, not regulations.⁵¹ Pennsylvania has separate provisions for judicial review of state and local adjudicatory actions.⁵² The Utah statute has separate provisions for review of rules, formal adjudicatory decisions, and informal adjudicatory decisions; only state agencies are covered by these provisions.⁵³

The modern trend in judicial review statutes is to draw no distinction between rulemaking and adjudication and to assimilate judicial review to other types of litigation. Under the 1981 MSAPA, judicial review is initiated by filing a petition for review in the appropriate court; the court can grant any appropriate form of relief.⁵⁴ MSAPA also provides for a petition by an agency to

inapplicable to review of ratemaking that occurs without a hearing because it is “legislative” action — case continues as declaratory judgment). The annotations to Section 7801 (the section authorizing review and only the first of six provisions in the New York scheme) run for 236 pages of microscopic print in the 1981 Annotated Code and an additional 82 pages in the 1993 supplement.

50. See Project, *State Judicial Review of Administrative Action*, 43 Admin. L. Rev. 571, 705-08 (1991).

51. See Ill. Ann. Stat. ch. 735, para. 5/3-101 *et seq.* (Smith-Hurd 1992).

52. Pa. Stat. Ann. tit. 2, §§ 701, 751 (Supp. 1993). However, there is no provision for review of non-adjudicatory agency action. See Note, 16 Duq. L. Rev. 201 (1977).

53. Utah Code Ann. §§ 63-46a-12.1 (declaratory judgment to review rules), 63-46b-15 (informal adjudicatory proceedings reviewed *de novo* in trial court), 63-46b-16 (formal adjudicatory proceedings reviewed on the record in appellate court) (1989 & Supp. 1992). See Thorup, *Recent Developments in State Administrative Law: The Utah Experience*, 41 Admin. L. Rev. 465, 467-73 (1989).

54. MSAPA §§ 5-105, 5-117. This is modeled on the Florida statute which provides for review of any form of state agency action by filing a petition in the district court of appeal which can grant any appropriate form of relief. Fla. Stat.

enforce its own rule or order, which seems like a useful provision.⁵⁵ However, the MSAPA applies only to review of actions of state, not to actions of local agencies.

In 1991, an Oregon advisory committee prepared a carefully drafted statute; it provides that review of any form of state or local government action is initiated by filing a notice of intent to appeal and any appropriate relief can be granted.⁵⁶ It was not enacted, however. Wyoming has a similar provision for trial court review of any action of any state or local agency.⁵⁷ The Washington statute calls for initiating review through a petition in the trial court for judicial review of any state agency action.⁵⁸

3. Recommendation

The statute should provide that final state or local agency action⁵⁹ is reviewable by a petition for judicial review⁶⁰ filed with

Ann. § 120.68(2), (13) (West 1982 & Supp. 1993). Judicial review is exclusively on the record, but if no hearing has been held and the validity of the agency action depends on disputed facts, the court can remand for a prompt factfinding proceeding. *Id.* § 120.68(4), (5), (6).

The 1981 Model State Administrative Procedure Act is printed in 15 U.L.A. 1 (1990) [hereinafter MSAPA].

55. MSAPA §§ 5-201, 5-202.

56. H.R. 2362, 66th Oregon Legislative Assembly, 1991 Regular Session, §§ 6, 22.

57. Wyo. Stat. § 16-3-114 (1977 & Supp. 1992). The Wyoming statute is quite concise and leaves many questions to be resolved by rules to be adopted by the Wyoming Supreme Court. These rules cover questions of the content of the record, pleadings, time and manner for filing pleadings and records, and extent to which supplemental evidence can be taken.

58. Wash. Rev. Code § 34.05.514(1) (1990). See Andersen, *The 1988 Washington Administrative Procedure Act — An Introduction*, 64 Wash. L. Rev. 781, 822 (1989).

59. The statute should contain a definition of agency action like that in MSAPA Section 1-102(2), which covers all possible actions or inactions. Certain agency actions now reviewable by de novo trials in superior court should not be reviewable under this statute. See *infra* text accompanying notes 75-79.

60. The existing writ of certiorari is called a “writ of review” in California. The petition for judicial review recommended here is wholly different from common law certiorari.

the appropriate court.⁶¹ Normal pleading and practice rules for that court would be applicable.⁶² The use of common law writs, such as mandamus, certiorari, and prohibition, and the use of equitable remedies, such as injunction and declaratory judgment, should be abolished in cases involving judicial review of agency action.⁶³ The court should be empowered to provide for any appropriate form of relief — declaratory, mandatory or otherwise;⁶⁴ it should be permitted to remand for further proceedings or simply reverse outright.⁶⁵ There should be appropriate provision for filing the

61. The court in which review should be sought is discussed *infra* in text accompanying notes 79-112. Of course, reviewability is conditioned on the plaintiff satisfying the requirements of standing and timing (exhaustion, finality, ripeness, or primary jurisdiction) or establishing that an exception to those rules is applicable.

62. Although discovery rules would apply to these proceedings, the statute or the comment should make it clear that discovery would only be available to obtain evidence that would be admissible in the judicial review proceeding. See *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 122 Cal. Rptr. 543 (1975). At present, the Commission's draft statute provides for a closed record in many judicial review cases; if the record is inadequate for judicial review, the court should generally remand to the agency to develop the necessary materials or make the requisite findings. See draft Sections 1123.810, 1123.850. Cf. *Camp v. Pitts*, 411 U.S. 138 (1973). The statute should not permit any other discovery proceedings in court. But see *Mobil Oil Corp. v. Superior Court*, 59 Cal. App. 3d 293, 130 Cal. Rptr. 814 (1976), which allowed discovery of evidence that could not be admitted in court but with respect to which the court could remand to the agency. See Section 1094.5(e)-(f) (court can remand to agency to receive evidence that in the exercise of reasonable diligence could not have been produced at the hearing or was improperly excluded at the hearing).

