STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Judicial Review of Agency Action

February 1997

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

CALIFORNIA LAW REVISION COMMISSION

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NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Judicial Review of Agency Action*, 27 Cal. L. Revision Comm'n Reports 1 (1997).

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STATE OF CALIFORNIA PETE WILSON, Governor

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February 27, 1997

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

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

This recommendation is submitted pursuant to Resolution Chapter 38 of the Statutes of 1996.

Respectfully submitted,

Allan L. Fink
Chairperson

ACKNOWLEDGMENTS

The Law Revision Commission developed this recommendation with the input of scores of individuals, agencies, and organizations, many of whom regularly attended Commission meetings and commented on drafts. The Commission appreciates their substantial involvement and contributions. The participation of a broad spectrum of experts and other persons interested in judicial review of agency action aids the Commission in preparing a better recommendation. The Commission benefits greatly from the public service performed by these individuals, agencies, and organizations.

Inclusion of the name of an individual, agency, or organization should not be taken as an indication of the person's position or opinion on any part of the recommendation. The Commission regrets any errors or omissions that may have been made in compiling these acknowledgments.

CONSULTANT

The Commission is indebted to its consultant on this project, Professor Michael Asimow of UCLA Law School. Professor Asimow prepared the background studies from which this recommendation evolved, and provided the Commission with invaluable advice at public meetings where the matter was considered.

STATE AGENCIES

State agency representatives regularly attended Commission meetings and commented on drafts prepared by the Commission and its staff, giving the Commission the benefit of public sector perspectives on the issues involved in judicial review of agency action.

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California Correctional Peace Officers Association
Christine Albertine
Larry DeFehr
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California School Employees Association
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JUDICIAL REVIEW OF AGENCY ACTION

BACKGROUND

This recommendation on judicial review of agency action is the second major part of the Commission's continuing study of administrative law.[1] The first part, governing administrative adjudication by state agencies, was enacted in 1995.[2] The next part of the study will cover administrative rulemaking.

This recommendation proposes that California's antiquated provisions for judicial review of agency action by administrative mandamus be replaced with a single, straightforward statute for judicial review of all forms of state action and most forms of non-legislative local agency action.[3] The goal is to allow litigants and courts to resolve swiftly the substantive issues in dispute, rather than to waste resources disputing tangential procedural issues.

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1. The Commission retained Professor Michael Asimow of UCLA Law School to serve as a consultant and prepare background studies. Professor Asimow prepared three studies on judicial review of agency action for the Commission, which are included in this report: (1) Asimow, *Judicial Review of Administrative Decision: Standing and Timing* (Sept. 1992), *printed infra*, 27 Cal. L. Revision Comm'n Reports 229 (1997); (2) Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157 (1995), *reprinted infra*, 27 Cal. L. Revision Comm'n Reports 309 (1997); and (3) Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus* (Nov. 1993), *printed infra*, 27 Cal. L. Revision Comm'n Reports 403 (1997).

2. 1995 Cal. Stat. ch. 938. See *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55 (1995).

3. The proposed law does not apply to judicial review of an ordinance or regulation enacted by a county board of supervisors or city council, whether legislative, executive, or administrative in nature.

REPLACING MANDAMUS AND OTHER FORMS OF JUDICIAL REVIEW

Under existing law, on-the-record adjudicatory decisions of state and local government are reviewed by superior courts under the administrative mandamus provisions of Code of Civil Procedure Section 1094.5.[4] Regulations adopted by state agencies are reviewed by superior courts in actions for declaratory judgment.[5] Various other agency actions are reviewed by traditional mandamus under Code of Civil Procedure Section 1085[6] or by declaratory judgment.[7] Many statutes set forth special review procedures for particular agencies.[8]

There are many problems with this patchwork scheme. First, it is often unclear whether judicial review should be sought by administrative mandamus, traditional mandamus,

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4. Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus*, 27 Cal. L. Revision Comm'n Reports 403 (1997); see also Code Civ. Proc. § 1094.6(a) (local agency).

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

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

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

8. Nonadjudicative decisions of the Public Utilities Commission are reviewed by the California Supreme Court. Pub. Util. Code § 1756; Cal. R. Ct. 58. Adjudicative decisions of the PUC are reviewed either by the Supreme Court or courts of appeal. Pub. Util. Code § 1756. Decisions of the Public Employment Relations Board and Agricultural Labor Relations Board are reviewed by the courts of appeal. Gov't Code §§ 3520, 3542, 3564; Lab. Code § 1160.8. Decisions of the State Energy Resources Conservation and Development Commission are reviewed in the same manner as decisions of the PUC. Pub. Res. Code § 25531. Decisions of the Department of Alcoholic Beverage Control, Alcoholic Beverage Control Appeals Board, and Workers' Compensation Appeals Board are reviewed either by the Supreme Court or the court of appeal. Bus. & Prof. Code §§ 23090, 23090.5; Lab. Code §§ 5950, 5955.

or declaratory relief. If an action for administrative mandamus can be brought, it must be brought under the administrative mandamus provisions.[9] Parties regularly file under the wrong provisions. Some cases hold that if the trial court uses the wrong writ, the case must be reversed on appeal so it can be retried under the proper procedure, even if no one objects.[10]

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

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

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

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

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

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

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

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

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

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

The Law Revision Commission recommends that the archaic judicial review system that has evolved over the years

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

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

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

17. See Code Civ. Proc. § 1094.5(e); Del Mar Terrace Conservancy, Inc. v. City Council, 10 Cal. App. 4th 712, 725-26, 12 Cal. Rptr. 2d 785, 793 (1992).

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

19. *Compare* Code Civ. Proc. § 1094.5(c) (administrative mandamus to review adjudication) *with* Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 34 n.2, 520 P.2d 29, 112 Cal. Rptr. 805 (1974) (distinction between review of adjudicative and quasi-legislative act). See Asimow, *supra* note 4, at 411. *But see* Del Mar Terrace Conservancy, Inc. v. City Council, 10 Cal. App. 4th 712, 725, 12 Cal. Rptr. 2d 785, 793 (1992) (same standard of review in administrative and traditional mandamus).

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

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

be replaced by a simple and straightforward statute. The proposed law provides that final state or local agency action[22] is reviewable by a petition for review filed with the appropriate court. Common law writs such as mandamus, certiorari, and prohibition, and equitable remedies such as injunction and declaratory judgment, would be replaced for judicial review of agency action by the unified scheme of the proposed law.[23] The proposed law makes clear the court continues to have discretion summarily to deny relief if the petition for review does not present a substantial issue for resolution by the court.[24]

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22. The proposed law does not apply to judicial review of ordinances, regulations, or legislative resolutions, enacted by a county board of supervisors or city council. These matters will continue to be reviewed by traditional mandamus or by an action for declaratory or injunctive relief. See, e.g., Carlton Santee Corp. v. Padre Dam Mun. Water Dist., 120 Cal. App. 3d 14, 18-19, 174 Cal. Rptr. 413 (1981) (mandamus to review validity of water district ordinance); 2 G. Ogden, California Public Agency Practice § 50.02[3][a] (1996).

23. The proposed law provides that an action to prevent an illegal expenditure by a local governmental entity under Section 526a of the Code of Civil Procedure must be brought under the proposed law. See *infra* text accompanying note 50. See generally Asimow, *Judicial Review of Administrative Decision: Standing and Timing*, 27 Cal. L. Revision Comm'n Reports 235-36 (1997); Asimow, *supra* note 4, at 422. The proposed law also makes clear that it does not apply where a statute provides for judicial review by a trial de novo, does not apply to an action for refund of taxes under Section 5140 or 5148 or under Division 2 of the Revenue and Taxation Code, does not apply to an action under the California Tort Claims Act, does not apply to litigation in which the sole issue is a claim for money damages or compensation if the agency whose action is at issue does not have statutory authority to determine the claim, does not apply to validating proceedings under the Code of Civil Procedure, does not apply to judicial review of a decision of a court, does not apply to judicial review of an award in binding arbitration under Government Code Section 11420.10, does not apply to judicial review of agency proceedings pursuant to a court-ordered reference, and does not limit use of the writ of habeas corpus. The proposed law does apply to judicial review of property taxation under Division 1 of the Revenue and Taxation Code, other than under Section 5140 or 5148 of that code.

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

AGENCIES TO WHICH PROPOSED LAW APPLIES

Existing statutes draw little or no distinction between judicial review of state and local agency action. The proposed law applies to all state and local government agencies, except three that are specifically exempted — the State Bar Court, Public Utilities Commission, and power plant siting decisions of the State Energy Resources Conservation and Development Commission. The State Bar Court is exempted because, under the constitutional doctrine of separation of powers, regulation of attorney discipline is a judicial function where the California Supreme Court has inherent and primary regulatory power.[25] The Public Utilities Commission is exempted because recently enacted[26] procedures for judicial review of PUC matters are significantly different from the proposed law.[27] Power plant siting decisions of the Energy Commission are exempted for reasons similar to the PUC exemption: these decisions are reviewed in the same manner as nonadjudicative decisions of the PUC,[28] and are therefore reviewed exclusively in the California Supreme Court.

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

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25. See 1 B. Witkin, California Procedure *Attorneys* §§ 356-57, at 438-40 (4th ed. 1996); Cal. R. Ct. 952 (rev. Mar. 15, 1991).

26. 1996 Cal. Stat. ch. 855.

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

28. Pub. Res. Code § 25531.

29. See, e.g., Anton v. San Antonio Community Hosp., 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.

RULES OF PROCEDURE

The proposed law provides a few key procedural rules for judicial review, and authorizes the Judicial Council to provide procedural detail by rule not inconsistent with the proposed law. The proposed law generalizes the rule in administrative mandamus that proceedings are heard by the court sitting without a jury.[30]

Where no specific procedural rule is applicable, normal rules of civil procedure govern judicial review.[31]

STANDING TO SEEK JUDICIAL REVIEW

Existing California law on standing to seek judicial review of agency action is mostly uncodified.[32] A petitioner for administrative or traditional mandamus to review a decision of a state or local agency must be beneficially interested in,[33] or aggrieved by,[34] the decision. This requirement is applied in various ways, depending on whether the action being

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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).

30. Code Civ. Proc. § 1094.5(a). In traditional mandamus, the court has discretion to submit factual issues to a jury. Code Civ. Proc. § 1090. In practice, however, juries are seldom used in writ proceedings because factual issues are usually limited and most courts prefer to decide them without the aid of a jury. California Civil Writ Practice § 9.75, at 327 (Cal. Cont. Ed. Bar, 3d ed. 1996).

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

32. Asimow, *Judicial Review of Administrative Decision: Standing and Timing*, 27 Cal. L. Revision Comm'n Reports 234 (1997).

33. Code Civ. Proc. § 1086.

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

reviewed is administrative adjudication, rulemaking, or quasi-legislative, informal, or ministerial action.

Administrative Adjudication and State Agency Regulations

A person seeking administrative mandamus to review an adjudicative proceeding under the Administrative Procedure Act must have been a party in the adjudicative proceeding.[35] A person seeking administrative mandamus to review an adjudicative proceeding not under the Administrative Procedure Act must have been either a party or a person authorized to participate as an interested party.[36] The proposed law codifies these rules.

For review of a state agency regulation by declaratory relief, the petitioner must be an interested person,[37] i.e., a person subject to or affected by the regulation.[38] If a regulation is reviewed by mandamus, the petitioner may have public interest standing by showing that he or she is interested as a citizen in having the law executed and the duty in question enforced.[39] The proposed law generally continues these rules.

Quasi-Legislative, Informal, or Ministerial Action

A person seeking traditional mandamus to review agency action other than an adjudicative proceeding or state agency

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35. Temescal Water Co. v. Department of Public Works, 44 Cal. 2d 90, 279 P.2d 1 (1955); Covert v. State Bd. of Equalization, 29 Cal. 2d 125, 173 P.2d 545 (1946).

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

37. Gov't Code § 11350(a).

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

39. Green v. Obledo, 29 Cal. 3d 126, 144-45, 624 P.2d 256, 172 Cal. Rptr. 206 (1981); American Friends Service Comm. v. Procunier, 33 Cal. App. 3d 252, 256, 109 Cal. Rptr. 22 (1973). See also discussion *infra* under "Public interest standing" in text accompanying notes 49-50.

rulemaking must show that a substantial right is affected and that the person will suffer substantial damage if the action is not annulled.[40] This requirement is relaxed if a public right is involved and judicial review is sought to enforce a public duty, in which case it is enough that the person seeking review is interested as a citizen in having the laws executed and the public duty enforced.[41]

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

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

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

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

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

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

the person lacks private interest standing to seek judicial review.[45] The proposed law codifies these rules.

Under the proposed law, the person seeking review need not personally have objected to the agency action, as long as the issue to be reviewed was raised before the agency by someone.[46] This avoids the undesirable effect of requiring a person seeking review to associate in the review process another person who did protest to the agency but is not now interested in the judicial review proceeding.

The proposed law denies a person who complained to an agency about a professional licensee standing to challenge an agency decision in favor of the licensee.[47]

The proposed law makes clear that a local agency may have private interest standing to seek judicial review of state action, and relaxes the limiting rule that local government has standing for constitutional challenges under the commerce or supremacy clause but not under the due process, equal protection, or contract clauses. There is no sound reason to treat certain constitutional claims differently for standing purposes.[48]

Public interest standing. The proposed law codifies case law in traditional mandamus that a person who lacks private interest standing may nonetheless sue to vindicate the public

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

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

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

48. Asimow, *supra* note 32, at 242 n.31. The proposed law does not adopt the federal or Model Act zone of interest test. See generally *id*. at 242-43.

interest.[49] This promotes the policy of allowing a citizen to ensure that a government body does not impair or defeat the purpose of legislation establishing a public right. The proposed law adds safeguards to public interest standing by requiring the person to reside or conduct business in the agency's jurisdiction, requires that the person will adequately protect the public interest, and requires the person first to request the agency to correct its action and to show that the agency has not done so within a reasonable time.

The proposed law provides that a taxpayers' suit to restrain illegal or wasteful expenditures[50] must be brought under the proposed law, and continues the rule that a plaintiff in such an action has standing without the need to show any individual harm.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Under existing law, a litigant must fully complete all federal, state, and local administrative remedies before coming to court or defending against administrative enforcement unless an exception to the exhaustion of remedies rule applies.[51] The proposed law codifies the exhaustion of remedies rule, including the rule that exhaustion of remedies is jurisdictional rather

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49. See, e.g., Green v. Obledo, 29 Cal. 3d 126, 144-45, 624 P.2d 256, 172 Cal. Rptr. 206 (1981); Hollman v. Warren, 32 Cal. 2d 351, 196 P.2d 562 (1948); Board of Social Welfare v. County of Los Angeles, 27 Cal. 2d 98, 162 P.2d 627 (1945); California Homeless & Housing Coalition v. Anderson, 31 Cal. App. 4th 450, 37 Cal. Rptr. 2d 639 (1995); Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1975); American Friends Service Committee v. Procunier, 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (1973).

50. Code Civ. Proc. § 526a.

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

than discretionary with the court.[52] The proposed law provides exceptions to the exhaustion of remedies rule to the extent administrative remedies are inadequate[53] or where requiring their exhaustion would result in irreparable harm disproportionate to the public and private benefit from requiring exhaustion.[54] The proposed law continues the rule of existing statutes that a litigant is not required to request reconsideration from the agency before seeking judicial review.[55]

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

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

53. The inadequacy requirement includes and accommodates existing California exceptions to the exhaustion of remedies rule for futility, certain constitutional issues, and lack of notice. Asimow, *supra* note 32, at 279.

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

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

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

occur until after conclusion of administrative proceedings.[57]

PRIMARY JURISDICTION

Under the doctrine of primary jurisdiction, a case properly filed in court may be shifted to an administrative agency that also has statutory power to resolve some or all of the issues in the case.[58] Thus the agency makes the initial decision in the case, but the court retains power to review the agency action.

The proposed law makes clear the doctrine of primary jurisdiction is distinct from exhaustion of remedies.[59] It provides that the court should send an entire case, or one or more issues in the case, to an agency for an initial decision only where the Legislature intended that the agency have exclusive or concurrent jurisdiction over that type of case or issue, or where the benefits to the court in doing so outweigh the extra delay and cost to the litigants.[60]

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

58. Asimow, *supra* note 32, at 281. The doctrine of primary jurisdiction must be distinguished from the doctrine of exhaustion of remedies. The rules are different with respect to burden of proof, presumption of jurisdiction, and applicability. *Id.* at 283-84.

59. Most California primary jurisdiction cases incorrectly describe the issue as one of exhaustion of remedies. Asimow, *supra* note 32, at 285. The proposed law should clear up much of the confusion. For recent cases analyzing the issue correctly, see Farmers Ins. Exch. v. Superior Court, 2 Cal. 4th 377, 826 P.2d 730, 6 Cal. Rptr. 2d 487 (1992); Miller v. Superior Court, 50 Cal. App. 4th 1665, 58 Cal Rptr. 2d 584 (1996); State Farm Fire & Casualty Co. v. Superior Court, 45 Cal. App. 4th 1093, 53 Cal. Rptr. 2d 229 (1996).

60. If the agency has concurrent jurisdiction, the party seeking to have the matter or issue referred to the agency must persuade the court that the efficiencies outweigh the cost, complexity, and delay inherent in so doing. Asimow, *supra* note 32, at 284. The court in its discretion may ask the agency to file an amicus brief with its views on the matter as an alternative to sending the case to the agency. The court's discretion to refer the matter or issue to the agency for action gives courts considerable flexibility in the interests of justice. See Farmers Ins. Exch. v. Superior Court, 2 Cal. 4th 377, 391-92, 826 P.2d 730, 6 Cal. Rptr. 2d 487, 496 (1992).

RIPENESS

The ripeness doctrine in administrative law counsels a court to refuse to hear an attack on the validity of an agency rule or policy until the agency takes further action to apply it in a specific fact situation.[61] The ripeness doctrine is well accepted in California law,[62] and the proposed law codifies it.

STATUTE OF LIMITATIONS FOR REVIEW OF ADJUDICATION

Existing statutes of limitations for judicial review of agency adjudication are scattered and inconsistent.[63] The limitations period for judicial review of adjudication under the Administrative Procedure Act is 30 days,[64] and for judicial review of a local agency decision other than by a school district is 90 days.[65] Other sections applicable to particular agencies provide different limitations periods for commencing judicial review.[66] Adjudicatory action not covered by any of these

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61. Asimow, *supra* note 32, at 293.

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

63. Asimow, *supra* note 32, at 296.

64. Gov't Code § 11523.

65. Code Civ. Proc. § 1094.6(b).

66. See, e.g., Code Civ. Proc. § 706.075 (90 days for withholding order for taxes); Food & Agric. Code §§ 59234.5, 60016 (30 days from notice of filing with court of notice of deficiency of assessment under commodity marketing program); Lab. Code §§ 1160.8 (30 days after ALRB decision), 5950 (45 days for decision of Workers' Compensation Appeals Board); Gov't Code §§ 3542 (30 days for PERB decisions), 19630 (one year for various state personnel decisions), 19815.8 (same), 65907 (90 days for decisions of zoning appeals board); Unemp. Ins. Code § 410 (six months for appeal of decision of Unemployment Insurance Appeals Board); Veh. Code § 14401(a) (90-days after notice of driver's license order); Welf. & Inst. Code §10962 (one year after notice of decision of Department of Social Services). Various rules on tolling apply to these statutes. See Asimow, *supra* note 32, at 298 n.227.

provisions is subject to the three-year or four-year limitations periods for civil actions generally.[67]

The proposed law continues the 30-day limitations period[68] for judicial review of adjudication under the Administrative Procedure Act, and generalizes it to apply to most state agency adjudication.[69] The proposed law continues the 90-day limitations period for local agency adjudication,[70] except that local agency adjudication under the Administrative Procedure Act will be 30 days as at present.[71] Special limitations periods under the California Environmental Quality Act[72] and some other provisions[73] are preserved. Except where a special

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

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

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

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

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

72. Pub. Res. Code § 21167.

73. The proposed law does not override special limitations periods statutorily preserved for policy reasons, such as for judicial review of an administratively-issued withholding order for taxes (Code Civ. Proc. § 706.075), notice of deficiency of an assessment due from a producer under a commodity marketing program (Food & Agric. Code §§ 59234.5, 60016), State Personnel Board (Gov't Code § 19630), Department of Personnel Administration (Gov't Code § 19815.8), cancellation by a city or county of a contract limiting use of agricultural land under the Williamson Act (Gov't Code § 51286), California Environmental Quality Act (Pub. Res. Code § 21167), decision of local legislative body

statute applies, non-adjudicatory action remains subject to the general three or four year limitations period for civil actions.

The proposed law requires the agency to give written notice to the parties of the date by which review must be sought, or of the shortest potentially applicable time period.[74] This will be particularly helpful to a party who is not represented by counsel. Failure to give the notice will toll the running of the limitations period up to a maximum of 180 days after the decision is effective.[75]

Under the existing Administrative Procedure Act and the existing statute for judicial review of a local agency decision, when a person seeking judicial review makes a timely request for the agency to prepare the record, the time to petition for review is extended until 30 days after the record is delivered.[76] The proposed law continues and generalizes this rule.

The proposed law does not change the case law rule that an agency may be estopped to plead the statute of limitations if a

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adopting or amending a general or specific plan, zoning ordinance, regulation attached to a specific plan, or development agreement (Gov't Code § 65009), cease and desist order of the San Francisco Bay Conservation and Development Commission and complaint by BCDC for administrative civil liability (Gov't Code §§ 66639, 66641.7), Unemployment Insurance Appeals Board (Unemp. Ins. Code §§ 410, 1243), certain driver's license orders (Veh. Code § 14401(a)), or welfare decisions of the Department of Social Services (Welf. & Inst. Code § 10962).

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

75. Concerning the effective date of the decision, see *supra* note 68.

76. Gov't Code § 11523; Code Civ. Proc. § 1094.6(d). Both statutes require that the record be requested within ten days after the decision becomes final to trigger the extension provision. The proposed law extends this 10-day period to 15 days.

party's failure to seek review within the prescribed period was due to misconduct of agency employees.[77]

STANDARD OF REVIEW

Review of Agency Interpretation of Law

Under existing law, courts use independent judgment to review an agency interpretation of law.[78] This is qualified by the rule that, depending on the context, courts should give great weight to a consistent construction of a statute by the agency responsible for its implementation.[79] Deference is given to the agency's interpretation if the court finds it appropriate to do so based on a number of factors. These factors are generally of two kinds — factors indicating that the agency has a comparative interpretive advantage over the courts, and factors indicating that the interpretation in question is probably correct.[80]

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

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

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

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

In the comparative advantage category are factors that assume the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another. A court is more likely to defer to an agency's interpretation of a statute that the agency enforces than to its interpretation of some other statute, the common law, the constitution, or judicial precedent.[81]

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

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

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

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

84. See Woosley v. State, 3 Cal. 4th 758, 776, 13 Cal. Rptr. 2d 30, 38-39 (1992), *cert. denied*, 113 S. Ct. 2416 (1993); California Ass'n of Psychology Providers v. Rank, 51 Cal. 3d 1, 17, 793 P.2d 2, 11, 270 Cal. Rptr. 796, 805 (1990); Dyna-Med, Inc. v. Fair Employment & Housing Comm'n, 43 Cal. 3d

ence may also be appropriate if the Legislature reenacted the statute in question with knowledge of the agency's prior interpretation.[85]

When a court reviews a regulation, it normally separates the issues, exercising independent judgment with appropriate deference on interpretive issues, such as whether the regulation conflicts with the governing statute, but applying the abuse of discretion standard on whether the regulation is reasonably necessary to effectuate the purpose of the statute.[86]

The Commission finds existing law on the standard of review of agency interpretation of law to be generally satisfactory. The proposed law continues independent judgment review of agency interpretation of law, with appropriate deference to the agency's interpretation.[87] The proposed law

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1379, 1388-89, 743 P.2d 1323, 1326-28, 241 Cal. Rptr. 67, 70-72 (1987); International Business Machines v. State Bd. of Equalization, 26 Cal. 3d 923, 930, 163 Cal. Rptr. 782, 785 (1980); Nipper v. California Auto. Assigned Risk Plan, 19 Cal. 3d 35, 44-45, 560 P.2d 743, 747-48, 136 Cal. Rptr. 854, 858-59 (1977); Whitcomb Hotel, Inc. v. California Employment Comm'n, 24 Cal. 2d 753, 757, 151 P.2d 233, 235 (1944).

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

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

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

does not address the standard of review of agency application of law to fact, leaving existing law unaffected.[88]

Review of Agency Factfinding

Basic fact-finding involves determining what happened (or will happen in the future), when it happened, the state of mind of the participants, and the like. Some basic facts are established by direct testimony, some by inference from circumstantial evidence. For example, suppose the agency finds from direct or circumstantial evidence that *E*, an employee of *R*, was driving home from a night school course at the time of the accident. *R* paid for the cost of the night school and encouraged but did not require *E* to take the course. Determinations of basic fact such as these can be made without knowing anything of the applicable law.[89]

Under existing law, in reviewing factual determinations in an adjudication by an agency not given judicial power by the California Constitution, courts use independent judgment if the proceeding substantially deprives a party's fundamental vested right.[90] California is the only jurisdiction in the United

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economic interests, and the Legislature appears to have wanted legal interpretations by these agencies within their regulatory authority to be given greater deference by the courts.

88. 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, *supra* note 80, at 1213-14.

89. Asimow, *supra* note 80, at 1211.

90. E.g., Bixby v. Pierno, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971); see generally Asimow, *supra*, note 80. *Bixby* involved judicial review of a decision of the Commissioner of Corporations approving a recapitalization plan of a family-owned corporation as "fair, just and equitable," an exercise of agency discretion. Bixby v. Pierno, *supra*, 4 Cal. 3d at 150-51. Exercise of agency discretion is subject to abuse of discretion review under the proposed law. See discussion in text *infra* accompanying notes 101-07. The substantial evidence test of the proposed law for factfinding applies only to the basic facts underlying the decision, not to application of law to basic facts or to the decision itself.

States that uses independent judgment so broadly as a standard for judicial review of agency action.[91]

The independent judgment test was imposed by a 1936 California Supreme Court decision on the ground that constitutional doctrines of separation of powers or due process required it.[92] The test applied to review of fact-finding by state agencies not established by the California Constitution, because it was thought those agencies could not constitutionally exercise judicial power. But courts have subsequently rejected any constitutional basis for the independent judgment test,[93] so the Legislature or the courts are now free to abolish it. Nonetheless, courts have continued to apply the independent judgment test to decisions of nonconstitutional state agencies where fundamental vested rights are involved. Thus the substantial evidence test is applied to review decisions of constitutional state agencies, and of nonconstitutional state agencies where fundamental vested rights are not involved. Independent judgment review is applied to nonconstitutional state agencies where substantial vested rights are involved. There is no rational policy basis for distinguishing between agencies established by the constitution and those that are not.

Independent judgment review of state agency adjudication substitutes factual conclusions of a trial judge, often a nonexpert generalist, for those of the administrative law judge and agency heads who are usually experienced in their professional field. Especially in cases involving technical material

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91. Some states use independent judgment review for particular situations. See, e.g., Weeks v. Personnel Bd. of Review, 373 A.2d 176 (R.I. 1977) (discharge of police officer). Colorado uses independent judgment review if a school board dismisses a teacher after the hearing officer recommended retention. Colo. Rev. Stat. § 22-63-302(10)(c) (Supp. 1995). See also Mo. Rev. Stat. § 536.140.2 (1990); Asimow, *supra* note 80, at 1164 n.13.

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

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

or the clash of expert witnesses, administrative law judges and agency heads are more likely to be in a position to reach the correct decision than a trial judge reviewing the record.[94]

Independent judgment review is inefficient because it requires parties to litigate the peripheral issue of whether or not independent judgment review applies. This involves the loose standard of the degree of "vestedness" and "fundamentalness" of the right affected. Independent judgment review requires closer scrutiny of the record, and the transcript may be lengthy. Independent judgment review also encourages more people to seek judicial review than would do so under a substantial evidence standard.[95]

Except in one limited case, the proposed law eliminates independent judgment review of state agency fact-finding, and instead requires the court to uphold agency findings if supported by substantial evidence in the record as a whole.[96] Under the exception, if the agency head changes a determination of fact made in an adjudicative proceeding conducted by an administrative law judge employed by the Office of Administrative Hearings, the proposed law preserves independent judgment review of that determination of fact.

Under existing law, fact-finding in adjudication by local agencies is reviewed by the same standard as for state agencies that do not derive judicial power from the California Constitution — independent judgment if a fundamental

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94. Asimow, *supra* note 80, at 1181-82.

95. Asimow, *supra* note 80, at 1184-85.

96. An important benefit of the substantial evidence test is that it greatly broadens the power of the appellate court in appeals from trial court decisions reviewing administrative action. Asimow, *supra* note 80, at 1168-69. The proposed law codifies the existing rule that a person challenging agency action has the burden of persuasion on overturning agency action. See California Administrative Mandamus §§ 4.157, 12.7 (Cal. Cont. Ed. Bar, 2d ed. 1989).

vested right is involved, otherwise substantial evidence.[97] The proposed law continues these rules for local agency adjudication, i.e., proceedings involving an evidentiary hearing to determine a legal interest of a particular person.[98]

Review of Agency Exercise of Discretion

An agency has discretion when the law allows it to choose between several alternative policies or courses of action. Examples include an agency's power to choose a severe or lenient penalty, whether there is good cause to deny a license, whether to grant permission for various sorts of land uses, or to approve a corporate reorganization as fair. An agency might have power to prescribe the permitted level of a toxin in drinking water, to decide whether to favor the environment at the expense of economic development or vice versa, or to decide whom to investigate or charge when resources are limited.[99]

Existing law is replete with conflicting doctrines on these important issues. California courts may review agency discretionary decisions on grounds of legality, procedural irregularity, or abuse of discretion despite broad statutory delegations

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

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

99. Asimow, *supra* note 80, at 1224.

of discretionary authority.[100] Under existing law, the court reviews adjudicative and quasi-legislative action by traditional mandamus generally on a closed record, but in reviewing ministerial or informal action, extra-record evidence is freely admissible if the facts are in dispute.[101] The agency must give reasons for the discretionary action in the case of review of adjudicatory action,[102] but not in the case of quasi-legislative action.[103]

In reviewing discretionary action, a court first decides whether the agency's choice was legally permissible and whether the agency followed legally required procedures, using independent judgment with appropriate deference.[104] Within these limits, the agency has power to choose between alternatives, and a court must not substitute its judgment for the agency's, since the Legislature gave discretionary power to the agency, not the court. But the court should reverse if the agency's choice was an abuse of discretion. Review for abuse of discretion consists of two distinct inquiries: the ade-

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

101. Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 575-79, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 147-50 (1995); see also discussion *infra* under "Evidence Outside the Administrative Record" in text accompanying notes 115-21.

102. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).

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

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

quacy of the factual underpinning of the discretionary decision, and the rationality of the choice.[105]

In reviewing the adequacy of the factual underpinning, it is not clear whether the abuse of discretion test is merely another way to state the substantial evidence test, or whether the substantial evidence test gives the court greater leeway in reviewing the agency decision, but the prevailing view is that they are synonymous.[106] Legislative history of a 1982 enactment[107] also suggests that substantial evidence is the appropriate test whenever the issue is the factual basis for agency discretionary action.

The proposed law requires the factual underpinnings of a discretionary decision to be reviewed by the same standards for other fact-finding — substantial evidence or independent judgment[108] — whether the decision arose out of formal or informal adjudication, quasi-legislative action such as rulemaking, or some other function.[109]

Review of Agency Procedure

Under existing law, California courts use independent judgment on the question of whether agency action complied with procedural requirements of statutes or the constitution.[110] California courts have occasionally mandated administrative

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105. Asimow, *supra* note 80, at 1228-29.

106. Asimow, *supra* note 80, at 1229.

107. 1982 Cal. Stat. ch. 1573, § 10 (amending Gov't Code § 11350); Asimow, *supra* note 80, at 1230.

108. See discussion *supra* in text accompanying notes 89-98.

109. The proposed law rejects case law indicating that an exercise of agency discretion can be disturbed only if evidentiary support is "entirely lacking" or that review is less intensive in abuse of discretion cases than in other cases. See generally Asimow, *supra* note 80, at 1240.

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

procedures not required by any statute, either in the interest of fair procedures[111] or to facilitate judicial review.[112]

The Commission believes that California courts should retain the power to impose administrative procedures not found in a statute. This power is necessary to prevent procedural unfairness to parties. However, while courts should continue to use independent judgment on procedural issues, they should normally accord considerable deference to agency decisions about how to implement procedural provisions in statutes. Agency expertise is just as relevant in establishing procedure as in fact-finding and determining law and policy.[113]

The proposed law permits the court to exercise independent judgment in reviewing agency procedures, with deference to the agency's determination of what procedures are appropriate.[114]

EVIDENCE OUTSIDE THE ADMINISTRATIVE RECORD

Under existing law, in administrative mandamus[115] to review an adjudicative proceeding, the court may remand to

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

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

113. Asimow, *supra* note 80, at 1246.

114. An agency's procedural choices under a general statute applicable to a variety of agencies, such as the Administrative Procedure Act, should be entitled to less deference than a choice made under a statute unique to that agency. Asimow, *supra* note 80, at 1247. The proposed law provides that the standard of review of agency procedure does not apply to judicial review of state agency rulemaking under the Administrative Procedure Act. The Law Revision Commission is studying this question as part of its administrative rulemaking study.

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

the agency to admit additional evidence only if in the exercise of reasonable diligence the evidence could not have been produced at, or was improperly excluded from, the administrative hearing.[116] For independent judgment review, the court may either admit the evidence itself or remand if one of those two conditions is satisfied.[117]

In traditional mandamus to review ministerial or informal action, extra-record evidence is freely admissible if the facts are in dispute.[118] The court simply takes evidence and determines the issues. In traditional mandamus to review quasi-legislative action, extra-record evidence is admissible only if the evidence existed before the agency decision and it was not possible in the exercise of reasonable diligence to present it at the administrative proceeding.[119]

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

If the agency failed to give interested persons notice and an opportunity to submit oral or written comment, or did not maintain a record or file of its proceedings, the proposed law permits the court to remand to the agency to reconsider in light of additional evidence that in the exercise of reasonable

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116. Code Civ. Proc. § 1094.5(e).

117. *Id.*

118. 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).

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

diligence could not have been produced at, or was improperly excluded from, the agency proceeding.[120] This is consistent with the agency's role as the primary factfinder and the court's role as a reviewing body. The court may receive the evidence itself without remanding the case to the agency in any of the following circumstances:

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

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

(3) No hearing was held by the agency and the court finds that remand to the agency would be unlikely to result in a better record for review and the interests of economy and efficiency would be served by receiving the evidence itself.[121]

PROPER COURT FOR REVIEW; VENUE

Under existing law, most judicial review of agency action is in superior court.[122] Either the Supreme Court or the court of appeal reviews decisions of the Workers' Compensation Appeals Board,[123] Department of Alcoholic Beverage Control,[124] and Alcoholic Beverage Control Appeals Board.[125] The court of appeal reviews decisions of the Agricultural

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

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

122. Asimow, *supra* note 4, at 423.

123. Lab. Code §§ 5950, 5955.

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

125. *Id.*

Labor Relations Board[126] and Public Employment Relations Board.[127] The proposed law does not alter this scheme.

Under existing law, venue in superior court for administrative mandamus is in the county where the cause of action arose.[128] The proposed law adds Sacramento County as an additional permissible county when a state agency is involved.[129] For judicial review of local agency action, the proposed law provides that venue is in the county of jurisdiction of the agency. This is probably not a substantive change, since the cause of action is likely to arise in the county of the local agency's jurisdiction. For judicial review of action of a nongovernmental entity,[130] the proposed law provides that venue is in the county where the entity is located.

STAYS PENDING REVIEW

Under the existing APA, an agency has power to stay its own decision.[131] Whether or not the agency does so, the superior court has discretion to stay the agency action, but should

126. Lab. Code § 1160.8.

127. Gov't Code §§ 3520, 3542, 3564.

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

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

130. See discussion *supra* in text accompanying note 29.

131. Gov't Code § 11519(b).

not impose or continue a stay if to do so would be against the public interest.[132]

A stricter standard applies in medical, osteopathic, or chiropractic cases in which a hearing was provided under the APA. The stricter standard also applies to non-health care APA cases in which the agency head adopts the proposed decision of the administrative law judge in its entirety or adopts the decision and reduces the penalty. Under the stricter standard, a stay should not be granted unless the court is satisfied that the public interest will not suffer and the agency is unlikely to prevail ultimately on the merits.[133] The court may condition a stay order on the posting of a bond.

If the trial court denies the writ of mandamus and a stay is in effect, the appellate court can continue the stay.[134] If the trial court grants the writ, the agency action is stayed pending appeal unless the appellate court orders otherwise.[135]

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

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

133. See Code Civ. Proc. § 1094.5(h).

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

135. In cases not arising under the administrative mandamus statute, the trial and appellate courts presumably have their usual power to grant a stay. Asimow, *supra* note 4, at 436; see California Civil Writ Practice §§ 7.51-7.53, at 267-69 (Cal. Cont. Ed. Bar, 3d ed. 1996).

degree to which the grant of a stay would harm third parties.[136]

COSTS

The proposed law consolidates and generalizes provisions on the fee for preparing a transcript and other portions of the record, recovering costs of suit by the prevailing party, and proceedings in forma pauperis.[137]

136. These revisions will make the standard for granting a stay similar to the standard for granting a preliminary injunction. Asimow, *supra* note 4, at 437.

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

JUDICIAL REVIEW OF AGENCY ACTION

CONTENTS

CODE OF CIVIL PROCEDURE

PROPOSED LEGISLATION

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

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

TITLE 2. JUDICIAL REVIEW OF AGENCY ACTION

CHAPTER 1. GENERAL PROVISIONS

Article 1. Preliminary Provisions

§ 1120. Entities to which title applies

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

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

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

(3) A public corporation in the state.