63. Of course those writs would continue to be available in cases not involving agency action. The Commission has yet to resolve whether writ practice should be retained in certain narrow areas of agency action such as denial of a continuance by an agency presiding officer.

64. However, it should not be empowered to award money damages unless provided by some other statute, such as provisions relating to an award of attorneys' fees or costs. See MSAPA §§ 5-117(a), (c) (no damages or compensation unless otherwise provided), 5-117(b) (any other appropriate relief, whether mandatory, injunctive, or declaratory; preliminary or final; temporary or permanent; equitable or legal).

65. MSAPA § 5-117(b); *Newman v. State Personnel Bd.*, 10 Cal. App. 4th 41, 12 Cal. Rptr. 2d 601 (1992) (where employing agency failed to sustain its

administrative record with the court.⁶⁶ Service of process would be according to normal practice.⁶⁷

Present law allows a reviewing court to affirm an agency decision in summary fashion without granting argument. In mandate practice, the trial court apparently can decline to issue an alternative writ either before or after the respondent files a return and submits points and authorities, although it is unclear whether such decision is a final order.⁶⁸ In court of appeal and Supreme Court practice, the court can decline to grant a writ of review.⁶⁹ The

burden of proof that employee should be discharged, Personnel Board decision should be reversed, not remanded for further proceedings).

66. See 2 G. Ogden, *supra* note 8, § 53.14. Normally, the record is prepared by the respondent on request of the petitioner after the payment of appropriate fees. It is then filed with the petition. However, the record can also be filed with the respondent's points and authorities or subsequently. Sections 1094.5(a), 1094.6(c); Gov't Code § 11523. If petitioner timely requests a transcript, the statute of limitations on filing a petition is tolled until the transcript is delivered. proposed Sections 1123.630-1123.640 in the Commission's recommendation on *Judicial Review of Agency Action*, beginning *supra* p. 45 The provisions relating to filing the record with the court may differ depending on whether review is in a trial court or the court of appeal. See *infra* text accompanying notes 79-112. I have not tried to deal with the details concerning the transcript and the record; agencies will have to tell us what provisions will be practicable in their particular situations.

67. Section 1107 provides for service on an agency's presiding officer, secretary, or upon a majority of the members of the agency. Perhaps all agencies should be required to designate by rule an employee on whom process would be served. In default thereof, the rules of Section 1107 could continue to apply.

68. See *supra* text accompanying notes 11-12.

69. Summary denial is common in cases of writs seeking review of decisions of the Workers' Compensation Appeals Board; the court summarily affirms after considering the petition and the answer. See California Workers' Compensation Practice § 11.76 (Cal. Cont. Ed. Bar 1985); *Lavore v. Industrial Accident Comm'n*, 29 Cal. App. 2d 255, 84 P.2d 176 (1938) (upholding constitutionality of procedure and praising its practicality). In reviewing decisions of the Agricultural Labor Relations Board, the court of appeals has power to summarily deny a petition, but only after the record has been lodged with the court and both parties have a reasonable opportunity to file points and authorities. *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 24 Cal. 3d 335, 351, 156 Cal. Rptr. 1 (1979); *Agricultural Labor Relations Bd., v. Abatti Produce, Inc.*, 168 Cal. App. 3d 504, 214 Cal. Rptr. 283 (1985). The Supreme Court has discretion

revised statute should maintain this authority in both superior court and the court of appeal, provided that the agency record is filed with the court and the party seeking review has a fair chance to oppose summary affirmance.

Petitions for judicial review should receive the same priority in the setting of a hearing as is presently accorded to writs.⁷⁰ Some superior courts handle their writ practice in special writs and receivers departments that decide the cases swiftly; this practice should be maintained. Other courts treat writs in the law and motion department and also set hearings on the peremptory writs quite quickly. Typically petitions for judicial review will be accompanied by a request for a stay of the agency action in question.⁷¹ Stay requests should be given priority consideration, whether the case is in the court of appeal or the superior court. In a later portion of this report, I suggest that many judicial review cases now considered in superior court be shifted to the court of appeal; one disadvantage of this proposal is that it would be difficult to give judicial review cases any priority on the court of appeal calendar, although stay motions could probably be disposed of quickly by the court of appeal.

The statute should provide that an agency can seek enforcement of a rule or order (including a subpoena) through a petition for civil

to refuse to grant a writ in PUC and State Bar Court cases. See Lakusta & Renton, *California Supreme Court Review of Decisions of the Public Utilities Commission — Is the Court's Denial of a Writ of Review a Decision on the Merits?*, 39 Hastings L.J. 1147 (1988) (summary affirmance of 90% of PUC decisions); Cal. R. Ct. 952 (State Bar Court).

70. See Cal. R. Ct. 2103(b) (general rule exempts writ practice from setting rules for civil litigation), 1907(b) (fast track). I am not certain whether or how the proposed statute should deal with the priority issue. One possibility is to require that a petitioner must request a hearing on the petition within 90 days of filing, as required by Public Resources Code Section 21167.4 for petitions alleging noncompliance with CEQA. See Dakin v. Department of Forestry, 17 Cal. App. 4th 681, 21 Cal. Rptr. 2d 490 (1993) (90-day rule applies to challenge of timber harvest plan).

71. The standards for granting a stay are discussed *infra* in text accompanying notes 126-31.

enforcement.⁷² But the statute should preserve the right to obtain review by way of defense; where government proceeds against a party civilly or criminally, the defense may be based upon the invalidity of some prior agency action such as a regulation that the party had not sought to review.⁷³ It would be unfair to preclude judicial review in this situation, since many respondents would never have known of the rule until it was used against them.

The statute should exclude various kinds of government actions that are reviewable in other ways according to statute.⁷⁴ Thus the statute should not be applied where a statute provides that agency action is reviewable through a de novo trial in superior court, as in the case of tax refund actions.⁷⁵ It should not cover actions review-

72. MSAPA §§ 5-201, 5-202. As to subpoenas, see *id.* § 4-210(b); Gov't Code § 11187.

73. See MSAPA § 5-203. Of course, this rule is conditioned by normal res judicata principles. For example, if the enforcement action is based upon violation of an order entered after a prior adjudication, it would be inappropriate to relitigate the issues resolved in the prior litigation.

74. If a person seeks judicial review but should have proceeded via another form of action, the court should convert the petition for judicial review into the other recognized form of review and, if necessary, transfer the case to the correct court. This prevents the statute of limitations from running on the plaintiff's claim. The action should not be dismissed simply because the wrong form of relief was sought. Thus, cases like *Wenzler v. Superior Court*, 235 Cal. App. 2d 128, 45 Cal. Rptr. 54 (1965), should be disapproved. In *Wenzler*, plaintiff sought mandate to seek return of a fine he had paid and of evidence that was seized from him after his conviction was reversed; mandate was dismissed because plaintiff should have proceeded by way of a quasi-contract action.

Existing law provides that where the claim is for inverse condemnation arising out of action by an administrative agency, the claimant should seek judicial review of the agency action before seeking compensation under eminent domain. *Patrick Media Group, Inc. v. California Coastal Comm'n*, 9 Cal. App. 4th 592, 11 Cal. Rptr. 2d 824 (1992), involved an inverse condemnation claim for the value of billboards removed by Commission action. The compensation claim must be first presented through a Section 1094.5 mandate action. An action for compensation under eminent domain could be joined with, or could follow, the Section 1094.5 action. The policy reason for this approach is that the Section 1094.5 action has a 30-day statute of limitations whereas an action for inverse condemnation can be brought five years after the taking occurred.

75. *Mystery Mesa Mission Christian Church, Inc. v. Assessment Appeals Bd.*, 63 Cal. App. 3d 37, 133 Cal. Rptr. 565 (1976) (Section 1094.5 unavailable

able under the Tort Claims Act,⁷⁶ actions for breach of contract by an agency,⁷⁷ or other recognized causes of action cognizable by courts in normal civil actions or by habeas corpus.⁷⁸

B. PROPER COURT FOR REVIEW

1. Present Law

As discussed above, present law lodges most judicial review of agency action in the superior court. However, the Supreme Court reviews Public Utilities Commission and State Bar Court decisions. The court of appeal reviews decisions of the Workers' Compensation Appeal Board,⁷⁹ the Agricultural Labor Relations

to review tax decision — refund suit is exclusive method); *Tivens v. Assessment Appeals Bd.*, 31 Cal. App. 3d 945, 107 Cal. Rptr. 679 (1973). However, I believe that the Legislature should make significant changes in California's tax adjudication system. As part of that process, the Legislature might decide to dispense with exclusive judicial review of tax decisions through a superior court refund action. Instead, it might permit judicial review through a petition for administrative review; however, in the interests of avoiding revenue loss, a taxpayer might be required to pay the tax before seeking review. For another example of de novo review, see Labor Code Section 98.2, which provides for appeal of awards by the Labor Commissioner by trial de novo. See also *Miller v. Foremost Motors, Inc.*, 16 Cal. App. 4th 1271, 20 Cal. Rptr. 2d 503 (1993).

76. MSAPA § 5-101(1) (act inapplicable to litigation in which sole issue is claim for money damages or compensation and agency whose action is at issue does not have statutory authority to determine the claim); Wash. Rev. Code § 34.05.510(a) (same).

77. See *Royal Convalescent Hosp. v. State Bd. of Control*, 99 Cal. App. 3d 788, 160 Cal. Rptr. 458 (1979), which correctly holds Section 1094.5 inapplicable to review of a decision by the Board of Control to reject a contract claim against the state. The claim could be prosecuted by a normal damage action against the state. That procedure should not be circumvented by review of the decision of the Board of Control rejecting the claim, whether or not the Board provided a hearing.

78. Section 2 of the Oregon legislation, *supra* note 56, has a long list of exceptions, some of which were obviously negotiated with agencies (such as exceptions for workers' compensation and unemployment insurance), but some of which are appropriate and generic.

79. Lab. Code § 5950.

Board,⁸⁰ the Public Employees Relations Board,⁸¹ and the Alcoholic Beverage Control Appeals Board.⁸² This seems to me like an illogical hodgepodge.

There is no clear pattern in other jurisdictions. Under federal practice, a great many agency rules and adjudications are reviewed at the court of appeals level. However, many types of cases remain in the federal district court, most importantly immigration and social security cases (and any others not allocated by statute to the court of appeals). The cases in district court tend to be fact intensive cases with relatively small stakes. The federal model thus would suggest that a relatively large number of California cases now heard by superior courts could be moved to the court of appeal.

In New York, all judicial review cases are filed in the trial court; however, the trial court transfers to the appellate division cases in which a formal adjudicatory hearing occurred. The theory, apparently, was that these cases do not require taking any additional evidence and are instead decided upon the agency record under the substantial evidence test.⁸³

The trend in newer judicial review statutes is to place a significant portion of judicial review cases into appellate rather than trial courts. The unenacted Oregon legislation provided for appellate court review of adjudicatory cases and of rules. All other cases would have been reviewed in the trial court.⁸⁴ The Utah statute provides for review of formal adjudicatory action in an appellate

80. *Id.* § 1160.8.