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

(1) A statute expressly so provides.

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

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

Comment. Section 1120 makes clear that the judicial review provisions of this title apply to actions of local agencies as well as state government. *But see* Section 1121(d) (title does not apply to judicial review of a local agency ordinance, regulation, or legislative resolution). 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 [in SB 68, administrative adjudication by quasi-public entities, introduced at the 1997 session].

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).

§ 1121. Proceedings to which title does not apply

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

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

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

(2) 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.

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

(b) Litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

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

(d) Judicial review of either of the following enacted by a county board of supervisors or city council:

(1) An ordinance or regulation.

(2) A resolution that is legislative in nature.

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

Comment. Under subdivision (a)(1) of Section 1121, this title does not apply where a statute provides for judicial review by a trial de novo. Such statutes include: Educ. Code §§ 33354 (hearing on compliance with federal law on interscholastic activities), 67137.5 (judicial review of college or university withholding student records); Food & Agric. Code § 31622 (hearing concerning vicious dog); Gov't Code § 53088.2 (judicial review of local action concerning video provider); Lab. Code §§ 98.2 (judicial review of order of Labor Commissioner on employee complaint), 1543 (judicial review of determination of Labor Commissioner involving athlete agent), 1700.44 (judicial review of order of Labor Commissioner involving talent agency); Rev. & Tax. Code § 1605.5 (change of property ownership or new construction); Welf. & Inst. Code § 5334 (judicial review of capacity hearing).

Subdivision (a)(2) exempts from this title actions for refund of taxes under 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)(3) provides that this title does not apply to an action brought under the California Tort Claims Act. However, subdivision (a)(3) does not prevent the claims requirements of the Tort Claims Act from applying to an action seeking primarily money damages and also extraordinary relief incidental to the prayer for damages. See Section

1123.730(b) (damages subject to Tort Claims Act if applicable); Eureka Teacher's Ass'n v. Board of Educ., 202 Cal. App. 3d 469, 474-76, 247 Cal. Rptr. 790 (1988); Loehr v. Ventura County Community College Dist., 147 Cal. App. 3d 1071, 1081, 195 Cal. Rptr. 576 (1983). However, this title does apply to compel an agency to pay a claim that has been allowed and is required to be paid. Gov't Code § 942.

Under subdivision (b), this title does not apply, for example, to enforcement of a government bond in an action at law, or to actions involving contract, intellectual property, or copyright. This title does apply to denial by the Department of Health Services of a claim by a health care provider where the department has statutory authority to determine such claims. See, e.g., Welf. & Inst. Code §§ 14103.6, 14103.7. Judicial review of denial of such a claim is under this title and not, for example, in small claims court. See Section 1121.120 (this title provides exclusive procedure for judicial review of agency action).

Subdivision (d) provides that this title does not apply to judicial review of an ordinance or regulation of a county board of supervisors or city council, or of a resolution of those bodies that is legislative in nature. For an example of a resolution that is legislative in nature, see Valentine v. Town of Ross, 39 Cal. App. 3d 954, 114 Cal. Rptr. 678 (1974) (resolution approving flood control project). For examples of resolutions that are not legislative in nature, see Simpson v. Hite, 36 Cal. 2d 125, 222 P.2d 225 (1950) (resolution designating site for court buildings); Burdick v. City of San Diego, 29 Cal. App. 2d 565, 84 P.2d 1064 (1938) (resolution designating site for city jail, police headquarters, and courtrooms). Matters exempted from this title by subdivision (d) 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 an ordinance, regulation, or legislative resolution upon which the action is based, the two proceedings may be consolidated by the court under Section 1048. See Section 1123.710.

Subdivision (e) makes clear this title does not apply where an agency acts as referee in a court-ordered reference. See, e.g., Water Code §§ 2000-2048. However, notwithstanding subdivision (e), Chapter 2 (commencing with Section 1122.010) on primary jurisdiction may still apply. Section 1122.010; see generally National Audubon Soc'y v.

Superior Court, 33 Cal. 3d 419, 451, 658 P.2d 709, 731, 189 Cal. Rptr. 346, 368, *cert. denied*, 464 U.S. 977 (1983); Environmental Defense Fund v. East Bay Mun. Util. Dist., 26 Cal. 3d 183, 193-200, 605 P.2d 1, 5-9, 161 Cal. Rptr. 466, 470-74 (1980). See also Water Code § 2504 (title does not apply to statutory adjudication under specified Water Code provisions).

§ 1121.110. Conflicting or inconsistent statute controls

1121.110. A statute applicable to a particular entity or a particular agency action prevails over a conflicting or inconsistent provision of this title.

Comment. Section 1121.110 is drawn from the first sentence of former Government Code Section 11523 (judicial review in accordance with provisions of Code of Civil Procedure "subject, however, to the statutes relating to the particular agency"). As used in Section 1121.110, "statute" does not include a local ordinance. See Cal. Const. art. IV, § 8(b) (statute enacted only by bill in the Legislature); *id.* art. XI, § 7 (local ordinance).

§ 1121.120. Other forms of judicial review replaced

1121.120. (a) The procedure provided in this title for judicial review of agency action is a proceeding for extraordinary relief in the nature of mandamus and shall be used in place of administrative mandamus, ordinary mandamus, certiorari, prohibition, declaratory relief, injunctive relief, and any other judicial procedure, to the extent those procedures might otherwise be used for judicial review of agency action.

(b) Nothing in this title limits use of the writ of habeas corpus.

(c) Notwithstanding Section 427.10, no cause of action may be joined in a proceeding under this title unless it states independent grounds for relief.

Comment. Subdivision (a) of Section 1121.120 is drawn from 1981 Model State APA Section 5-101. By establishing this title as the exclusive method for judicial review of agency action, Section 1121.120 continues and broadens the effect of former Section 1094.5. See, e.g., Viso v. State, 92 Cal. App. 3d 15, 21, 154 Cal. Rptr. 580, 584 (1979).

Subdivision (a) implements the original writ jurisdiction given by Article VI, Section 10, of the California Constitution (original jurisdiction for extraordinary relief in the nature of mandamus). Nothing in this title limits the original writ jurisdiction of the courts. See Section 1123.510(b).

Under subdivision (b), this title does not apply to the writ of habeas corpus. See Cal. Const. art. I, § 11, art. VI, § 10. See also *In re* McVickers, 29 Cal. 2d 264, 176 P.2d 40 (1946); *In re* Stewart, 24 Cal. 2d 344, 149 P.2d 689 (1944); *In re* DeMond, 165 Cal. App. 3d 932, 211 Cal. Rptr. 680 (1985).

Subdivision (c) continues prior law. See, e.g., State v. Superior Court, 12 Cal. 3d 237, 249-51, 524 P.2d 1281, 115 Cal. Rptr. 497, 504 (1974) (declaratory relief not appropriate to review administrative decision, but is appropriate to declare a statute facially unconstitutional); Hensler v. City of Glendale, 8 Cal. 4th 1, 876 P.2d 1043, 32 Cal. Rptr. 2d 244, 253 (1994) (inverse condemnation action may be joined in administrative mandamus proceeding involving same facts); Mata v. City of Los Angeles, 20 Cal. App. 4th 141, 147-48, 24 Cal. Rptr. 2d 314, 318 (1993) (complaint for violation of civil rights may be joined with administrative mandamus). If other causes of action are joined with a proceeding for judicial review, the court may sever the causes for trial. See Section 1048. See also Section 598.

Nothing in this section limits the type of relief or remedial action available in a proceeding under this title. See Section 1123.730 (type of relief).

§ 1121.130. Injunctive relief ancillary

1121.130. Injunctive relief is ancillary to and may be used as a supplemental remedy in connection with a proceeding under this title.

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

§ 1121.140. Exercise of agency discretion

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

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

§ 1121.150. Application of new law

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

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

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

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

Article 2. Definitions

§ 1121.210. Application of definitions

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

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

§ 1121.220. Adjudicative proceeding

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

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

§ 1121.230. Agency

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

(b) When this title applies to judicial review of a decision of a nongovernmental entity, "agency" includes that entity.

Comment. Section 1121.230 is drawn from the Administrative Procedure Act. See Gov't Code § 11405.30 (operative July 1, 1997) & Comment ("agency" defined). Subdivision (a) is broadly drawn to subject all governmental units to this title unless expressly excepted by statute. See Comment to Section 1120.

§ 1121.240. Agency action

1121.240. "Agency action" means any of the following:

(a) The whole or a part of a rule or a decision.

(b) The failure to issue a rule or a decision.

(c) An agency's performance of any other duty, function, or activity, discretionary or otherwise.

(d) An agency's failure to perform any duty, function, or activity, discretionary or otherwise, that the law requires to be performed or that would be an abuse of discretion if not performed.

Comment. Section 1121.240 is drawn from 1981 Model State APA Section 1-102(2). The term "agency action" includes a "rule" and a "decision" defined in Sections 1121.290 (rule) and 1121.250 (decision), and an agency's failure to issue a rule or decision. It goes further, however. Subdivisions (c) and (d) make clear that "agency action" includes everything and anything else that an agency does or does not do, whether its action or inaction is discretionary or otherwise. There are no exclusions from that all-encompassing definition. As a consequence, there is a category of "agency action" that is neither a "decision" nor a "rule" because it neither establishes the legal rights of any particular person nor establishes law or policy of general applicability. See also

Section 1123.110(b) (court may summarily decline to grant review if petition does not present substantial issue).

The principal effect of the broad definition of "agency action" is that everything an agency does or does not do is subject to judicial review if the limitations provided in Chapter 3 (commencing with Section 1123.110) are satisfied. See Section 1123.110 (requirements for judicial review). Success on the merits in such cases, however, is another thing. See also Sections 1121.230 ("agency" defined), 1123.160 (condition of relief).

§ 1121.250. Decision

1121.250. "Decision" means an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person.

Comment. Section 1121.250 is drawn from the Administrative Procedure Act. See Gov't Code § 11405.50 (operative July 1, 1997) & Comment ("decision" defined). See also Sections 1121.240 ("agency action" defined), 1121.280 ("person" defined).

§ 1121.260. Local agency

1121.260. "Local agency" means "local agency" as defined in Section 54951 of the Government Code.

Comment. Section 1121.260 is drawn from former Section 1094.6, and is broadened to include school districts. Under Government Code Section 54951, "local agency" means "a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency." See also Section 1121.230 ("agency" defined).

§ 1121.270. Party

1121.270. (a) As it relates to agency proceedings, "party" means the agency that is taking action, the person to which the agency action is directed, and any other person named as a party or allowed to appear or intervene in the agency proceedings.

(b) As it relates to judicial review proceedings, "party" means the person seeking judicial review of agency action

and any other person named as a party or allowed to participate as a party in the judicial review proceedings.

Comment. Subdivision (a) of Section 1121.270 is drawn from the Administrative Procedure Act. See Gov't Code § 11405.60 (operative July 1, 1997) & Comment ("party" defined). This section does not address the question of whether a person is entitled to judicial review. Standing to obtain judicial review is dealt with in Article 2 (commencing with Section 1123.210) of Chapter 3. See also Section 1121.230 ("agency" defined).

§ 1121.280. Person

1121.280. "Person" includes an individual, partnership, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character.

Comment. Section 1121.280 is drawn from the Administrative Procedure Act. See Gov't Code § 11405.70 (operative July 1, 1997) & Comment ("person" defined). It supplements the definition in Code of Civil Procedure Section 17 and is broader in its application to a governmental subdivision or unit. This includes an agency other than the agency against which rights under this title are asserted by the person. Inclusion of such agencies and units of government insures, therefore, that other agencies or other governmental bodies will be accorded all the rights that a person has under this title.

§ 1121.290. Rule

1121.290. "Rule" means the whole or a part of an agency regulation, including a "regulation" as defined in Section 11342 of the Government Code, order, or standard of general applicability that implements, interprets, makes specific, or prescribes law or policy, or the organization, procedure, or practice requirements of an agency, except one that relates only to the internal management of the agency. The term includes the amendment, supplement, repeal, or suspension of an existing rule.

Comment. Section 1121.290 is drawn from 1981 Model State APA Section 1-102(10) and Government Code Section 11342(g). The definition includes all agency orders of general applicability that

implement, interpret, or prescribe law or policy, without regard to the terminology used by the issuing agency to describe them. The exception for an agency standard that relates only to the internal management of the agency is drawn from Government Code Section 11342(g), and is generalized to apply to local agencies. See also Sections 1121 (this title does not apply to local agency ordinance), 1121.230 ("agency" defined), 1121.260 ("local agency" defined).

This title applies to an agency rule whether or not the rule is a "regulation" to which the rulemaking provisions of the Administrative Procedure Act apply.

CHAPTER 2. PRIMARY JURISDICTION

§ 1122.010. Application of chapter

1122.010. Notwithstanding Section 1121, this chapter applies if a judicial proceeding is pending and the court determines that an agency has exclusive or concurrent jurisdiction over the subject matter of the proceeding or an issue in the proceeding.

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

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

§ 1122.020. Exclusive agency jurisdiction

1122.020. If an agency has exclusive jurisdiction over the subject matter of the proceeding or an issue in the proceeding, the court shall decline to exercise jurisdiction over the subject matter or the issue. The court may dismiss the proceeding or

retain jurisdiction pending agency action on the matter or issue.

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

§ 1122.030. Concurrent agency jurisdiction

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

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

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

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

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

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

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

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

(b) This section does not apply to a criminal proceeding.

(c) Nothing in this section confers concurrent jurisdiction on a court over the subject matter of a pending disciplinary proceeding under the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Comment. Section 1122.030 codifies the court's broad discretion to refer the matter or an issue to an agency for action if there is concurrent jurisdiction. See, e.g., Farmers Ins. Exch. v. Superior Court, 2 Cal. 4th 377, 391-92, 826 P.2d 730, 6 Cal. Rptr. 2d 487, 496 (1992). See generally Asimow, *Judicial Review: Standing and Timing,* 27 Cal. L. Revision Comm'n Reports 229, 281-93 (1997).

Court retention of jurisdiction does not preclude agency involvement. For example, the court in its discretion may request that the agency file an amicus brief setting forth its views on the matter as an alternative to referring the matter to the agency. If the matter is referred to the agency, the agency action remains subject to judicial review. Section 1122.040 (judicial review following agency action).

§ 1122.040. Judicial review following agency action

1122.040. If an agency has exclusive or concurrent jurisdiction over the subject matter of the proceeding or an issue in the proceeding, agency action on the matter or issue is subject to judicial review to the extent provided in Chapter 3 (commencing with Section 1123.110).

Comment. Section 1122.040 makes clear that judicial review principles apply to agency action even though an agency has exclusive jurisdiction or the court refers a matter of concurrent jurisdiction to the agency for action under this chapter.

CHAPTER 3. JUDICIAL REVIEW

Article 1. General Provisions

§ 1123.110. Requirements for judicial review

1123.110. (a) Subject to subdivision (b), a person who has standing under this chapter and who satisfies the requirements

governing exhaustion of administrative remedies, ripeness, time for filing, and other preconditions is entitled to judicial review of final agency action.

(b) The court may summarily decline to grant judicial review if the petition for review does not present a substantial issue for resolution by the court.

Comment. Subdivision (a) of Section 1123.110 is drawn from 1981 Model State APA Section 5-102(a). It ties together the threshold requirements for obtaining judicial review of final agency action, and guarantees the right to judicial review if these requirements are met. See, e.g., Sections 1123.120 (finality), 1123.130 (judicial review of agency rule), 1123.210 (standing), 1123.310 (exhaustion of administrative remedies), 1123.630-1123.640 (time for filing petition for review of decision in adjudicative proceeding).

The term "agency action" is defined in Section 1121.240. The term includes rules, decisions, and other types of agency action and inaction. This chapter contains provisions for judicial review of all types of agency action.

Subdivision (b) continues the former discretion of the courts to decline to grant a writ of administrative mandamus. Parker v. Bowron, 40 Cal. 2d 344, 351, 254 P.2d 6, 9 (1953); Dare v. Board of Medical Examiners, 21 Cal. 2d 790, 796, 136 P.2d 304, 308 (1943); Berry v. Coronado Bd. of 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).

§ 1123.120. Finality

1123.120. A person may not obtain judicial review of agency action unless the agency action is final.

Comment. Section 1123.120 continues the finality requirement of former Section 1094.5(a) in language drawn from 1981 Model State APA Section 5-102(b)(2). Agency action is typically not final if the agency intends the action to be preliminary, preparatory, procedural, or intermediate with regard to subsequent action of that agency or another agency. For example, state agency action concerning a proposed rule subject to the rulemaking part of the Administrative Procedure Act is not final until the agency submits the proposed rule to the Office of Administrative Law for review as provided by that act, and the Office of Administrative Law approves the rule pursuant to Government Code

Section 11349.3. See also Section 1123.130 (rulemaking may not be enjoined or prohibited, and rule may not be reviewed until it has been applied).

For an exception to the requirement of finality, see Section 1123.140.

§ 1123.130. Judicial review of agency rule

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

(b) A person may not obtain judicial review of an agency rule until the rule has been applied by the agency.

Comment. Subdivision (a) of Section 1123.130 continues State Water Resources Control Bd. v. Office of Admin. Law, 12 Cal. App. 4th 697, 707-08, 16 Cal. Rptr. 2d 25, 31-32 (1993). Subdivision (a) prohibits, for example, a court from enjoining a state agency from holding a public hearing or otherwise proceeding to adopt a proposed rule on the ground that the notice was legally defective. Similarly, subdivision (a) prohibits a court from enjoining the Office of Administrative Law from reviewing or approving a proposed rule that has been submitted by a regulatory agency pursuant to Government Code Section 11343(a). A rule is subject to judicial review after it is adopted. See Sections 1120, 1123.110. See also Section 1123.140 (rule must be fit for immediate judicial review).

Subdivision (b) codifies the case law ripeness requirement for judicial review of an agency rule. See, e.g., Pacific Legal Foundation v. California Coastal Comm'n, 33 Cal. 3d 158, 655 P.2d 306, 188 Cal. Rptr. 104 (1982). See also Section 1121.290 ("rule" defined). For an exception to the requirement of ripeness, see Section 1123.140. An allegation that procedures followed in adopting a state agency rule were legally deficient would not be ripe for judicial review until the agency completes the rulemaking process and formally adopts the rule (typically by submitting it to the Office of Administrative Law pursuant to Government Code Section 11343), the Office of Administrative Law approves the rule and submits it to the Secretary of State pursuant to Government Code Section 11349.3 thus allowing it to become final, and the adopting agency applies the rule.

§ 1123.140. Exception to finality and ripeness requirements

1123.140. Notwithstanding Sections 1123.120 and 1123.130, a person may obtain judicial review of agency action that is not final or, in the case of an agency rule, that

has not been applied by the agency, if all of the following conditions are satisfied:

(a) It appears likely that the person will be able to obtain judicial review of the agency action when it becomes final or, in the case of an agency rule, when it has been applied by the agency.

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

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

Comment. Section 1123.140 codifies an exception to the finality and ripeness requirements in language drawn from 1981 Model State APA Section 5-103. An issue is fit for immediate judicial review if it is primarily legal rather than factual in nature and can be adequately reviewed in the absence of concrete application by the agency. Under this language the court must assess and balance the fitness of the issues for immediate judicial review, 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).

§ 1123.150. Proceeding not moot because penalty completed

1123.150. A proceeding under this chapter is not made moot by satisfaction during the pendency of the proceeding of a penalty imposed by the agency.

Comment. Section 1123.150 continues the substance of the seventh sentence of former Section 1094.5(g) and the fourth sentence of former Section 1094.5(h)(3).

§ 1123.160. Condition of relief

1123.160. (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.

Comment. Subdivision (a) of 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.

Subdivision (b) is drawn from Government Code Section 65010 (planning and zoning law).

Article 2. Standing

§ 1123.210. No standing unless authorized by statute

1123.210. A person does not have standing to obtain judicial review of agency action unless standing is conferred by this article or is otherwise expressly provided by statute.

Comment. Section 1123.210 states the intent of this article to override existing case law standing principles and to replace them with the statutory standards prescribed in this article. Other statutes conferring standing include Public Resources Code Section 30801 (judicial review of decision of Coastal Commission by "any aggrieved person").

This title provides a single judicial review procedure for all types of agency action. See Section 1121.120. The provisions on standing therefore accommodate persons who seek judicial review of the entire range of agency actions, including rules, decisions, and other action or inaction. See Section 1121.240 ("agency action" defined).

§ 1123.220. Private interest standing

1123.220. An interested person has standing to obtain judicial review of agency action. For the purpose of this section, a person is not interested by the mere filing of a

complaint with the agency where the complaint is not authorized by statute or ordinance.

Comment. Section 1123.220 governs private interest standing for judicial review of agency action other than adjudication. For special rules governing standing for judicial review of a decision in an adjudicative proceeding, see Section 1123.240. See also Section 1121.240 ("agency action" defined). The provision that an "interested" person has standing is drawn from the law governing writs of mandate, and from the law governing judicial review of state agency regulations. See, e.g., Code Civ. Proc. §§ 1060 (interested person may obtain declaratory relief), 1069 (party beneficially interested may obtain writ of review), 1086 (party beneficially interested may obtain writ of mandate); Gov't Code § 11350(a) (interested person may obtain judicial declaration on validity of state agency regulation); *cf.* Code Civ. Proc. § 902 (appeal by party aggrieved). This requirement continues case law that a person must suffer some harm from the agency action in order to have standing to obtain judicial review of the action on a basis of private, as opposed to public, interest. See, e.g., Sperry & Hutchinson Co. v. California State Bd. of Pharmacy, 241 Cal. App. 2d 229, 50 Cal. Rptr. 489 (1966); Silva v. City of Cypress, 204 Cal. App. 2d 374, 22 Cal. Rptr. 453 (1962). A plaintiff's private interest is sufficient to confer standing if that interest is over and above that of members of the general public. Carsten v. Psychology Examining Comm., 27 Cal. 3d 793, 796, 614 P.2d 276, 166 Cal. Rptr. 844 (1980). Non-pecuniary injuries, such as environmental or aesthetic claims, are sufficient to satisfy the private interest test. Bozung v. Local Agency Formation Comm'n, 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975); Albion River Watershed Protection Ass'n v. Department of Forestry, 235 Cal. App. 3d 358, 286 Cal. Rptr. 573 (1991); Kane v. Redevelopment Agency of Hidden Hills, 179 Cal. App. 3d 899, 224 Cal. Rptr. 922 (1986); Citizens Ass'n for Sensible Development v. County of Inyo, 172 Cal. App. 3d 151, 217 Cal. Rptr. 893 (1985). See generally Asimow, *Judicial Review: Standing and Timing*, 27 Cal. L. Revision Comm'n Reports 229, 236-38 (1997).

Section 1123.220 merely requires that a person be "interested" to seek judicial review. Thus if a person has sufficient interest in the subject matter, the person may seek judicial review even though the person did not personally participate in the agency proceeding. See Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 267-68, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972). However, in most cases the exhaustion of remedies rule requires the issue to be reviewed to have been raised before the agency by someone. See Section 1123.350.

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

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

§ 1123.230. Public interest standing

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

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

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

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

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

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

The limitations in subdivisions (a)-(c) are drawn loosely from other provisions of state and federal law. See, e.g., Section 1021.5 (attorney fees in public interest litigation); Section 1123.220 & Comment (private interest standing); first portion of Section 526a (taxpayer within jurisdiction); Corp. Code § 800(b)(2) (allegation in shareholder derivative action of efforts to secure action from board); Fed. R. Civ. Proc. 23(a) (representative must fairly and adequately protect interests of class). The requirement in subdivision (c) of a request to the agency does not supersede the California Environmental Quality Act. See Section 1121.110 (conflicting or inconsistent statute controls); Pub. Res. Code § 21177 (objection may be oral or written). Nor does the requirement in subdivision (c) of notice to the agency excuse exhaustion of administrative remedies under Sections 1123.310-1123.350, consistent with prior public interest standing cases. See, e.g., Sea & Sage Audubon Soc'y, Inc. v. Planning Comm'n, 34 Cal. 3d 412, 417-18, 668 P.2d 664, 194 Cal. Rptr. 357 (1983); California Aviation Council v. County of Amador, 200 Cal. App. 3d 337, 341-42, 246 Cal. Rptr. 110 (1988).

§ 1123.240. Standing for review of decision in adjudicative proceeding

1123.240. Notwithstanding Sections 1123.220 and 1123.230, a person does not have standing to obtain judicial review of a decision in an adjudicative proceeding unless one of the following conditions is satisfied:

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

(b) The person (1) was a participant in the proceeding and is either interested or the person's participation was authorized by statute or ordinance, or (2) has standing under Section 1123.230. This subdivision does not apply to judicial review of a proceeding under the formal hearing provisions of the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

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

Subdivision (a) governs standing to challenge a decision in an adjudicative proceeding under the Administrative Procedure Act. The provision is thus limited primarily to a state agency adjudication where an evidentiary hearing for determination of facts is statutorily or constitutionally required for formulation and issuance of a decision. See Gov't Code §§ 11410.10-11410.50 (application of administrative adjudication provisions of Administrative Procedure Act) (operative July 1, 1997).

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

Subdivision (b) applies to a decision in an adjudicative proceeding other than a proceeding subject to the Administrative Procedure Act. Under this provision, a person does not have standing to obtain judicial review unless the person (1) was a participant in the proceeding and is either "interested" or participated as authorized by statute or ordinance, or (2) has public interest standing under Section 1123.230. Participation may include appearing and testifying, submitting written comments, or other appropriate activity that indicates a direct involvement in the agency action. Giving standing to a participant who satisfies the requirements for public interest standing is consistent with Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282 (1975). Thus a person may have public interest standing for judicial review of adjudication if the right to be vindicated is an important one affecting the public interest, the person resides or conducts business in the jurisdiction of the agency or meets the

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

§ 1123.250. Organizational standing

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

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

Article 3. Exhaustion of Administrative Remedies

§ 1123.310. Exhaustion required

1123.310. A person may obtain judicial review of agency action only after exhausting all administrative remedies available within the agency whose action is to be reviewed and within any other agency authorized to exercise administrative review, unless judicial review before that time

is permitted by this article or otherwise expressly provided by statute.

Comment. Section 1123.310 codifies the exhaustion of remedies doctrine of existing law. See, e.g., Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 109 P.2d 942 (1941) (exhaustion requirement jurisdictional). Exceptions to the exhaustion requirement are stated in other provisions of this article. See Sections 1123.340 (exceptions to exhaustion of administrative remedies), 1123.350 (exact issue rule).

This chapter does not provide an exception from the exhaustion requirement for judicial review of an administrative law judge's denial of a continuance. *Cf.* former subdivision (c) of Gov't Code § 11524. Nor does it provide an exception for discovery decisions. *Cf.* Shively v. Stewart, 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1966). This chapter does not continue the exemption found in the cases for a local tax assessment alleged to be a nullity. *Cf.* Stenocord Corp. v. City & County of San Francisco, 2 Cal. 3d 984, 471 P.2d 966, 88 Cal. Rptr. 166 (1970). Judicial review of such matters should not occur until conclusion of administrative proceedings.

This chapter does not require a person seeking judicial review of a rule to have participated in the rulemaking proceeding on which the rule is based. Section 1123.330. However, this chapter does prohibit judicial review of proposed regulations (see Section 1123.130), regulations that have been preliminarily adopted but are not yet final (Section 1123.120), and adopted regulations that have not yet been applied (Section 1123.130).

§ 1123.320. Administrative review of adjudicative proceeding

1123.320. If the agency action being challenged is a decision in an adjudicative proceeding, all administrative remedies available within an agency are deemed exhausted for the purpose of Section 1123.310 if no higher level of review is available within the agency, whether or not a rehearing or other lower level of review is available within the agency, unless a statute or regulation requires a petition for rehearing or other administrative review.

Comment. Section 1123.320 restates the existing California rule that a petition for a rehearing or other lower level administrative review is not a prerequisite to judicial review of a decision in an adjudicative proceeding. See former Gov't Code § 11523; Gov't Code § 19588 (State

Personnel Board). This overrules any contrary case law implication. *Cf.* Alexander v. State Personnel Bd., 22 Cal. 2d 198, 137 P.2d 433 (1943).

Administrative remedies are deemed exhausted under this section only when no further higher level review is available within the agency issuing the decision. This does not excuse a requirement of further administrative review by another agency, such as an appeals board.

§ 1123.330. Judicial review of rulemaking

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

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

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

(b) A person may obtain judicial review of an agency's failure to adopt a rule under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, notwithstanding the person's failure to request or obtain a determination from the Office of Administrative Law under Section 11340.5 of the Government Code.

Comment. Subdivision (a)(2) of Section 1123.330 continues the former second sentence of subdivision (a) of Government Code Section 11350, and generalizes it to apply to local agencies as well as state agencies. See Sections 1120 (application of title), 1121.230 ("agency" defined), 1121.290 ("rule" defined). The petition to the agency referred to in subdivision (a) is authorized by Government Code Section 11340.6.

Subdivision (b) is new, and makes clear that exhaustion of remedies does not require filing a complaint with the Office of Administrative Law that an agency rule is an underground regulation. *Cf.* Gov't Code § 11340.5.

§ 1123.340. Exceptions to exhaustion of administrative remedies

1123.340. The requirement of exhaustion of administrative remedies is jurisdictional and the court may not relieve a

person of the requirement unless any of the following conditions is satisfied:

(a) The remedies would be inadequate.

(b) The requirement would be futile.

(c) The requirement would result in irreparable harm disproportionate to the public and private benefit derived from exhaustion.

(d) The person was entitled to notice of a proceeding in which relief could be provided but lacked timely notice of the proceeding. The court's authority under this subdivision is limited to remanding the case to the agency to conduct a supplemental proceeding in which the person has an opportunity to participate.

(e) The person seeks judicial review on the ground that the agency lacks subject matter jurisdiction in the proceeding.

(f) The person seeks judicial review on the ground that a statute, regulation, or procedure is facially unconstitutional.

Comment. Section 1123.340 authorizes the reviewing court to relieve the person seeking judicial review of the exhaustion requirement in limited circumstances. This enables the court to exercise some discretion. See generally Asimow, *Judicial Review: Standing and Timing*, 27 Cal. L. Revision Comm'n Reports 229, 260-71 (1997). This section may not be used as a means to avoid compliance with other requirements for judicial review, however, such as the exact issue rule. See Section 1123.350.

The exceptions to the exhaustion of remedies requirement consolidate and codify a number of existing case law exceptions, including:

Inadequate remedies. Under subdivision (a), administrative remedies need not be exhausted if the available administrative review procedure or the relief available through administrative review is insufficient. This codifies case law. See, e.g., Common Cause v. Board of Supervisors, 49 Cal. 3d 432, 443, 777 P.2d 610, 261 Cal. Rptr. 574 (1989); Endler v. Schutzbank, 68 Cal. 2d 162, 168, 436 P.2d 297, 65 Cal. Rptr. 297 (1968); Rosenfield v. Malcolm, 65 Cal. 2d 559, 421 P.2d 697, 55 Cal. Rptr. 505 (1967).

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

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

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

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

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

§ 1123.350. Exact issue rule

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

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

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

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

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

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

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

Comment. Subdivision (a) of Section 1123.350 codifies the case law exact issue rule. See, e.g., Resource Defense Fund v. Local Agency Formation Comm'n, 191 Cal. App. 3d 886, 894, 236 Cal. Rptr. 794, 798 (1987); Coalition for Student Action v. City of Fullerton, 153 Cal. App. 3d 1194, 200 Cal. Rptr. 855 (1984); see generally Asimow, *Judicial Review: Standing and Timing,* 27 Cal. L. Revision Comm'n Reports 229, 259-60 (1997). It limits the issues that may be raised and considered in the reviewing court to those that were raised before the agency. The exact issue rule is in a sense a variation of the exhaustion of remedies requirement — the agency must first have had an opportunity to determine the issue that is subject to judicial review.

Under subdivision (b) the court may relieve a person of the exact issue requirement in circumstances that are in effect an elaboration of the doctrine of exhaustion of administrative remedies. See also Section 1123.340 & Comment (exceptions to exhaustion of administrative remedies).

The intent of paragraph (1) of subdivision (b) is to permit the court to consider an issue that was not raised before the agency if the agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue. Examples include: (A) an issue as to the facial constitutionality of the statute that enables the agency to function to the extent state law prohibits the agency from passing on the validity of the statute; (B) an issue as to the amount of compensation due as a result of an agency's breach of contract to the extent state law prohibits the agency from passing on this type of question.

Paragraph (2) permits a party to raise a new issue in the reviewing court if the issue arises from newly discovered facts that the party excusably did not know at the time of the agency proceedings.

Paragraph (3) permits a party to raise a new issue in the reviewing court if the challenged agency action is an agency rule and if the person seeking to raise the new issue in court was not a party in an adjudicative proceeding which provided an opportunity to raise the issue before the agency.

Paragraph (4) permits a new issue to be raised in the reviewing court by a person who was not properly notified of the adjudicative proceeding which produced the challenged decision. This does not give standing to a person not otherwise entitled to notice of the adjudicative proceeding.

Paragraph (5) permits a new issue to be raised in the reviewing court if the interests of justice would be served thereby, and the new issue arises from a change in controlling law or from agency action after the person exhausted the last opportunity for seeking relief from the agency. See Lindeleaf v. Agricultural Labor Relations Bd., 41 Cal. 3d 861, 718 P.2d 106, 226 Cal. Rptr. 119 (1986).

Article 4. Standards of Review

§ 1123.410. Standards of review of agency action

1123.410. Except as otherwise provided by statute, agency action shall be judicially reviewed under the standards provided in this article.

Comment. Section 1123.410 is drawn from 1981 Model State APA Section 5-116(a)(2). The appropriate review standard of this article to be applied by the court depends on the issue being considered. For example, in exercising discretion, an agency may be called upon to interpret a statute, to determine basic facts, and to make the discretionary decision. In reviewing this action, the court would use the standard of Section 1123.420 (independent judgment with appropriate deference) in reviewing the statutory interpretation, the standard of Section 1123.430 (substantial evidence) or 1123.440 (substantial evidence or independent judgment) in reviewing the determination of facts, and the standard of Section 1123.450 (abuse of discretion) in reviewing the exercise of discretion.

The scope of judicial review provided in this article may be qualified by another statute that establishes review based on different standards than those in this article. See, e.g., Rev. & Tax. Code §§ 5170, 6931-6937.

§ 1123.420. Review of agency interpretation of law

1123.420. (a) The standard for judicial review of agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action.

(b) This section does not apply to interpretation of law by the Public Employment Relations Board, Agricultural Labor Relations Board, or Workers' Compensation Appeals Board within the regulatory authority of those agencies.

Comment. Section 1123.420 clarifies and codifies existing case law on judicial review of agency interpretation of law.

Subdivision (a) applies the independent judgment test for judicial review of 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).

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. Dept. 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).

§ 1123.430. Review of agency factfinding

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

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

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

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

Subdivision (a) eliminates for state agencies the rule of former Section 1094.5(c), providing for independent judgment review in cases where

"authorized by law." The former standard was interpreted to provide for independent judgment review where a fundamental vested right is involved. Bixby v. Pierno, 4 Cal. 3d 130, 144, 481 P.2d 242, 93 Cal. Rptr. 234 (1971); see generally Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1161-76 (1995).

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

Subdivision (b) continues the substance of language formerly found in Government Code Section 11425.50(b). The requirement that the presiding officer identify specific evidence of observed demeanor, manner, or attitude of the witness in credibility cases is in that section.

Under subdivision (c), independent judgment review of a changed determination of fact is limited to that fact. All other factual determinations are reviewed using the standard of subdivision (a) — substantial evidence in light of the whole record.

§ 1123.440. Review of factfinding in local agency adjudication

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

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

(b) In all other cases, whether the determination is supported by substantial evidence in the light of the whole record.

Comment. Section 1123.440 continues former Section 1094.5(c) as it applied to factfinding in local agency adjudication. See Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 32, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

§ 1123.450. Review of agency exercise of discretion

1123.450. The standard for judicial review of whether agency action is a proper exercise of discretion, including an agency's determination under Section 11342.2 of the Government Code that a regulation is reasonably necessary to effectuate the purpose of the statute that authorizes the regulation, is abuse of discretion.

Comment. Section 1123.450 codifies the existing authority of the court to review agency action that constitutes an exercise of agency discretion. A court may decline to exercise review of discretionary action in circumstances where the Legislature so intended or where there are no standards by which a court can conduct review. *Cf.* 5 U.S.C. § 701(a)(2) (federal APA).

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. Often, the determination of such facts requires specialized expertise and the factfindings involve guesswork or prophecy. A reviewing court must be appropriately deferential to agency findings of legislative fact and should not demand that such facts be proved with certainty. Nevertheless, a court can still legitimately review the rationality of legislative 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).

§ 1123.460. Review of agency procedure

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

(a) Whether the agency has engaged in an unlawful 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.

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.

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.

Section 1123.460 does not apply to state agency rulemaking. Gov't Code § 11350.

§ 1123.470. Burden of persuasion

1123.470. Except as otherwise provided by statute, the burden of demonstrating the invalidity of agency action or entitlement to relief is on the party asserting the invalidity or entitlement to relief.

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

Article 5. Superior Court Jurisdiction and Venue

§ 1123.510. Superior court jurisdiction

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

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

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

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

§ 1123.520. Superior court venue

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

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

(2) In the case of action of a nongovernmental entity, the county where the entity is located.

(3) In cases not governed by paragraph (1) or (2), including local agency action, the county or counties of jurisdiction of the agency.

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

Comment. Subdivision (a)(1) of Section 1123.520 continues prior law for judicial review of state agency action, with the addition of Sacramento County. See Code Civ. Proc. § 393(1)(b); California Administrative Mandamus § 8.16, at 269 (Cal. Cont. Ed. Bar, 2d ed. 1989); Duval v. Contractors State License Bd., 125 Cal. App. 2d 532, 271 P.2d 194 (1954). Subdivision (a)(2) continues what appears to have been existing law for judicial review of action of a nongovernmental entity. See California Administrative Mandamus, *supra*, § 8.16, at 270.