81. Gov't Code §§ 3520(c), 3542(c), 3564(c).

82. Bus. & Prof. Code § 23090.

83. N.Y. Civ. Prac. L. & R. §§ 7803(4), 7804(g).

84. Oregon legislation, *supra* note 56, § 8(1), (2). By stipulation of the parties, however, any other case could be heard by the appellate court if it is required by law to be determined exclusively on a record and its validity can be determined without any judicial factfinding. *Id.* § 8(3). The Oregon legislation also provides that if a case is filed in the wrong court, it will be transferred to the correct court without having to be refiled. *Id.* § 9.

court; all other cases are in the trial court.⁸⁵ Minnesota places review of both formal adjudication and rules in appellate courts.⁸⁶ Florida places review of all state agency action in an appellate court.⁸⁷ On the other hand, the new Washington statute calls for review in the trial court.⁸⁸

2. Recommendation

Resolving the issue of the proper court for judicial review of agency action is difficult. The path of least resistance is to leave things as they are. However, I do not believe that would be the best course.⁸⁹

I propose transferring the initial review of a significant body of the cases now in the superior court to the courts of appeal.⁹⁰ The

85. Utah Code Ann. §§ 63-46a-13 (declaratory judgment in trial court to review rules), 63-46b-15 (informal adjudicatory proceedings reviewed in trial court), 63-46b-16 (formal adjudicatory proceedings reviewed in appellate court).

86. Minn. Stat. Ann. §§ 14.44 (rules), 14.63 (formal adjudication). See Hanson, *The Court of Appeals and Judicial Review of Agency Action*, 10 Wm. Mitchell L. Rev. 645 (1984) (pointing out that this statute is not exclusive and continues to allow challenges through common law writs and equitable remedies in the trial court).

87. Fla. Stat. Ann. § 120.68(2).

88. Wash. Rev. Code § 324.05.518 (1990). There is an exception for cases certified to the appellate court by the trial court. Certification can occur only if judicial review is limited to the record and there are fundamental issues involved requiring a prompt determination.

89. If that is the Commission's decision, it should explore whether to make review by the court of appeal of superior court decisions discretionary rather than available as of right. This would diminish the burden that the present system of two-level judicial review imposes on the courts. Workers' compensation cases are now heard initially in the court of appeal but under a system of discretionary review; in most cases, the court summarily declines to grant a writ of review. Court of appeal justices told me they favor this system.

Another proposal I did not explore would be creation of a new court system to hear administrative appeals. While there is much to be said in favor of a specialized court, the shortage of state budgetary resources makes any such plan completely infeasible.

90. See Admin. Conf. of the U.S. Recommendation 75-3, 1 C.F.R. § 305.75-3; Currie & Goodman, *Judicial Review of Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1 (1975); 4 K. Davis, *Administrative Law*

Commission has not yet decided whether to abolish completely the independent judgment test in connection with review of state agency action. At this writing, it appears that the use of the independent judgment test will be greatly restricted.⁹¹ In most cases, the test will be substantial evidence. In such cases, the function being discharged by a reviewing court is fundamentally appellate, rather than trial.⁹² Essentially the court is asked to decide questions of law and to assess the reasonableness of the agency's fact findings and discretionary decisions. Review of such issues from a well-organized record seems more appropriately the work of specialists in appeals — i.e., appellate courts.⁹³ Thus a system that lodges cases at the appellate level makes sense, because it calls on the relevant expertise of appellate justices. Even if some issues in some cases remain to be decided under independent judgment, I would not shift those cases to trial courts; appellate courts can decide those issues as well.⁹⁴

Treatise § 23.5 (2d ed. 1983) (review of administrative action should be in a court of appeal except where evidence needs to be taken).

91. Currently the Commission has decided that independent judgment should continue to apply in cases where agency heads reverse the fact findings of presiding officers. I hope this decision will be reconsidered so that independent judgment would apply only with respect to cases initially decided by ALJs in the Office of Administrative Hearings and also only to reversals of presiding officer findings based on demeanor of witnesses.

92. Dissenting in *Bixby v. Pierno*, 4 Cal. 3d 130, 159 n.21, 93 Cal. Rptr. 234 (1971), Justice Burke wrote: "If a uniform substantial evidence review were adopted, the Court of Appeal rather than the trial court would be the logical forum to perform the review function. Preliminary review by the trial court would be superfluous and uneconomic in cases requiring no determination of controverted issues of fact."

93. In the rare situation in which the appellate court needs to receive evidence and does not wish to remand to the agency, there should be provision for appointment of a referee or special master to receive the evidence. See MSAPA § 5-114(a).

94. I would not favor a system which allocated to trial courts cases in which independent judgment applied and to appellate courts cases in which substantial evidence applied. This would be extremely difficult to apply, since there would be constant questions about which court a case should be filed in (i.e., did the

There is another significant advantage of transferring authority to the court of appeal: judicial review will be centralized into relatively few courts. Present practice disperses the cases to superior court judges throughout the state, many of them inexperienced in administrative law. This change should ensure a more uniform pattern of decisions, one less influenced by luck of the draw or hometown favoritism. The collegial character of court of appeal decisionmaking should insure a higher quality of decision, a greater number of reported administrative law cases, and a better system of precedents.⁹⁵ This is especially important because a new APA will undoubtedly generate a good many interpretive disputes; it would be helpful to have an accessible body of precedents on these issues that will be generated without unnecessary delay. Transfer to the appellate level should also save the state money since its attorneys will have to do less traveling to superior courts in remote counties. And by substituting one level of review for two, this proposal will save money for litigants on both sides and bring disputes to a conclusion years sooner than under existing law.

Probably judicial review of all cases of adjudication covered by the new APA adjudication procedures should be moved to the court of appeal.⁹⁶ The exception would be those types of cases that generate a large volume of relatively low-stakes, fact-oriented appeals, few of which are likely to go beyond the superior court. Here I have DMV driver's license cases specifically in mind. Decisions in welfare or unemployment cases might also fall into this category. These are cases that should probably remain in the supe-

agency head reverse the presiding officer on a question of law or fact; if of fact the case goes to the trial court, if of law to the appellate court).

95. See Currie & Goodman, *supra* note 90, at 12. The fact that most administrative law decisions are made now in unreported trial court decisions (or in depublished court of appeal decisions) drastically limits the amount of available precedents on many important issues.

96. A compromise proposal might be to move the review only of those cases heard by an OAH ALJ to the appellate court. In general, a relatively high percentage of cases involving professional licenses and of civil rights find their way to the appellate courts; they might as well start there.

rior court. Doing so would decrease the burden on the appellate courts and perhaps would serve the convenience of litigants who could save money by going to their local trial court.⁹⁷

Similarly, review of rules adopted under the APA's rulemaking procedures should occur initially in the court of appeal,⁹⁸ since that process generates a well-organized record⁹⁹ and the issues have already been scrutinized by OAL. The issues raised on appeal tend to be questions of law, procedure, or whether a rule was reasonably necessary (a version of the abuse of discretion test). There are not many cases of this sort and the burden on appellate courts should not be substantial. Instead, the public interest may be served by having an appellate decision on important public policy issues more quickly. Undeniably, some cases involving review of rules can involve large records presenting numerous difficult technical issues. Such cases are burdensome to whatever court considers them; because of the high stakes, however, they are likely to find their way to an appellate court. Thus even in these cases, there is little advantage to anyone (including the appellate justices) from having the cases run first through the superior court.¹⁰⁰

Courts of appeal should have the same power that reviewing courts at all levels now have to affirm an agency decision without oral argument after the filing of points and authorities and after the

97. See Admin. Conf. of the U.S. Recommendation 75-3, 1 C.F.R. § 305.75-3, suggesting that immigration cases and social security retirement and disability cases remain in the federal district court and that appeals concerning benefits under the black lung program be transferred to federal district courts.

98. See Currie & Goodman, *supra* note 90, at 39-54. Of course, the validity of regulations is sometimes questioned in the course of an enforcement action in a trial court against a person alleged to have violated the rules. That person should always be able to obtain review of the validity of regulations in the course of a criminal or civil enforcement action. See *supra* text accompanying note 73.

99. See Gov't Code §§ 11346.8(d), 11347.3, 11350(b). The record must be indexed. *Id.* § 11347.3(a)(12).

100. It can be argued that the court of appeal needs to do less work on a case that has been initially decided by the superior court than on a case that has not yet been subject to any judicial scrutiny. However, OAL scrutiny of rules serves this function at least as well as trial court scrutiny.

record has been filed with the court.¹⁰¹ Indeed, there is an unresolved constitutional issue lurking here; it can be argued (although I do not agree with this argument) that the court of appeals must have the power to summarily affirm.¹⁰²

Finally, I would leave review of local agency decisions, and of state agency decisions that are not governed by APA procedures, in the superior court.¹⁰³ Because these kinds of decisions are often made under highly informal procedures, they tend to produce less well-organized records. Many, but far from all, involve low stakes, which suggests that the trial court is a better place to hear them and that they are unlikely to be appealed after the trial court deci-

101. See *supra* text accompanying notes 10-11.

102. Under Article VI, Section 10, of the California Constitution, courts of appeal "have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." Under Section 11 (as revised in 1966), "courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute." I believe that appellate review of an administrative decision is a "cause" and the Legislature can confer appellate jurisdiction on the court of appeal to hear this "cause" under Section 11. See *Sarracino v. Superior Court*, 13 Cal. 3d 1, 9-10, 118 Cal. Rptr. 21 (1974) ("cause" is the proceeding before the court); *Quezada v. Superior Court*, 171 Cal. App. 2d 528, 530, 340 P.2d 1018 (1959) (a "cause" includes every matter that could come before a court for decision). Therefore, it is not necessary to rely on the provision in Section 10 relating to original jurisdiction in extraordinary writ cases, and there is no need to incorporate anything from existing writ practice in the petition for review procedure.

However, the Supreme Court left this issue somewhat in doubt when it upheld appellate-level consideration of petitions for review of the decisions of the Agricultural Labor Relations Board. *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 24 Cal. 3d 335, 347-52, 156 Cal. Rptr. 1 (1979). Although the court noted that the analysis in the preceding paragraph based on appeal under Section 11 was "arguable," *id.* at 347, it upheld the petition for review as an exercise of extraordinary writ authority under Section 10. To do so, it had to infer that the Legislature wished to give the reviewing court the power to summarily deny a petition in its sound discretion after providing for a fair opportunity for the petitioner to file points and authorities and after the ALRB has provided the record to the court.

103. Utah followed this pattern — formal adjudication is reviewed in an appellate court, informal adjudication in a trial court. See *supra* note 53.

sion.¹⁰⁴ Moreover, I am concerned by the possible additional burden on appellate courts of having to decide a large volume of time-consuming and complex cases concerning local land-use planning or environmental law. There may also be a significant volume of appeals arising out of local personnel or education decisions.