Subdivision (a)(3) is new, but is probably not a substantive change, since the cause of action is likely to arise in the county of the local agency's jurisdiction. In addition to applying to local agencies (defined in Section 1121.260), subdivision (a)(3) applies to agencies that are neither state nor local. See, e.g., Gov't Code § 66801 (Tahoe Regional Planning Agency).

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

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

Article 6. Petition for Review; Time Limits

§ 1123.610. Petition for review

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

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

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

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

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

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

§ 1123.620. Contents of petition for review

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

(a) The name of the petitioner.

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

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

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

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

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

(g) The reasons why relief should be granted.

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

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

§ 1123.630. Time for filing petition for review in adjudication of agency other than local agency and formal adjudication of local agency

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) 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.

(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 one hundred eighty 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."

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).

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)).

Subdivision (e) is drawn from former Code of Civil Procedure Section 1094.6(f). See also Unemp. Ins. Code § 410; Veh. Code § 14401(b). 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).

The introductory clause of subdivision (e) 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).

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

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) 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, 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 one hundred eighty 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."

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).

Subdivision (d) is drawn from former Code of Civil Procedure Section 1094.6(f). For an example of a 30-day period under environmental laws, see Gov't Code §§ 66639, 66641.7. See also the Comment to the parallel provision in Section 1123.630.

Article 7. Review Procedure

§ 1123.710. Applicability of rules of practice for civil actions

1123.710. (a) Except as otherwise provided in this title or by rules of court adopted by the Judicial Council not inconsistent with this title, Part 2 (commencing with Section 307) applies to proceedings under this title.

(b) The following provisions of Part 2 (commencing with Section 307) do not apply to a proceeding under this title:

(1) Section 426.30.

(2) Subdivision (a) of Section 1013.

(c) A party may obtain discovery in a proceeding under this title only of the following:

(1) Matters reasonably calculated to lead to the discovery of evidence admissible under Section 1123.850.

(2) Matters in possession of the agency for the purpose of determining the accuracy of the affidavit of the agency official who compiled the administrative record for judicial review.

Comment. Subdivision (a) of Section 1123.710 continues the effect of Section 1109 in proceedings under this title. For example, under Section 632, upon the request of any party appearing at the trial, the court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial. See Delany v. Toomey, 111 Cal. App. 2d 570, 571-72, 245 P.2d 26 (1952).

Under subdivision (b)(1), the compulsory cross-complaint provisions of Section 426.30 do not apply to judicial review under this title.

Subdivision (b)(2) provides that the provisions of Section 1013(a) for extension of time when notice is mailed do not apply to judicial review under this title. This continues prior law for judicial review of local agency action under former Section 1094.6. Tielsch v. City of Anaheim, 160 Cal. App. 3d 576, 206 Cal. Rptr. 740 (1984). Prior law was unclear whether Section 1013(a) applied to judicial review of state agency proceedings under former Section 1094.5. See California Administrative Mandamus § 7.4, at 242 (Cal. Cont. Ed. Bar, 2d ed. 1989). For statutes providing that Section 1013 does apply, see Lab. Code § 98.2; Veh. Code § 40230. These statutes prevail over Section 1123.710(b)(2). See Section 1121.110 (conflicting or inconsistent statute controls).

Subdivision (c)(1) codifies City of Fairfield v. Superior Court, 14 Cal. 3d 768, 774-75, 537 P.2d 375, 122 Cal. Rptr. 543 (1975). The affidavit referred to in subdivision (c)(2) is provided for in Section 1123.820.

§ 1123.720. Stay of agency action

1123.720. (a) The filing of a petition for review under this title does not of itself stay or suspend the operation of any agency action.

(b) Subject to subdivision (g), on application of the petitioner, the reviewing court may grant a stay of the agency action pending the judgment of the court if it finds that all of the following conditions are satisfied:

(1) The petitioner is likely to prevail ultimately on the merits.

(2) Without a stay the petitioner will suffer irreparable injury.

(3) The grant of a stay to the petitioner will not cause substantial harm to others.

(4) The grant of a stay to the petitioner will not substantially threaten the public health, safety, or welfare.

(c) The application for a stay shall be accompanied by proof of service of a copy of the application on the agency. Service shall be made in the same manner as service of a summons in a civil action.

(d) The court may condition a stay on appropriate terms, including the giving of security for the protection of parties or others.

(e) If an appeal is taken from a denial of relief by the superior court, the agency action shall not be further stayed except on order of the court to which the appeal is taken. However, in cases where a stay is in effect at the time of filing the notice of appeal, the stay is continued by operation of law for a period of 20 days after the filing of the notice.

(f) Except as provided by statute, if an appeal is taken from a granting of relief by the superior court, the agency action is stayed pending the determination of the appeal unless the court to which the appeal is taken orders otherwise. Notwithstanding Section 916, the court to which the appeal is taken may direct that the appeal shall not stay the granting of relief by the superior court.

(g) No stay may be granted to prevent or enjoin the state or an officer of the state from collecting a tax.

Comment. Section 1123.720 is drawn from 1981 Model State APA Section 5-111, and supersedes former Section 1094.5(g)-(h).

Subdivision (b)(1) generalizes the requirement of former Section 1094.5(h)(1) that a stay may not be granted unless the petitioner is likely to prevail on the merits. The former provision applied only to a decision of a licensed hospital or state agency made after a hearing under the formal hearing provisions of the Administrative Procedure Act.

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

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

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

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

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

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

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

§ 1123.730. Type of relief

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

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

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

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

Comment. Section 1123.730 is drawn from 1981 Model State APA Section 5-117, and supersedes former Section 1094.5(f). Section 1123.730 makes clear that the single form of action established by Sections 1121.120 and 1123.610 encompasses any appropriate type of relief, with the exceptions indicated.

Subdivision (b) continues the effect of Code of Civil Procedure Section 1095 permitting the court to award damages in an appropriate case. Under subdivision (b), the court may award damages or compensation subject to the Tort Claims Act, if applicable. The claim presentation requirements of the Tort Claims Act do not apply, for example, to a claim against a local public entity for earned salary or wages. Gov't Code § 905(c). See also Snipes 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 (operative July 1, 1997) and Comment.

For statutes authorizing an award of attorney's fees, see Sections 1028.5, 1123.950. See also Gov't Code §§ 68092.5 (expert witness fees), 68093 (mileage and fees in civil cases in superior court), 68096.1-68097.10 (witness fees of public officers and employees). *Cf.* Gov't Code § 11450.40 (fees for witness appearing in APA proceeding pursuant to subpoena) (operative July 1, 1997).

§ 1123.740. Jury trial

1123.740. All proceedings shall be heard by the court sitting without a jury.

Comment. Section 1123.740 continues a portion of the first sentence of former Section 1094.5(a) and generalizes it to apply to all proceedings under this title.

Article 8. Record for Judicial Review

§ 1123.810. Administrative record exclusive basis for judicial review

1123.810. (a) Except as provided in Section 1123.850 or as otherwise provided by statute, the administrative record is the exclusive basis for judicial review of agency action if both of the following requirements are satisfied:

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

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

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

Comment. Section 1123.810 codifies existing practice. See, e.g., Beverly Hills Fed. Sav. & Loan Ass'n v. Superior Court, 259 Cal. App. 2d 306, 324, 66 Cal. Rptr. 183, 192 (1968). For authority to augment the administrative record for judicial review, see Section 1123.850 (new evidence on judicial review).

The closed record rule of subdivision (a) is limited to cases where the agency gave notice and an opportunity to submit oral or written comment, and maintained a record or file of its proceedings. These requirements will generally be satisfied in most administrative adjudication and quasi-legislative action. In other cases, subdivision (b) makes clear the court may either receive evidence itself or may remand to the agency to receive the evidence. This will apply to most ministerial and informal action. These rules are generally consistent with Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 888 P.2d 1268, 38 Cal. Rptr. 2d 139 (1995).

If the closed record requirement of Section 1123.810(a) applies, the court still has some discretion to remand to the agency. See Section 1123.850(c).

§ 1123.820. Contents of administrative record

1123.820. (a) Except as provided in subdivision (b), the administrative record for judicial review of agency action consists of all of the following:

(1) Any agency documents expressing the agency action.

(2) Other documents identified by the agency as having been considered by it before its action and used as a basis for its action.

(3) All material submitted to the agency in connection with the agency action.

(4) A transcript of any hearing, if one was maintained, or minutes of the proceeding. In case of electronic reporting of

proceedings, the transcript or a copy of the electronic reporting shall be part of the administrative record in accordance with the rules applicable to the record on appeal in judicial proceedings.

(5) Any other material described by statute as the administrative record for the type of agency action at issue.

(6) 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 rulemaking under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code is the file of the rulemaking proceeding prescribed by Section 11347.3 of the Government Code.

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

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

Comment. Section 1123.820 is drawn from 1981 Model State APA Section 5-115(a), (d), (f)-(g). For authority to augment the administrative record for judicial review, see Section 1123.850 (new evidence on judicial review). The administrative record for judicial review is related but not necessarily identical to the record of agency proceedings that is

prepared and maintained by the agency. The administrative record for judicial review specified in this section is subject to the provisions of this section on shortening, summarizing, or organizing the record, or stipulation to an agreed or settled statement of the parties. Subdivision (c).

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

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

The affidavit requirement in subdivision (a)(6) may be satisfied by a declaration under penalty of perjury. Section 2015.5.

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

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

modifying, enjoining, or staying the agency action, or remanding for further proceedings. Section 1123.730.

§ 1123.830. Preparation of record

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

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

(2) If the agency action is other than that described in paragraph (1), the administrative record shall be prepared by the agency.

(b) Except as otherwise provided by statute, the administrative record shall be delivered to the petitioner as follows:

(1) Within 30 days after the request and payment of the fee provided in Section 1123.910 in an adjudicative proceeding involving an evidentiary hearing of 10 days or less.

(2) Within 60 days after the request and payment of the fee provided in Section 1123.910 in a nonadjudicative proceeding, or in an adjudicative proceeding involving an evidentiary hearing of more than 10 days.

(c) For good cause shown, the time limits provided in subdivision (b) may be extended by either or both of the following:

(1) By the court for a reasonable period.

(2) By the agency for a period not exceeding 190 days after the request and payment of the fee and cost provided in Section 1123.910. This paragraph does not apply to review of an adjudicative proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(d) If the agency fails timely to deliver the record, the court may order the agency to deliver the record, and may impose sanctions and grant other appropriate relief for failure to comply with any such order.

Comment. Section 1123.830 supersedes the fourth sentence of former Government Code Section 11523 and the first sentence of subdivision (c) of former Code of Civil Procedure Section 1094.6. Under former Section 11523, in judicial review of proceedings under the Administrative Procedure Act, the record was to be prepared either by the Office of Administrative Hearings or by the agency. However, in practice the record was prepared by the Office of Administrative Hearings, consistent with subdivision (a)(1). The provision in subdivision (b) making the agency's duty to prepare and deliver the record contingent on payment of the fee is drawn from former Government Code Section 11523.

Although Section 1123.830 requires the Office of Administrative Hearings or the agency to prepare the record, the burden is on the petitioner attacking the administrative decision to show entitlement to judicial relief, so it is petitioner's responsibility to make the administrative record available to the court. Foster v. Civil Serv. Comm'n, 142 Cal. App. 3d 444, 453, 190 Cal. Rptr. 893, 899 (1983). However, this does not authorize use of an unofficial record for judicial review.

Although subdivision (a) requires the agency to prepare the record on request of the petitioner for review, in state agency rulemaking under the Administrative Procedure Act, the file is already complete at the time of review. See Gov't Code § 11347.3.

The introductory clause of subdivision (b) recognizes that some statutes prescribe the time to prepare the record in particular proceedings. See, e.g., Gov't Code § 3564 (10-day limit for Public Employment Relations Board).

§ 1123.840. Disposal of administrative record

1123.840. Any administrative record received for filing by the clerk of the court may be disposed of as provided in Sections 1952, 1952.2, and 1952.3.

Comment. Section 1123.840 continues former Section 1094.5(i) without change. Rulemaking records should be carefully safeguarded by the agency. Concerning retention of rulemaking records by the Secretary of State, see Gov't Code §§ 11347.3, 12223.5, 14755.

§ 1123.850. New evidence on judicial review

1123.850. (a) If the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded in the agency proceedings, it may enter judgment remanding the case for reconsideration in the light of that evidence. Except as provided in this section, the court shall not admit the evidence on judicial review without remanding the case.

(b) The court may receive evidence described in subdivision (a) without remanding the case in any of the following circumstances:

(1) The evidence relates to the validity of the agency action and is needed to decide (i) improper constitution as a 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.

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

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

Comment. Subdivision (a) of Section 1123.850 supersedes former Section 1094.5(e), which permitted the court to admit evidence without remanding the case in cases in which the court was authorized by law to exercise its independent judgment on the evidence. Under this section and Section 1123.810, the court is limited to evidence in the administrative record except under subdivision (b). The provision in subdivision (a) permitting new evidence that could not in the exercise of reasonable diligence have been produced in the administrative proceeding should be narrowly construed. Such evidence is admissible only in rare instances. See Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 578, 888 P.2d 1268, 1278, 38 Cal. Rptr. 2d 139, 149 (1995). For rulemaking, no evidence is admissible that was not in existence at the time of the agency proceeding. Gov't Code § 11350 (state agency rulemaking under the Administrative Procedure Act); Western States Petroleum Ass'n v. Superior Court, *supra* (quasi-legislative action generally).

Subdivision (b)(1) is drawn from 1981 Model State APA Section 5-114(a)(1)-(2). Evidence may be received only if it is likely to contribute to the court's determination of the validity of agency action under one or more of the standards set forth in Sections 1123.410-1123.460.

Subdivision (b)(2) applies to judicial review of agency interpretation of law under Section 1123.420, and to factfinding in local agency proceedings to which the independent judgment standard applies under Section 1123.440. Admission of evidence under this provision is discretionary with the court.

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

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

Section 1123.850 deals only with admissibility of new evidence on issues involved in the agency proceeding. It does not limit evidence on issues unique to judicial review, such as petitioner's standing or capacity,

or affirmative defenses such as laches for unreasonable delay in seeking judicial review. For standing rules, see Sections 1123.210-1123.250.

Section 1123.850 does not address the question of whether the evidence must have been in existence at the time of the agency proceeding. For state agency rulemaking, this is governed by Government Code Section 11350. For other action, it is governed by case law. See, e.g., Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 578, 888 P.2d 1268, 1278, 38 Cal. Rptr. 2d 139, 149 (1995) (quasi-legislative action); Elizabeth D. v. Zolin, 21 Cal. App. 4th 347, 356-57, 25 Cal. Rptr. 2d 852, 856-57 (1993) (administrative adjudication); Toyota of Visalia, Inc. v. New Motor Vehicle Bd., 188 Cal. App. 3d 872, 881-82, 233 Cal. Rptr. 708 (1987) (same); Windigo Mills v. Unemployment Ins. Appeals Bd., 92 Cal. App. 3d 586, 596-97, 155 Cal. Rptr. 63 (1979) (same).

Subdivision (e) makes clear this section does not prevent the court from taking judicial notice of a precedent decision. See Evid. Code § 452.

For a special rule requiring the court to consider all relevant evidence, see Water Code § 1813. This special rule prevails over Section 1123.850. See Section 1121.120 (conflicting or inconsistent statute controls).

Article 9. Costs and Fees

§ 1123.910. Fee for transcript and preparation and certification of record

1123.910. The agency preparing the administrative record for judicial review shall charge the petitioner the fee provided in Section 69950 of the Government Code for the transcript, if any, and the reasonable cost of preparation of other portions of the record and certification of the record.

Comment. Section 1123.910 continues the substance of a portion of the fourth sentence of former Section 11523 of the Government Code, the third sentence of subdivision (a) of former Code of Civil Procedure Section 1094.5, and the second sentence of subdivision (c) of former Code of Civil Procedure Section 1094.6.

§ 1123.920. Recovery of costs of suit

1123.920. Except as otherwise provided by rules of court adopted by the Judicial Council, the prevailing party is

entitled to recover the following costs of suit borne by the party:

(a) The cost of preparing the transcript, if any.

(b) The cost of compiling and certifying the record.

(c) Any filing fee.

(d) Fees for service of documents on the other parties.

Comment. Section 1123.920 supersedes the sixth sentence of subdivision (a) of former Section 1094.5, and the fifth and tenth sentences of former Section 11523 of the Government Code. Section 1123.920 generalizes these provisions to apply to all proceedings for judicial review of agency action. See also Bus. & Prof. Code § 125.3 (recovery of costs of investigation and enforcement in a disciplinary proceeding by a board in the Department of Consumer Affairs or the Osteopathic Medical Board).

§ 1123.930. No renewal or reinstatement of license on failure to pay costs

1123.930. No license of a petitioner for judicial review of a decision in an adjudicative proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code shall be renewed or reinstated if the petitioner fails to pay all of the costs required under Section 1123.920.

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

§ 1123.940. Proceedings in forma pauperis

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

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

§ 1123.950. Attorney fees in action to review administrative proceeding

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

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

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

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

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

SELECTED CONFORMING REVISIONS

STATE BAR COURT

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

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

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

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

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

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

Comment. Section 23090 is amended to change the application for a writ of review to a petition for judicial review, consistent with Code of Civil Procedure Section 1123.610, and to delete the 30-day time limit formerly prescribed in this section. Under Code of Civil Procedure Section 1123.630, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the respondent, unless the agency orders that it shall become effective sooner. Gov't Code § 11519.

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

~~23090.1. The writ of review shall be made returnable at a time and place then or thereafter specified by court order and shall direct the board to certify the whole record of the~~

~~department in the case to the court within the time specified. No new or additional evidence shall be introduced in such court, but the cause shall be heard on the whole record of the department as certified to by the board.~~

Comment. Section 23090.1 is repealed because it is superseded by the judicial review provisions of the Code of Civil Procedure. See Section 23090.4. The provision in the first sentence for the return of the writ of review is superseded by Code of Civil Procedure Section 1123.710 (applicability of rules of practice for civil actions). The provision in the first sentence for the record of the department is superseded by Code of Civil Procedure Section 1123.820 (contents of administrative record). The second sentence is superseded by Code of Civil Procedure Sections 1123.810 (administrative record exclusive basis for judicial review) and 1123.850 (new evidence on judicial review).

Bus. & Prof. Code § 23090.2 (repealed). Scope of review

~~23090.2. The review by the court shall not extend further than to determine, based on the whole record of the department as certified by the board, whether:~~

~~(a) The department has proceeded without or in excess of its jurisdiction.~~

~~(b) The department has proceeded in the manner required by law.~~

~~(c) The decision of the department is supported by the findings.~~

~~(d) The findings in the department's decision are supported by substantial evidence in the light of the whole record.~~

~~(e) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the hearing before the department.~~

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

Comment. Subdivisions (a) through (d) of former Section 23090.2 are superseded by Code of Civil Procedure Sections 1123.410-1123.460 and 1123.160. Subdivision (e) is superseded by Code of Civil Procedure Section 1123.850. The last sentence is superseded by Code of Civil

Procedure Sections 1123.420 (interpretation of law), 1123.430 (factfinding), 1123.810 (administrative record exclusive basis for judicial review), and 1123.850 (new evidence on judicial review). Nothing in the Code of Civil Procedure or in this article permits the court to hold a trial de novo.

Bus. & Prof. Code § 23090.3 (amended). Right to appear in judicial review proceeding

~~23090.3. The findings and conclusions of the department on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department.~~ The *parties to a judicial review proceeding are the* board, the department, and each party to the action or proceeding before the board ~~shall have the right to appear in the review proceeding. Following the hearing, the court shall enter judgment either affirming or reversing the decision of the department, or the court may remand the case for further proceedings before or reconsideration by the department~~ *whose interest is adverse to the person seeking judicial review*.

Comment. Section 23090.3 is largely superseded by the judicial review provisions of the Code of Civil Procedure. See Section 23090.4. The first sentence is superseded by Code of Civil Procedure Section 1123.430 (review of agency factfinding). The second sentence is superseded by Code of Civil Procedure Section 1123.420 (interpretation of law). The fourth sentence is superseded by Code of Civil Procedure Section 1123.730 (type of relief).

Bus. & Prof. Code § 23090.4 (amended). Judicial review

23090.4. ~~The provisions of the Code of Civil Procedure relating to writs of review shall, insofar as applicable, apply to proceedings in the courts as provided by this article. A copy of every pleading filed pursuant to this article shall be served on the board, the department, and on each party who entered an appearance before the board.~~ *Judicial review shall*

be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

Comment. Section 23090.4 is amended to delete the first sentence, and to replace it with a reference to the judicial review provisions of the Code of Civil Procedure. Special provisions of this article prevail over general provisions of the Code of Civil Procedure governing judicial review. See Code Civ. Proc. § 1121.110 (conflicting or inconsistent statute controls). Copies of pleadings in judicial review proceedings must be served on the parties. See Code Civ. Proc. §§ 1123.610 (petition for review), 1123.710 (applicability of rules of practice for civil actions).

Bus. & Prof. Code § 23090.5 (amended). Courts having jurisdiction

23090.5. No court of this state, except the Supreme Court and the courts of appeal to the extent specified in this article, shall have jurisdiction to review, affirm, reverse, correct, or annul any order, rule, or decision of the department or to suspend, stay, or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the department in the performance of its duties~~, but a writ of mandate shall lie from the Supreme Court or the courts of appeal in any proper case~~.

Comment. Section 23090.5 is amended to delete the former reference to a writ of mandate. The writ of mandate has been replaced by a petition for review. See Section 23090.4; Code Civ. Proc. § 1123.610 (petition for review). *But cf.* Code Civ. Proc. § 1123.510(b) (original jurisdiction of Supreme Court or courts of appeal under California Constitution not affected).

Bus. & Prof. Code § 23090.6 (repealed). Stay of order

~~23090.6. The filing of a petition for, or the pendency of, a writ of review shall not of itself stay or suspend the operation of any order, rule, or decision of the department, but the court before which the petition is filed may stay or suspend, in whole or in part, the operation of the order, rule, or decision of the department subject to review, upon the terms and conditions which it by order directs.~~

Comment. Former Section 23090.6 is superseded by Code of Civil Procedure Section 1123.720 (stays). See Section 23090.4.

Bus. & Prof. Code § 23090.7 (amended). Effectiveness of order

23090.7. ~~No~~ *Except for the purpose of Section 1123.630 of the Code of Civil Procedure, no* decision of the department which has been appealed to the board and no final order of the board shall become effective during the period in which ~~application~~ *a petition for review* may be made ~~for a writ of review, as provided by Section 23090~~.

Comment. Section 23090.7 is amended to add the "except" clause. Section 23090.7 is also amended to recognize that judicial review under the Code of Civil Procedure has been substituted for a writ of review under this article. See Section 23090.4.

TAXPAYER ACTIONS

Code Civ. Proc. § 526a (amended). Taxpayer actions

526a. ~~An action to obtain a judgment, restraining and preventing any~~ *(a) A proceeding for judicial review of agency action to restrain or prevent* illegal expenditure of, waste of, or injury to the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained ~~against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein.~~ *under Title 2 (commencing with Section 1120) of Part 3.*

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

~~An action~~ *(c) A proceeding* brought pursuant to this section to enjoin a public improvement project shall take special precedence over all civil matters on the calendar of the court

except those matters to which equal precedence on the calendar is granted by law.

Comment. Section 526a is amended to make the former statutory and common law taxpayers' action subject to the judicial review provisions of this code. See Sections 1120-1123.950. Under the judicial review provisions, the petitioner must show entitlement to relief on a ground specified in Sections 1123.410-1123.460. See Section 1123.160. The petition for review must name the agency as respondent or the agency head by title, not individual employees of the agency. Section 1123.610. Standing rules are provided in Sections 1123.210-1123.250. Concerning the common law taxpayers' action, see Los Angeles v. Superior Court, 50 Cal. App. 4th 598, 57 Cal. Rptr. 2d 878, 885 (1996).

VALIDATING PROCEEDINGS

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

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

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

WRIT OF MANDATE

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

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

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

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

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

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

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

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

~~1094.5. (a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner. Where the petitioner has proceeded pursuant to Section 68511.3 of the Government Code and the Rules of Court implementing that section and where the transcript is necessary to a proper review of the administrative~~

proceedings, the cost of preparing the transcript shall be borne by the respondent. Where the party seeking the writ has proceeded pursuant to Section 1088.5, the administrative record shall be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner, where required, or as otherwise directed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs.

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

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

(d) Notwithstanding subdivision (c), in cases arising from private hospital boards or boards of directors of districts organized pursuant to The Local Hospital District Law, Division 23 (commencing with Section 32000) of the Health and Safety Code or governing bodies of municipal hospitals formed pursuant to Article 7 (commencing with Section 37600) or Article 8 (commencing with Section 37650) of Chapter 5 of Division 3 of Title 4 of the Government Code, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the

~~light of the whole record. However, in all cases in which the petition alleges discriminatory actions prohibited by Section 1316 of the Health and Safety Code, and the plaintiff makes a preliminary showing of substantial evidence in support of that allegation, the court shall exercise its independent judgment on the evidence and abuse of discretion shall be established if the court determines that the findings are not supported by the weight of the evidence.~~

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

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

~~(g) Except as provided in subdivision (h), the court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. However, no such stay shall be imposed or continued if the court is satisfied that it is against the public interest; provided that the application for~~

the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which the appeal is taken. However, in cases where a stay is in effect at the time of filing the notice of appeal, the stay shall be continued by operation of law for a period of 20 days from the filing of the notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which the appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect, the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of the proceedings.

(h) (1) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision of any licensed hospital or any state agency made after a hearing required by statute to be conducted under the provisions of the Administrative Procedure Act, as set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, conducted by the agency itself or an administrative law judge on the staff of the Office of Administrative Hearings pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. However, the stay shall not be imposed or continued unless the court is satisfied

~~that the public interest will not suffer and that the licensed hospital or agency is unlikely to prevail ultimately on the merits; and provided further that the application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.~~

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

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

~~determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of the proceedings.~~

~~(i) Any administrative record received for filing by the clerk of the court may be disposed of as provided in Sections 1952, 1952.2, and 1952.3.~~

~~(j) Effective January 1, 1996, this subdivision shall apply only to state employees in State Bargaining Unit 5. For purposes of this section, the court is not authorized to review any disciplinary decisions reached pursuant to Section 19576.1 of the Government Code.~~

Comment. The portion of the first sentence of subdivision (a) of former Section 1094.5 relating to finality is superseded by Section 1123.120 (finality). The portion of the first sentence of former subdivision (a) relating to trial by jury is superseded by Section 1123.740. The second sentence of former subdivision (a) is superseded by Section 1123.710(a) (Judicial Council rules of pleading and practice). See also Sections 1123.830(c) (delivery of record) and 1123.840 (disposal of record). The third sentence of former subdivision (a) is superseded by Section 1123.910 (fee for preparing record). The fourth sentence of former subdivision (a) is continued in substance in Section 1123.940 (proceedings in forma pauperis). The fifth sentence of former subdivision (a) is superseded by Section 1123.710(a) (Judicial Council rules of pleading and practice). The sixth sentence of former subdivision (a) is superseded by Section 1123.920 (recovery of costs of suit).

The provision of subdivision (b) relating to review of whether the respondent has proceeded without or in excess of jurisdiction is superseded by Section 1123.420 (review of agency interpretation of law). The provision relating to whether there has been a fair trial is superseded by Section 1123.460 (review of agency procedure). The provision relating to whether there has been a prejudicial abuse of discretion is superseded by Section 1123.450 (review of agency exercise of discretion). The provision relating to proceeding in the manner required by law is superseded by Section 1123.460 (review of agency procedure). The provision relating to an order or decision not supported by findings or findings not supported by evidence is superseded by Section 1123.430 (review of agency factfinding).

Subdivision (c) is superseded by Section 1123.430 (review of agency factfinding).

Subdivision (d) is superseded by Health and Safety Code Sections 1339.62-1339.64.

Subdivision (e) is superseded by Section 1123.850 (new evidence on judicial review).

The first sentence and first portion of the second sentence of subdivision (f) is continued in Section 1123.730(c) (type of relief). The last portion of the second sentence of subdivision (f) is continued in substance in Section 1121.140 (exercise of agency discretion).

The first through sixth sentences of subdivision (g), and the first, second, and third sentences of subdivision (h)(3), are superseded by Section 1123.720 (stay). The seventh sentence of subdivision (g) and the fourth sentence of subdivision (h)(3) are continued in Section 1123.150 (proceeding not moot because penalty completed).

Subdivision (i) is continued without change in Section 1123.840 (disposal of administrative record).

Subdivision (j) is continued in Section 19576.1 of the Government Code.

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

~~1094.6. (a) Judicial review of any decision of a local agency, other than school district, as the term local agency is defined in Section 54951 of the Government Code, or of any commission, board, officer or agent thereof, may be had pursuant to Section 1094.5 of this code only if the petition for writ of mandate pursuant to such section is filed within the time limits specified in this section.~~

~~(b) Any such petition shall be filed not later than the 90th day following the date on which the decision becomes final. If there is no provision for reconsideration of the decision, or for a written decision or written findings supporting the decision, in any applicable provision of any statute, charter, or rule, for the purposes of this section, the decision is final on the date it is announced. If the decision is not announced at the close of the hearing, the date, time, and place of the announcement of the decision shall be announced at the hearing. If there is a provision for reconsideration, the decision is final for purposes of this section upon the expiration of the period during which such reconsideration~~

can be sought; provided, that if reconsideration is sought pursuant to any such provision the decision is final for the purposes of this section on the date that reconsideration is rejected. If there is a provision for a written decision or written findings, the decision is final for purposes of this section upon the date it is mailed by first-class mail, postage prepaid, including a copy of the affidavit or certificate of mailing, to the party seeking the writ. Subdivision (a) of Section 1013 does not apply to extend the time, following deposit in the mail of the decision or findings, within which a petition shall be filed.

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

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

(e) As used in this section, decision means a decision subject to review pursuant to Section 1094.5, suspending, demoting, or dismissing an officer or employee, revoking, or denying an application for a permit, license, or other

~~entitlement, or denying an application for any retirement benefit or allowance.~~

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

~~As used in this subdivision, "party" means an officer or employee who has been suspended, demoted or dismissed; a person whose permit, license, or other entitlement has been revoked or suspended, or whose application for a permit, license, or other entitlement has been denied; or a person whose application for a retirement benefit or allowance has been denied.~~

~~(g) This section shall prevail over any conflicting provision in any otherwise applicable law relating to the subject matter, unless the conflicting provision is a state or federal law which provides a shorter statute of limitations, in which case the shorter statute of limitations shall apply.~~

Comment. Subdivision (a) and the first sentence of subdivision (b) of former Section 1094.6 is superseded by Sections 1121.230 ("agency" defined), 1121.260 ("local agency" defined), 1123.640 (time for filing petition for review), 1123.120 (finality), and 1123.140 (exception to finality requirement). The second, fourth, and fifth sentences of subdivision (b) are superseded by Section 1123.120. The third sentence of subdivision (b) is continued in Government Code Section 54962(b).

The first sentence of subdivision (c) is superseded by Section 1123.830 (preparation of the record). The second sentence of subdivision (c) is superseded by Section 1123.910 (fee for preparing record). The third sentence of subdivision (c) is superseded by Code of Civil Procedure Section 1123.820 (contents of administrative record).

Subdivision (d) is superseded by Section 1123.640 (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 1123.640 (time for filing petition for review) and 1121.270 ("party" defined). Subdivision (g) is not continued.

COMMISSION ON PROFESSIONAL COMPETENCE

Educ. Code § 44945 (amended). Judicial review

44945. The decision of the Commission on Professional Competence may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction ~~in the same manner as a decision made by a hearing officer under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The court, on review, shall exercise its independent judgment on the evidence~~ *under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure*. The proceeding shall be set for hearing at the earliest possible date and shall take precedence over all other cases, except older matters of the same character and matters to which special precedence is given by law.

Comment. Section 44945 is amended to make judicial review under this section subject to the provisions for judicial review in the Code of Civil Procedure. The former second sentence of Section 44945 is superseded by the standards of review in Code of Civil Procedure Sections 1123.410-1123.460.

BOARD OF GOVERNORS OF CALIFORNIA COMMUNITY COLLEGES

Educ. Code § 87682 (amended). Judicial review

87682. The decision of the arbitrator or administrative law judge, as the case may be, may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction ~~in the same manner as a decision made by an administrative law judge under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The court, on review, shall exercise its independent judgment on the evidence~~ *under Title 2 (commencing with Section 1120) of Part 3 of the Code of*

Civil Procedure. The proceeding shall be set for hearing at the earliest possible date and shall take precedence over all other cases, except older matters of the same character and matters to which special precedence is given by law.

Comment. Section 87682 is amended to make judicial review under this section subject to the provisions for judicial review in the Code of Civil Procedure. The former second sentence of Section 87682 is superseded by the standards of review in Code of Civil Procedure Sections 1123.410-1123.460.

COSTS IN CIVIL ACTIONS RESULTING FROM ADMINISTRATIVE PROCEEDINGS

Gov't Code § 800 (repealed). Costs in action to review administrative proceeding

~~800. In any civil action to appeal or review the award, finding, or other determination of any administrative proceeding under this code or under any other provision of state law, except actions resulting from actions of the State Board of Control, where it is shown that the award, finding, or other determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity, the complainant if he or she prevails in the civil action may collect reasonable attorney's fees, computed at one hundred dollars ($100) per hour, but not to exceed seven thousand five hundred dollars ($7,500), where he or she is personally obligated to pay the fees, from the public entity, in addition to any other relief granted or other costs awarded.~~

~~This section is ancillary only, and shall not be construed to create a new cause of action.~~

~~Refusal by a public entity or officer thereof to admit liability pursuant to a contract of insurance shall not be considered arbitrary or capricious action or conduct within the meaning of this section.~~

Comment. Former Section 800 is continued in Code of Civil Procedure Section 1123.950.

PUBLIC EMPLOYMENT RELATIONS BOARD

Gov't Code § 3520 (amended). Judicial review of unit determination or unfair practice case

3520. (a) Judicial review of a unit determination shall only be allowed: (1) when the board, in response to a petition from the state or an employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review.

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

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

(c) ~~Such~~ *The* petition shall be filed in the ~~district~~ court of appeal in the appellate district where the unit determination or unfair practice dispute occurred. ~~The petition shall be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, as applicable~~. Upon the filing of ~~such~~ *the* petition, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board, within 10 days after the clerk's notice unless ~~such~~ *the* time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board

~~such~~ *any* temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying, or setting aside the order of the board. ~~The findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, shall be conclusive.~~ The provisions of ~~Title 1 (commencing with Section 1067)~~ *Title 2 (commencing with Section 1120)* of Part 3 of the Code of Civil Procedure ~~relating to writs~~ shall, except where specifically superseded herein, apply to proceedings pursuant to this section.

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

Comment. Section 3520 is amended to make judicial review of the Public Employment Relations Board subject to the provisions for judicial review in the Code of Civil Procedure, except as provided in this section. The board is exempt from the provision in the Code of Civil Procedure governing standard of review of questions of law, so existing case law will continue to apply to the board. See Code Civ. Proc. § 1123.420(b) & Comment.

The former second sentence of subdivision (c) which required the petition to be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, is superseded by Code of Civil Procedure Section 1123.630. Under that section, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the respondent, unless the

agency orders that it shall become effective sooner. Code Civ. Proc. § 1123.630(b)(2).

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

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

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

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

(c) ~~Such~~ *The* petition shall be filed in the ~~district~~ court of appeal in the appellate district where the unit determination or unfair practice dispute occurred. ~~The petition shall be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, as applicable~~. Upon the filing of ~~such~~ *the* petition, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board, within 10 days after the clerk's notice unless ~~such~~ *the* time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board ~~such~~ *any* temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree

enforcing, modifying, or setting aside the order of the board. ~~The findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, are conclusive.~~ The provisions of ~~Title 1 (commencing with Section 1067)~~ *Title 2 (commencing with Section 1120)* of Part 3 of the Code of Civil Procedure ~~relating to writs~~ shall, except where specifically superseded herein, apply to proceedings pursuant to this section.

(d) If the time to petition for ~~extraordinary relief from~~ *judicial review of* a board decision has expired, the board may seek enforcement of any final decision or order in a ~~district~~ court of appeal or a superior court in the *appellate* district where the unit determination or unfair practice case occurred. The board shall respond within 10 days to any inquiry from a party to the action as to why the board has not sought court enforcement of the final decision or order. If the response does not indicate that there has been compliance with the board's final decision or order, the board shall seek enforcement of the final decision or order upon the request of the party. The board shall file in the court the record of the proceeding, certified by the board, and appropriate evidence disclosing the failure to comply with the decision or order. If, after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person or entity refuses to comply with the order, the court shall enforce ~~such~~ *the* order by ~~writ of mandamus~~ *appropriate process*. The court shall not review the merits of the order.

Comment. Section 3542 is amended to make judicial review of the Public Employment Relations Board subject to the provisions for judicial review in the Code of Civil Procedure, except as provided in this section. Special provisions of this section prevail over general provisions of the Code of Civil Procedure governing judicial review. See Code of Civil Procedure Section 1121.110 (conflicting or inconsistent statute controls). The board is exempt from the provision in the Code of Civil Procedure governing standard of review of questions of law, so existing case law

will continue to apply to the board. See Code Civ. Proc. § 1123.420(b) & Comment.

The former second sentence of subdivision (c) which required the petition to be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, is superseded by Code of Civil Procedure Section 1123.630. Under that section, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the respondent, unless the agency orders that it shall become effective sooner. Code Civ. Proc. § 1123.630(b)(2).