The proposal to transfer a significant volume of cases from the superior court to the court of appeal would lighten the load on our superior courts, but it would increase the load of the courts of appeal. Note, however, that a reasonably high percentage of appealed cases get to the court of appeal from the superior court anyway because, if there was enough at stake to litigate, there may be enough to appeal.¹⁰⁵ As to cases that go to the court of appeal anyway, there would be no increase in the court of appeal caseload. Starting these cases in the court of appeal would save money for the state and the litigants alike. Nevertheless, it is undeniable that the workload of the court of appeal would be increased by cases that now start and terminate in the superior court; and, of course, this means that three judges must consider a case that under present practice is finally disposed of by only one. The views of the Judicial Council on these issues will, no doubt, be influential with the Law Revision Commission.¹⁰⁶

104. Such cases may more frequently require the court to receive additional evidence, which is more easily done in a trial court.

105. Unfortunately, no statistics are available to help us estimate what this percentage is. Estimates from lawyers and judges vary widely and tend to reflect the particular subspecialty in which the attorney is engaged.

Cases are somewhat more likely to be appealed from superior court to the court of appeal under a substantial evidence regime than an independent judgment regime. As pointed out in the study on scope of review, under present law a trial judge's decision under independent judgment is almost unreviewable by the court of appeal, while a trial judge's decision applying the substantial evidence test is subject to greater scrutiny by the court of appeal.

On the other hand, under a regime of substantial evidence rather than independent judgment, there will be fewer cases brought to court in the first place. A litigant always has a shot in an independent judgment case but given a reasonably strong case on both sides, it is likely that substantial evidence supports the agency decision on factual questions.

106. As mentioned earlier, an additional disadvantage of the proposal to shift cases to the court of appeal is that it would be difficult for appellate courts to

This proposal also entails moving initial review of PUC and State Bar Court decisions from the Supreme Court to the court of appeal. My belief is that the Supreme Court is too busy to take seriously review of the complex decisions of the PUC. They are normally summarily affirmed.¹⁰⁷ Of course, the PUC welcomes a situation in which its decisions are essentially unreviewable, but it is hard to explain why this one agency should be exempt from judicial scrutiny. Other agencies that engage in complex economic regulation, such as the Water Resources Control Board, must suffer the indignities of judicial scrutiny; why not the PUC as well?¹⁰⁸

For similar reasons, it seems more appropriate that decisions of the Review Department of the State Bar Court be reviewed by the court of appeal than the Supreme Court;¹⁰⁹ now that review of these decisions is discretionary rather than available as of right, it would appear that appellants are more likely to receive review at

give the same priority to judicial review cases as is provided now by many superior courts.

107. See Lakusta & Renton, *California Supreme Court Review of Decisions of the Public Utilities Commission — Is the Court's Denial of a Writ of Review a Decision on the Merits?*, 39 Hastings L.J. 1147 (1988) (court denies writ in at least 90% of PUC cases without consideration of the record or statement of reasons, yet the decisions are treated as res judicata).

108. See Comment, “*Basic Findings*” and *Effective Judicial Review of the California Public Utilities Commission*, 13 UCLA L. Rev. 313 (1966) (criticizing Supreme Court rubber stamp review); Lakusta & Renton, *supra* note 107. According to the leading treatise on public utility law, “The road to upsetting a determination of the California commission probably climbs a steeper grade than any other similar route in the country.” 1 A.J.G. Priest, *Principles of Public Utility Regulation* 27 (1969). However, in partial compensation to the PUC, the Legislature should repeal Public Utilities Code Section 1756, which calls for independent judgment on the law and the facts when a PUC order is challenged on constitutional grounds. This section is based on outdated constitutional notions. Substantial evidence review is appropriate even where a PUC order is challenged as confiscatory. Of course, PUC findings of legislative fact and PUC exercises of statutory discretion would be treated with great deference by courts under applicable scope of review principles.

109. These decisions can be reviewed by either the Supreme Court or the court of appeal in accordance with procedures prescribed by the Supreme Court. Bus. & Prof. Code § 6082.

the court of appeal level than at the Supreme Court level.¹¹⁰ Moreover, review of individual attorney discipline cases is simply not a wise use of the Supreme Court's precious resources.¹¹¹

I polled a good many lawyers and judges on the issue of whether to shift judicial review of most administrative decisions from the superior court to the court of appeal. The results showed no clear pattern. Some practicing lawyers wanted all cases kept in the superior court; others preferred a shift to the court of appeal. Court of appeal justices, unsurprisingly, were apprehensive about the extra workload. Superior court judges were about evenly divided.

A few final points: the statute should contain a simple transfer procedure so that cases filed in the wrong court can be transferred to the correct court without the need to refile. The Oregon legislation has some well worked out provisions on transfers.

The statute should also provide a mechanism to deal with the situation in which a petition for judicial review is in the court of appeal but is joined with an action that requires a trial in the superior court, such as eminent domain or violation of the federal civil rights statute.¹¹² Res judicata concerns may require that all such actions be filed together or suffer preclusion. Perhaps the court of appeal should have discretion to allow all claims to be heard in the superior court, even though the petition for judicial review would normally be at the appellate level.

C. VENUE FOR JUDICIAL REVIEW

Under present law, superior court mandate actions seeking judicial review of state or local agency action are filed in the county in

110. Since 1991, the Supreme Court has not granted review of any of the discipline cases decided by the State Bar Court Review Department. 13 Cal. Law. 71 (July 1993).

111. See Comment, *Attorney Discipline and the California Supreme Court: Transfer of Direct Review to the Courts of Appeal*, 72 Cal. L. Rev. 252 (1984) (attorney discipline questions not important enough for direct Supreme Court review).