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

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

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

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

(c) ~~Such~~ *The* petition shall be filed in the ~~district~~ court of appeal in the appellate district where the unit determination or unfair practice dispute occurred. ~~The petition shall be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, as applicable~~. Upon the filing of ~~such~~ *the*

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

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

Comment. Section 3564 is amended to make judicial review of the Public Employment Relations Board subject to the provisions for judicial review in the Code of Civil Procedure. The board is exempt from the provision in the Code of Civil Procedure governing standard of review of questions of law, so existing case law will continue to apply to the board. See Code Civ. Proc. § 1123.420(b) & Comment.

The former second sentence of subdivision (c) which required the petition to be filed within 30 days after issuance of the board's final

order, order denying reconsideration, or order joining in the request for judicial review, is superseded by Code of Civil Procedure Section 1123.630. Under that section, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the respondent, unless the agency orders that it shall become effective sooner. Code Civ. Proc. § 1123.630(b)(2).

ADMINISTRATIVE PROCEDURE ACT — RULEMAKING

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

11350. (a) ~~Any interested~~ *Except as provided in subdivisions (d) and (e), a* person may obtain a judicial declaration as to the validity of any regulation ~~by bringing an action for declaratory relief in the superior court in accordance with~~ *under Title 2 (commencing with Section 1120) of Part 3 of* the Code of Civil Procedure. ~~The right to a judicial determination shall not be affected either by the failure to petition or to seek reconsideration of a petition filed pursuant to Section 11347.1 before the agency promulgating the regulations.~~ The regulation may be declared to be invalid for a substantial failure to comply with this chapter, or, in the case of an emergency regulation or order to repeal, upon the ground that the facts recited in the statement do not constitute an emergency within the provisions of Section 11346.1.

(b) In addition to any other ground that may exist, a regulation may be declared invalid if either of the following exists:

(1) The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.

(2) The agency declaration pursuant to paragraph (8) of subdivision (a) of Section 11346.5 is in conflict with substantial evidence in the record.

~~For purposes of this section, the record shall be deemed to consist of all material maintained in the file of the rulemaking proceeding as defined in Section 11347.3.~~

(c) The approval of a regulation by the office or the Governor's overruling of a decision of the office disapproving a regulation shall not be considered by a court in ~~any action for declaratory relief brought with respect to~~ *a proceeding for judicial review of* a regulation.

(d) Notwithstanding Sections 1123.820 and 1123.850 of the Code of Civil Procedure, on judicial review:

(1) The court may not require the agency to add to the administrative record an explanation of reasons for a regulation.

(2) No evidence is admissible that was not in existence at the time of the agency proceeding under this chapter.

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

Comment. Section 11350 is amended to recognize that judicial review of agency regulations is now accomplished under Title 2 of Part 3 of the Code of Civil Procedure. The former second sentence of subdivision (a) is continued in Code of Civil Procedure Section 1123.330 (judicial review of rulemaking). The former second sentence of subdivision (b)(2) is continued in Code of Civil Procedure Section 1123.820(b) (contents of administrative record).

Subdivision (d) codifies one aspect of Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 578, 888 P.2d 1268, 1278, 38 Cal. Rptr. 2d 139, 149 (1995), and is consistent with Section 11347.3 which prescribes the contents of the rulemaking file and requires an affidavit of an agency official that the record is complete and the date on which the record was closed.

ADMINISTRATIVE PROCEDURE ACT — ADJUDICATION

Gov't Code § 11420.10 (amended). ADR authorized

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

(1) Mediation by a neutral mediator.

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

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

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

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

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

Gov't Code § 11425.50 (amended). Decision

11425.50. (a) The decision shall be in writing and shall include a statement of the factual and legal basis for the decision as to each of the principal controverted issues.

(b) The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. If the factual basis for the decision includes a determination *of the presiding officer* based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on ~~judicial~~ *administrative* review the ~~court~~ *agency* shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

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

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

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

Comment. Subdivision (b) of Section 11425.50 is amended to apply to the reviewing agency the requirement that great weight be given to

factual determinations of the presiding officer based on credibility, consistent with requiring the court on judicial review to do the same. The former requirement in subdivision (b) that the court give great weight on judicial review to determinations of the presiding officer based on credibility is continued in Code of Civil Procedure Section 1123.430(b).

Subdivision (b) requires the agency to give great weight to factual determinations, but not to application of law to fact.

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

~~11523. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section, the petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. On request of the petitioner for a record of the proceedings, the complete record of the proceedings, or the parts thereof as are designated by the petitioner in the request, shall be prepared by the Office of Administrative Hearings or the agency and shall be delivered to petitioner, within 30 days after the request, which time shall be extended for good cause shown, upon the payment of the fee specified in Section 69950 for the transcript, the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which is collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a~~

~~transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until 30 days after its delivery to him or her. The agency may file with the court the original of any document in the record in lieu of a copy thereof. In the event that the petitioner prevails in overturning the administrative decision following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification.~~

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

The second sentence is superseded by Code of Civil Procedure Section 1123.630 (time for filing petition for review of decision in adjudicative proceeding).

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

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

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

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

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

The eighth sentence is superseded by Code of Civil Procedure Section 1123.630 (time for filing petition for review of decision in adjudicative proceeding).

The ninth sentence is continued in substance in Code of Civil Procedure Section 1123.710 (applicability of rules of practice for civil

actions) and Evidence Code Section 1511 (duplicate and original of a writing generally admissible to same extent).

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

Gov't Code § 11524 (amended). Continuances

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

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

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

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

STATE PERSONNEL BOARD AND DEPARTMENT OF PERSONNEL ADMINISTRATION

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

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

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

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

(d) Disciplinary action taken pursuant to this section is not subject to Sections 19180, 19574.1, 19574.2, 19575, 19575.5, 19579, 19580, 19581, 19581.5, 19582, 19583, and 19587, or

to State Personnel Board Rules 51.1 to 51.9, inclusive, 52, and 52.1 to 52.5, inclusive. *Disciplinary action taken pursuant to this section is not subject to judicial review.*

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

Comment. Section 19576.1 is amended to add the second sentence to subdivision (d). This continues the substance of former Code of Civil Procedure Section 1094.5(j).

LOCAL AGENCIES

Gov't Code § 54963 (added). Decision of local agency; judicial review

54963. (a) This section applies to a decision of a local agency as defined in Section 1121.250 of the Code of Civil Procedure, other than by a school district, suspending, demoting, or dismissing an officer or employee, revoking or denying an application for a permit, license, or other entitlement, or denying an application for any retirement benefit or allowance.

(b) If the decision is not announced at the close of the hearing, the date, time, and place of the announcement of the decision shall be announced at the hearing.

(c) Judicial review of the decision shall be under Title 2 (commencing with 1120) of Part 3 of the Code of Civil Procedure.

Comment. Subdivision (a) of Section 54963 continues subdivision (e) of former Code of Civil Procedure Section 1094.6. Subdivision (b) continues the third sentence of subdivision (b) of former Code of Civil Procedure Section 1094.6. Subdivision (c) is new.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment. Section 65009 is amended to add subdivision (j) to make clear that judicial review under this section shall be under the judicial review provisions of the Code of Civil Procedure. See Code Civ. Proc. §§ 1120-1123.950. Paragraph (1) of subdivision (j) is consistent with Code of Civil Procedure Section 1121(d). Under paragraph (2) of

subdivision (j), the time limits and notice provisions of Code of Civil Procedure Sections 1123.630 and 1123.640 do not apply to proceedings governed by this section.

ZONING ADMINISTRATION

Gov't Code § 65907 (amended). Time for attacking administrative determination

65907. (a) ~~Except as otherwise provided by ordinance, any action or proceeding to attack, review, set aside, void, or annul~~ *A proceeding for judicial review of* any decision of matters listed in Sections 65901 and 65903, or ~~concerning~~ *of* any of the proceedings, acts, or determinations taken, done, or made prior to ~~such~~ *the* decision, or ~~to determine the reasonableness, legality, or validity~~ of any condition attached thereto, ~~shall not be maintained by any person unless the action or proceeding is commenced within 90 days and the legislative body is served within 120 days after the date of the decision. Thereafter,~~ *shall be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. After the time provided in Section 1123.640 of the Code of Civil Procedure has expired,* all persons are barred from ~~any such action or~~ *a* proceeding *for judicial review* or any defense of invalidity or unreasonableness of that decision or of these proceedings, acts, or determinations. ~~All actions~~ *A proceeding for judicial review* brought pursuant to this section shall be given preference over all other civil matters before the court, except probate, eminent domain, and forcible entry and unlawful detainer proceedings.

(b) Notwithstanding Section 65803, this section shall apply to charter cities.

~~(c) The amendments to subdivision (a) shall apply to decisions made pursuant to this division on or after January 1, 1984.~~

Comment. Subdivision (a) of Section 65907 is amended to make proceedings to which it applies subject to the judicial review provisions in the Code of Civil Procedure. Subdivision (c) is deleted as no longer necessary.

PRIVATE HOSPITAL BOARDS

Health & Safety Code §§ 1339.62-1339.64 (added). Judicial review

Article 12. Judicial Review of Decision of Private Hospital Board

§ 1339.62. Definitions

1339.62. As used in this article:

(a) "Adjudicative proceeding" is defined in Section 1121.220 of the Code of Civil Procedure.

(b) "Decision" is defined in Section 1121.250 of the Code of Civil Procedure.

Comment. Section 1339.62 applies definitions applicable to the judicial review provisions in the Code of Civil Procedure.

§ 1339.63. Judicial review; venue

1339.63. (a) Judicial review of a decision of a private hospital board in an adjudicative proceeding shall be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

(b) The proper county for judicial review of a decision of a private hospital board in an adjudicative proceeding is determined under Title 4 (commencing with Section 392) of Part 2 of the Code of Civil Procedure.

Comment. Subdivision (a) of Section 1339.63 continues the effect of former Code of Civil Procedure Section 1094.5(d). See also Anton v. San Antonio Community Hosp., 19 Cal. 3d 802, 815-20, 567 P.2d 1162, 140 Cal. Rptr. 442 (1979) (administrative mandamus available to review action by private hospital board).

Subdivision (b) continues the substance of existing law. See Code Civ. Proc. § 1109; California Administrative Mandamus § 8.16, at 269 (Cal.

Cont. Ed. Bar, 2d ed. 1989). See also Sections 1339.62 ("adjudicative proceeding" and "decision" defined); 1339.64 (standard of review of factfinding).

Judicial review of a decision of a public hospital is also under Code of Civil Procedure Sections 1120-1123.950. See Code Civ. Proc. §§ 1120 (title applies to judicial review of agency action), 1121.130 ("agency" broadly defined to include all governmental entities).

§ 1339.64. Standard of review of factfinding

1339.64. The standard for judicial review of whether a decision of a private hospital board in an adjudicative proceeding is based on an erroneous determination of fact made or implied by the board is whether the board's determination is supported by substantial evidence in the light of the whole record.

Comment. Section 1339.64 continues former Code of Civil Procedure Section 1094.5(d), except that the independent judgment standard of review of alleged discriminatory action under Section 1316 is not continued.

AGRICULTURAL LABOR RELATIONS BOARD

Lab. Code § 1160.8 (amended). Review of final order of board; procedure

1160.8. Any person aggrieved by the final order of the board granting or denying in whole or in part the relief sought may obtain a review of ~~such~~ *the* order in the court of appeal having jurisdiction over the county wherein the unfair labor practice in question was alleged to have been engaged in, or wherein ~~such~~ *the* person resides or transacts business, ~~by filing in such court a written petition requesting that the order of the board be modified or set aside. Such petition shall be filed with the court within 30 days from the date of the issuance of the board's order~~ *under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure*. Upon the filing of ~~such~~ *the* petition *for review*, the court shall cause notice to be served upon the board and thereupon shall have

jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board within 10 days after the clerk's notice unless ~~such~~ *the* time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board ~~such~~ *any* temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the board. ~~The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.~~

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

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

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

The former second sentence of Section 1160.8 which required the petition to be filed within 30 days from the date of issuance of the board's order is superseded by Code of Civil Procedure Section 1123.630. Under that section, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the respondent, unless the

agency orders that it shall become effective sooner. Code Civ. Proc. § 1123.630(b)(2).

WORKERS' COMPENSATION APPEALS BOARD

Lab. Code § 5950 (amended). Judicial review

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

Comment. Section 5950 is amended to delete the second sentence specifying the time limit for judicial review. Under Code of Civil Procedure Section 1123.630, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the respondent, unless the agency orders that it shall become effective sooner. Code Civ. Proc. § 1123.630(b)(2).

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

~~5951. The writ of review shall be made returnable at a time and place then or thereafter specified by court order and shall direct the appeals board to certify its record in the case to the court within the time therein specified. No new or additional evidence shall be introduced in such court, but the cause shall be heard on the record of the appeals board as certified to by it.~~

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

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

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

~~(a) The appeals board acted without or in excess of its powers.~~

~~(b) The order, decision, or award was procured by fraud.~~

~~(c) The order, decision, or award was unreasonable.~~

~~(d) The order, decision, or award was not supported by substantial evidence.~~

~~(e) If findings of fact are made, such findings of fact support the order, decision, or award under review.~~

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

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

The last sentence is superseded by Code of Civil Procedure Sections 1123.430 (review of factfinding), 1123.810 (administrative record exclusive basis for review), and 1123.850 (new evidence). Nothing in the Code of Civil Procedure or in this article permits the court to hold a trial de novo.

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

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

Comment. Section 5953 is largely superseded by the judicial review provisions of the Code of Civil Procedure. See Section 5954. The first sentence is superseded by Code of Civil Procedure Section 1123.430 (review of factfinding). The second sentence is superseded by Code of Civil Procedure Section 1123.420 (review of interpretation of law). The fourth sentence is superseded by Code of Civil Procedure Section 1123.730 (type of relief).

Lab. Code § 5954 (amended). Judicial review

5954. ~~The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable, apply to proceedings in the courts under the provisions of this article. A copy of every pleading filed pursuant to the terms of this article shall be served on the appeals board and upon every party who entered an appearance in the action before the appeals board and whose interest therein is adverse to the party filing such pleading.~~ *Judicial review shall be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.*

Comment. Section 5954 is amended to replace the former provisions with a reference to the judicial review provisions of the Code of Civil Procedure. Special provisions of this article prevail over general provisions of the Code of Civil Procedure governing judicial review. See

Code Civ. Proc. § 1121.110 (conflicting or inconsistent statute controls). Copies of pleadings in judicial review proceedings must be served on the parties. See Code Civ. Proc. §§ 1123.610 (petition for review), 1123.710 (applicability of rules of practice for civil actions).

Lab. Code § 5955 (amended). Courts having jurisdiction; mandate

5955. No court of this state, except the Supreme Court and the courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or award of the appeals board, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the appeals board in the performance of its duties ~~but a writ of mandate shall lie from the Supreme Court or a court of appeal in all proper cases~~.

Comment. Section 5955 is amended to delete the former reference to a writ of mandate. The writ of mandate has been replaced by a petition for review. See Section 5954; Code Civ. Proc. § 1123.610 (petition for review). See also Code Civ. Proc. § 1123.510(b) (original writ jurisdiction of Supreme Court and courts of appeal not affected).

Lab. Code § 5956 (repealed). Stay of order

~~5956. The filing of a petition for, or the pendency of, a writ of review shall not of itself stay or suspend the operation of any order, rule, decision, or award of the appeals board, but the court before which the petition is filed may stay or suspend, in whole or in part, the operation of the order, decision, or award of the appeals board subject to review, upon the terms and conditions which it by order directs, except as provided in Article 3 of this chapter.~~

Comment. Former Section 5956 is superseded by Code of Civil Procedure Section 1123.720 (stays). The stay provisions of the Code of Civil Procedure are subject to Article 3 (commencing with Section 6000) (undertaking on stay order). See Code Civ. Proc. § 1121.110 (conflicting or inconsistent statute prevails).

Lab. Code § 6000 (amended). Undertaking on stay order

6000. The operation of any order, decision, or award of the appeals board under the provisions of this division or any judgment entered thereon, shall not at any time be stayed by the court to which petition is made for ~~a writ of~~ *judicial* review, unless an undertaking is executed on the part of the petitioner.

Comment. Section 6000 is amended reflect replacement of the writ of review by the judicial review procedure in Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. The stay provisions of Code of Civil Procedure Section 1123.720 are subject to this article. See Code Civ. Proc. § 1121.110 (conflicting or inconsistent statute prevails).

CALIFORNIA ENVIRONMENTAL QUALITY ACT

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

21168. ~~Any~~ *(a) Except as provided in subdivision (b), an* action or proceeding to attack, review, set aside, void or annul a determination, finding, or decision of a public agency~~, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency~~, on the grounds of noncompliance with ~~the provisions of~~ this division shall be ~~in accordance with the provisions of Section 1094.5~~ *under Title 2 (commencing with Section 1120) of Part 3* of the Code of Civil Procedure.

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

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

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.

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

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

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

STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

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

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

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

PUBLIC UTILITIES COMMISSION

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

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

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

PROPERTY TAXATION

Rev. & Tax. Code § 2954 (amended). Assessee's challenge by writ

2954. (a) An assessee may challenge a seizure of property made pursuant to Section 2953 by petitioning for ~~a writ of prohibition or writ of mandate in the superior court~~ *review under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure* alleging:

(1) That there are no grounds for the seizure;

(2) That the declaration of the tax collector is untrue or inaccurate; and

(3) That there are and will be sufficient funds to pay the taxes prior to the date such taxes become delinquent.

(b) As a condition of maintaining the ~~special~~ *review* proceedings ~~for a writ~~, the assessee shall file with the tax collector a bond sufficient to pay the taxes and all fees and charges actually incurred by the tax collector as a result of the seizure, and shall furnish proof of the bond with the court. Upon the filing of the bond, the tax collector shall release the property to the assessee.

Comment. Section 2954 is amended to make judicial review under the section subject to general provisions in the Code of Civil Procedure for review of agency action.

Rev. & Tax. Code § 2955 (technical amendment). Recovery of costs by assessee

2955. If the assessee prevails in the ~~special~~ *review* proceeding ~~for a writ~~ under Section 2954, the assessee is entitled to recover from the county all costs, including attorney's fees, incurred by virtue of the seizure and subsequent actions, and the tax collector shall bear the costs of seizure and any fees and expenses of keeping the seized property. If, however, subsequent to the date the taxes in question become delinquent, the taxes are not paid in full and it becomes necessary for the tax collector to seize property of the assessee in payment of the taxes or to commence an action against the assessee for recovery of the taxes, in addition to all taxes and delinquent penalties, the assessee shall reimburse the county for all costs incurred at the time of the original seizure and all other costs charged to the tax collector or the county as a result of the original seizure and any subsequent actions.

Comment. Section 2955 is amended to recognize that judicial review under Section 2954 is subject to general provisions in the Code of Civil Procedure for review of agency action.

Rev. & Tax. Code § 2956 (technical amendment). Precedence for court hearing

2956. In all ~~special~~ *review* proceedings ~~for a writ~~ brought under this article, all courts in which such proceedings are pending shall, upon the request of any party thereto, give such proceedings precedence over all other civil actions and proceedings, except actions and proceedings to which special precedence is otherwise given by law, in the matter of the setting of them for hearing or trial and in their hearing or trial,

to the end that all such proceedings shall be quickly heard and determined.

Comment. Section 2956 is amended to recognize that judicial review under this article is subject to general provisions in the Code of Civil Procedure for review of agency action.

STATE BOARD OF EQUALIZATION

Rev. & Tax. Code § 7279.6 (amended). Judicial review

7279.6. An arbitrary and capricious action of the board in implementing the provisions of this chapter shall be reviewable ~~by writ~~ *under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure*.

Comment. Section 7279.6 is amended to make judicial review under the section subject to general provisions in the Code of Civil Procedure for review of agency action.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

Unemp. Ins. Code § 1243 (amended). Judicial review

1243. A decision of the appeals board on an appeal from a denial of a protest under Section 1034 or on an appeal from a denial or granting of an application for transfer of reserve account under Article 5 (commencing with Section 1051) shall be subject to judicial review ~~if an appropriate proceeding is filed by the employer within 90 days of the service of notice of the decision~~ *under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure*. The director may, in writing, extend for a period of not exceeding two years the time *provided in Section 1123.630 of the Code of Civil Procedure* within which such proceeding may be instituted if written request for such extension is filed with the director within the ~~90-day period~~ *time prescribed by that section*.

Comment. Section 1243 is amended to make clear that judicial review under the section shall be under Code of Civil Procedure Sections 1120-1123.950. The former 90-day time limit for a proceeding under this section is superseded by the time limit provided in Code of Civil Procedure Section 1123.630 (30 days from effective date of decision or giving of notice, whichever is later).

DEPARTMENT OF MOTOR VEHICLES

Veh. Code § 13559 (amended). Petition for review

13559. (a) Notwithstanding Section 14400 or 14401, ~~within 30 days of the issuance of the~~ *a person who has been issued a* notice of determination of the department sustaining an order of suspension or revocation of the person's privilege to operate a motor vehicle, after the hearing pursuant to Section 13558, ~~the person~~ may ~~file a~~ a petition for review of the order in the court of competent jurisdiction in the person's county of residence. ~~The filing of a petition for judicial review shall not stay the order of suspension or revocation. The review shall be on the record of the hearing and the court shall not consider other evidence. If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is not supported by the evidence in the record,~~ *Except as provided in this section, the proceedings shall be conducted under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. In addition to the relief authorized under Title 2,* the court may order the department to rescind the order of suspension or revocation and return, or reissue a new license to, the person.

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

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

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

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

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

Comment. Subdivision (b) of Section 14401 is amended to recognize that judicial review is under Code of Civil Procedure Sections 1120-1123.950. See Code Civ. Proc. § 1121.120 (other forms of judicial review replaced).

DEPARTMENT OF SOCIAL SERVICES

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

10962. The applicant or recipient or the affected county, within one year after receiving notice of the director's final decision, may file a petition ~~with the superior court~~, *for judicial review* under ~~the provisions of Section 1094.5~~ *Title 2 (commencing with Section 1120) of Part 3* of the Code of Civil Procedure~~, praying for a review of the entire proceedings in the matter, upon questions of law involved in the case. Such~~. *The* review~~, if granted~~, shall be the exclusive remedy available to the applicant or recipient or county for review of the director's decision. The director shall be the sole respondent in ~~such~~ *the* proceedings. Immediately upon

being served the director shall serve a copy of the petition on the other party entitled to judicial review and ~~such~~ *that* party shall have the right to intervene in the proceedings.

No filing fee shall be required for the filing of a petition *for review* pursuant to this section. ~~Any such petition to the superior court~~ *The proceeding for judicial review* shall be entitled to a preference in setting a date for hearing ~~on the petition~~. No bond shall be required in the case of any petition for review, nor in any appeal ~~therefrom~~ *from the decision of the superior court*. The applicant or recipient shall be entitled to reasonable attorney's fees and costs, if ~~he obtains a decision in his favor~~ *the applicant or recipient obtains a favorable decision.*

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

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

UNCODIFIED

Uncodified (added). Severability

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

Uncodified (added). Application of new law

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

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

COMMENTS TO TECHNICAL CONFORMING REVISIONS

COMMENTS TO TECHNICAL CONFORMING REVISIONS

Note. Senate Bill 261 makes revisions in existing codes to conform them to the new provisions in the Code of Civil Procedure for judicial review of agency action. To save printing costs, the text of Senate Bill 261 is not set out in this Appendix. Instead, Comments to sections in the bill are set out below. Leadlines for uncodified acts use the same numbering system as West's Annotated California Codes.

Department of Consumer Affairs

Bus. & Prof. Code § 125.7 (amended). Restraining orders

Comment. Section 125.7 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Bus. & Prof. Code § 125.8 (amended). Temporary order restraining licensee

Comment. Section 125.8 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Denial, Suspension, and Revocation of Licenses Generally

Bus. & Prof. Code § 494 (amended). Interim suspension or restriction order

Comment. Section 494 is amended to revise references to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Healing Arts Generally

Bus. & Prof. Code § 809.8 (amended). Judicial review, discovery, and testimony

Comment. Section 809.8 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Medical Board of California

Bus. & Prof. Code § 2087 (amended). Action to compel approval or admission

Comment. Section 2087 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former language prohibiting the court from exercising independent judgment on the evidence is deleted as unnecessary, since under Code of Civil Procedure Section 1123.430 the standard of review of factfinding is substantial evidence in light of the whole record.

Bus. & Prof. Code § 2337 (amended). Calendar preference

Comment. Section 2337 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Board of Pharmacy

Bus. & Prof. Code § 4300 (amended). Suspension or revocation of license; judicial review

Comment. Section 4300 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Board of Examiners in Veterinary Medicine

Bus. & Prof. Code § 4875.6 (amended). Procedure to contest citation or penalty

Comment. Section 4875.6 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Contractors' State License Board

Bus. & Prof. Code § 7071.11 (amended). Action on bond

Comment. Section 7071.11 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Bureau of Security and Investigative Services

Bus. & Prof. Code § 7502.4 (amended). Restraining order

Comment. Section 7502.4 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Structural Pest Control Board

Bus. & Prof. Code § 8662 (amended). Appeal of fine or suspension; judicial review

Comment. Section 8662 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Bus. & Prof. Code § 8698.3 (amended). (Operative until January 1, 1997) Civil penalties; judicial review

Comment. Section 8698.3 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former 30-day time limit of Section 8698.3 is superseded by Code of Civil Procedure Section 1123.640.

Real Estate Commissioner

Bus. & Prof. Code § 10471.5 (technical amendment). Notice of commissioner's decision

Comment. Section 10471.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former requirement of notice of the time to file a petition for review is superseded by Code of Civil Procedure Section 1123.630.

Department of Food and Agriculture (part 1)

Bus. & Prof. Code § 12015.3 (amended). (Operation contingent) Civil penalty

Comment. Section 12015.3 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (c)(9) prescribing the time limit for a petition is superseded by Code of Civil Procedure Section 1123.640.

Attorney General (part 1)

Bus. & Prof. Code § 17550.18 (amended). (Operative until January 1, 1999) Severability; burden of proof; proceeding challenging decision of Attorney General

Comment. Section 17550.18 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference to substantial evidence review is continued in substance in Code of Civil Procedure Section 1123.430 (standard of review of factfinding). See also Code Civ. Proc. § 1123.450 (review of

agency exercise of discretion). The former provision on the record for review is superseded by Code of Civil Procedure Section 1123.820 (contents of administrative record) and 1123.850 (new evidence on judicial review).

California Horse Racing Board

Bus. & Prof. Code § 19463 (amended). Finality of action

Comment. Section 19463 is amended to make clear that judicial review of board action is under the judicial review provisions of the Code of Civil Procedure. The former last sentence of Section 19463 (30-day limitation period) is superseded by Code of Civil Procedure Section 1123.630 (limitation period for adjudicative proceeding). For administrative action other than in an adjudicative proceeding, the general limitations periods for ordinary civil actions will apply, as determined by the nature of the right asserted. See, e.g., Allen v. Humboldt County Board of Supervisors, 220 Cal. App. 2d 877, 884-85, 34 Cal. Rptr. 232, 236 (1963); see also Berkeley Unified School Dist. v. State, 33 Cal. App. 4th 350, 362-63, 365, 39 Cal. Rptr. 2d 326, 333, 335 (1995).

Attorney General (part 2)

Bus. & Prof. Code § 19813 (amended). Conduct of proceedings

Comment. Section 19813 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Civ. Code § 1812.203 (amended). Filing and updating disclosure statements

Comment. Section 1812.203 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference to superior court is superseded by Code of Civil Procedure Section 1123.510 (superior court jurisdiction). The former reference to "other judicial relief" is deleted, since the judicial review provisions of the Code of Civil Procedure provide the exclusive means of judicial review. See Code Civ. Proc. § 1121.120.

State Board of Equalization & Franchise Tax Board

Code Civ. Proc. § 706.075 (amended). Withholding order for taxes

Comment. Section 706.075 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

State Regulatory Agencies

Code Civ. Proc. § 1028.5 (technical amendment). Action between small business and regulatory agency

Comment. Section 1028.5 is amended to revise the reference to former Section 800 of the Government Code, which has been recodified in the Code of Civil Procedure.

General Law

Code Civ. Proc. § 1089.5 (amended). Answer to petition for writ of mandate

Comment. Section 1089.5 is amended to delete the reference to Section 11523 of the Government Code, which has been repealed. For formal adjudication under the Administrative Procedure Act, the record is requested pursuant to Section 1123.830, but Section 1089.5 does not apply to judicial review proceedings under Sections 1120-1123.950. See Section 1123.710 (Part 2 applies, but not Part 3).

Public Entities (part 1)

Code Civ. Proc. § 1245.255 (amended). Judicial review; resolution of necessity

Comment. Section 1245.255 is amended to change the former reference to a writ of mandate to a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

School District Governing Boards

Educ. Code § 35145 (amended). Public meetings

Comment. Section 35145 is amended to delete the reference to mandamus or injunction. See Gov't Code § 54960.1 (petition for review).

Community College District Governing Boards

Educ. Code § 72121 (amended). Public meetings

Comment. Section 72121 is amended to delete the reference to mandamus or injunction. See Gov't Code § 54960.1 (petition for review).

Educ. Code § 81960 (amended). Proceeding to compel performance of duties

Comment. Section 81960 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Educ. Code § 87611 (amended). Judicial review

Comment. Section 87611 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Trustees of California State University

Educ. Code § 90072 (amended). Judicial review

Comment. Section 90072 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Regents of the University of California

Educ. Code § 92491 (amended). Bondholder's power to secure performance

Comment. Section 92491 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

California Educational Facilities Authority

Educ. Code § 94148 (amended). Restrictions

Comment. Section 94148 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Council for Private Postsecondary and Vocational Education

Educ. Code § 94323 (amended). Procedure for notice and hearing

Comment. Subdivision (k)(1) of Section 94323 is amended to replace the former reference to a writ of mandate with a reference to the

provisions for judicial review of Code of Civil Procedure Sections 1120-1123.950.

Former subdivision (k)(2) is deleted. The first sentence of former subdivision (k)(2) is superseded by Code of Civil Procedure Section 1123.820 (contents of administrative record). The second sentence of former subdivision (k)(2) is superseded by Code of Civil Procedure Section 1123.470 (burden of demonstrating invalidity of agency action on party asserting it). The third sentence of former subdivision (k)(2) is superseded by Code of Civil Procedure Section 1123.810 (record exclusive basis for judicial review). The fourth sentence of former subdivision (k)(2) is superseded by Code of Civil Procedure Sections 1123.420-1123.460.

Former subdivision (k)(3) is redesignated as subdivision (k)(2) and amended to delete the requirement that the party seeking a stay must establish a substantial likelihood that it will prevail on the merits. This is superseded by Code of Civil Procedure Section 1123.720(b) (petitioner likely to prevail on the merits, without a stay petitioner will suffer irreparable injury, and stay will not substantially harm others or threaten public health, safety, or welfare).

County Elections Officials

Elec. Code § 9190 (amended). Public examination; amendment or deletion of materials

Comment. Section 9190 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Elec. Code § 9295 (amended). Public examination

Comment. Section 9295 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Elec. Code § 13313 (amended). Public examination

Comment. Section 13313 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Savings and Loan Commissioner

Fin. Code § 8055 (amended). Judicial review

Comment. Section 8055 is amended to refer to the provisions for judicial review, see Code Civ. Proc. §§ 1120-1123.950, and to delete the former second sentence. The former second sentence is superseded by Code of Civil Procedure Section 1123.630. Under Section 1123.630, the time for filing a petition for review is 30 days after the decision is effective.

Fish and Game Commission

Fish & Game Code § 2076 (amended). Judicial review

Comment. Section 2076 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Department of Food and Agriculture (part 2)

Food & Agric. Code § 5311 (amended). Civil penalty

Comment. Section 5311 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference in subdivision (c) to the time within which review must be commenced is superseded by Code of Civil Procedure Section 1123.630.

State Agencies Responsible for Roadside Vegetation Control

Food & Agric. Code § 5509 (amended). Judicial review

Comment. Section 5509 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. The former second sentence of Section 5509 authorizing injunctive relief is continued in substance in Code of Civil Procedure Section 1123.730 (relief permitted).

Department of Food and Agriculture (part 3)

Food & Agric. Code § 11512.5 (amended). Suspension; appeal

Comment. Section 11512.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

The former provision in subdivision (a)(5) prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630.

Food & Agric. Code § 12648 (amended). Declaration of crop as nuisance; judicial review

Comment. Section 12648 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 12999.4 (amended). Civil penalty

Comment. Section 12999.4 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision requiring review to be sought within 30 days after the date of the decision is superseded by Code of Civil Procedure Section 1123.630.

Food & Agric. Code § 12999.5 (amended). Civil penalty

Comment. Section 12999.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (c)(9) prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630.

Food & Agric. Code § 14009 (amended). Review of action involving permit; judicial review

Comment. Section 14009 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 15071.5 (amended). Civil penalty

Comment. Section 15071.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 18931 (amended). Administrative and judicial review

Comment. Section 18931 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 19447 (amended). Civil penalty

Comment. Section 19447 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 21051.3 (amended). Civil penalty

Comment. Section 21051.3 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

The former provision in subdivision (c) prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630.

Food & Agric. Code § 21051.4 (amended). Civil penalty

Comment. Section 21051.4 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 24007 (amended). Civil penalty; judicial review

Comment. Section 24007 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (f) prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630.

Food & Agric. Code § 35928 (amended). Prohibited use of raw milk; judicial review

Comment. Subdivision (d) of Section 35928 is amended to replace the former reference to Section 1085 of the Code of Civil Procedure with a reference to Code of Civil Procedure Sections 1120-1123.950, and to delete the former reference to the superior court. Under Section 1123.510 of the Code of Civil Procedure, the superior court is the proper court for judicial review.

Food & Agric. Code § 43003 (amended). Civil penalty; judicial review

Comment. Section 43003 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 46007 (amended). Civil penalty; judicial review

Comment. Section 46007 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (e) prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630. The former provision in subdivision (e) for review to be sought by "any person" is superseded by Code of Civil Procedure Sections 1123.210-1123.240 (standing). This may not be a significant substantive change, because "any person" may have been qualified by the provision in Code of Civil Procedure Section 1086 permitting mandamus to be sought by a party "beneficially interested."

Food & Agric. Code § 47025 (amended). (Operative until January 1, 2000) Violations and enforcement; judicial review

Comment. Section 47025 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The provision formerly in subdivision (d)(9) prescribing the time within which judicial review must be sought is superseded by Code of Civil Procedure Section 1123.630.

Food & Agric. Code § 59234.5 (amended). Deficiency determination

Comment. Subdivision (d) of Section 59234.5 is amended to refer to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 60016 (amended). Deficiency judgment

Comment. Subdivision (d) of Section 60016 is amended to refer to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 61899 (amended). Judicial review

Comment. Section 61899 is amended to refer to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 62665 (amended). Judicial review

Comment. Section 62665 is amended to refer to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former 30-day time limit for review is superseded by Code of Civil Procedure Section 1123.630.

Public Entities (part 2)

Gov't Code § 942 (amended). Judicial review

Comment. Section 942 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to compel performance of a ministerial duty of a public entity. See Code Civ. Proc. §§ 1121.120, 1123.610. However, an action against the public entity under the California Tort Claims Act is not subject to the judicial review provisions of the Code of Civil Procedure. See *id.* § 1121(a)(3) and Comment.

Local Public Entities

Gov't Code § 970.2 (amended). Duty of public entity to pay judgment; judicial review

Comment. Section 970.2 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to compel performance of a ministerial duty of a public entity. See Code Civ. Proc. §§ 1121.120, 1123.610. However, an action against the public entity under the California Tort Claims Act is not subject to the judicial review provisions of the Code of Civil Procedure. See *id.* § 1121(a)(3) and Comment.

Gov't Code § 7911 (amended). Return of excess revenues; judicial review

Comment. Section 7911 is amended to replace the former reference to a writ of mandate with a reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.850.

Administrator for Oil Spill Response, Department of Fish & Game

Gov't Code § 8670.68 (amended). Complaint; hearing; judicial review

Comment. Section 8670.68 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (d) for review jurisdiction in the court of appeal is superseded by Code of Civil Procedure Section 1123.510 (superior court jurisdiction). The former fourth sentence of subdivision (d) (substantial evidence review) is superseded by Code of Civil Procedure Sections 1123.420 (independent judgment review of application of law to fact) and 1123.430 (substantial evidence review of factfinding). The former fifth sentence of subdivision (d) (petition for mandate does not stay corrective action or penalties) is superseded by Code of Civil Procedure Section 1123.720 (stay in discretion of reviewing court).

Gov't Code § 8670.69.6 (amended). Judicial review of cease and desist order

Comment. Section 8670.69.6 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference to the superior court is continued in substance in

Code of Civil Procedure Section 1123.510 (jurisdiction in superior court).

State Agencies

Gov't Code § 11130 (amended). Commencement of action

Comment. Section 11130 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Gov't Code § 11130.3 (amended). Voiding action in violation of open meeting law

Comment. Section 11130.3 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. The former provision in subdivision (a) prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630.

Administrative Procedure Act (rulemaking)

Gov't Code § 11350.3 (amended). Judicial review of disapproved or repealed regulation

Comment. Section 11350.3 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. The former reference to superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Administrative Procedure Act (administrative adjudication)

Gov't Code § 11460.80 (amended). (Operative July 1, 1997) Judicial review

Comment. Section 11460.80 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Gov't Code § 11517 (amended). Decision in contested case

Comment. Section 11517 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Gov't Code § 11529 (amended). Interim orders

Comment. Section 11529 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

State Fair Employment and Housing Commission

Gov't Code § 12987.1 (amended). Judicial review

Comment. Section 12987.1 is amended to revise the references to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The language added to the last portion of subdivision (a) continues the substance of the former language it replaces. The language formerly found in subdivision (b) concerning permissible relief is continued in substance in Code of Civil Procedure Sections 1123.720 (stay of agency action) and 1123.730 (court may set aside or modify agency action and make interlocutory orders).