112. See *Griffin Homes, Inc. v. Superior Court*, 229 Cal. App. 3d 991, 1003-07, 280 Cal. Rptr. 792 (1991) (judicial review and Section 1983 civil rights claim).

which the cause of action arose.¹¹³ In licensing and personnel cases, this means the plaintiff's principal place of business;¹¹⁴ in non-licensing cases, it means where the injury occurred.¹¹⁵ Review of a driver's license suspension occurs in the county of the plaintiff's residence,¹¹⁶ and review of Medical Board decisions occurs only in Sacramento, Los Angeles, San Diego, or San Francisco.¹¹⁷ Depending on particular statutes, cases reviewable by the court of appeal are filed in the appellate district where the cause of action arose¹¹⁸ or where plaintiff resides.¹¹⁹

My recommendation concerning venue depends on whether my prior recommendation concerning review of APA cases in the

113. Section 393(1)(b): "the county in which the cause, or some part thereof, arose, is the proper county for the trial of the following actions: ... (b) Against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office" However, tort and contract actions against the state must be filed in Sacramento or in any county where the Attorney General has an office. Section 401(1); Gov't Code § 955.

114. A cause "arises" in the county where the subject of agency action carried on business and would be hurt by official action, not where the agency signs the order or takes the challenged action. *Tharp v. Superior Court*, 32 Cal. 3d 496, 502, 186 Cal. Rptr. 335 (1982) (car dealer must seek review in Tulare County, his principal place of business; agency cannot shift venue to Sacramento); *Lynch v. Superior Court*, 7 Cal. App. 3d 929, 86 Cal. Rptr. 925 (1970) (dismissal of state employee — venue is proper where he worked, not where actions giving rise to charges against him occurred); *Sutter Union High Sch. Dist. v. Superior Court*, 140 Cal. App. 3d 795, 190 Cal. Rptr. 182 (1983) (same); *Duval v. Contractors' State License Bd.*, 125 Cal. App. 2d 532, 271 P.2d 194 (1954) (county in which contractor's business was situated).

115. *Regents of Univ. of Cal. v. Superior Court*, 3 Cal. 3d 529, 91 Cal. Rptr. 57 (1970) (taxpayers action against Regents because of unconstitutional regulations enforced against a UCLA faculty member — venue in Los Angeles).

116. Veh. Code § 13559; *Lipari v. DMV*, 16 Cal. App. 4th 667, 20 Cal. Rptr. 2d 246 (1993).

117. Bus. & Prof. Code § 2019.

118. See, e.g., Bus. & Prof. Code § 23090 (ABCAB case filed in appellate district where proceeding arose); Gov't Code § 3542(c) (PERB judicial review filed in appellate district where unit determination or unfair practice dispute occurred); Lab. Code § 1160.8 (ALRB review filed in appellate district where practice in question occurred or where person resides or transacts business).

119. Lab. Code § 5950 (workers' compensation).

court of appeal is accepted. If so, I suggest that the venue for petitions for judicial review (whether in superior court or in the court of appeal) be the county (or the appellate district) of the petitioner's residence or principal place of business.¹²⁰ This approach seems somewhat more determinate than the existing rule, which is tied to the county where the cause of action arose, but it would not significantly change the results.¹²¹ The primary reason for choosing the petitioner's locale (rather than the agency's or the Attorney General's locale) is convenience to the petitioner.¹²² Cases filed in the wrong superior court or court of appeal should not be dismissed but should be transferred to the proper court.¹²³

If the Commission decides not to follow my recommendation to lodge review of APA cases in the court of appeal, then my recommendation concerning venue is different. It is probable that superior court judges in small counties are inexperienced in administrative law matters. Most counties do not maintain a specialized writ and receiver department, so the cases are assigned to judges at random. Some say there is a significant hometown advantage for the petitioner. For that reason, if review of APA cases is to remain lodged in superior court, venue in actions against state agencies

120. If plaintiff resides and has a principal place of business in different counties, plaintiff could choose between the two. In cases brought against local agencies, the recommended provision would change the rule of Section 394 (action against city or county generally tried where local agency is located); as a practical matter most actions against local agencies are filed by persons living in the locality so the change is not substantial.

121. Another approach the Commission might consider would be to give petitioner a choice between his or her locale (home or principal place of business) and the place where the agency is located or, if the Attorney General will represent the agency, a city where the Attorney General has an office. See Fla. Stat. Ann. § 120.68(2) (venue is appellate court in district where agency maintains headquarters or a party resides); MSAPA § 5-104 (offering states the choice of the state capital or the plaintiff's residence).

122. "The underlying purpose of statutory provisions as to venue for actions against state agencies is to afford to the citizen a forum that is not so distant and remote that access to it is impractical and expensive.... Access to the judicial forum should be as expeditious, inexpensive, and direct as possible." Regents of Univ. of Cal. v. Superior Court, 3 Cal. 3d 529, 536, 91 Cal. Rptr. 57 (1970).

123. Lipari v. DMV, 16 Cal. App. 4th 667, 20 Cal. Rptr. 2d 246 (1993).

should be located in Sacramento or, where the agency is represented by the Attorney General, in counties where the Attorney General has an office (Sacramento, Los Angeles, San Francisco, and San Diego).¹²⁴ This is presently required in Medical Board cases.¹²⁵

Assuming review remains in the superior court, it seems particularly important to centralize review of state agency legislative action (such as adoption of regulations) in the superior courts of larger counties or in Sacramento. Typically a large number of petitioners would have standing to challenge such matters. If plaintiffs could sue in their home county, there would be substantial opportunity to forum shop. Yet these cases tend to be difficult (they involve review of a rulemaking record) and often involve issues of large public importance. The superior court judges who must decide them should be more experienced and specialized in administrative law than superior court judges in general.