State Board of Control

Gov't Code § 13969.1 (amended). Decision; review

Comment. Section 13969.1 is amended to replace the former references to a writ of mandate with a reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.850.

California Health Facilities Financing Authority

Gov't Code § 15444 (amended). Rights and remedies of bond holders

Comment. Section 15444 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to compel performance of a ministerial duty by a public entity. See Code Civ. Proc. §§ 1121.120, 1123.610.

Commission on State Mandates

Gov't Code § 17559 (amended). Judicial review

Comment. Section 17559 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Board of Administration, Public Employees Retirement System

Gov't Code § 20126 (technical amendment). Refusal to admit liability

Comment. Section 20126 is amended to revise the reference to former Section 800.

County Boards of Supervisors (part 1)

Gov't Code § 26370 (amended). Rights and remedies of bond holders

Comment. Section 26370 is amended to replace the former reference to mandamus or other appropriate proceeding with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Gov't Code § 26470 (amended). Rights and remedies of bond holders

Comment. Section 26470 is amended to replace the former reference to mandamus or other appropriate proceeding with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

County Boards of Retirement

Gov't Code § 31725 (amended). Determination of permanent incapacity

Comment. Section 31725 is amended to replace the former reference to the writ of mandamus with a reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.850.

Local Agencies (part 1)

Gov't Code § 50770 (amended). Rights and remedies of bond holders

Comment. Section 50770 is amended to replace the former reference to mandamus or other appropriate proceeding with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Governing Boards of Cities and Counties

Gov't Code § 51154 (amended). Judicial review

Comment. Section 51154 is amended to add subdivision (b). The judicial review provisions of the Code of Civil Procedure have replaced mandamus as the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

County Boards of Supervisors (part 2) or City Council

Gov't Code § 51286 (amended). Judicial review

Comment. Section 51286 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Gov't Code § 51294 (amended). Enforcement

Comment. Section 51294 is amended to add subdivision (b). The judicial review provisions of the Code of Civil Procedure have replaced mandamus as the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Gov't Code § 51294.2 (amended). Validation proceedings

Comment. Section 51294.2 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Gov't Code § 53069.4 (technical amendment). Violation of local ordinance; appeal

Comment. Section 53069.4 is amended to revise the reference to the judicial review provisions of the Code of Civil Procedure. See Code Civ. Proc. §§ 1120-1123.950.

Gov't Code § 53595.35 (amended). Remedies of trustees and holders of debt instruments

Comment. Section 53595.35 is amended to replace the former reference to enforcement by mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Local Agencies (part 2)

Gov't Code § 54642 (amended). Enforcement of rights of bondholders

Comment. Section 54642 is amended to replace the former reference to enforcement by mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Gov't Code § 54702.8 (amended). Action by holder of bonds

Comment. Section 54702.8 is amended to replace the former reference to enforcement by mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Gov't Code § 54740.6 (amended). Judicial review

Comment. Section 54740.6 is amended to replace the former references to mandamus with references to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. The former provision for superior court jurisdiction is continued in substance in Code of Civil Procedure Section 1123.510. The former time limit for a mandamus petition under this section is superseded by the time limit in Code of Civil Procedure Section 1123.640. The former provision for the court to exercise independent judgment on the evidence is superseded by Code of Civil Procedure Section 1123.440 (standard of review of determinations of fact).

Gov't Code § 54960 (amended). Proceeding to prevent violation; recording closed sessions; discovery of tapes

Comment. Section 54960 is amended to replace the former reference to mandamus, injunction or declaratory relief with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. See also Code Civ. Proc. § 1123.730 (court may grant injunctive or declaratory relief).

Gov't Code § 54960.1 (amended). Proceeding to determine validity of action

Comment. Section 54960.1 is amended to replace the former reference to mandamus or injunction with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Department of Housing and Community Development (part 1), Council of Governments, or Local Government

Gov't Code § 65584 (amended). Local government share of regional housing needs

Comment. Section 65584 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Gov't Code § 65590 (amended). Replacement dwelling units in coastal zone; exemptions

Comment. Section 65590 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Cities and Counties

Gov't Code § 65751 (amended). Action challenging general plan

Comment. Section 65751 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Local Agencies (part 3)

Gov't Code § 66499.37 (amended). Judicial review

Comment. Section 66499.37 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. The former limitations provision in Section 66499.37, requiring the action or proceeding to be brought and summons served within 90 days after the date of the decision, is superseded by Code of Civil Procedure Section 1123.640 (90 days after decision announced or required notice given). A summons is not required in judicial review proceedings. See Code Civ. Proc. § 1123.610(c) & Comment.

San Francisco Bay Conservation and Development Commission (part 1)

Gov't Code § 66639 (amended). Judicial review

Comment. Section 66639 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference to superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Subdivision (b) is deleted. The contents of the record for judicial review are prescribed in Code of Civil Procedure Section 1123.820. The standard of review of the sufficiency of the evidence is prescribed in Code of Civil Procedure Section 1123.430 (standard of review of determinations of fact).

Gov't Code § 66641.7 (amended). Judicial review; action to collect penalties

Comment. Section 66641.7 is amended to revise the references to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Tahoe Regional Planning Agency

Gov't Code § 66802 (added). Judicial review

Comment. Under Section 66802, judicial review involving the Tahoe Regional Planning Compact is under the judicial review provisions of the Code of Civil Procedure. See Code Civ. Proc. §§ 1120-1123.950. This is consistent with Code of Civil Procedure Sections 1121.120 (other forms of judicial review replaced) and 1123.610 (petition for review). Actions alleging noncompliance with this compact or with an ordinance or regulation of the agency is authorized by Section 66801, Article VI.

Formerly, actions alleging noncompliance with the Tahoe Regional Planning Compact were for ordinary mandamus, declaratory or injunctive relief, or inverse condemnation. See People *ex rel*. Younger v. County of El Dorado, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971) (mandamus); League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 105 Cal. App. 3d 394, 396, 164 Cal. Rptr. 357 (1980) (mandamus, injunctive relief); Viso v. State of California, 92 Cal. App. 3d 15, 154 Cal. Rptr. 580 (1979) (declaratory and injunctive relief, inverse condemnation); Sierra Tereno v. Tahoe Regional Planning Agency, 79 Cal. App. 3d 439, 144 Cal. Rptr. 776 (1978) (inverse condemnation). The judicial review provisions in the Code of Civil Procedure replace mandamus and declaratory and injunctive relief in these cases. See Code Civ. Proc. § 1121.120. However, these provisions

cannot replace actions for inverse condemnation. Inverse condemnation is of constitutional origin, and cannot be curtailed by statute. California Government Tort Liability Practice § 2.97, at 181-82 (Cal. Cont. Ed. Bar, 3d ed. 1992). Concerning joinder of a cause of action for inverse condemnation with a judicial review proceeding, see Code Civ. Proc. § 1121.120(b) and Comment.

San Francisco Bay Area Transportation Terminal Authority

Gov't Code § 67620 (amended). Rights and remedies of bondholders

Comment. Subdivision (a) of Section 67620 is amended to refer to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Board of Directors of Industrial Development Authority of City or County

Gov't Code § 91537 (amended). Resolution authorizing issuance of bonds

Comment. Section 91537 is amended to replace the former reference to various proceedings and remedies with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. The court on review may grant appropriate relief, whether mandatory, injunctive, or declaratory, preliminary or final, temporary or permanent, or equitable or legal. Code Civ. Proc. § 1123.730. See also Code Civ. Proc. § 1121.130 (injunctive relief ancillary).

California Passenger Rail Financing Commission

Gov't Code § 92308 (amended). Rights and remedies of bondholder

Comment. Section 92308 is amended to replace the former reference to enforcement proceedings by mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Department and Commission of Boating and Waterways

Harb. & Nav. Code § 737 (amended). Conduct of proceedings; judicial review

Comment. Section 737 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Board of Pilot Commissioners

Harb. & Nav. Code § 1183 (amended). Trial and judicial review

Comment. Section 1183 is amended to make clear that judicial review of a decision of the board is under the judicial review provisions of the Code of Civil Procedure. The former provision for the court to exercise its independent judgment on the evidence is superseded by Sections 1123.420-1123.460 of the Code of Civil Procedure.

San Diego Unified Port District

Harb. & Nav. Code Appendix 1 § 66 (amended). Enforcement of debt instruments

Comment. Section 66 is amended to replace the former reference to enforcement proceedings by mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Humboldt Bay Harbor, Recreation, and Conservation District

Harb & Nav. Code Appendix 2 § 66 (amended). Enforcement of debt instruments

Comment. Section 66 is amended to replace the former reference to enforcement proceedings by mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

State Department of Health Services (part 1)

Health & Safety Code § 1428 (amended). Contesting citation; penalties; notice of dismissal

Comment. Section 1428 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Health & Safety Code § 1550.5 (amended). Temporary suspension of license

Comment. Section 1550.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision for review in superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Health & Safety Code § 1793.15 (amended). Recording notice of lien

Comment. Section 1793.15 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision for filing within 30 days of service of the decision is superseded by Code of Civil Procedure Section 1123.630.

Board of Trustees, Mosquito Abatement District

Health & Safety Code § 2280.1 (amended). Judicial review

Comment. Section 2280.1 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Health & Safety Code § 2861.5 (amended). Judicial review

Comment. Section 2861.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Department of Housing and Community Development (part 2)

Health & Safety Code § 17980.8 (amended). (First of two) Abatement of nuisance

Comment. Section 17980.8 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former penultimate sentence of Section 17980.8 is superseded by Code of Civil Procedure Sections 1123.420-1123.460.

Health & Safety Code § 18024.4 (amended). Citation final; judicial review

Comment. Section 18024.4 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

State Department of Health Services (part 2)

Health & Safety Code § 25149 (amended). Endangerment to health and environment

Comment. Section 25149 is amended to revise the reference to the judicial review provisions. See Code Civ. Proc. §§ 1120-1123.950.

Health & Safety Code § 25187 (amended). Order specifying schedule for compliance

Comment. Section 25187 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former second sentence of subdivision (g) is superseded by Code of Civil Procedure Sections 1123.420-1123.460. The language formerly in subdivision (g) that a petition for a writ of mandate does not stay corrective action or penalties is continued in substance in Code of Civil Procedure Section 1123.720(a).

Health & Safety Code § 25202.7 (amended). Judicial review

Comment. Section 25202.7 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former language requiring the court to uphold the decision of the department if supported by substantial evidence is superseded by Code of Civil Procedure Sections 1123.420-1123.460.

Health & Safety Code § 25231 (amended). Judicial review

Comment. Section 25231 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Health & Safety Code § 25233 (amended). Application for variance

Comment. Section 25233 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former language of subdivision (g) requiring the court to uphold the decision of the director if supported by substantial evidence is superseded by Code of Civil Procedure Sections 1123.420-1123.460.

Health & Safety Code § 25234 (amended). Application to remove land use restriction

Comment. Section 25234 is amended to revise the reference to the provisions for judicial review, see Code Civ. Proc. §§ 1120-1123.950, and to delete the provision for substantial evidence review. Standards of review are prescribed in Code of Civil Procedure Sections 1123.420-1123.460.

Health & Safety Code § 25356.1 (amended). (Operative until July 1, 1998) Remedial action plans; judicial review

Comment. Subdivision (g) of Section 25356.1 is amended to revise the reference to the provisions for judicial review, see Code Civ. Proc. §§ 1120-1123.950, and to delete the provision for substantial evidence review which is continued in substance in Code of Civil Procedure Section 1123.430. The language formerly in subdivision (g) that the filing of a petition for a writ of mandate does not stay removal or remedial action is continued in substance in Code of Civil Procedure Section 1123.720(a).

Health & Safety Code § 25356.8 (amended). (Operative until July 1, 1998) Judicial review

Comment. Subdivision (b) of Section 25356.8 is amended to revise the reference to the provisions for judicial review, see Code Civ. Proc. §§ 1120-1123.950, and to delete the provision prescribing the standard of review which is continued in substance in Code of Civil Procedure Section 1123.430.

Health & Safety Code § 25398.10 (amended). Arbitration panel

Comment. Section 25398.10 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630.

Administering Agency of City, County, or Fire District on Handling Hazardous Materials

Health & Safety Code § 25514.6 (amended). Complaint by administering agency

Comment. Section 25514.6 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference in subdivision (d) to the superior court is continued in substance in Code of Civil Procedure Section 1123.510. The former

language in subdivision (d) requiring the court to uphold the decision of the agency if supported by substantial evidence is superseded by Code of Civil Procedure Sections 1123.420-1123.460. The former language in subdivision (d) that the filing of a petition for a writ of mandate does not stay accrual of penalties is continued in substance in Code of Civil Procedure Section 1123.720(a).

Redevelopment Agencies (part 1)

Health & Safety Code § 33660 (amended). Rights and remedies of obligee

Comment. Section 33660 is amended to replace the former reference to various enforcement proceedings with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Health & Safety Code § 33781 (amended). Enforcement of rights of holders and trustees

Comment. Section 33781 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Housing Authorities (part 1)

Health & Safety Code § 34362 (amended). Amending or abrogating contract

Comment. Section 34362 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Business, Transportation and Housing Agency

Health & Safety Code § 35823 (amended). Finality of decision; hearing; judicial review

Comment. Section 35823 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former penultimate sentence of Section 35823 is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standard of review) and 1123.850 (new evidence on judicial review).

Cities and Counties (part 2), and Redevelopment Agencies (part 2)

Health & Safety Code § 37646 (amended). Actions to protect or enforce rights

Comment. Section 37646 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Cities and Counties (part 3), Redevelopment Agencies (part 3), and Housing Authorities (part 2)

Health & Safety Code § 37936 (amended). Actions to protect or enforce rights

Comment. Section 37936 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Air Pollution Control Hearing Boards

Health & Safety Code § 40864 (amended). Judicial review

Comment. Section 40864 is amended to replace the former reference to judicial review by writ of mandate with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950. The time limit formerly in subdivision (a) is superseded by Code of Civil Procedure Section 1123.630. Former subdivision (b) is superseded by Code of Civil Procedure Sections 1123.830 (preparation of administrative record) and 1123.910 (fee for preparation of record). Former subdivision (c) is superseded by Code of Civil Procedure Section 1123.820 (contents of administrative record). The former first sentence of subdivision (d) (extension of time after request for record) is superseded by Code of Civil Procedure Section 1123.650(b)(2).

State Air Resources Board

Health & Safety Code § 42316 (amended). Mitigation of impact of water activities

Comment. Section 42316 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (b) prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630.

Health & Safety Code § 44011.6 (amended). Test for smoke emissions; penalties; administrative hearing

Comment. Section 44011.6 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (m) prescribing the time limit for judicial review is superseded by Code of Civil Procedure Section 1123.630.

California Pollution Control Financing Authority

Health & Safety Code § 44554 (amended). Rights and remedies of bondholder

Comment. Section 44554 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Cities and Counties (part 4)

Health & Safety Code § 52033 (amended). Resolution authorizing issuance of bonds; security; enforcement rights

Comment. Section 52033 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

State Department of Health Services (part 3)

Health & Safety Code § 108900 (amended). Civil and criminal penalties

Comment. Section 108900 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former language in subdivision (f) requiring the petition to be filed in superior court is continued in substance in Code of Civil Procedure Section 1123.510. The former language in subdivision (f) requiring the court to uphold the decision of the director if supported by substantial evidence is superseded by Code of Civil Procedure Sections 1123.420-1123.460. The former language in subdivision (f) that the filing of a petition for a writ of mandate does not stay corrective action or penalties is continued in substance in Code of Civil Procedure Section 1123.720(a).

Health & Safety Code § 110915 (amended). Civil penalties; hearing; review; civil action

Comment. Subdivision (e) of Section 110915 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (e) permitting judicial review to be sought by "any person" is superseded by Code of Civil Procedure Sections 1123.210-1123.240 (standing). This may not be a significant substantive change, because the former reference to "any person" may have been qualified by the provision in Code of Civil Procedure Section 1086 permitting mandamus to be sought by a party "beneficially interested." The former provision in subdivision (e) on the time limit to seek judicial review is superseded by Code of Civil Procedure Section 1123.630.

Health & Safety Code § 111855 (amended). Civil penalties

Comment. Section 111855 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former language in subdivision (g) requiring the petition to be filed in superior court is continued in substance in Code of Civil Procedure Section 1123.510. The former language in subdivision (g) prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630. The former language in subdivision (g) requiring the court to uphold the decision of the director if supported by substantial evidence is superseded by Code of Civil Procedure Sections 1123.420-1123.460. The former language in subdivision (g) that the filing of a petition for a writ of mandate does not stay corrective action or penalties is continued in substance in Code of Civil Procedure Section 1123.720(a).

Health & Safety Code § 111940 (amended). Civil penalties

Comment. Section 111940 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former language in subdivision (g) prescribing the time for review is superseded by Code of Civil Procedure Section 1123.630. The former reference in subdivision (g) to the superior court is continued in substance in Code of Civil Procedure Section 1123.510. The former language in subdivision (g) requiring the court to uphold the decision of the director if supported by substantial evidence is superseded by Code of Civil Procedure Sections 1123.420-1123.460. The former language in subdivision (g) that the filing of a petition for a writ of mandate does not stay required corrective action is continued in substance in Code of Civil Procedure Section 1123.720(a).

Health & Safety Code § 112615 (amended). Judicial review

Comment. Section 112615 is amended to insert a reference to the provisions for judicial review, see Code Civ. Proc. §§ 1120-1123.950, and to delete the time limit for filing a petition for review. The time to file a petition for review is provided in Code of Civil Procedure Section 1123.630.

Resources Agency

Health & Safety Code § 113220 (amended). Extension of time; administrative appeal

Comment. Section 113220 is amended to make clear judicial review is under the Code of Civil Procedure. See Code Civ. Proc. §§ 1120-1123.950.

State Department of Health Services (part 4)

Health & Safety Code § 115155 (amended). Judicial review

Comment. Section 115155 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Health & Safety Code § 116625 (amended). Revocation or suspension of permit; judicial review

Comment. Subdivision (b) of Section 116625 is amended to replace the former reference to a writ of mandate with a reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference to the superior court is also deleted. This is nonsubstantive, since judicial review under the Code of Civil Procedure is in the superior court. Code Civ. Proc. § 1123.510.

Health & Safety Code § 116700 (amended). Judicial review

Comment. Section 116700 is amended to revise the reference to the provisions for judicial review, and to apply all of the judicial review provisions of the Code of Civil Procedure, and not merely the two subdivisions formerly mentioned. See Code Civ. Proc. §§ 1120-1123.950. The former time limit in subdivision (a) is superseded by Code of Civil Procedure Section 1123.630. Section 116700 is also amended to delete provisions formerly in subdivision (b), which are superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standard of review) and 1123.850 (new evidence on judicial review). The former reference to superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Health & Safety Code § 121270 (amended). AIDS Vaccine Victims Compensation Fund

Comment. Section 121270 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former time limits provided in subdivision (i) are superseded by Code of Civil Procedure Section 1123.630.

Health & Safety Code § 123340 (amended). Certificate of amounts unpaid; judicial review

Comment. Section 123340 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Advisory Health Council

Health & Safety Code § 127275 (amended). Judicial review

Comment. Section 127275 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former last sentence of Section 127275 (substantial evidence review) is superseded by Code of Civil Procedure Section 1123.430. The provision for judicial review by any party "other than the department" is a special exception to the standing rules of Sections 1123.220-1123.240.

Office of Statewide Health Planning and Development

Health & Safety Code § 128775 (amended). (Operative on July 1, 1997) Administrative and judicial review

Comment. Section 128775 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former penultimate sentence of Section 128775 (substantial evidence review) is superseded by Code of Civil Procedure Section 1123.430. Former subdivision (e) (delayed operative date) is deleted as no longer necessary.

Insurance Commissioner

Ins. Code § 728 (amended). Removal or suspension of officer or employee of insurer

Comment. Section 728 is amended to revise the reference to the provisions for judicial review, see Code Civ. Proc. §§ 1120-1123.950, and to delete the provisions in subdivisions (f) and (i) for independent judgment review. Standards of review are prescribed in Code of Civil Procedure Sections 1123.420-1123.460.

Ins. Code § 791.18 (amended). Judicial review

Comment. Section 791.18 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (a) prescribing the time for review is superseded by Code of Civil Procedure Section 1123.630. The former last sentence of subdivision (a) is superseded by Code of Civil Procedure Section 1123.730 (type of relief).

Ins. Code § 1065.4 (amended). Judicial review

Comment. Section 1065.4 is amended to make clear judicial review is under Code of Civil Procedure Sections 1120-1123.950. The former 60-day time limit in Section 1065.4 is superseded by Code of Civil Procedure Section 1123.630.

Ins. Code § 1104.9 (amended). Maintenance of securities and money in other jurisdictions

Comment. Section 1104.9 is amended to replace the former reference to a writ of mandate and declaratory relief with a reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Ins. Code § 1748.5 (amended). Suspension or removal from office or employment

Comment. Subdivision (f) of Section 1748.5 is amended to replace the former reference to a writ of mandate under Code of Civil Procedure Section 1085 with a reference to the provisions for judicial review of Code of Civil Procedure Sections 1120-1123.950. The former provisions in subdivisions (f) and (i) for independent judgment review are superseded by Code of Civil Procedure Section 1123.430 (substantial evidence review of fact-finding).

Ins. Code § 1780.63 (amended). Judicial review

Comment. Section 1780.63 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former last sentence of subdivision (a) is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review). The former 30-day limit in subdivision (b) is continued in substance in Code of Civil Procedure Section 1123.630. The former language in subdivision (b) permitting the court to order a stay for good cause is continued in substance in Code of Civil Procedure Section 1123.720.

Ins. Code § 1858.6 (amended). Judicial review

Comment. Section 1858.6 is amended to make clear judicial review is under Code of Civil Procedure Sections 1120-1123.950. The former

provision for independent judgment review is superseded by Code of Civil Procedure Section 1123.430 (substantial evidence review of fact-finding).

Ins. Code § 11754.5 (amended). Judicial review

Comment. Section 11754.5 is amended to revise the reference to the judicial review provisions of the Code of Civil Procedure. See Code Civ. Proc. §§ 1120-1123.950.

Ins. Code § 12414.19 (amended). Judicial review

Comment. Section 12414.19 is amended to make clear judicial review is under Code of Civil Procedure Sections 1120-1123.950. The former provision for independent judgment review is superseded by Code of Civil Procedure Section 1123.430 (substantial evidence review of fact-finding).

Volunteer Fire Departments

Lab. Code § 1964 (amended). Removal of volunteer firefighter; hearing; judicial review

Comment. Section 1964 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former language in subdivision (c) on the standard of review is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review).

Military Department

Mil. & Vet. Code § 489 (amended). Judicial review

Comment. Section 489 is amended to replace the former reference to mandamus or other appropriate proceedings with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Mil. & Vet. Code § 1005.1. Authorization to compel performance of duty of state official

Comment. Section 1005.1 is amended to replace the former reference to mandamus or other appropriate proceedings with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Local Mental Health Director

Penal Code § 4011.8 (amended). Voluntary inpatient or outpatient mental health services

Comment. Section 4011.8 is amended to add the last sentence to make clear that a denial of an application for voluntary mental health services by an executive branch agency is reviewable only under the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Department of Justice

Penal Code § 11126 (amended). Correction of record

Comment. Section 11126 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Department of Conservation (part 1)

Pub. Res. Code § 2774.2 (amended). Review of administrative penalties

Comment. Section 2774.2 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference in subdivision (e) to the superior court is continued in substance in Code of Civil Procedure Section 1123.510. The former provision in subdivision (e) for independent judgment review is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review).

Pub. Res. Code § 2774.4 (amended). Lead agency powers; hearing; review

Comment. Section 2774.4 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference in subdivision (f) to the superior court is continued in substance in Code of Civil Procedure Section 1123.510. The former provision in subdivision (f) for independent judgment review is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review).

State Oil and Gas Supervisor

Pub. Res. Code § 3236.5 (amended). Civil penalties; judicial review

Comment. Section 3236.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Pub. Res. Code § 3333 (amended). Judicial review

Comment. Section 3333 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former requirement specifying the time for judicial review is superseded by Code of Civil Procedure Section 1123.630. The special provision in subdivision (a) for venue in the superior court of any county in which all or part of the area affected is located prevails over the general venue provision in Code of Civil Procedure Section 1123.520. See Code Civ. Proc. § 1121.110 (conflicting or inconsistent statute controls).

The former provision in subdivision (b) for a notice of intention to petition for judicial review is deleted as superfluous, since the petition itself must generally be filed within 60 days after the order. See Code Civ. Proc. § 1123.630 and Comment.

Department of Conservation (part 2)

Pub. Res. Code § 14591.5 (amended). Judgment to collect civil penalties or restitution

Comment. Section 14591.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

State Energy Resources Conservation and Development Commission

Pub. Res. Code § 25534.2 (amended). Judicial review; action to recover penalties

Comment. Section 25534.2 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in Section 25534.2 prescribing the time for review is superseded by Code of Civil Procedure Section 1123.630.

Pub. Res. Code § 25901 (amended). Judicial review

Comment. Section 25901 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (a) prescribing the time for review is

superseded by Code of Civil Procedure Section 1123.630. The standards of review formerly in subdivision (b) are superseded by Code of Civil Procedure Sections 1123.420-1123.460.

California Alternative Energy and Advanced Transportation Financing Authority

Pub. Res. Code § 26034 (amended). Rights and remedies of bondholder

Comment. Section 26034 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

San Francisco Bay Conservation and Development Commission (part 2)

Pub. Res. Code § 29602 (amended). Judicial review

Comment. Section 29602 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision permitting an "aggrieved" person to seek judicial review is superseded by Code of Civil Procedure Sections 1123.210-1123.240 (standing).

Pub. Res. Code § 29603 (amended). Judicial review

Comment. Section 29603 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision permitting an "aggrieved" person to seek judicial review is superseded by Code of Civil Procedure Sections 1123.210-1123.240 (standing). The provision permitting an applicant for a marsh development permit or the commission to seek judicial review is a special provision that controls over the general standing rules of Code of Civil Procedure Sections 1123.210-1123.240. See Code Civ. Proc. § 1121.110 (conflicting or inconsistent statute controls).

Delta Protection Commission

Pub. Res. Code § 29772 (amended). Judicial review

Comment. Section 29772 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

The former provision permitting an "aggrieved" person to seek judicial review is superseded by Code of Civil Procedure Sections 1123.210-1123.240 (standing).

California Coastal Commission

Pub. Res. Code § 30801 (amended). Judicial review

Comment. Section 30801 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Pub. Res. Code § 30802 (amended). Judicial review of action of local government

Comment. Section 30802 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

California Urban Waterfront Area Restoration Financing Authority

Pub. Res. Code § 32205 (amended). Action to enforce rights

Comment. Section 32205 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

California Integrated Waste Management Board

Pub. Res. Code § 41721.5 (amended). Amendments

Comment. Section 41721.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Pub. Res. Code § 42854 (amended). Judicial review

Comment. Section 42854 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former 30-day time period in subdivision (a) is superseded by Code of Civil Procedure Section 1123.630. The former requirement that the petition be filed in superior court is continued in substance in Code of Civil Procedure Section 1123.510. The former provision in subdivision (b) for substantial evidence review is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review).

Former subdivision (c) (petition for writ of mandate does not stay corrective action or penalties) is continued in substance in Code of Civil

Procedure Section 1123.720(a). Former subdivision (d) is superseded by Code of Civil Procedure Section 1123.730 (type of relief).

Pub. Res. Code § 50000 (amended). Review and approval of new sites

Comment. Section 50000 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Municipal Utility Districts

Pub. Util. Code § 13106 (amended). Rights and remedies of bond holders

Comment. Section 13106 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Pub. Util. Code § 13575.7 (amended). Judicial review; nonexclusiveness of remedy

Comment. Section 13575.7 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (a) specifying the time limit for review is superseded by Code of Civil Procedure Section 1123.630. The former first sentence of subdivision (b) concerning the contents of the record is superseded by Code of Civil Procedure Sections 1123.820 (contents of administrative record) and 1123.850 (new evidence on judicial review). The former last sentence of subdivision (b) (independent judgment) is superseded by Code of Civil Procedure Sections 1123.420-1123.460.

California Transportation Commission (part 1)

Pub. Util. Code § 21675.2 (amended). Judicial review; public notice

Comment. Section 21675.2 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Department of Aeronautics, Business and Transportation Agency

Pub. Util. Code § 24252 (amended). Judicial review

Comment. Section 24252 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference to Government Code Section 11440 is obsolete because it was repealed by 1979 Cal. Stat. ch. 567.

Southern California Rapid Transit District

Pub. Util. Code § 30981 (amended). Rights and remedies of bond holders

Comment. Section 30981 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Santa Clara County Transit District

Pub. Util. Code § 100492 (amended). Rights and remedies of bond holders

Comment. Section 100492 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Sacramento Regional Transit District

Pub. Util. Code § 102602 (amended). Rights and remedies of bond holders

Comment. Section 102602 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

San Mateo County Transit District

Pub. Util. Code § 103602 (amended). Rights and remedies of bond holders

Comment. Section 103602 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

San Diego Metropolitan Transit Development Board

Pub. Util. Code § 120702 (amended). Rights and remedies of bond holders

Comment. Section 120702 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

West Bay Rapid Transit Authority

Pub. Util. Code Appendix 2 § 10.1 (amended). Rights and remedies of bond holders

Comment. Section 10.1 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

County Boards of Supervisors (part 3)

Rev. & Tax. Code § 1611.6 (technical amendment). Attorney's fees

Comment. Section 1611.6 is amended to revise the references to former Section 800 of the Government Code.

Franchise Tax Board

Rev. & Tax. Code § 19381 (technical amendment). No injunction to prevent tax

Comment. Section 19831 is amended to make clear the judicial review provisions of the Code of Civil Procedure may not be used to prevent the assessment or collection of a tax under this part.

Cities and Counties (part 5)

Sts. & Hy. Code § 5302.5 (amended). Assessment as obligation of owner of property; time for payment; collection of tax levy; judicial review

Comment. Section 5302.5 is amended to replace the former references to mandamus and other remedies with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Sts. & Hy. Code § 6467 (amended). Certificates representing unpaid assessments

Comment. Section 6467 is amended to replace the former references to mandamus and other remedies with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Sts. & Hy. Code § 6468 (amended). Form of bond

Comment. Section 6468 is amended to replace the former references to mandamus and other remedies with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

California Transportation Commission (part 2)

Sts. & Hy. Code § 30238 (amended). Performance of duties may be compelled

Comment. Section 30238 is amended to replace the former references to mandamus and other remedies with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

El Dorado County Toll Tunnel Authority

Sts. & Hy. Code § 31171 (amended). Rights and remedies of bondholder

Comment. Section 31171 is amended to replace the former references to mandamus and other proceedings with a reference to the judicial

review provisions of Code of Civil Procedure Sections 1120-1123.950. The last sentence of Section 31171 is made expressly subject to Code of Civil Procedure Section 1121.120, which provides that the judicial review provisions of the Code of Civil Procedure replace other forms of action for judicial review of agency action.

Parking Authorities of Cities or Counties

Sts. & Hy. Code § 33400 (amended). Powers of obligee

Comment. Subdivision (a) of Section 33440 is amended to replace the former reference to mandamus and other proceedings with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Subdivision (b) is amended to make clear that proceedings in equity are authorized only against nongovernmental parties, consistent with Code of Civil Procedure Section 1121.120 (other forms of judicial review replaced for review of governmental action).

Cities or Parking Districts

Sts. & Hy. Code § 35417 (amended). Ordinance as covenant for protection of bondholder

Comment. Section 35417 is amended to replace the former reference to mandamus and other remedies with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Sts. & Hy. Code § 35468 (amended). Tax levy to pay assessment on public property

Comment. Section 35468 is amended to replace the former reference to mandamus and other proceedings with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

California Unemployment Insurance Appeals Board

Unemp. Ins. Code § 409.2 (amended). Judicial review of precedent decision

Comment. Section 409.2 is amended to replace the former reference to an action for declaratory relief with a reference to judicial review

under Code of Civil Procedure Sections 1120-1123.950. The former reference to the superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Unemp. Ins. Code § 1338 (technical amendment). Decision allowing benefits

Comment. Section 1338 is amended to replace the former reference to mandamus with a reference to judicial review. A petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Unemp. Ins. Code § 3264 (amended). Denial of liability; judicial review

Comment. Section 3264 is amended to replace the former reference to a writ of mandate with a reference to judicial review under Code of Civil Procedure Sections 1120-1123.950.

New Motor Vehicle Board

Veh. Code § 3058 (amended). Judicial review

Comment. Section 3058 is amended to make clear judicial review is under the judicial review provisions of the Code of Civil Procedure, see Code Civ. Proc. §§ 1120-1123.950, and to delete the last sentence. The time to file a petition for review is provided in Code of Civil Procedure Section 1123.630.

Veh. Code § 3068 (amended). Judicial review

Comment. Section 3068 is amended to make clear judicial review is under the judicial review provisions in the Code of Civil Procedure, see Code Civ. Proc. §§ 1120-1123.950, and to delete the last sentence. The time to file a petition for review is provided in Code of Civil Procedure Section 1123.630.

Public Agencies (part 4)

Veh. Code § 22851.3 (amended). Disposition of low-value vehicles

Comment. Section 22851.3 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

State Water Resources Control Board (part 1)

Water Code § 1126 (amended). Judicial review

Comment. Section 1126 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (a) for an "aggrieved party" to seek review is continued in substance in Code of Civil Procedure Section 1123.220 ("interested person"). The former provision in subdivision (a) specifying the time limit for review is superseded by Code of Civil Procedure Section 1123.630. The former second sentence of subdivision (a) (right to review not affected by failure to seek reconsideration) is continued in substance in Code of Civil Procedure Section 1123.320 (exhaustion of administrative remedies). The former third sentence of subdivision (a) (time to file petition extended during reconsideration) is superseded by Code of Civil Procedure Section 1123.630(c).

The former second sentence of subdivision (b) (independent judgment review) is superseded by Code of Civil Procedure Sections 1123.410-1123.460 (standards of review).

Water Code § 2504 (added). Inapplicability of Code of Civil Procedure provisions

Comment. Section 2504 makes clear the judicial review provisions of the Code of Civil Procedure do not apply to statutory adjudication under this chapter.

Department of Water Resources

Water Code § 6357.4 (amended). Notice and hearing; judicial review

Comment. Section 6357.4 is amended to delete the last sentence. The writ of mandate to review agency action has been replaced by a proceeding for judicial review under Code of Civil Procedure Sections 1120-1123.950. The former last sentence of Section 6357.4 is superseded by Code of Civil Procedure Section 1123.630 (time for filing petition for review in adjudicative proceeding).

Water Code § 6461 (amended). Certificate of approval; judicial review

Comment. Section 6461 is amended to delete the last sentence. The writ of mandate to review agency action has been replaced by a proceeding for judicial review under Code of Civil Procedure Sections 1120-1123.950. The former last sentence of Section 6461 is superseded

by Code of Civil Procedure Section 1123.630 (time for filing petition for review in adjudicative proceeding).

Reclamation Boards

Water Code § 9266 (amended). Compelling performance of duties

Comment. Section 9266 is amended to replace the former reference to mandamus and other remedies with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

State Departments Generally

Water Code § 11708 (amended). Proceedings to compel performance of duties

Comment. Section 11708 is amended to replace the former reference to mandamus and other proceedings with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

State Water Resources Control Board (part 2) and Regional Water Quality Control Boards

Water Code § 13330 (amended). Judicial review

Comment. Section 13330 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (a) specifying the time within which review must be sought is superseded by Code of Civil Procedure Section 1123.630. The former provision in subdivisions (a) and (b) for superior court jurisdiction is continued in substance in Code of Civil Procedure Section 1123.510. The provision formerly in subdivision (d) for independent judgment review is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review). The former references in subdivisions (a), (b), (c), and (e) to an "aggrieved" party are continued in substance in Code of Civil Procedure Section 1123.220 ("interested" person).

California Water Districts

Water Code § 36391 (amended). Compelling protection of revenues pledged for security

Comment. Section 36391 is amended to replace the former reference to mandamus and other proceedings with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. The last sentence of Section 36391 is made expressly subject to Code of Civil Procedure Section 1121.120, which provides that the judicial review provisions of the Code of Civil Procedure replace other forms of action for judicial review of agency action.

California Water Storage Districts

Water Code § 44961 (amended). Judicial review; protection of security

Comment. Section 44961 is amended to replace the former reference to mandamus and other proceedings with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. The last sentence of Section 44961 is made expressly subject to Code of Civil Procedure Section 1121.120, which provides that the judicial review provisions of the Code of Civil Procedure replace other forms of action for judicial review of agency action.

Kings River Conservation District

Water Code Appendix § 59-33 (amended). Bonds for construction of works

Comment. Section 33 is amended to replace the former reference to mandamus and other actions with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Yolo County Flood Control and Water Conservation District

Water Code Appendix § 65-4.8 (amended). Notice of ground water charge

Comment. Section 4.8 is amended to revise the reference to the judicial review provisions of the Code of Civil Procedure. The former

provision specifying the time within which review must be sought is superseded by Code of Civil Procedure Section 1123.640 (time limit for judicial review of adjudicative proceeding). The former provision in the last sentence of Section 4.8 for independent judgment review is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review).

Sierra Valley Groundwater Management District; Long Valley Groundwater Basin

Water Code Appendix § 119-406 (amended). Judicial review

Comment. Section 406 is amended to replace the former reference to a writ of mandate with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950. The former reference to superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Mono County Tri-Valley Groundwater Management District

Water Code Appendix § 128-504 (amended). Review of ordinance or resolution

Comment. Section 504 is amended to replace the former reference to a writ of mandate with a reference to judicial review provisions of Code of Civil Procedure Sections 1120-1123.950. The former reference to superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Honey Lake Valley Groundwater Management District

Water Code Appendix § 129-421 (amended). Review of ordinance or resolution

Comment. Section 421 is amended to replace the former reference to a writ of mandate with a reference to judicial review provisions of Code of Civil Procedure Sections 1120-1123.950. The former reference to superior court is continued in substance in Code of Civil Procedure Section 1123.510.

San Diego Area Wastewater Management District

Water Code Appendix § 133-510 (amended). (Operative date contingent) Bonds, notes, and other evidence of indebtedness; dissolution of district or withdrawal of territory

Comment. Section 510 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

San Gabriel Basin Water Quality Authority

Water Code Appendix § 134-604 (amended). (Operative until July 1, 2002) Evidences of indebtedness

Comment. Section 604 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Willow Creek Valley Groundwater Management District

Water Code Appendix § 135-421 (amended). Judicial review

Comment. Section 421 is amended to replace the former reference to a writ of mandate with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950. The former reference to superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Regional Centers for the Developmentally Disabled

Welf. & Inst. Code § 4668 (amended). Actions void; judicial review

Comment. Section 4668 is amended to replace the former reference to an action by mandamus, injunction, or declaratory relief with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Counties

Welf. & Inst. Code § 5655 (amended). Cooperation with county; sanctions

Comment. Section 5655 is amended to replace the former reference to mandamus and other actions with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

State Department of Social Services (part 1)

Welf. & Inst. Code § 10605 (amended). Noncompliance in county administration; review

Comment. Section 10605 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Welf. & Inst. Code § 10605.2 (amended). County noncompliance

Comment. Section 10605.2 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

State Department of Health Services (part 5)

Welf. & Inst. Code § 10744 (amended). County noncompliance; sanctions; review

Comment. Section 10744 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former last clause of the last sentence of Section 10744 concerning injunctive relief is continued in substance in Code of Civil Procedure Section 1123.730 (court may grant injunctive relief on judicial review).

State Department of Social Services (part 2)

Welf. & Inst. Code § 11468.5 (amended). Judicial review

Comment. Section 11468.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Welf. & Inst. Code § 11468.6 (amended). Review of group home audit findings

Comment. Section 11468.6 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

State Department of Health Services (part 5)

Welf. & Inst. Code § 14087.27 (amended). Judicial or administrative review

Comment. Section 14087.27 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Welf. & Inst. Code § 14105.405 (amended). (Operative until January 1, 1999) Fair hearing

Comment. Section 14105.405 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference to superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Welf. & Inst. Code § 14171 (amended). Administrative appeal; interest

Comment. Section 14171 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Department of Rehabilitation

Welf. & Inst. Code § 19709 (amended). Judicial review

Comment. Section 19709 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (a) limiting review to questions of law is not continued. Both questions of law and questions of fact are reviewable under the Code of Civil Procedure. See Code Civ. Proc. §§ 1123.420-1123.460.

BACKGROUND STUDIES

JUDICIAL REVIEW: STANDING AND TIMING *

by Michael Asimow

September 1992

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JUDICIAL REVIEW: STANDING AND TIMING

by Michael Asimow *

INTRODUCTION

The present California law relating to judicial review of the actions of state and local government agencies is a bewildering patchwork. This study discusses the existing statutory and decisional law relating to judicial review and suggests adoption of modernized code sections. This portion of the study will consider matters relating to standing to seek review and timing of review. The next portion of the study will consider abolition of the writ system in favor of a unified judicial review statute; it will also consider the proper court in which to seek review and the scope of judicial review.

The Law Revision Commission's administrative law project has, up until this point, concentrated solely on adjudication by state agencies; it made no effort to prescribe the rules for local government adjudication. This made sense since there are major differences between adjudication by state government agencies and that performed by the myriad of local government entities. However, the Commission should consider a different approach when considering judicial review. The existing code sections and precedents draw little or no distinction between the review of state action and local government action. Therefore, I propose that the Commission's recommendations relating to judicial review extend to agencies of local government as well as state government. Otherwise, the vast body of existing law must be left in place to regulate review of local government action and there would be sharp differ-

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ences between the review of state and local action. Since this study will show that existing law is unnecessarily confusing and often of dubious merit, it seems appropriate that all of it be modernized.

In addition, the Commission's previous recommendations concerned adjudication, not rulemaking. It has determined to put off recommendations relating to rulemaking until the future. However, the studies relating to judicial review will include material relating to the judicial review of rules and other non-adjudicatory agency action. Again, if this is not done, the corpus of existing judicial review law would have to be preserved for review of non-adjudicatory action. There would be sharp differences in the provisions relating to the review of adjudicatory and non-adjudicatory action. Again, that seems like an unwise result.

The overall goal of the Commission's recommendations should be to supersede the existing antiquated writ system with a single unified judicial review statute. Such a statute would replace the existing writs of ordinary mandate,[1] "certiorarified" mandate,[2] certiorari,[3] and declaratory relief[4] insofar as these remedies apply to the review of state or local agency action. Each of these remedies is weighted down by the barnacles of decades or centuries. A modern statute would unify the provisions relating to review of agency action and would codify all of the various doctrines relating to review (such as standing and timing doctrines) that now lurk in the case law.

I. STANDING TO SEEK JUDICIAL REVIEW

Among the most fundamental judicial review issues is that of standing: who can seek judicial review of agency action? Surprisingly, California law on standing, although mostly uncodified, works well. It is almost completely free of the result-oriented, con-

1. Code Civ. Proc. §§ 1084-1097. All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

2. Section 1094.5.

3. Sections 1067-1077. The writ of certiorari is called the "writ of review" by these sections.

4. Section 1060.

fusing, and perverse limitations imposed on standing in the federal courts.[5] Thus the Commission should build on strength by codifying the principles that the courts have already worked out.

A. EXISTING LAW

Existing law relating to standing breaks down conveniently into four categories: private interest, public interest, taxpayer suits, and third-party standing. Essentially, plaintiffs are allowed into court to challenge state or local government action if they can satisfy the criteria for any one of these categories. As will be discussed in greater detail in the second judicial review study, persons seeking judicial review under present law must decide under which writ to proceed. In most cases, they seek a writ of mandate (called mandamus at common law). In California, mandate is used to review two very different sorts of agency action. Ordinary or traditional mandate is used when plaintiff claims that a government body has failed to perform a non-discretionary act that the law requires it to perform.[6] So-called "certiorarified" mandate[7] reviews an agency decision resulting from a trial type hearing. In some circumstances, a taxpayer action is appropriate.[8] Under other circumstances, declaratory judgment[9] or the writ of review (called certiorari at common law)[10] is used.

In each case, the statute states a standing requirement. In the case of mandate and review, a plaintiff must be "beneficially inter-

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5. This is one area where California should not follow the 1981 Model Act which has incorporated the unsatisfactory federal approach. The 1981 Model State Administrative Procedure Act is printed in 15 U.L.A. 1 (1990) [hereinafter MSAPA].

6. Section 1085.

7. Section 1094.5. The "certiorarified" adjective has long been used to describe the Section 1094.5 procedure because it adapted mandamus to cover matters historically reviewed under the writ of certiorari. The bizarre historical evolution of Section 1094.5 will be discussed in the second phase of this study.

8. Section 526a.

9. Section 1060 *et seq.*

10. Section 1068.

ested."[11] A taxpayer plaintiff must be a citizen of the local jurisdiction involved in the suit.[12] In the case of declaratory judgment, a plaintiff must be "interested" under a written instrument or contract or desire a declaration of his rights or duties.[13] In general, these provisions mirror the general California rule relating to appeals from trial court judgments: a party seeking review must be "aggrieved."[14]

There is a large body of case law that fills out (and indeed expands beyond all recognition) the meaning of these Delphic phrases. Despite occasional detours, the courts have worked out a scheme of judicial review that seems to allow the right plaintiffs to challenge agency action without at the same time creating a vast body of confusion (as the federal courts have done in trying to solve the same problem).

1. Private Interest

Most persons seeking judicial review of agency action unquestionably have standing to do so. The action is directed at them; it deprives them of a legal interest or requires them to take action or prohibits them from doing so. Standing is never an issue in such situations because the plaintiff's private interests are directly and adversely affected. Consequently, they meet the "beneficial interest" test contained in the mandate provision or the "interested" test in the declaratory judgment statute.

a. "Over and above" test

The beneficial interest test is also satisfied where plaintiff incurs some sort of practical harm even if an order is not directed at him and does not deprive him of a legal right. According to the cases, a plaintiff's private interest is sufficient to confer standing where that

11. Sections 1069, 1086.

12. Section 526a. If plaintiff is a corporation, it must have paid a tax to the local jurisdiction that is the subject of the suit. *Id.*

13. Section 1060.

14. Section 902. See Association of Psychology Providers v. Rank, 51 Cal. 3d 1, 270 Cal. Rptr. 796 (1990) (psychiatrists are "aggrieved" and thus have standing to appeal from a trial court decision striking down a regulation that might shift income or responsibility from psychiatrists to psychologists).

interest is "over and above" that of the members of the general public.[15] The cases have been generous in granting standing to persons with quite attenuated pecuniary interests who, nevertheless, can claim some actual or potential harm that distinguishes them from the general public.[16] Earlier cases that imposed stricter standards are no longer followed.[17]

In addition, the courts treat non-pecuniary injuries, such as environmental or aesthetic claims, as sufficient to meet the private interest test.[18] Moreover, persons who were made parties to an administrative proceeding automatically have standing to appeal

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15. Carsten v. Psychology Examining Comm., 27 Cal. 3d 793, 796, 166 Cal. Rptr. 844 (1980). See Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 284-85, 384 P.2d 158 (1963) (union president has standing in both representative and personal capacities to litigate discrimination against union members even though he has not personally been victim of discrimination).

16. See, e.g., Association of Psychology Providers v. Rank, 51 Cal. 3d 1, 270 Cal. Rptr. 796 (1990) (psychiatrists can challenge regulation that diminished sphere of responsibility of psychiatrists vis-à-vis psychologists); Chas. L. Harney, Inc. v. Contractors' State License Bd., 39 Cal. 2d 561, 247 P.2d 913 (1952) (contractor can challenge regulations preventing it from bidding on certain jobs even though it has no plans to bid on any such jobs); Pacific Legal Found. v. UIAB 74 Cal. App. 3d 150, 141 Cal. Rptr. 474 (1977) (plaintiff has employees — thus can challenge UIAB precedent decision that might someday adversely affect it); Sperry & Hutchinson v. State Bd. of Pharmacy, 241 Cal. App. 2d 229, 50 Cal. Rptr. 489 (1966) (stamp company can challenge regulation banning pharmacists from giving trading stamps); Gowens v. City of Bakersfield, 179 Cal. App. 2d 282, 3 Cal. Rptr. 746 (1960) (hotel required to collect tax from lodgers has standing to challenge tax).

17. See, e.g., United States v. Superior Court, 19 Cal. 2d 189, 197-98, 120 P.2d 26 (1941) (since statute is directed at agricultural handlers, growers have no standing even though the order in question will prevent handlers from purchasing their oranges).

18. See, e.g., Bozung v. Local Agency Formation Comm'n, 13 Cal. 3d 263, 272, 118 Cal. Rptr. 249 (1975) (opposition to environmental effects of annexation — plaintiff lives outside area to be annexed); Albion River Watershed Protection Ass'n v. Department of Forestry, 235 Cal. App. 3d 358, 286 Cal. Rptr. 573, 580-88 (1991) (opponents of logging); Kane v. Redevelopment. Agency of Hidden Hills, 179 Cal. App. 3d 899, 224 Cal. Rptr. 922 (1986) (resident of county interested in slower growth); Citizens Ass'n for Sensible Dev. v. County of Inyo, 172 Cal. App. 3d 151, 159, 217 Cal. Rptr. 893 (1985) (geographic nexus with site of challenged project — can be "attenuated").

from it, regardless of any other interest.[19] However, if the plaintiff cannot establish that he has suffered some kind of harm from the decision in question, he lacks standing to seek review of the decision.[20]

b. Associational standing

Present law generously allows standing to associations, including unions, trade associations, or political associations, whether or not incorporated. Such associations can sue on behalf of their members. The only requirements are that a member or members could have met the private interest standard had they sued individually, the interests the association seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires the participation of the individual members.[21] Earlier cases had placed this issue in doubt.[22]

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19. Temescal Water Co. v. Department of Pub. Works, 44 Cal. 2d 90, 107, 279 P.2d 963 (1955); Covert v. State Bd. of Equalization, 29 Cal. 2d 125, 130, 173 P.2d 545 (1946) (complainant against licensee who was party to administrative proceeding can seek review of decision denying relief); Beverly Hills Fed. Sav. & Loan Ass'n v. Superior Court, 259 Cal. App. 2d 306, 316 n.7, 66 Cal. Rptr. 183 (1968) (bank resisting grant of license to competitor). But see Madruga v. Borden Co., 63 Cal. App. 2d 116, 121, 146 P.2d 273 (1944) (participant in administrative hearing denied right of review — probably explainable because plaintiff had adequate remedy at law).

20. Parker v. Bowron, 40 Cal. 2d 344, 254 P.2d 6 (1953) (secretary of union has no standing to challenge city's failure to pay prevailing wages to its employees); Grant v. Board of Medical Examiners, 232 Cal. App. 2d 820, 43 Cal. Rptr. 270 (1965) (no standing to challenge agency action favorable to plaintiff despite presence of language in hearing officer's decision derogatory to him); Silva v. City of Cypress, 204 Cal. App. 2d 374, 22 Cal. Rptr. 453 (1962) (challenger of zoning variance fails to allege that he was detrimentally affected by the decision).

21. County of Alameda v. Carleson, 5 Cal. 3d 730, 737 n.6, 97 Cal. Rptr. 385 (1971) (unincorporated association of welfare recipients has standing to appeal trial court decision invalidating welfare regulations); Brotherhood of Teamsters v. UIAB, 190 Cal. App. 3d 1515, 1521-24, 236 Cal. Rptr. 78 (1987) (union can challenge denial of unemployment benefits to its members because of a lockout); Residents of Beverly Glen, Inc. v. City of Los Angeles, 34 Cal. App. 3d 117, 109 Cal. Rptr. 724 (1973) (environmental concerns of canyon residents).

22. Parker v. Bowron, 40 Cal. 2d 344, 254 P.2d 6 (1953) (union cannot challenge city's failure to pay prevailing wages to its employees whether or not

The ability of associations to sue on behalf of their members is extremely important. Associations often have much greater resources to pursue litigation than do individuals. Moreover, the association is already in place; it need not be organized for purposes of pursuing a particular case, thus limiting transaction costs. Finally, associational standing avoids the free rider problem inherent in individual litigation where a number of people are affected: each such person hopes that others will bear the costs of litigation and therefore nobody does anything (or one individual unfairly has to absorb the costs of litigation that benefit many people).

c. Party status as prerequisite to standing

Must the person seeking judicial review have been a party to the agency proceeding? This issue combines elements of standing and exhaustion of remedies and has caused difficulty. The exhaustion of remedies requirement is that the particular ground on which agency action is claimed to be invalid must have been raised before the agency.[23] The related standing rule is that the particular plaintiff now seeking review of agency action must have objected to the agency action orally or in writing, although not necessary on the grounds that are now the basis for review.[24] However, the courts have drawn exceptions to the rule[25] and also have not applied it

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some employees were members of the union); Associated Boat Indus. v. Marshall, 104 Cal. App. 2d 21, 230 P.2d 379 (1951) (trade association is not "interested" in a regulation even though its members are). See Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 283-85, 384 P.2d 158 (1963), which effectively disapproves *Parker*.

23. The "exact issue" rule is discussed under exhaustion of remedies.

24. See Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 267-68, 104 Cal. Rptr. 761 (1972).

25. The *Friends of Mammoth* decision established an exception to the general rule: an association or a class formed after the agency proceeding can sue so long as at least one of its members participated in the agency proceeding. The general rule, and the *Friends of Mammoth* exception, have been codified for California Environmental Quality Act cases in Public Resources Code Section 21177. See Albion River Watershed Protection Ass'n v. Department of Forestry, 235 Cal. App. 3d 358, 286 Cal. Rptr. 573, 580-88 (1991), which suggests the problems raised by the *Friends of Mammoth* exception; Leff v. City of Monterey

consistently.[26] These rather tortured exceptions and inconsistent treatment raise doubts about whether the rule is worth maintaining.

I believe the exhaustion rule is sound but that the standing rule is not.[27] The standing rule forces litigants to jump through unnecessary hoops trying to involve as parties to an appeal persons who were active in protesting something before the agency at an earlier time but are not personally interested in securing review of it. So long as the precise issue on which review is now being sought was considered at the agency level, why should it matter whether the particular plaintiff (or someone in the plaintiff's group) was personally involved in raising that or other issues before the agency?[28]

Park, 218 Cal. App. 3d 682, 267 Cal. Rptr. 343 (1990) (exception applied even though not a class action).

Another exception to the standing rule was established in Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1975). In a case involving public rights, plaintiff was permitted to seek review of a decision by a local planning commission despite having failed to appear at the administrative proceeding. Later cases have limited the *Corte Madera* exception to cases of public as opposed to private right and only where the members of the public failed to receive notice of the proceeding in which they failed to appear. Resource Defense Fund v. Local Agency Formation Comm'n, 191 Cal. App. 3d 886, 894-95, 236 Cal. Rptr. 794 (1987); Mountain View Chamber of Commerce v. City of Mountain View, 77 Cal. App. 3d 82, 143 Cal. Rptr. 441 (1977).

26. Peery v. Superior Court, 29 Cal. 3d 837, 841, 176 Cal. Rptr. 533 (1981); Employees Serv. Ass'n v. Grady, 243 Cal. App. 2d 817, 827, 52 Cal. Rptr. 831 (1966); Brotherhood of Teamsters v. UIAB 190 Cal. App. 3d 1515, 1521, 236 Cal. Rptr. 78 (1987).

27. The Model Act provides that a petitioner for judicial review of a rule need not have participated in the rulemaking proceeding on which the rule is based. I believe this is the correct resolution of the issue. MSAPA § 5-107(1).

28. A comparable rule requires that a person seeking to appeal a judicial decision have been a party to that case at the trial level. Section 902. However, this has not proved to be a problem, at least in administrative law cases, since persons aggrieved by trial court decisions to which they were not previously parties have been allowed to become parties by moving to vacate the judgment. See Association of Psychology Providers v. Rank, 51 Cal. 3d 1, 270 Cal. Rptr. 796 (1990); County of Alameda v. Carleson, 5 Cal. 3d 730, 737 n.6, 97 Cal. Rptr. 385 (1971); Simac Design, Inc. v. Alciati, 92 Cal. App. 3d 146, 153, 154 Cal. Rptr. 676 (1979). In other cases, parties whose interest appeared on the face of the record were allowed to appeal even though not parties to the trial court deci-

d. Victim standing

A related issue is whether a person who has complained to an agency about a professional licensee should be allowed to challenge an agency decision in favor of the licensee. In some cases, at least, a victim might claim private interest standing on the grounds that the administrative decision will have a bearing on some related litigation (such as a malpractice case). I would deny standing to such a person (unless that person had been made a party at the administrative level). The Commission has already decided in the adjudication phase of its study of administrative law that there should be no right of private prosecution. It would be consistent with that approach to deny standing to seek judicial review to a complainant against a licensee who has not been made a party to the administrative proceeding and who had no right to become a party under a statute specific to the agency.[29]

e. Local government standing

One confusing group of standing cases concerns the issue of whether a unit of local government can sue the state on the basis that a state statute is unconstitutional. It seems that local government can sue based on the commerce or supremacy clauses but not due process, equal protection, or the contract clause.[30] These dis-

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sion. Harris v. Alcoholic Beverage Control Appeals Bd., 245 Cal. App. 2d 919, 923, 54 Cal. Rptr. 346 (1966). Consequently, I see no need to recommend modification of Section 902.

29. If the complainant has been made a party to the administrative proceeding, or has a statutory right to become a party, the complainant should have standing to appeal from the decision. Covert v. State Bd. of Equalization, 29 Cal. 2d 125, 173 P.2d 545 (1946).

30. See Star-Kist Foods, Inc. v. County of Los Angeles, 42 Cal. 3d 1, 227 Cal. Rptr. 391 (1986).

tinctions seem difficult to justify.[31] Local government should have standing to sue the state.[32]

f. Comparison to federal law

The California rules on private interest are blessedly free of the complications that have arisen in federal cases where the courts seem bent on restricting standing as far as possible to limit the caseload of the federal courts and prevent judges from meddling in matters that do not concern them.[33] For example, judicial review under federal law requires not only that the plaintiff have been "injured in fact," it also requires that the plaintiff be within the "zone of interests" arguably protected or regulated by the statute or constitutional provision in question.[34] The courts have found the "zone of interest" test extremely difficult to apply; in my opinion there is no persuasive rationale for it. Even more important, federal courts impose strict requirements of causation and remediability;[35] the agency action must have caused the injury to the plaintiff (without the intermediate actions of some third party) and judicial action against the defendant must be likely to remedy that injury. These requirements have been quite strictly applied, yet the tests

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31. In general, units of local government have standing to sue the state under the private interest test. See, e.g., County of Contra Costa v. Social Welfare Bd., 199 Cal. App. 2d 468, 18 Cal. Rptr. 573 (1962) (county ordered to pay welfare by state board). There is no apparent reason to treat certain constitutional claims differently for standing purposes.

32. Of course, granting standing is not equivalent to a ruling that the plaintiff has a cause of action. If the constitutional provision in question does not, as a matter of substantive law, protect local government, the suit should be dismissed on the merits, not on the basis of a lack of standing. Star-Kist Foods, Inc. v. County of Los Angeles, 42 Cal. 3d 1, 227 Cal. Rptr. 391 (1986).

33. The reader will be grateful that the author considers an extended discussion of the federal standing cases beyond the scope of this study.

34. The U.S. Supreme Court strongly endorsed the zone of interest test in Air Courier Conference v. American Postal Workers Union, 111 S. Ct. 913 (1991) (postal employees not within zone of interest of statute giving post office a monopoly).

35. These tests are constitutional, as opposed to prudential rules like the zone of interest test. Congress can alter the zone of interest test, but cannot abolish the causation and remediability tests.

remain unpredictable in practice.[36] Again, in my opinion, there is no need for these tests. Unfortunately, the zone of interest test, as well as the causation and remediability tests, were built into the Model Act's standing provision.[37] California should not follow the Model Act's lead on this point.

2. Public Actions.

California cases arising under the ordinary mandamus remedy of Section 1085 have been extremely forthcoming in allowing plaintiffs who lack any private injury as described above to sue to vindicate the public interest.[38] In a recent California Supreme Court case, for example, plaintiffs were given standing simply in their role as citizens to sue a county for failing to implement state law by not deputizing county employees as voting registrars.[39] While some earlier cases cast doubt on the public interest rule,[40] the newer cases emphatically endorse it.[41]

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36. See, e.g., Allen v. Wright, 468 U.S. 737 (1984).

37. MSAPA § 5-106(a)(5)(ii)-(iii).

38. Since Section 1086 requires that a mandate plaintiff be "beneficially interested," these cases are dramatic examples of judicial lawmaking.

39. Common Cause v. Board of Supervisors, 49 Cal. 3d 432, 261 Cal. App. 3d 574 (1989) (plaintiff can seek mandate as well as provisional relief).

40. Carsten v. Psychology Examining Comm., 27 Cal. 3d 793, 166 Cal. App. 3d 844 (1980), refused to allow a member of an agency to obtain judicial review of the actions of that very agency. The case contains language which would undercut the public interest exception. Later cases limit *Carsten* to its facts — for policy reasons, an agency member should not be allowed to sue her own agency. Green v. Obledo, 29 Cal. 3d 126, 143-45, 172 Cal. Rptr. 206 (1981). Parker v. Bowron, 40 Cal. 2d 344, 254 P.2d 6 (1953), refusing to allow an individual or unions standing to compel a city to comply with a requirement that it pay prevailing wages, also casts doubt on the public interest rule, but must be considered obsolete.

41. See Green v. Obledo, 29 Cal. 3d 126, 143-45, 172 Cal. Rptr. 206 (1981) (plaintiff can attack regulation denying welfare benefits including both the portion that denies her benefits and other portions that have no effect on her); Pitts v. Perluss, 58 Cal. 2d 824, 829, 27 Cal. Rptr. 19 (1962) (citizen urging enforcement of department's duty to adopt regulations); Hollman v. Warren, 32 Cal. 2d 351, 196 P.2d 562 (1948) (constitutionality of statute limiting number of notaries that can be appointed); Board of Social Welfare v. County of Los Angeles, 27 Cal. 2d 98, 162 P.2d 627 (1945) (replacement of expired welfare checks);

The rationale for this rule has been stated several times: "[W]here the question is one of public right and the object of mandamus is to procure enforcement of a public duty, the relator need not show he has any legal or special interest in the result since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced."[42] Public interest standing "promotes the policy of guaranteeing citizens the opportunity to ensure that no government body impairs or defeats the purpose of legislation establishing a public right."[43]

Apparently, this rule applies only to mandate, not to actions for declaratory judgment.[44] There seems to be little reason for the distinction and a new statute should generalize the public injury test to all actions for judicial review of agency action.

In my view, the public interest rule works well. It has no counterpart on the federal level where a plaintiff must always demonstrate both "palpable" and "particularized" injury in fact.[45] I

Frank v. Kizer, 213 Cal. App. 3d 926, 261 Cal. Rptr. 882 (1989) (patients have standing to compel compliance with federal Medicaid regulations even though their particular cases have already been settled); American Friends Serv. Comm. v. Procunier, 33 Cal. App. 3d 252, 255-56, 109 Cal. Rptr. 22 (1973) (action to force agency to comply with state rulemaking requirements); Newland v. Kizer, 209 Cal. App. 3d 647, 257 Cal. Rptr. 450 (1989) (action to force agency to adopt regulations); Madera Community Hosp. v. County of Madera, 155 Cal. App. 3d 136, 201 Cal. Rptr. 768 (1984) (same); Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1975) (environmental group challenging approval of development); McDonald v. Stockton Metro. Transit Dist., 36 Cal. App. 3d 436, 440, 111 Cal. Rptr. 637 (1973) (action to compel city to build bus shelters under its contract with DOT); *In re* Veterans' Indus., Inc., 8 Cal. App. 3d 902, 88 Cal. Rptr. 303 (1970) (compelling court to exercise cy pres discretion).

42. Board of Social Welfare v. County of Los Angeles, 27 Cal. 2d 98, 101, 162 P.2d 627 (1945).

43. Green v. Obledo, 29 Cal. 3d 126, 144, 172 Cal. Rptr. 206 (1981).

44. Sherwyn v. Department of Social Servs., 173 Cal. App. 3d 52, 218 Cal. Rptr. 778 (1985) (a case decided primarily on ripeness grounds); American Friends Serv. Comm. v. Procunier, 33 Cal. App. 3d 252, 255-56, 109 Cal. Rptr. 22 (1973).

45. See, e.g., Schlesinger v. Reservists' Comm., 418 U.S. 208 (1974) (challenge to practice of members of Congress holding military positions);

believe that plaintiffs who wish to incur the expense and bother of litigating public interest questions, such as the illegality of government action, should be allowed to do so. There is no reason to believe that the existing California public interest rule, or the generous provision for taxpayer suits discussed below, has caused any significant problems by way of harassing agencies or flooding the courts.[46] Nevertheless, the Commission may wish to consider some limitations on public interest or taxpayer suits, such as a bond requirement[47] or a requirement that the Attorney General or local law enforcement authority be first notified and given an opportunity to sue before the public interest or taxpayer suit is filed.[48] I do not recommend either of these measures, absent some empirically based showing that public interest suits are posing a serious problem of harassment or obstruction of public programs.

Aside from the risk of harassment or obstruction, the problem with the public interest rule is definitional. It may be far from self evident whether a particular claim really meets the standards of public right-public duty. So far, at least, this has not proved difficult; the courts have stated that where the public duty is sharp and the public need weighty, a plaintiff needs to show no personal

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Sierra Club v. Morton, 405 U.S. 727 (1972) (Sierra Club lacks standing to challenge development program despite its historic commitment to protection of the Sierras).

46. See Carsten v. Psychology Examining Comm., 27 Cal. 3d 793, 805-06, 166 Cal. Rptr. 844 (1980) (dissenting opinion). Justice Richardson's dissent in this 4-3 decision persuasively attacked the majority's rule which precludes a member of an agency from suing her own agency. The dissent thought this was a perfectly appropriate citizen suit and asserted (admittedly without statistical support) that the existing law had caused no problems for government or the courts.

47. In the court's discretion, plaintiff might be compelled to post a bond to cover the defendant's costs. See Comment, *Taxpayers' Suits: Standing Barriers and Pecuniary Restraints*, 59 Temple L.Q. 951, 974-76 (1986). Such a requirement would be akin to that imposed on plaintiffs in stockholder derivative suits. See Corp. Code § 800(c)-(f).

48. *Cf.* Keith v. Hammel, 29 Cal. App. 131, 154 P. 871 (1915) (taxpayer's action against sheriff should have first been presented to proper county officers to give them a chance to sue).

need; but if the public need is less pointed, courts require plaintiff to show his personal need for relief.[49] While vague, this test seems serviceable. As discussed below, it is probably not possible to draft anything very specific on this point.[50]

3. Taxpayer Actions

Historically California has been extremely receptive to actions brought by taxpayers to restrain illegal or wasteful expenditures.[51] In 1906, the enactment of Code of Civil Procedure Section 526a formalized the existing case law on the subject. While Section 526a applies only to local government entities, the case law evolution of the remedy has continued so that taxpayer actions can be brought against state officials[52] or local government entities not mentioned in Section 526a.[53]

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49. McDonald v. Stockton Metro. Transit Dist., 36 Cal. App. 3d 436, 440, 111 Cal. Rptr. 637 (1973).

50. This study does not discuss the recovery of attorney's fees by a successful plaintiff. However, under Section 1021.5, a court may award fees to a successful plaintiff in any action which has resulted in the enforcement of "an important right affecting the public interest if (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.…" If the Commission wanted a definition of public interest standing, it could adapt the test in Section 1021.5(a).

51. See generally Myers, *Standing in Public Interest Litigation: Removing the Procedural Barriers*, 15 Loy. L.A. L. Rev. 1 (1981); Note, *California Taxpayer Suits: Suing State Officers under Section 526a of the Code of Civil Procedure*, 28 Hastings L. Rev. 477 (1976). Non-California discussions of taxpayer actions include Comment, *Taxpayers' Suits: Standing Barriers and Pecuniary Restraints*, 59 Temple L.Q. 951 (1986) (virtually every state allows taxpayer suits against both state and local government); Note, *Taxpayers' Suits: A Survey and Summary*, 69 Yale L.J. 895 (1960).

52. Stanson v. Mott, 17 Cal. 3d 204, 222-23, 130 Cal. Rptr. 697, 708-09 (1976); Ahlgren v. Carr, 209 Cal. App. 2d 248, 25 Cal. Rptr. 887 (1962).

53. Los Altos Property Owners Ass'n v. Hutcheon, 69 Cal. App. 3d 22, 137 Cal. Rptr. 775 (1977) (action against school board can be brought under Section 526a as well as under the common law); Gogerty v. Coachella Valley Jr. College Dist., 57 Cal. 2d 727, 371 P.2d 582 (1962).

The purpose of taxpayer actions is to "enable a large body of the citizenry to challenge governmental action that otherwise would go unchallenged in the courts because of the standing requirement … California courts have consistently construed Section 526a liberally to achieve this remedial purpose."[54]

Taxpayer actions can be brought to enjoin expenditures that are contrary to local or state statutes (so called "ultra vires" expenditures) or are contrary to constitutional restrictions. Taxpayers can enjoin programs that involve spending only trivial sums or even non-spending government activities provided that governmental employees are paid a salary to execute them.[55] A program can be enjoined even if it does not involve the spending of tax dollars or even if it makes money[56] or even though there are also individuals whose private interest would have allowed them to sue.[57] Taxpayer actions cannot be defeated by claims that plaintiff is seeking an advisory opinion or that there is no case or controversy.[58] And actions for declaratory relief or damages are also permitted, even though Section 526a appears limited to injunctions.[59]

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54. Blair v. Pitchess, 5 Cal. 3d 258, 267-68, 96 Cal. Rptr. 42 (1971). For example, despite the limitation in Section 526a restricting standing to citizen residents of the jurisdiction whose expenditures are being challenged, the courts have allowed nonresident taxpayers to sue. Irwin v. City of Manhattan Beach, 65 Cal. 2d 13, 18-20, 51 Cal. Rptr. 881 (1966) (allowing nonresident corporate but not individual taxpayers to sue violates equal protection).

55. Regents of Univ. of Cal. v. Superior Court, 3 Cal. 3d 529, 542, 91 Cal. Rptr. 57 (1970) (University's refusal to employ communists); Wirin v. Parker, 48 Cal. 2d 890, 894, 313 P.2d 844 (1957) (use of public funds to conduct illegal police surveillance); Wirin v. Horrall, 85 Cal. App. 2d 497, 504, 193 P.2d 470 (1948) (use of funds to conduct police blockades).

56. Blair v. Pitchess, 5 Cal. 3d at 267-68.

57. Van Atta v. Scott, 27 Cal. 3d 424, 166 Cal. Rptr. 149 (1980).

58. Blair v. Pitchess, 5 Cal. 3d at 267-68.

59. Van Atta v. Scott, 27 Cal. 3d at 424 (declaratory relief); Stanson v. Mott, 17 Cal. 3d 204, 222-23, 130 Cal. Rptr. 697, 708-09 (1976) (damages if defendant failed to exercise due care in illegally spending state funds). See Keller v. State Bar, 47 Cal. 3d 1152, 255 Cal. Rptr. 542 (no personal liability of Bar governors for spending Bar funds on election since they reasonably believed the expenditure was authorized).

Less clear is the degree to which "wasteful" expenditures can be enjoined. Section 526a, but not common law taxpayer actions, allow actions restraining governmental waste;[60] presumably this means spending that cannot achieve any proper governmental purpose even though it is not ultra vires. The vagueness of the "waste" concept gives rise to concern.[61]

California law relating to taxpayer suits is completely at variance with federal law. Federal cases have rejected taxpayer actions[62] with the single, somewhat anomalous exception of taxpayer actions to enforce the establishment clause, which are permitted.[63]

4. *Jus Tertii* — Enforcing Rights of Third Parties.

In some situations, a person (*A*) would have standing to seek review because of some personal legal or practical harm to its interests. For some reason, however, *A* does not or cannot actually seek review. Another party (*B*), who might not meet any of the standing criteria on its own, seeks review on *A*'s behalf. Suing to enforce the rights of third parties is often referred to as *jus tertii*. California cases, like federal cases, make provision for *jus tertii* in appropriate cases.[64]

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60. Los Altos Property Owners Ass'n v. Hutcheon, 69 Cal. App. 3d 22, 137 Cal. Rptr. 775 (1977).

61. Harnett v. County of Sacramento, 195 Cal. 676, 683, 235 P. 45 (1925) (court can enjoin a redistricting election which could not achieve desired result); Los Altos Property Owners Ass'n v. Hutcheon, 69 Cal. App. 3d 22, 137 Cal. Rptr. 775 (1977) (claim that school board's consolidation plan would cost more than plaintiff taxpayer's alternative plan states cause of action for waste); City of Ceres v. City of Modesto, 274 Cal. App. 2d 545, 555-56, 79 Cal. Rptr. 168 (1969) (installation of sewer lines — wasteful, improvident, and completely unnecessary public spending can be enjoined by a taxpayer even though done in exercise of lawful power).

62. Valley Forge Christian Sch. v. Americans United, 454 U.S. 464 (1982).

63. Flast v. Cohen, 392 U.S. 83 (1968).

64. *Jus tertii* is not automatic, however. For example, *B* was not allowed to sue on *A's* behalf where *B* and *A* had conflicting interests. Camp Meeker Sys., Inc. v. PUC, 51 Cal. 3d 845, 274 Cal. Rptr. 678 (1990). And in a case primarily decided on ripeness grounds, attorneys were denied standing to sue on behalf of clients who wished to enter into surrogate parenting arrangements to challenge

Two factors have been employed in deciding whether *B* can sue. First, what is the relationship between *B* and *A*? *B* is likely to have standing if *A*'s rights are inextricably bound up with an activity that *B* wishes to pursue. Second, is there some practical obstacle to *A* seeking review itself?[65]

In the California cases that have permitted suit under the *jus tertii* approach, both factors pointed in the direction of permitting standing. For example, in *Selinger v. City Council of Redlands*,[66] a state statute required automatic approval of a subdivision application if not denied within one year. Arguably this statute denied due process to adjacent landowners who normally would be entitled to notice and a hearing on the application. But the adjacent landowners were not notified and the subdivision was automatically approved after one year. A city was permitted to sue on behalf of the landowners. The statute interfered with the city's zoning pro-

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policies of a state agency. Sherwyn v. Department of Social Servs., 173 Cal. App. 3d 52, 218 Cal. Rptr. 778 (1985).

In the venerable case of Parker v. Bowron, 40 Cal. 2d 344, 254 P.2d 6 (1953), the question was whether a city was complying with a prevailing wage law; neither unions (that contained some city workers) nor the secretary of those unions was permitted to assert the rights of city employees. The *Parker* case has clearly been superseded by later cases involving the right of associations to vindicate the rights of their members. See *supra* text accompanying notes 21-22. *Parker* might still be followed, however, on the question of whether the secretary of the union could assert the rights of city workers; however, it is likely that the suit could proceed as a public action under modern cases. The prevailing wage law might be considered as one that created public rights and duties.

65. This analysis was drawn from federal cases. For example, a physician is permitted to sue on behalf of patients who assert that a state statute denies the patient's right to obtain an abortion; a vendor is permitted to assert the rights of buyers penalized by an unconstitutional statute. Singleton v. Wulff, 428 U.S. 106 (1976); Craig v. Boren, 429 U.S. 190 (1976). See generally L. Tribe, American Constitutional Law § 3-19 (2d ed. 1988).