D. STAYS PENDING REVIEW

1. Existing Law

Under the existing APA, an agency has power to stay its own decision.¹²⁶ Regardless of whether the agency did so, the superior court has discretion to stay the agency action, but should not impose or continue a stay if it is satisfied that it would be against the public interest.¹²⁷ A stricter standard is imposed in medical, osteopathic, or chiropractic cases in which a hearing was provided under the APA.¹²⁸ The stricter standard also applies to non-health

124. Section 401(1).

125. Bus. & Prof. Code § 2019.

126. Gov't Code § 11519(b).

127. Section 1094.5(g). The public interest determination must be made on a case-by-case basis by the court in which administrative mandamus is sought. *Sterling v. Santa Monica Rent Control Bd.*, 168 Cal. App. 3d 176, 186-87, 214 Cal. Rptr. 71 (1985) (improper for court in which prohibition was sought to grant a stay pending judicial review).

128. The constitutionality of imposing the stricter standard in medical cases was upheld in *Board of Medical Quality Assurance v. Superior Court*, 114 Cal. App. 3d 272, 170 Cal. Rptr. 468 (1980).

care APA cases in which the agency heads adopted the ALJ's proposed decision in its entirety (or adopted the proposed decision and reduced the penalty). Under this stricter standard, a stay should not be granted unless the court is satisfied that the public interest will not suffer and the agency is unlikely to prevail ultimately on the merits.¹²⁹ The court has power to condition a stay order upon the posting of a bond.¹³⁰

If the trial court denies the writ and a stay is in effect, the appellate court can continue the stay (and must continue it for 20 days after a notice of appeal is filed). If the trial court grants the writ, the agency action is stayed pending appeal unless the appellate court otherwise orders.¹³¹ In cases not arising under Section 1094.5, presumably a trial court and an appellate court have the normal power to grant a stay through a preliminary injunction.

2. Recommendation

The draft statute already provides that an agency may grant a stay of its decision.¹³² As to stays on judicial review, present Cali-

129. Section 1094.5(h)(1). The statute requires a preliminary assessment of the merits of the petition and a conclusion that the petitioner is likely to obtain relief; it is insufficient that petitioner merely state a possibly viable defense or restate arguments rejected by the ALJ or the agency. *Medical Bd. v. Superior Court*, 227 Cal. App. 3d 1458, 278 Cal. Rptr. 247 (1991); *Board of Medical Quality Assurance v. Superior Court*, 114 Cal. App. 3d 272, 170 Cal. Rptr. 468 (1980).

In APA cases not involving health care licensing, this stricter standard does not apply if the agency rejected the ALJ's decision. In such cases, the laxer standard of Section 1094.5(g) applies.

130. *Venice Canals Resident Home Owners Ass'n v. Superior Court*, 72 Cal. App. 3d 675, 140 Cal. Rptr. 361 (1977) (bond protects interests of homeowners who were allowed to build homes by the agency order under review during lengthy period of delay while the record is prepared). Even if petitioner is indigent, the court still has discretion to order posting of a bond as a condition to granting a stay. *Id.*

131. Section 1094.5(g), (h)(3).

132. See Sections 650.110(a)(2) & 650.120 in administrative adjudication draft attached to Commission staff Memorandum 92-70 (Oct. 9, 1992) (on file with California Law Revision Commission). It should be made clear in a comment that it is not necessary for a petitioner to exhaust the remedy of requesting

fornia law should be simplified by unifying the standards. There is no apparent reason why the stay standard should vary depending on what sort of case is involved or whether the agency heads did or did not adopt the judge's original decision.

Moreover, the existing criteria for granting stays seem unduly narrow; in addition to the factors relating to the public interest and the likelihood of success on the merits, the court should consider the degree to which the applicant for a stay will suffer irreparable injury from denial of a stay and the degree to which the grant of a stay would harm third parties.¹³³ If these factors were cranked into the equation, the standard for granting a stay would be similar to the standard for granting a preliminary injunction, which it closely resembles.¹³⁴

The comment should also approve case law¹³⁵ that allows the court to condition the granting of a stay upon posting of a bond in order to protect third parties.¹³⁶

a stay from the agency in order to request one from the court. [Ed. note. This provision was not included in the Commission's final recommendation.]

133. See MSAPA § 5-111(c). Harm to third parties is often a relevant concern in the case of local zoning and environmental decisions.

134. See Cohen v. Board of Supervisors, 40 Cal. 3d 277, 286, 219 Cal. Rptr. 467 (1985); 6 B. Witkin, California Procedure *Provisional Remedies* §§ 282-83, at 241-43 (3d ed. 1985).

135. See *supra* note 130.

136. MSAPA Section 5-111 is somewhat different from this recommendation. That section casts the stay decision as judicial review of an agency's decision to deny a stay. That implies that requesting an agency to grant a stay is an administrative remedy that must be exhausted. I do not think that should be required.

In cases involving threats to public health, safety, or welfare, Section 5-111 provides that no stay can be granted unless the court finds the petitioner is likely to prevail on the merits, the petitioner would suffer irreparable injury if denied a stay, the grant of relief will not substantially harm third parties, and the threat to public health, safety or welfare relied on by the agency is not sufficiently serious to justify denial of a stay. In cases not involving a substantial threat to public health, safety or welfare, the court shall grant relief if, in its independent judgment, the agency's denial of temporary relief was unreasonable in the circumstances.