66. 216 Cal. App. 3d 271, 264 Cal. Rptr. 499 (1989). Similarly, see Drum v. Fresno County Dep't of Pub. Works, 144 Cal. App. 3d 777, 783-84, 192 Cal. Rptr. 782 (1983). See also the leading California case of Board of Social Welfare v. County of Los Angeles, 27 Cal. 2d 98, 100, 162 P.2d 627 (1945), allowing a state social welfare agency to sue a county on behalf of welfare recipients "who are … ordinarily financially, and often physically, unable to maintain such proceedings on their own behalf."

cess (although it did not deprive the city of due process); therefore the first criterion of inextricable relationship was met. Secondly, the landowners would have difficulty bringing the suit since they were never notified of the development until it was too late to challenge it.

There may be cases in which *B* cannot meet these tests. In many such cases, however, *B* could probably sue under the public rights approach discussed above where the courts require no personal stake at all.

B. RECOMMENDATIONS

A statute should codify standing law, which is now mostly in relatively inaccessible and somewhat confusing case law and fragmentary and misleading statutes.[67] I suggest working with the provision in the Model Act[68] but adding provisions on public actions and pruning the parts of the statute that incorporate inappropriate and unsatisfactory federal standing rules.

1. Private Interest.

The MSAPA section provides standing to a person to whom the agency action is specifically directed and to a person who was a party to the agency proceedings that led to the agency action. It also provides standing to "a person eligible for standing under another provision of law."[69] These subsections seem appropriate and reflect existing California law.

The MSAPA provides that "if the challenged agency action is a rule, a person subject to that rule" has standing to seek review of the rule.[70] This would change existing California law that, with some exceptions, requires a person challenging a rule to have been

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67. For example, Section 526a, relating to taxpayer actions, appears to cover only actions against local government, yet it has been expanded to cover actions against the state.

68. MSAPA § 5-106.

69. *Id.* § 5-106(a)(1), (2), (4).

70. *Id.* § 5-106(a)(3).

a party to the rulemaking proceeding.[71] As discussed above, I believe that the existing rule is unnecessary. The related exhaustion of remedies rule requiring that the particular issue that is the subject of the challenge be raised at the administrative level makes sense, but there is little reason to require that the particular plaintiff have been involved in the rulemaking proceeding.

The MSAPA then provides that "a person otherwise aggrieved or adversely affected by the agency action" has standing to challenge it. "For purposes of this paragraph, no person has standing as one otherwise aggrieved or adversely affected unless: (i) the agency action has prejudiced or is likely to prejudice that person.…"[72] This adequately states the "private interest" standard, which is well developed in existing California law.[73] The MSAPA then goes on to add the zone of interests, causation, and remediability requirements of federal law,[74] which I strongly urge that California not adopt.[75]

The statute should make clear that it preserves existing law about the right of associations to sue on behalf of any of their members who can meet the private interest standard.[76] This idea should be expressed in statutory language.

The statute should also preserve the *jus tertii* rule — the right of third parties to assert the rights of persons who meet the private interest standard.[77] Here the standard is so vague that it might be

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71. See *supra* text accompanying notes 24-28.

72. MSAPA § 5-106(a)(5).

73. Note again that the MSAPA does not require that the person have been a party to the action below, whether it is quasi-legislative or quasi-judicial. I believe this change is appropriate.

74. MSAPA § 5-106(a)(5)(ii), (iii).

75. Probably the section can be simplified by leaving out the language about "otherwise aggrieved or adversely affected," leaving only a residual section on private interest for agency action that "prejudiced or is likely to prejudice" the plaintiff. This seems adequate to capture any sort of practical or legal harm and thus meets the California standards that the plaintiff be hurt in some way that distinguishes him from the general public.

76. See *supra* text accompanying notes 21-22.

77. See *supra* text accompanying notes 64-66.

difficult to write a statute on it. Perhaps the *jus tertii* rule can be the subject of a comment to the section stating that prior law is preserved, together with a few citations to existing cases that articulate that law. Finally, the statute or a comment should make clear the local government has standing to sue the state on any legal theory.[78]

2. Public Interest and Taxpayer Suits

Because it seems to be based on federal law, the MSAPA standing provision does not allow standing to taxpayers or to persons asserting public interest claims. I believe California law on these points is working well and should be preserved.

However, it seems to me that taxpayer actions should be dispensed with. If there is a generous public interest type standard, what is the need for the separate taxpayer action? The case law has expanded taxpayer actions to the point that their conceptual basis (arising out of harm to the long-suffering taxpayer) seems rather silly. As we have seen, a taxpayer can seek to enjoin any action by government whether it involves spending funds or not, or even if the activity is a money-maker. Any action that involves paid staff to implement falls within the domain of taxpayer standing — and obviously this includes every possible action by government. Who cares, at this point, whether the plaintiff is a taxpayer or not?

Besides, some aspects of taxpayer standing under existing law seem dubious. I do not believe that there should be an action for "waste" of taxpayer funds; if there is no basis for claiming illegality of the action or expenditure, the courts should not intervene. An action for "waste" provides too great an inducement for harassing lawsuits that raise essentially political issues. Moreover, I do not believe that there should be personal liability of government officials for administrative action that proves to be invalid, whether or not such action meets the due care standard developed in existing

78. See *supra* text accompanying notes 30-32.

law.[79] Such liability runs contrary to the policies behind the tort claims act.[80]

Instead, it seems sensible to fold the taxpayer action into a generic public interest standard.[81] Such a standard would allow a plaintiff to challenge action of state or local government on the ground that such action is contrary to law. Such law could be expressed in the state or federal constitution, a statute, a regulation, or even in judicial decisions. However, the law in question must be one that a court believes was intended to benefit the general public or a large segment of the general public, as opposed to a narrow private interest. The law might, for example, be one that imposes environmental controls or controls on the political process. It might be a tax law that is being erroneously interpreted to create a loophole. It might be a benefit statute intended to relieve poverty. The bounds of the public interest statute cannot be expressed by any statutory formula and must evolve case by case. I leave it to the staff to figure out exactly how such a provision should be drafted.[82] Perhaps a comment stating that the Legislature approves of existing law (illustrated by a few citations) would be sufficient.

II. TIMING OF JUDICIAL REVIEW

Various doctrines control the timing of judicial review; if applicable, these doctrines require a delay of judicial involvement in resolving the dispute. At present, none of the doctrines are statutory and several overlap. In many respects, the case law is confusing and inconsistent. Codification and clarification of these doctrines and their various exceptions would be helpful.

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79. See *supra* note 59.

80. See California Government Liability Tort Practice §§ 2.89-2.91, at 170-73, §§ 6.143-6.156, at 863-79 (Cal. Cont. Ed. Bar, 3d ed. 1992). In general, in all but very unusual cases, a public entity must provide a defense for public employees and must indemnify such employees against any liability for job-related acts. Thus the Legislature is committed to a regime in which public employees are not subject to personal liability.

81. Taxpayer suits have functionally become citizen suits. Note, 69 Yale L.J. 895, 906 (1960).

82. See *supra* note 50, suggesting use of language in Section 1021.5.

A. EXHAUSTION OF ADMINISTRATIVE REMEDIES

1. Existing California Law

The requirement that a party exhaust administrative remedies before seeking judicial review has been heavily litigated in California.[83]

Unless an exception to the rule is applicable, a litigant must fully complete all federal,[84] state and local administrative remedies before coming to court or defending against administrative enforcement.[85] The doctrine applies even though a litigant contends that an agency has made a legal error, for example by wrongfully taking jurisdiction over the case or by denying benefits to the litigant or by failing to follow its own procedural rules.[86]

The exhaustion rule applies whenever a process exists whereby an unfavorable agency decision might be challenged within that agency or another agency.[87] The rule applies to the review of state or local agency actions that might be deemed quasi-legislative,

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83. For general treatments of exhaustion under California law, see Comment, *Exhaustion of Administrative Remedies in California*, 56 Cal. L. Rev. 1061 (1968); California Administrative Mandamus ch. 2 (Cal. Cont. Ed. Bar, 2d ed. 1989); 3 B. Witkin, California Procedure *Actions* §§ 308-23, at 392-415 (4th ed. 1996); 2 G. Ogden, California Public Agency Practice § 51.02 (1992).

This section of the study does not consider the rule that a failure to exhaust *judicial* remedies under Section 1094.5 establishes the propriety of the administrative action under the doctrine of administrative res judicata. See, e.g., Knickerbocker v. City of Stockton, 199 Cal. App. 3d 235, 244 Cal. Rptr. 764 (1988). This section concerns only exhaustion of administrative remedies.

84. Acme Fill Corp. v. San Francisco Bay Cons. & Dev. Comm'n, 187 Cal. App. 3d 1056, 1064, 232 Cal. Rptr. 348 (1986) (exhaustion of federal remedy before suing in state court).

85. South Coast Regional Comm'n v. Gordon, 18 Cal. 3d 832, 135 Cal. Rptr. 781 (1977) (failure to exhaust remedies precludes raising defenses against enforcement); People v. Coit Ranch, Inc., 204 Cal. App. 2d 52, 57-58, 21 Cal. Rptr. 875 (1962) (same).

86. Bollengier v. Doctors Medical Ctr., 222 Cal. App. 3d 1115, 1126-32, 272 Cal. Rptr. 273 (1990).

87. However, that process must be one provided by regulation or statute that furnishes clearly defined machinery for submission, evaluation, and resolution of the dispute. See *infra* text accompanying note 116.

quasi-administrative or ministerial, as well as quasi-judicial.[88] It requires not only that every procedural avenue be completely exhausted,[89] but also that the exact issue that the litigant wants the court to consider have been raised before the agency.[90] It applies even though the administrative remedy is no longer available; in such cases, of course, dismissal because of a failure to exhaust is equivalent to denying judicial review altogether.

In California, unlike federal law, there is no separate "final order" rule.[91] If the decision being challenged is not final, the court

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88. Redevelopment Agency of the County of Riverside v. Superior Court, 228 Cal. App. 3d 1487, 1492, 279 Cal. Rptr. 558 (1991) (whether adoption of redevelopment plan is quasi-legislative or quasi-administrative, exhaustion rule applies); Lopez v. Civil Serv. Comm'n, 232 Cal. App. 3d 312, 283 Cal. Rptr. 447 (1991) (exhaustion applies to all forms of mandate and applies even though plaintiff seeks ministerial rather than quasi-judicial action by agency).

But see City of Coachella v. Riverside County Airport Land Use Comm'n, 210 Cal. App. 3d 1277, 1287-88, 258 Cal. Rptr. 795 (1989), involving objections to a land use plan adopted by a local agency. The objector failed to appear at a legally required public hearing. The court held that appearance at the hearing was not a remedy that must be exhausted, since the agency was not required to do anything in response to submissions at the hearing. I regard the latter decision as probably incorrect; the public hearing was obviously intended for the purpose of allowing the public to raise questions about the planning decision and for the agency to consider and respond to such questions.

89. Lopez v. Civil Serv. Comm'n, 232 Cal. App. 3d 312, 283 Cal. Rptr. 447 (1991) (must raise issue at every stage of the administrative process); Edgren v. Regents of Univ. of Cal., 158 Cal. App. 3d 515, 205 Cal. Rptr. 6 (1984) (litigant who withdrew during a hearing, complaining of due process violations in the way the hearing was being conducted, failed to exhaust remedies).

There appears to be an exception to the requirement that the objection be raised at every possible stage in the case of land use planning; it is sufficient to raise an objection before the "lead agency" but not before the planning commission. Browning-Ferris Ind. v. San Jose City Council, 181 Cal. App. 3d 860, 226 Cal. Rptr. 575 (1986).

90. The exact issue rule is discussed *infra* in text accompanying notes 100-03.

91. Section 1094.5 provides for review of any "final administrative order or decision" arising out of a hearing. Most decisions have dismissed applications for mandamus to review non-final orders because of a failure to exhaust remedies (as distinguished from a separate final order rule). Some cases have treated finality as a distinct reason to dismiss applications under Section 1094.5. Kumar v. National Medical Enters., 218 Cal. App. 3d 1050, 267 Cal. Rptr. 452 (1990)

will dismiss under the exhaustion of remedies rule, unless an exception to the exhaustion doctrine applies.[92] I have not suggested any change in this practice since the analysis of whether a decision is a "final order" and whether a litigant has "exhausted administrative remedies" are so similar. It would probably create more confusion than clarity to try to separate them.

a. Purposes and costs of the exhaustion doctrine

The purposes of the exhaustion requirement have often been spelled out.[93] Essentially, there are two rationales for the exhaustion rule.

The first rationale for exhaustion arises out of a pragmatic concern for judicial efficiency. Judicial proceedings are more efficient if piecemeal review can be avoided. The quality of review is enhanced if a court can start with a complete factual record produced at the agency level. Moreover, it is helpful to a court if an expert agency has resolved the same issue that the court must deal with. Finally, a litigant may succeed before the agency or the case may be settled; thus the court can avoid ever having to decide the case at all.

The second purpose of exhaustion is based on separation of powers; the agencies of state and local government are a separate branch of government and their autonomy must be respected. This purpose is furthered by allowing an agency to apply its expertise to the problem and to correct its own mistakes before it is haled into court. Moreover, if exhaustion were not required, litigants would have an incentive to short-circuit agency processes and avoid an agency decision to which a court would give deference. Such end

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(only final order from appellate body of hospital can be appealed under Section 1094.5); Board of Medical Quality Assurance v. Superior Court, 73 Cal. App. 3d 860, 141 Cal. Rptr. 83 (1977) (Section 1094.5 action filed for purpose of taking deposition in a pending administrative action dismissed because of the lack of a final order).

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

93. See, e.g., McCarthy v. Madigan, 112 S. Ct. 1081, 1086-87 (1992); Rojo v. Klieger, 52 Cal. 3d 65, 82-85, 276 Cal. Rptr. 130 (1990).

runs are contrary to the Legislature's intention in creating those agencies.

While the exhaustion doctrine serves valuable public purposes, the requirement can be very costly to litigants. The exhaustion doctrine requires them to resort to agency remedies they believe are almost certainly useless. Where a private litigant ultimately prevails in court, but has first been required to exhaust administrative remedies, the effect of the doctrine is to delay ultimate resolution of the case, perhaps for years. It also requires the expenditure of substantial, perhaps crushing, professional fees. Indeed, exhaustion of remedies often means exhaustion of litigants. In many cases, the remedy in question is no longer available by the time the case comes to court; in such cases, requiring exhaustion means that the case is over and the private litigant has lost.

b. Doctrine is jurisdictional

One notable aspect of the California exhaustion rule is that it is jurisdictional, not discretionary. At the federal level and in most states, exhaustion of remedies is discretionary unless a specific statute requires exhaustion, in which case it is treated as jurisdictional.[94]

The rule that exhaustion is jurisdictional derives from the leading California case, *Abelleira v. District Court of Appeal*.[95] In *Abelleira*, an administrative judge held that employees were entitled to unemployment benefits despite a statutory rule precluding payment of benefits in cases where unemployment was caused by a strike. The employer appealed to higher agency authority. While that appeal was pending, the employer sought judicial review of the ALJ's decision. The employer argued that immediate review should be available, notwithstanding its failure to exhaust remedies, because the statute required payment of benefits to the employees pending the administrative appeal. The employer claimed that such immediate and unlawful payments would deplete the benefit fund. The court of appeal held that immediate judicial

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94. See McCarthy v. Madigan, 112 S. Ct. 1081 (1992).

95. 17 Cal. 2d 280, 102 P.2d 329 (1941).

review was available.[96] An employee sought a writ of prohibition in the California Supreme Court.

The Court granted the writ. In order to do so, it had to label the exhaustion requirement as jurisdictional since prohibition would not lie to correct an abuse of discretion by the lower court. Its sweeping opinion emphatically endorsed the exhaustion doctrine, and its peremptory rejection of possible exceptions committed California courts to a policy of relatively rigid enforcement of the doctrine.

Since *Abelleira*, both the Supreme Court and lower courts have often countenanced exceptions to the exhaustion requirement. However, the rule that exhaustion is jurisdictional constrains the ability of lower courts to recognize new exceptions or broaden the existing ones or to excuse a lack of exhaustion based on a balancing of factors.[97] In contrast, federal cases often excuse exhaustion

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96. A federal court would not have treated *Abelleira* as an exhaustion case but as a final order case. In *Abelleira*, the employer was protesting against the immediate payment of benefits to the employee which occurred after the initial decision. Insofar as preventing that payment was concerned, the employer had exhausted its remedy when it lost at the initial hearing. The appeal to the agency heads was not a remedy that could have prevented immediate payment of benefits.

However, the order in question was not final and would not be final until the agency heads had acted on the employer's appeal. See FTC v. Standard Oil Co., 449 U.S. 232 (1980) (litigant had exhausted remedy with respect to particular issue but still could not appeal a non-final order). *Abelleira* would have been a weak case for an exception to the final order rule. The employer was not seriously harmed by the immediate payment of benefits since its reserve account would be credited if it were ultimately successful in the case. On the other hand, the unemployed workers obviously needed their payments immediately, not at the end of protracted litigation.

California law has no separate final order rule for administrative action. As in *Abelleira*, the exhaustion doctrine is used to preclude appeals of non-final orders.

97. A few California cases use a flexible, balancing analysis to decide whether to excuse a failure to exhaust remedies. See Doster v. County of San Diego, 203 Cal. App. 3d 257, 251 Cal. Rptr. 507 (1988); Hull v. Cason, 114 Cal. App. 3d 344, 359, 171 Cal. Rptr. 14 (1981) (public interest demands court take case which had already been litigated for several years despite failure to exhaust remedies); Hollon v. Pierce, 257 Cal. App. 2d 468, 64 Cal. Rptr. 808 (1964);

by determining whether the purposes of the exhaustion rule would be frustrated if an exception were to be allowed in the particular case in light of the costs that exhaustion would impose on the particular litigant.

In addition, according to some cases, the rule that exhaustion is jurisdictional means that the exhaustion objection cannot be waived by agreement[98] or by failure to make the objection at the appropriate time; instead, it can be initially raised at any time, even on appeal.[99]

c. The "exact issue" rule

One important corollary to the exhaustion of remedies rule requires that the exact issue to be considered by a reviewing court have been presented to the agency during the course of its consideration of the matter.[100] Thus a person can be precluded from rais-

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Greenblatt v. Munro, 161 Cal. App. 2d 596, 605-07, 326 P.2d 929 (1958). This approach is probably contrary to *Abelleira*.

98. Noonan v. Green, 276 Cal. App. 2d 25, 80 Cal. Rptr. 513 (1969); Buchwald v. Superior Court, 254 Cal. App. 2d 347, 359-60, 62 Cal. Rptr. 364 (1967).

99. Hittle v. Santa Barbara County Employees Retirement Ass'n, 39 Cal. 3d 374, 384, 216 Cal. Rptr. 733 (1985); People v. Coit Ranch, Inc., 204 Cal. App. 2d 52, 57, 21 Cal. Rptr. 875 (1962). This rule is in some doubt, however. See Green v. City of Oceanside, 194 Cal. App. 3d 212, 219-23, 239 Cal. Rptr. 470 (1987), rejecting an exhaustion defense raised for the first time on appeal. The court pointed out persuasively that it would be grossly unfair for defendant to ignore this procedural defense and put plaintiff to expense of trial, knowing it could assert the exhaustion defense on appeal if it lost at trial.

100. See, e.g., Resource Defense Fund v. Local Agency Formation Comm'n, 191 Cal. App. 3d 886, 894, 236 Cal. Rptr. 794, 798 (1987); Coalition for Student Action v. City of Fullerton, 153 Cal. App. 3d 1194, 200 Cal. Rptr. 855 (1984). CEB calls this doctrine the requirement of preserving issues at the administrative hearing. California Administrative Mandamus §§ 2.2-2.24, at 36-48 (Cal. Cont. Ed. Bar, 2d ed. 1989). The exact issue rule has been codified in cases brought under the California Environmental Quality Act. Pub. Res. Code § 21177(a).

The exact issue rule is often quite strictly applied. Thus specific environmental objections to a timber harvesting plan were not raised before the agency by preprinted form objections raising various environmental and political concerns because these related to logging generally without being specific to the project under review. Albion River Watershed Protection Ass'n v. Department of Forestry, 235 Cal. App. 3d 358, 286 Cal. Rptr. 573, 580-88 (1991). But see Citizens Ass'n for Sensible Dev. v. County of Inyo, 172 Cal. App. 3d 151, 163,

ing a particular issue or defense, even though every possible administrative remedy was exhausted, because the particular issue was not pressed before the agency.[101] It appears, however, that unlike the exhaustion doctrine, the exact issue doctrine is not jurisdictional;[102] therefore, it probably can be waived by the agency. Apparently the same exceptions that apply to the general exhaustion rule also apply to the exact issue rule.

The exact issue rule makes good sense. In judicial efficiency terms, it is important that the issue be raised below so that a complete record can be created at the agency level and so that the agency can apply its expert judgment to that issue. Particularly in local land use planning, the issues often concern complex urban planning, timber management, and environmental policy problems. Thus preliminary consideration by the agency is very helpful to reviewing courts. In separation of powers terms, it is appropriate that courts require the presentation of issues to agencies; otherwise litigants would be encouraged to sidestep preliminary agency consideration, to which a court ordinarily owes considerable deference, in the hope of getting a better shake from the court reviewing the issue de novo.[103]

d. Exceptions to exhaustion

The exceptions to the exhaustion doctrine have been heavily litigated. These exceptions can be grouped under two broad headings: inadequacy of the remedy and irreparable injury. Under inade-

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217 Cal. Rptr. 893 (1985) (less specificity required to preserve issue in administrative than in judicial proceeding since parties often not represented by counsel).

101. Indeed, a mere perfunctory or "skeleton" presentation is insufficient if it is seen as a ruse for transferring the issue from the agency to the court. See Dare v. Board of Medical Examiners, 21 Cal. 2d 790, 799, 136 P.2d 304 (1943); City of Walnut Creek v. County of Contra Costa, 101 Cal. App. 3d 1012, 162 Cal. Rptr. 224 (1980).

102. See Greenblatt v. Munro, 161 Cal. App. 2d 596, 605-07, 326 P.2d 929 (1958).

103. City of Walnut Creek v. County of Contra Costa, 101 Cal. App. 3d 1012, 162 Cal. Rptr. 224 (1980).

quacy of the remedy fall the accepted exceptions for futility, inadequate remedy, certain constitutional issues, and lack of notice.[104]

i. Futility.

If it is positively clear that the agency will not grant the requested relief, the remedy would be considered inadequate because it is futile.[105] However, the exhaustion requirement is not excused merely because favorable agency action is unlikely. If courts excused exhaustion merely because favorable agency action is unlikely, the exhaustion requirement would practically disappear, since litigants usually go to court prematurely only when they feel there is little chance that they will prevail at the agency level.[106] Moreover, the exception is not applicable even though the remedy is no longer available at the time a litigant seeks judicial review, unless the litigant can establish positively that the remedy would have been useless if it had been availed of.[107]

The futility exception is based upon a balance of the purposes of the exhaustion rule against the costs of enforcing it. Forcing a litigant to pursue the remedy serves judicial efficiency and recognizes the agency's role under the separation of powers. Yet it becomes difficult to justify imposing the costs of exhaustion on a litigant when it is certain that those costs will be wasted. Therefore, litigants must pursue probably unavailing remedies but need not pursue certainly unavailing ones.

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104. The exception for local tax assessments alleged to be a nullity is anomalous. In addition, the existing APA contains a questionable exception for denial of continuances. See *infra* text accompanying note 142. The California Supreme Court also decided to hear a case despite a failure to raise the exact issue where public policy required that the issue be immediately resolved. Lindeleaf v. Agricultural Labor Relations Bd., 41 Cal. 3d 861, 870-71, 226 Cal. Rptr. 119 (1986).

105. Ogo Assocs. v. City of Torrance, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (1974).

106. Doyle v. City of Chino, 117 Cal. App. 3d 673, 683, 172 Cal. Rptr. 844 (1981).

107. George Arakelian Farms v. Agricultural Labor Relations Bd., 40 Cal. 3d 654, 662-63, 221 Cal. Rptr. 488, 493 (1985) (failure to make timely request for agency review precludes judicial review — inadequate showing that review would be futile).

In the leading case on the futility exception, a developer was excused from applying for a variance from a zoning scheme when that scheme was enacted for the purpose of blocking the very project the developer wanted to build.[108] Similarly, if agency memoranda[109] or a prior decision involving the same litigant[110] indicate that the decision in the particular case is absolutely certain to go against the litigant, he need not exhaust remedies. However, the fact that an agency has previously decided a string of cases on the same legal issue in a way adverse to the litigant's position is not sufficient;[111] the agency might be willing to distinguish its prior cases.[112]

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108. Ogo Assocs. v. City of Torrance, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (1974).

109. Truta v. Avis Rent a Car Systems, Inc., 193 Cal. App. 3d 802, 812, 238 Cal. Rptr. 806, 811 (1987); *In re* Thompson, 52 Cal. App. 3d 780, 125 Cal. Rptr. 261, 263 (1975).

110. Elevator Operators Union v. Newman, 30 Cal. 2d 799, 811, 186 P.2d 1, 7 (1947) (discharge of employee — union board had already rejected appeal from discharge decision and would certainly reject a damage claim based on same discharge); Breaux v. Agricultural Labor Relations Bd., 217 Cal. App. 2d 730, 743, 265 Cal. Rptr. 904, 910 (1990) (futile to question settlement before agency that had already approved it).

111. Gantner & Mattern Co. v. California Employment Comm'n, 17 Cal. 2d 314, 317, 104 P.2d 932, 934 (1947); Westinghouse Elec. Corp. v. County of Los Angeles, 42 Cal. App. 3d 32, 39-40, 116 Cal. Rptr. 742, 747 (1974); City of Los Angeles v. California Towel & Linen Supply, 217 Cal. App. 2d 410, 420, 31 Cal. Rptr. 832 (1963); Virtue Bros. v. County of Los Angeles, 239 Cal. App. 2d 220, 232, 48 Cal. Rptr. 505 (1966).

112. See Yamaha Motor Corp. U.S.A. v. Superior Court, 185 Cal. App. 3d 1232, 1242, 230 Cal. Rptr. 382, 387 (1986). This case concerned the breach of a franchise agreement by refusing to supply a dealer with a new product line offered to other dealers. The New Motor Vehicle Board had decided a case involving the identical product line but a different dealer. The court required exhaustion since the Board might distinguish the prior case for reasons specific to this particular dealer, like the size of the dealership and financial impact.

Similarly, the fact that the agency previously decided other issues in the same case in a way contrary to the plaintiff's position does not mean that it would not fairly consider the issues currently presented. Sea & Sage Audubon Soc'y, Inc. v. Planning Comm'n, 34 Cal. 3d 412, 418-19, 194 Cal. Rptr. 357 (1983).

Some cases have stretched the futility doctrine. They have excused a failure to exhaust where the agency's initial response seemed hostile and unyielding,[113] where the agency disclaimed jurisdiction,[114] or where it seemed unlikely the decisionmaker would change his mind.[115] It would seem that the more flexible futility test in these cases runs afoul of the stern *Abelleira* rule that exhaustion is jurisdictional, not a matter of judicial discretion.

ii. Inadequate remedies.

In addition to cases in which the administrative remedy is considered futile, remedies can be considered inadequate for other reasons and thus need not be exhausted. Thus a procedure that provides no clearly defined machinery for the submission, evaluation, and resolution of complaints is inadequate.[116] One rather problematic application of this doctrine occurs where the subject matter

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113. Grier v. Kizer, 219 Cal. App. 3d 422, 432, 268 Cal. Rptr. 244, 249 (1990) (unyielding position that regulation was validly adopted); Jacobs v. State Bd. of Optometry, 81 Cal. App. 3d 1022, 1030, 147 Cal. Rptr. 225, 229 (1978) (dismissive reply to inquiry); Police Officers Ass'n v. Huntington Beach, 58 Cal. App. 3d 492, 498-99, 126 Cal. Rptr. 893, 897-98 (1976) (hostile response to grievance plus position in lower court); *In re* Faucette, 253 Cal. App. 2d 338, 343, 61 Cal. Rptr. 97, 99 (1967) (failure to fully consider initial application means further administrative recourse is futile).

114. Department of Personnel Admin. v. Superior Court, 5 Cal. App. 4th 155, 6 Cal. Rptr. 2d 714, 721-22 (1992).

115. Doster v. County of San Diego, 203 Cal. App. 3d 257, 261-62, 257 Cal. Rptr. 507, 509-10 (1988). This case employs a flexible balancing analysis in order to decide whether to excuse a deputy sheriff's failure to request a hearing within the five-day time period allowed by local ordinance. One factor in favor of excusing it was that a factual record compiled at an earlier hearing already existed. Considering the unlikelihood that the sheriff would change his mind and the existence of a factual record, the court decided that it should reach the narrow legal question involved.

116. Common Cause v. Board of Supervisors, 49 Cal. 3d 432, 443, 261 Cal. Rptr. 574 (1989) (plaintiff not required to petition Secretary of State to adopt regulations); Endler v. Schutzbank, 68 Cal. 2d 162, 168, 65 Cal. Rptr. 297 (1968) (where agency retained discretion to ignore decision, procedure was inadequate — heads-I-win-tails-you-lose); Rosenfield v. Malcolm, 65 Cal. 2d 559, 55 Cal. Rptr. 595 (1967) (remedy of instituting an investigation not adequate to deal with plaintiff's claim of illegal discharge).

of the controversy lies outside the agency's jurisdiction.[117] This subject matter rule applies to cases in which the jurisdictional error appears clearly and positively on the face of the pleadings and does not depend on any disputed factual matters.[118] Unless cautiously applied, this exception could be broadened to cover any alleged agency error of law.

Similarly, a remedy might be inadequate because of a lack of minimally adequate notice[119] or other necessary procedure.[120] If the procedure in question cannot furnish any of the relief sought by plaintiff, or an acceptable substitute for that relief, it is not adequate.[121] If agency action has ground to a halt or the agency is

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117. County of Contra Costa v. State, 177 Cal. App. 3d 62, 73, 222 Cal. Rptr. 750, 758 (1986) (dictum). The problem of an agency lacking subject matter jurisdiction is more likely to arise in a primary jurisdiction case. See County of Alpine v. County of Tuolumne, 49 Cal. 2d 787, 322 P.2d 449 (1958).

This rule was misapplied in Richman v. Santa Monica Rent Control Bd., 7 Cal. App. 4th 1457, 9 Cal. Rptr. 2d 690, 693 (1992), to excuse a litigant's failure to comply with the exact issue rule by failing to raise a question of law before the agency. The court thought that the agency had no jurisdiction to deal with a question of law since this was a matter for the courts. While the courts may have power to independently decide a question of law, it does not at all follow that an agency lacks jurisdiction to make the initial call on such a question. Consequently, it is inappropriate to excuse a failure to raise the issue before the agency.

118. See, under federal law, Leedom v. Kyne, 358 U.S. 184 (1958) (agency lacked jurisdiction to order inclusion of non-professionals in bargaining unit of professionals — error apparent on face of pleadings).

119. Horn v. County of Ventura, 24 Cal. 3d 605, 156 Cal. Rptr. 718 (1979).

120. Superior Strut & Hanger Co. v. Port of Oakland, 72 Cal. App. 3d 987, 1002, 140 Cal. Rptr. 515 (1977) (procedure provided for no testimony, no fact-finding determination, no opportunity to be heard); Bollengier v. Doctors Medical Ctr., 222 Cal. App. 3d 1115, 1128-29, 272 Cal. Rptr. 273, 279 (1990) (hospital's procedure provided adequate notice and minimal standards of fair procedure); Tiholiz v. Northridge Hosp. Found., 151 Cal. App. 3d 1197, 199 Cal. Rptr. 338 (1984) (same).

121. Ramos v. County of Madera, 4 Cal. 3d 685, 691, 94 Cal. Rptr. 421, 425 (1971) (welfare fair hearings not equipped to deal with class actions or provide money damages); Tiernan v. Trustees of the Cal. State Univ. & Colleges, 33 Cal. 3d 211, 217, 188 Cal. Rptr. 115, 119 (1982) (procedure adequate to deal with claim of discharge infringing first amendment rights but not for claim that university must enact new regulations); Glendale City Employees' Ass'n, Inc. v.

unreasonably delaying resolution of the issue or has refused to take jurisdiction over it, is unfair to expect a litigant to resort to that remedy.[122] It is possible that an excessive fee for invoking a remedy could render the remedy inadequate, but plaintiff has the burden to establish that it sought a fee waiver and, if waiver is denied, that the fee is unreasonable.[123]

City of Glendale, 15 Cal. 3d 328, 342, 124 Cal. Rptr. 513, 523 (1975) (procedure handles individual cases, not complex dispute involving interpretation of memorandum of agreement); Horsemen's Benevolent & Prof. Ass'n v. Valley Racing Ass'n, 4 Cal. App. 4th 1538, 6 Cal. Rptr. 2d 698 (1992) (board cannot award money damages — remedy inadequate); Mounger v. Gates, 193 Cal. App. 3d 1248, 1256, 239 Cal. Rptr. 18, 23 (1987) (administrative appeal cannot remedy violation of procedural rights). At the federal level, see McCarthy v. Madigan, 112 S. Ct. 1081, 1091 (1992) (plaintiff sought only money damages which administrative procedure could not provide).

However, other California cases do require exhaustion of remedies even if the administrative procedure may not resolve all issues or provide the precise relief requested. Acme Fill Corp. v. San Francisco Bay Cons. & Dev. Comm'n, 187 Cal. App. 3d 1056, 1064, 232 Cal. Rptr. 348 (1986) (agency could not provide declaration that statute inapplicable to plaintiff); Edgren v. Regents of Univ. of Cal., 158 Cal. App. 3d 515, 520, 205 Cal. Rptr. 6, 9 (1984) (exhaustion of University's personnel remedies required even though plaintiff seeks damages in tort). These cases are questionable after Rojo v. Klieger, 52 Cal. 3d 65, 276 Cal. Rptr. 130 (1990) (exhaustion not required where agency cannot provide compensatory damages), overruling Westlake Community Hosp. v. Superior Court, 17 Cal. 3d 465, 131 Cal. Rptr. 90 (1976). However, *Rojo* involves primary jurisdiction rather than exhaustion of remedies.

It is difficult to generalize about the problem of misfitting remedies; sometimes exhaustion is required, sometimes not.

122. See McCarthy v. Madigan, 112 S. Ct. 1081. 1087 (1992); Kirkpatrick v. City of Oceanside, 232 Cal. App. 3d 267, 277, 283 Cal. Rptr. 191, 197 (1991) (stonewalling); Department of Personnel Admin. v. Superior Court, 5 Cal. App. 4th 155, 6 Cal. Rptr. 2d 714, 718-22 (1992) (agency declined to take jurisdiction); Los Angeles County Employees Ass'n v. County of Los Angeles, 168 Cal. App. 3d 683, 686, 214 Cal. Rptr. 350 (1985) (procedure cannot furnish remedy in time to prevent injury to employees); Hollon v. Pierce, 257 Cal. App. 2d 468, 64 Cal. Rptr. 808 (1964).

123. Sea & Sage Audubon Soc'y, Inc. v. Planning Comm'n, 34 Cal. 3d 412, 421-22, 194 Cal. Rptr. 357 (1983) (4-3 decision — dissent would place burden to establish reasonableness on agency).

iii. Constitutional issues.

Certain types of constitutional claims can be raised in court without first exhausting administrative remedies. For example, exhaustion is generally excused in cases of an on-the-face constitutional challenge to a provision of the statute that creates the agency[124] or to the procedures the agency provides.[125] Probably the constitutional excuse should also apply to on-the-face constitutional challenges to agency regulations or to statutes that the agency is applying.[126]

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124. As the California Supreme Court remarked, "It would be heroic indeed to compel a party to appear before an administrative body to challenge its very existence and to expect a dispassionate hearing before its preponderantly lay membership on the constitutionality of the statute establishing its status and functions." State v. Superior Court, 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497 (1974). See also Sail'er Inn v. Kirby, 5 Cal. 3d 1, 6, 95 Cal. Rptr. 329, 332 (1971); United States v. Superior Court, 19 Cal. 2d 189, 195-96, 120 P.2d 26 (1941) (dictum); Lund v. California State Employees Ass'n, 222 Cal. App. 3d 174, 183, 271 Cal. Rptr. 425 (1990); Chrysler Corp. v. New Motor Vehicle Bd., 89 Cal. App. 3d 1034, 1038-39, 153 Cal. Rptr. 135, 138 (1979).

125. Horn v. County of Ventura, 24 Cal. 2d 605, 611, 156 Cal. Rptr. 718 (1979) (one need not exhaust defective remedies to challenge their sufficiency); Chevrolet Motor Div. v. New Motor Vehicle Bd., 146 Cal. App. 3d 533, 539, 194 Cal. Rptr. 270 (1983) (compliance with exact issue rule excused because attack is on constitutionality of Board's procedures).

It also appears that a litigant need not exhaust local remedies if those remedies are invalid under a state statute. See Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 287, 32 Cal. Rptr. 830 (1963) (no need to exhaust local remedies where those remedies are rendered inapplicable to plaintiff because of state statutes); Friends of Lake Arrowhead v. San Bernardino County Bd. of Supervisors, 38 Cal. App. 3d 497, 505-08, 113 Cal. Rptr. 539 (1974) (state statute preempts remedy provision of local ordinance).

126. See Vogulkin v. State Bd. of Educ., 194 Cal. App. 2d 424, 434-35, 15 Cal. Rptr. 194 (1961) (exhaustion not required for constitutional attack on statutes that agency is applying). This decision is correct. No distinction should be drawn between a challenge to the constitutionality of the statute that created the agency and a challenge to the constitutionality of statutes that the agency is enforcing.

However, this distinction (i.e., requiring exhaustion for constitutional attacks on statutes the agency is applying but not to attacks on the statute creating the agency) is supported by dictum from older cases. See United States v. Superior Court, 19 Cal. 2d 189, 195, 120 P.2d 26 (1941); Walker v. Munro, 178 Cal. App. 2d 67, 2 Cal. Rptr. 737 (1960); Tushner v. Griesinger, 171 Cal. App. 2d 599, 341 P.2d 416 (1959). As discussed in the text, since 1978 the California

The constitutional excuse makes sense, since an agency is extremely unlikely to uphold such challenges. Indeed, a provision of the California Constitution adopted in 1978 explicitly prohibits agencies from holding statutes unconstitutional.[127] Thus the constitutional exception really is a subset of the inadequate-remedy exception: agency procedures are not adequate to deal with an on-the-face constitutional challenge to statutes, regulations, or procedures.

The constitutional exception should not be broadened very far since many legal claims can be stated in constitutional terms.[128] For example, a litigant might argue that agency action is "irrational" or "unreasonable" so that it denies substantive due process. Similarly, a claim that a regulation is ultra vires could be articulated in terms of the constitutional separation of powers. Or a claimed defect in notice or an allegedly biased decisionmaker might be a violation of procedural due process.[129] If by making

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Constitution has prohibited an agency from invalidating any statute on constitutional grounds. Consequently, it is futile to ask an agency to consider the constitutionality of any statute and the pre-1978 cases requiring exhaustion in cases challenging constitutionality of statutes the agency is applying should not be followed.

127. The California Constitution (art. III, § 3.5) provides that no administrative agency (whether or not created by the California Constitution) can declare a statute unconstitutional or unenforceable on the basis of its being unconstitutional (unless an appellate court has already determined that the statute is unconstitutional). Similarly, an agency cannot declare a statute unenforceable on the basis that a federal statute or regulation prohibits its enforcement unless an appellate court has already so determined.

128. Some cases state restrictions on the constitutional exception that seem unnecessary. For example, a litigant should be able to get to court even though the litigant has already begun the administrative process; some cases indicate that the excuse is only available to people who have not begun availing themselves of that process. Eye Dog Found. v. State Bd. of Guide Dogs for the Blind, 67 Cal. 2d 536, 544, 63 Cal. Rptr. 21, 27 (1967).

129. The constitutional exception does not apply to a claim that the agency has misapplied otherwise valid procedural rules, even though the misapplication could be stated in constitutional terms. Bollengier v. Doctors Medical Ctr., 222 Cal. App. 3d 1115, 1127-28, 272 Cal. Rptr. 273 (1990). See Association of Nat'l Advertisers v. FTC, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied,* 447 U.S. 921

such claims litigant could avoid exhausting remedies, the requirement would nearly disappear. Therefore, these sorts of contrived constitutional claims are not sufficient to excuse a failure to exhaust.

The constitutional exception does not apply to constitutional attacks on statutes or regulations based on their application to the particular facts (as distinguished from an on-the-face attack).[130] In many as-applied challenges, the agency remedy is adequate, since some sort of variance or waiver procedure is available to avoid harsh or unreasonable application of the law.[131] By the same token, the constitutional exception does not apply if material facts are in dispute and such facts must be found in order to resolve the constitutional dispute[132] nor does it apply to non-constitutional

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(1980) (Leventhal, J. concurring) (improper to review bias claim absent final agency action).

Another example of an attempt to turn a statutory claim into a constitutional one in order to avoid the exhaustion requirement occurred in County of Contra Costa v. State, 177 Cal. App. 3d 62, 74-75, 222 Cal. Rptr. 750, 758-59 (1986). This case involved the issue of whether statutes complied with the constitutional requirement that they reimburse local government for new state mandates. An agency (Board of Control) was created to adjudicate claims by local government that the Legislature had filed to comply with this mandate. The court correctly held that this remedy had to be exhausted, even though the local government plaintiffs stated their claim in constitutional terms. Clearly, the administrative remedy was wholly adequate for the purpose of dealing with plaintiff's claims.

130. Security-First Nat'l Bank v. County of Los Angeles, 35 Cal. 2d 319, 217 P.2d 946 (1950) (exhaustion requirement); Griswold v. Mount Diablo Unified Sch. Dist., 63 Cal. App. 3d 648, 134 Cal. Rptr. 3 (1976) (exact issue requirement).

131. See Metcalf v. County of Los Angeles, 24 Cal. 2d 267, 148 P.2d 645 (1944); Mountain View Chamber of Commerce v. City of Mountain View, 77 Cal. App. 3d 82, 143 Cal. Rptr. 441 (1978). Indeed, it has been held that even an on-the-face constitutional attack is premature if the agency has a variance procedure that might solve the plaintiff's problem without reaching the constitutional question. Smith v. City of Duarte, 228 Cal. App. 2d 267, 39 Cal. Rptr. 524 (1964). However, this decision is questionable; generally a litigant is allowed to go to court with respect to constitutional claims even if he also has nonconstitutional defenses to raise before the agency.

132. Sail'er Inn v. Kirby, 5 Cal. 3d 1, 95 Cal. Rptr. 329 (1971) (dictum).

claims involved in the same case.[133] Probably, the exception should not apply at all if there are both constitutional and non-constitutional issues in the same case if an agency decision favorable to the litigant on a non-constitutional issue would dispose of the case. Such a decision would avoid the need for the court to reach the constitutional question at all.[134] And to excuse exhaustion in such a case would prolong the litigation since the petitioner will have to return to the agency to try the non-constitutional issues if he loses in court on the constitutional issues.

iv. Lack of notice.

Where a litigant failed to exhaust a remedy because he was not appropriately notified of its availability in time to use the remedy, the failure to exhaust is excused. This exception to exhaustion has been frequently recognized in local land use planning cases where persons affected by an application were not appropriately notified by either personal or constructive notice.[135] The exception should apply in such cases whether or not the plaintiff claims to be articulating the public interest or its own private interest.[136] The exception should also apply whether the defect in question is a failure to have exhausted a remedy or a failure to have raised the exact issue before the agency.

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133. Flores v. Los Angeles Turf Club, 55 Cal. 2d 736, 746-48, 13 Cal. Rptr. 201 (1961).

134. However, if the objections were to the constitutionality of agency procedure, a litigant probably should not be required to exhaust illegal remedies even if those remedies might furnish substantive relief.

135. See Environmental Law Fund v. Town of Corte Madera, 49 Cal. App. 3d 105, 113, 122 Cal. Rptr. 282, 286 (1975). However, the exception does not apply where the planning authority has given notice to the community by publication as provided by statute. Sea & Sage Audubon Soc'y, Inc. v. Planning Comm'n, 24 Cal. 3d 412, 417, 194 Cal. Rptr. 357, 360 (1983); Redevelopment Agency of Riverside v. Superior Court, 228 Cal. App. 3d 1487, 279 Cal. Rptr. 558 (1991).

136. The court in *Corte Madera* justified the exception for lack of notice by stating that persons protecting the public interest should not be prevented from litigating land use decisions of which they had not been notified. Of course, in these cases, it is difficult to separate public interest from private interest and it should not matter.

Another variation of this exception has been recognized in adjudicatory cases where the agency failed to call a litigant's attention to an available administrative remedy and, under the facts, the litigant's failure to find out about the remedy is justifiable.[137]

v. Irreparable injury.

Abelleira recognized an irreparable injury exception to the exhaustion requirement but held that it was very narrow. The only situation of irreparable injury it accepted was a rate order that allegedly confiscated a utility's property by requiring it to operate unprofitably.[138] Later the Supreme Court applied the exception to a case in which a litigant claimed that by complying with state law it would violate a federal law and incur the risk of serious penalties.[139]

Subsequent cases have continued to be skeptical of irreparable injury claims[140] although there have been some exceptions.[141] At a

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137. Hittle v. Santa Barbara County Employees Retirement Ass'n, 39 Cal. 3d 374, 384, 216 Cal. Rptr. 733 (1985); Westlake Community Hosp. v. Superior Court, 17 Cal. 3d 465, 478, 131 Cal. Rptr. 90, 97 (1976).

138. In *Abelleira*, the dissenters argued that the irreparable injury standard was met because of harm to the public (as opposed to the plaintiffs). The alleged harm was that illegal payments to unemployed workers would drain the compensation fund. However, the majority focused only on the harm to the plaintiffs which was not compelling. Similarly, United States v. Superior Court, 19 Cal. 2d 189, 120 P.2d 26 (1941), held that loss to handlers who were unable to market all oranges they had purchased was not irreparable since they did not allege the order would destroy their business.

139. Sail'er Inn v. Kirby, 5 Cal. 3d 1, 7, 95 Cal. Rptr. 329, 332 (1971) (not clear whether court applied the irreparable harm or the inadequate remedy exception).

140. Mountain View Chamber of Commerce v. City of Mountain View, 77 Cal. App. 3d 82, 143 Cal. Rptr. 441 (1978) (plaintiff must apply for variance from sign removal ordinance even though maintenance of nonconforming sign could violate civil and criminal nuisance statutes since no such enforcement action was threatened).

141. Department of Personnel Admin. v. Superior Court, 5 Cal. App. 4th 155, 6 Cal. Rptr. 2d 714, 721 (1992) (impact on state budget and layoffs of state employees); Heyenga v. City of San Diego, 94 Cal. App. 3d 756, 156 Cal. Rptr. 496 (1979) (preliminary injunction against transfer of police officer pending administrative appeal); Greenblatt v. Munro, 161 Cal. App. 2d 596, 605-07, 326 P.2d 929 (1958). *Greenblatt* applied the irreparable injury exception to a failure

minimum, a plaintiff seeking an exception to a failure to exhaust remedies by reason of irreparable injury should show that the injury is truly irreparable (and goes far beyond the expense and bother of litigation), that the injury is imminent (as opposed to an injury that will occur in the future if the plaintiff loses before the agency), and that the litigant could not have obtained a stay at the administrative level.

vi. Local tax issues.

Where a local tax assessment is alleged to be a "nullity" and there are no outstanding valuation issues, it is not necessary to exhaust the local tax dispute resolution remedy. An assessment might be a nullity, for example, where the property in question is tax exempt, nonexistent, or outside the taxing jurisdiction.[142] This exception seems out of line with the existing structure of exhaustion exceptions; I see no persuasive rationale for it. The local tax appeal process seems the ideal place to obtain at least an initial decision of such disputes; the remedy is adequate and the harm is not irreparable.

2. Recommendations

a. Jurisdictional or discretionary

As noted above, *Abelleira* committed California to the position that a failure to exhaust remedies is a jurisdictional defect,[143] as

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to have raised the exact issue before the agency. The injury was revocation of a liquor license. The licensee failed to raise an apparently meritorious legal defense before the agency; of course, by the time the case came to court, it was too late to raise the issue before the agency. The court remanded the case to the agency solely to reassess the penalty. See also Volpicelli v. Jared Sydney Torrance Memorial Hosp., 109 Cal. App. 3d 242, 253-54, 167 Cal. Rptr. 610 (1980), which combined the exceptions for futility and irreparable harm.

142. Stenocord Corp. v. City & County of San Francisco, 2 Cal. 3d 984, 987, 88 Cal. Rptr. 166 (1970); California Administrative Mandamus § 2.41, at 57-58 (Cal. Cont. Ed. Bar, 2d ed. 1989).

143. It appears that a failure to comply with the exact issue rule is not a jurisdictional defect but failure to have exhausted an administrative remedy is jurisdictional.

opposed to a matter of trial court discretion.[144] Under the rule that exhaustion is jurisdictional, the trial court must decide whether a litigant falls within one of the existing narrowly drawn exceptions to exhaustion; if not, the court must dismiss the case.

I suggest that the issue of whether to excuse a failure to exhaust remedies be treated as within the trial court's discretion, as it is in federal law and under the Model Act.[145] The existing approach is simply too rigid; there are many cases in which a litigant comes close to satisfying several of the existing exceptions but does not quite fit any of them; yet requiring exhaustion would be very costly to the litigant and would serve no useful purpose.[146] Similarly, the parameters of some of the exceptions (such as inadequate remedies or constitutional issues) are fuzzy; rather than struggle with applying the rather abstractly stated exceptions to the particular facts, it would be better to decide whether the policies behind the exhaustion doctrine suggest that an exception should be made in the particular case.

Under this approach, courts would no longer be constrained by a few narrow exceptions but could combine several of them or invent new ones if necessary.[147] In a close case, the court should balance the equities,[148] considering such factors as:

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144. A group of court of appeal cases treats the doctrine as discretionary despite *Abelleira*. See *supra* note 97.

145. However, if the Legislature mandates exhaustion of a specific remedy, exhaustion of that remedy would be treated as jurisdictional as under present law. See McCarthy v. Madigan, 112 S. Ct. 1081 (1992).

146. Several United States Supreme Court cases concerning failure to exhaust remedies within the Selective Service System are illustrative. Judicial review of a draft board's decision on a classification issue could be obtained only by raising the issue as a defense in the criminal proceeding for refusing induction. A failure to exhaust remedies meant that the registrant was stripped of his defense in the criminal case. Where the issue involved was purely one of law, the registrant had not deliberately bypassed Selective Service procedures, and an appeal would probably have been futile, exhaustion was excused. McKart v. United States, 395 U.S. 185 (1969). But where the claim was fact-based and excusing exhaustion would have encouraged registrants to bypass Selective Service procedures, exhaustion was required. McGee v. United States, 402 U.S. 479 (1971).

147. Thus a court might decide to hear a case despite failure to raise the exact issue where public policy demanded that the issue be resolved. Lindeleaf v.

(1) the likelihood that plaintiff will prevail on the merits (i.e., is plaintiff's legal claim apparently well founded or patently contrived);[149]

(2) the relative degree of hardship to plaintiff from being compelled to exhaust remedies;

(3) whether the remedy is still available (if not, dismissal of the case denies any judicial review);

(4) the relative adequacy of agency remedies to deal with the question in dispute;

(5) whether it would be important to establish a precedent on the legal issue in dispute;

(6) the reason for failure to exhaust (i.e., was the failure justifiable or was it part of a scheme to avoid an unfavorable agency ruling);

(7) judicial efficiency issues such as the question of whether agency expertise would contribute to solving the problem, whether the process in question would generate a factual record helpful to the court,[150] or whether facts are in dispute and must be found in order to reach the legal questions.

If exhaustion were made a matter of trial court discretion rather than of jurisdiction, it would be less likely that reviewing courts would grant writs aborting a trial court's decision to excuse a failure to exhaust remedies. In general, it seems better to me to let the trial court go ahead and decide a case it wants to decide without premature interruption from appellate courts. In theory, an appellate court could still grant a writ aborting premature judicial review

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Agricultural Labor Relations Bd., 41 Cal. 3d 861, 870, 226 Cal. Rptr. 119 (1986).

148. See Power, *Help is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. Ill. L. Rev. 547 (advocating a balancing methodology in applying the exhaustion doctrine).

149. This factor is particularly important in cases where a litigant is seeking to avoid the exhaustion rule by reason of constitutional claims. A court should examine such claims closely to see whether they seem well-founded or merely contrived.

150. See McCarthy v. Madigan, 112 S. Ct. 1081, 1090 (1992).

on the basis of abuse of discretion, but this would be a rare occurrence.

Finally, if exhaustion is discretionary rather than jurisdictional, a failure to exhaust would be waived if the agency failed to object at the appropriate time before trial. Thus the failure to exhaust claim would and should be treated like any other claim or defense — it must be timely raised.[151]

It could be argued that this recommendation will seriously undercut the exhaustion rule by encouraging many more litigants to attempt to short circuit the administrative process. This might increase the burdens on the courts and thwart the policies behind the exhaustion doctrine. However, I do not believe this will be the case. Generally litigants will exhaust remedies regardless of the existence of a possible exception if there is any hope of a favorable agency outcome. The risk of going to court without exhausting remedies may be quite substantial: the court may dismiss the case on the basis of exhaustion and the administrative remedy may no longer be available. Even if it still remains available, an unsuccessful attempt to obtain premature judicial intervention would be very costly. The recommendation will not significantly change California law; it will be nearly as difficult as ever to circumvent the exhaustion requirement, but making the doctrine discretionary permits slightly more play in the joints.

b. Reconsideration

Both the existing California APA[152] and other statutes[153] provide that a litigant need not request reconsideration from the agency before pursuing judicial review. However, the common law rule in

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151. This would change present California law. But see Green v. City of Oceanside, 194 Cal. App. 3d 212, 219-23, 239 Cal. Rptr. 470 (1987) (failure to exhaust is waivable defect). I believe, however, that a court should be permitted to reject a waiver of exhaustion and to raise the exhaustion defense on its own motion if it believed judicial efficiency would be served by remanding the case to the agency.

152. Gov't Code § 11523.

153. Gov't Code § 19588 (State Personnel Board).

California may be otherwise.[154] A request for reconsideration should never be required as a prerequisite to judicial review[155] unless specifically provided by statute to the contrary.[156]

c. Continuances and discovery

The existing APA permits immediate judicial review of the denial by an administrative law judge of a motion for a continuance.[157] Presumably, outside the APA agencies, a court would refuse to entertain such review because it would violate the exhaustion of remedies requirement and no exception to the exhaustion requirement would normally be applicable.[158] I have previously recommended that the revised APA contain no provision allowing immediate judicial review of the denial of a continuance. The Commission has deferred a decision on this question until it considers all issues relating to the exhaustion of remedies doctrine.

I believe that there is no justification for immediate judicial review of the denial of a continuance by an ALJ; such rulings by trial judges are not immediately appealable and the administrative law rule should be no different. Denial of a request for a continu-

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154. Alexander v. State Personnel Bd., 22 Cal. 2d 198, 137 P.2d 433 (1943).

155. "Reconsideration" means a request to the agency reviewing authority that it reconsider its own final decision. See Section 649.210 in administrative adjudication draft attached to Commission staff Memorandum 92-70 (Oct. 9, 1992) (on file with California Law Revision Commission) [hereinafter Memorandum]. [Ed. note. This provision was not included in the Commission's final recommendation.] The term does not refer to appeals to a higher agency level; normally such appeals are required by the exhaustion doctrine. In some agencies, such as the Workers' Compensation Appeals Board, appeal from a presiding officer's decision to the agency heads is referred to as "reconsideration." Such appeals would continue to be required, since they involve appeals to a higher level rather than reconsideration at the same level.

156. By statute, it is necessary to request reconsideration from the PUC before seeking review of a PUC decision in the California Supreme Court. PUC staff have told me that this reconsideration practice is very important to the agency. As a result, I do not suggest that the existing statute be altered.

157. Gov't Code § 11524(c), added to the APA in 1979.

158. More precisely, such review would violate the final order rule which, in California, is explicitly stated in Section 1094.5 and is generally treated as covered by the exhaustion requirement. See *supra* text accompanying notes 91-92.

ance should normally be unreviewable unless a court decides that an exception to the exhaustion rule (such as irreparable injury) is applicable.

Denial of a continuance is just one of many possible rulings by an ALJ prior to or at the hearing and there is no immediate review of any others. For example, an ALJ or an agency head might refuse to recuse herself because of bias or might proceed with a hearing despite having received ex parte contacts. She might refuse to hold a pre-hearing conference or exclude a relevant issue in the pre-hearing conference order. An ALJ might make a variety of rulings relating to evidence (such as refusing to uphold a claim of privilege). Indeed, an ALJ may rule that the agency has jurisdiction over a particular transaction on the facts, a proposition that the litigant believes is dead wrong. In all such cases, a party must completely exhaust remedies, all the way through the agency head level, before seeking review of the procedural or substantive ruling. In each of these cases, if the court decides the ALJ or agency heads erred, the case must be remanded to the agency and reheard. I see no justification for treating continuances differently; indeed, the harm done by denying a continuance and requiring the hearing to go ahead immediately seems trivial compared to the harm done to litigants by other sorts of errors.

Immediate review of the denial of a continuance is contrary to the purposes of the exhaustion doctrine. The timing of the hearing should be something solidly within the discretion of the ALJ; ALJs schedule their hearings (especially at remote locations) carefully and a last-minute request for a continuance can disrupt that schedule and leave an ALJ idle. Repeated requests for continuances by counsel are often used because an attorney is unprepared or because a client wishes to stall off the inevitable as long as possible. It seems inefficient to involve trial courts in this sort of dispute and it undermines the authority of the administrative judge. Moreover, by seeking judicial review, a party can obtain the very continuance that the ALJ has denied — even if the trial court denies the motion, the administrative hearing has been delayed. Thus immediate judicial review provides an easy end-run around the ALJ's decision to deny a continuance.

Another exhaustion issue that has been discussed by the Commission concerns discovery orders. The existing APA lodges all discovery disputes in the trial court,[159] but the Commission has decided that they should be settled at the agency level instead. Nevertheless, the current Commission draft preserves the right to seek a writ of mandate in the trial court against an agency discovery decision.[160] Again, this provision would be an exhaustion exception, providing a right of immediate review, regardless of whether a litigant could show some compelling need for immediate review.

For the reasons given above, I would treat discovery orders just like any other agency procedural decision; absent a sufficiently strong claim for an exhaustion exception, there should be no right of immediate review of an order either granting or denying discovery. Both the judicial efficiency and the separation of power rationales for exhaustion counsel against involvement of the court in discovery disputes; the ability to seek review of such rulings provides a handy way for counsel to delay and confuse the administrative proceeding. Just as we have eschewed formal civil discovery in the administrative process because of its potential for hindrance, we should also avoid premature judicial entanglement in discovery disputes.

d. Model Act

The Model Act provision on exhaustion[161] seems satisfactory and should be used as the starting point for drafting a California provision.

i. General rule.

The Model Act clearly states the general exhaustion of remedies rule. "A person may file a petition for judicial review under this Act only after exhausting all administrative remedies available

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159. Gov't Code § 11507.7. A trial court decision on discovery is not subject to appeal but can be reviewed through a writ of mandamus. Section 11507.7(h).

160. See Section 645.360 in administrative adjudication draft attached to Memorandum, *supra* note 155. [Ed. note. This provision was not included in the Commission's final recommendation.]

161. MSAPA § 5-107.

within the agency whose action is being challenged and within any other agency authorized to exercise administrative review.…" It would be desirable to have the exhaustion rule stated in the statute in this clear form; under present law, exhaustion is mostly a judicial rather than a statutory doctrine.

The balance of the Model Act provision concerns the exceptions to the general rule. It wraps up all of the exhaustion exceptions[162] into two standards: "the court *may* relieve a petitioner of the requirement to exhaust any or all administrative remedies, *to the extent* that the administrative remedies are *inadequate*, or requiring their exhaustion would result in *irreparable harm* disproportionate to the public benefit derived from requiring exhaustion."[163] Note that by using the word "may" this provision is designed to make the exhaustion decision a matter of judicial discretion rather than jurisdiction.[164]

ii. Who exhausted the remedy.

The Model Act provides for an exception that has already been discussed in the material relating to standing:[165] "A petitioner for judicial review of a rule need not have participated in the rulemaking proceeding upon which that rule is based, or have petitioned for its amendment or repeal.…"[166] As already noted, I believe the Model Act is right on this point. Provided that a remedy has been exhausted and the exact issue raised by someone, it should not matter whether the particular litigant has raised the issue or even participated at the agency level, provided that the litigant meets the normal criteria for standing to seek review.

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162. The Model Act provides for one obvious exception: exhaustion is not required if this Act or another statute provides that it is not required. MSAPA § 5-107(2). This was intended to make clear that petitions for reconsideration are not required before seeking review since the provision relating to reconsideration is located elsewhere in the Act. MSAPA § 4-218(1).

163. MSAPA § 5-107(3) (emphasis added).

164. The comment makes this clear, contrasting the 1981 Model Act to the 1961 Act, which might be read as creating a non-discretionary standard.

165. See *supra* text accompanying notes 24-28, 71.

166. MSAPA § 5-107(1).

However, this provision should be generalized so that it covers all administrative proceedings, not just rulemaking, since much state or local land use planning decisionmaking is hard to classify as between rulemaking and adjudication.

iii. Exception for inadequate remedies.

Under the Model Act, exhaustion is not required "to the extent that the administrative remedies are inadequate.…" This language accommodates the existing California exceptions for futility, inadequate remedies, certain constitutional issues, and lack of notice.[167] Thus the existing law on these points would be substantially preserved, subject to the caveat that the exhaustion would be a matter of trial court discretion so that a court could excuse a failure to exhaust in an appropriate case that does not quite fit one of the existing exceptions.

iv. Exception for irreparable injury.

The Model Act allows a court to excuse a failure to exhaust remedies if exhaustion "would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion." Here a balance is clearly called for. On the one hand, the harm to the litigant from being required to exhaust remedies must be evaluated. The existing California irreparable injury standard is extremely narrow; it should be broadened.[168] In appropriate circumstances, the court should be allowed to consider the cost of exhausting remedies and the particular litigant's ability to bear that cost as well as such harms as business disruption, delay, bad publicity, and the like. Surely a factor worth considering is whether the remedy is still available. Against the harm must be weighed the benefits from requiring exhaustion, both in terms of judicial efficiency and separation of powers. Here a highly relevant factor would be the reason for the failure to exhaust remedies and whether it might be an attempted end-run around the agency to avoid an unfavorable agency decision.

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167. See *supra* text accompanying notes 105-37.

168. See *supra* text accompanying notes 138-40. Some cases have been more lenient. See *supra* note 141.

e. The exact issue rule

I favor retaining the exact issue rule, with the understanding that the plaintiff need not have raised the issue below if somebody else did,[169] and with the further understanding that the courts can excuse a failure to have raised the exact issue if a litigant qualifies for an exception to the exhaustion rule. Probably the exact error rule and the exhaustion of remedies rule should be combined into a single provision.

The Model Act states an exact issue rule separately from its exhaustion rule. The exact issue provision states: "A person may obtain judicial review of an issue that was not raised before the agency only to the extent that.…"[170] The Act then states a series of exceptions to the exact issue rule. However, they seem superfluous if the same exceptions applicable to exhaustion also apply to the exact issue rule.[171]

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169. See *supra* text accompanying notes 165-66.

170. MSAPA § 5-112.

171. The Act excuses compliance with the exact issue rule "to the extent that (1) the agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue.…" That provision is unnecessary since the remedy would be inadequate in such a case.

Similarly, the Act excuses compliance with the exact issue rule "to the extent that … (2) the person did not know and was under no duty to discover, or did not know and was under a duty to discover, but could not reasonably have discovered, facts giving rise to the issue.…" Here again, the remedy would probably be considered inadequate.

The exact error rule is excused where "(5) the interests of justice would be served by judicial resolution of an issue arising from: (i) a change in controlling law occurring after the agency action; or (ii) agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency." Again, this seems adequately covered by the inadequate remedies exception and by existing law. See Lindeleaf v. Agricultural Labor Relations Bd., 41 Cal. 3d 861, 870, 226 Cal. Rptr. 119 (1986) (excusing failure to raise the exact issue in a case in which a change in law occurring after the agency action suggested an argument for the first time).

The Model Act excuses compliance with the exact error rule "to the extent that … the agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in substantial compliance with this Act.…" MSAPA § 5-112(4). This provision would be superfluous since an exception to the exhaustion rule would normally apply: a remedy is inadequate

B. PRIMARY JURISDICTION

1. Distinguishing Primary Jurisdiction from Exhaustion of Remedies.

Under the doctrine of primary jurisdiction,[172] a case properly filed in court, that asserts a right of action based on statute, common law or the constitution, may be shifted to an administrative agency that also has statutory power to resolve the issues in that case. Thus the agency, rather than the court, makes the *initial decision* in the case, but normally that court (or a different one) retains the power to *judicially review* the agency action.

The primary jurisdiction doctrine is inapplicable if the plaintiff is seeking judicial review of the validity of a rule or of a prior decision of the agency that has power to resolve the issue in the case. In such situations, the applicable doctrine is *exhaustion of administrative remedies*, as discussed above. Generally, primary jurisdiction issues arise when the lawsuit takes the form of *A* v. *B* but agency *C* has an administrative process that might resolve all or

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to the extent that a litigant lacked actual or constructive notice of the adjudication or the procedure.

One Model Act exception seems questionable. It would excuse compliance with the exact error rule "to the extent that … the agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings which provided an adequate opportunity to raise the issue.…" MSAPA § 5-112(3). I disagree with this exception. First, it requires the drawing of a line between rulemaking and adjudication, but that line is difficult to draw with respect to various kinds of local land use planning decisions. Second, this provision would change existing California law which does require presentation of the exact issue in connection with state or local decisions that, like rulemaking, require public participation. By not stating any exceptions to the exact issue rule (but simply incorporating the exhaustion exceptions), this exception should disappear since it is contrary to existing law.

172. See generally 4 K. Davis, Administrative Law Treatise, ch. 22 (2d ed. 1978 and Supp. 1989); B. Schwartz, Administrative Law 523-41 (3d ed. 1991); P. Verkuil, S. Shapiro & R. Pierce, Administrative Law and Process 190-200 (2d ed. 1991); Botein, *Primary Jurisdiction: The Need for Better Court/Agency Interaction*, 29 Rutgers L. Rev. 867 (1976); Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964).

part of the *A* v. *B* dispute. In contrast, exhaustion of remedies, not primary jurisdiction, applies when the lawsuit is *A* v. Agency *C*.[173]

If the primary jurisdiction doctrine applies, the court has two choices:

(1) if the agency is found to have exclusive jurisdiction over the case, or is empowered to deal with all of the issues in the case and the plaintiff would not be prejudiced thereby, the court should dismiss the case; or

(2) if the agency does not have exclusive jurisdiction and is not empowered to deal with all of the issues in the case, or provide all possible remedies, or the plaintiff might otherwise be prejudiced by dismissal,[174] the court should issue a stay, send the appropriate issues to the agency, but retain the case on its docket until the agency has finished its processes. If the entire case has been shifted to the agency, the agency makes the initial decision. The case returns to court only for the purpose of providing judicial review of the agency's decision.[175] If one or

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173. Sometimes it may be unclear which doctrine is applicable since agency *C* may have some connection to *B* (which might be a different government agency). In such cases, the court should apply whichever doctrine seems appropriate; essentially the question is whether the lawsuit is fundamentally judicial review of the action of the defendant unit of government (in which case it is an exhaustion case) as opposed to an independent lawsuit, the issues in which are within the remedial power of a government agency (in which case it is a primary jurisdiction issue). Because there may be a band of cases in which it is difficult to tell which is which, it is important that the exhaustion doctrine be made a matter of discretion rather than jurisdiction, see *supra* text accompanying notes 143-51, so that the court has the latitude to do what makes sense in the context of the given case.

174. See Jaffe, *supra* note 172, at 1054-59, arguing that a court should retain jurisdiction even if all issues have been shifted to agency, if plaintiff might be prejudiced by dismissal. For example, if the agency remedy is no longer available or the agency might dismiss the case after the judicial statute of limitations has run, the plaintiff could be prejudiced by dismissal. In such cases, the court should retain the case on its docket. Here again, the contrast with exhaustion of remedy rules is apparent.

175. A good example of the doctrine at work is provided by a recent Supreme Court decision. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, (1990). A trucking company sued a shipper in federal district court for undercharges. Since the defense centered on the reasonableness of the rates, the court correctly shifted the case to the ICC. The ICC held that the rates were reasonable even though they were less than the filed rates. On judicial review, the Supreme

> more issues, but not the entire case, has been shifted to the agency, the agency would resolve those issues. Then the court would decide the remaining issues, having the benefit of the agency's decision on some of the issues; it could judicially review the agency's resolution of those issues but not redecide them.

The federal courts have decided a vast number of primary jurisdiction cases; at least at a high level of generality, these decisions form a consistent pattern.[176] In general, where a litigant brings a case to court stating a claim for which relief can be granted, the court normally decides the case, even though an agency also has jurisdiction to decide one or more or all of the issues in the case.[177]

This is the critical difference between primary jurisdiction and exhaustion of remedies: in exhaustion cases, the plaintiff must satisfy a burden of justifying immediate judicial review before administrative remedies have been exhausted. Immediate judicial review is provided only in exceptional circumstances. On the contrary, however, in cases involving competing claims for jurisdiction to try the case (i.e., there is a primary jurisdiction issue), the case

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Court held that the ICC had failed to abide by the "filed rate" doctrine and reversed its decision. Thus the agency had the initial call, but the courts had the final call. For an earlier set of cases establishing the same pattern, see Far East Conference v. United States, 342 U.S. 570 (1952); Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481 (1958).

176. Of course, there is a good deal of confusion among the federal cases in actually applying these standards, particularly in cases where there is a conflict between antitrust and regulatory regimes and legislative intention is unclear. See Botein, *supra* note 172.

177. An important Supreme Court decision that illustrates this observation is Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976). In this case, plaintiff's damage action for misrepresentation by the airline (failure to disclose overbooking) was allowed to proceed in court, despite the fact that the agency could have provided remedies for the same offense. Typical recent cases rejecting claims of primary jurisdiction are Taffet v. Southern Co., 920 F.2d 847 (11th Cir. 1991) (action by utility customers complaining that rates were increased by utility's fraudulent concealment of accounting practices); Marshall v. El Paso Natural Gas Co., 874 F.2d 1373 (10th Cir. 1989) (defendant negligently plugged plaintiff's wells).

should be shifted to the agency only if the defendant satisfies the burden of justifying this result.

In fact, primary jurisdiction problems are quite different from exhaustion problems and should be treated differently. Exhaustion relates solely to the timing of judicial review, whereas in primary jurisdiction cases a court and an agency have competing, concurrent claims to initially decide the case. In cases of competing trial jurisdiction, the plaintiff's case is legitimately in court; as a result, there is no separation of powers rationale for sending the case to an agency for decision.[178] Of course, there may be reasons of judicial efficiency for doing so; but the defendant must persuade the court that these efficiency claims outweigh the costs, complexities, and delays inherent in shifting a case legitimately in court to an agency where plaintiff must start all over again. Consequently, the presumption in a primary jurisdiction case is that the court should keep the case; in exhaustion cases, the presumption is that the court should dismiss the case.

2. When Primary Jurisdiction Applies Under Federal Law

In general, federal courts apply the primary jurisdiction doctrine, sending the case or the issue to the agency, in one of several situations: (1) the matter is highly technical and agency expertise would be helpful to the court in resolving the issue;[179] (2) the industry is so pervasively regulated by the agency that the regulatory scheme would be jeopardized by judicial interference; (3) there is a need for uniformity that would be jeopardized by the possibility of conflicting court decisions;[180] (4) there is evidence that the Legislature intended the issue to be resolved exclusively by the agency rather than a court.[181] Even where the first three of those situations arise,

178. Of course, if the Legislature has "preempted" judicial jurisdiction by lodging exclusive trial jurisdiction in the agency, that legislative decision must be respected. Such cases are the clearest ones for applying primary jurisdiction.

179. United States v. Western Pac. R. Co., 352 U.S. 59 (1959).

180. Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

181. Where the agency has statutory power to exempt the practice in question from liability (whether from tort damages, antitrust damages or any other right enforced in court), the Legislature obviously intended that the agency have the

the court has discretion to retain and decide the case, rather than sending it back to the agency, if there are persuasive reasons for doing so.[182]

3. California Law

The doctrine of primary jurisdiction has not been well developed in California. Most of the cases in which the problem arises describe the issue incorrectly as a problem of exhaustion of remedies and struggle to apply the exhaustion exceptions.[183] Yet the courts often sense that somehow the problem is different from the conventional exhaustion problem and the exhaustion exceptions seem to be applied more leniently. The result is a jumbled mass of cases. To clear up this confusion, California badly needs a statutory provision on primary jurisdiction.

a. Cumulative remedy doctrine

In a few rather narrowly defined classes of cases, courts can proceed despite the presence of an administrative remedy. Where a single statute (or perhaps a single California code) provides a litigant with a choice of administrative or judicial remedies, the liti-

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power to pass on the practice before it could be dealt with by a court. For discussion of the complexities in balancing regulatory power with the antitrust laws, see Jaffe, *supra* note 172, at 1060-70; K. Davis, *supra* note 172, at §§ 22.6-22.10.

182. Jaffe, *supra* note 172, at 1050.

183. See, e.g., Department of Personnel Admin. v. Superior Court, 5 Cal. App. 4th 155, 6 Cal. Rptr. 2d 714, 718-22 (1992); Hollon v. Pierce, 257 Cal. App. 2d 468, 64 Cal. Rptr. 808 (1967) (applies exhaustion exceptions). Infrequently, the court refers correctly to the issue as one of primary jurisdiction. See National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 448-51, 189 Cal. Rptr. 346, 366-68 (1983) (identifying issue as primary jurisdiction); County of Alpine v. County of Tuolumne, 49 Cal. 2d 787, 322 P.2d 449, 452, 455 (1958) (same); E. B. Ackerman Importing Co. v. City of Los Angeles, 61 Cal. 2d 595, 39 Cal. Rptr. 726 (1964) (court stays action while parties obtain determination from Federal Maritime Commission). Even less often, a case will recognize that there is a difference between the doctrines. Common Cause v. Board of Supervisors, 49 Cal. 3d 432, 441 n.6, 261 Cal. Rptr. 574, 579 n.6 (1989) (primary jurisdiction is not jurisdictional so that failure to raise the defense in the trial court waives it).

gant can choose the judicial one.[184] Similarly, where a statute provides a new remedy that enforces an already existing common law right, the remedy is cumulative rather than exclusive. Whereas, if the new remedy does not codify an existing common law right, it is exclusive.[185] Finally, in cases involving water rights, a system of concurrent jurisdiction exists — plaintiffs can choose to go to the Water Board or to court.[186]

These rules are confusing and seem ad hoc. Essentially they ask the wrong question. Normally, persons should be allowed to pursue judicial rights, despite existence of an administrative remedy (whether in the same code or elsewhere, and whether or not it codifies a common law right), unless the Legislature intended to make the administrative remedy exclusive or there is some other good reason to shift the case to the agency.

b. Reaching right result for wrong reason

While treating the primary jurisdiction problem as a problem of exhaustion of remedies, California courts have often reached results that in fact reflect primary jurisdiction theory while twisting exhaustion theory. In a recent California Supreme Court case, *Rojo*

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184. City of Susanville v. Lee C. Hess Co., 45 Cal. 2d 684, 290 P.2d 520, 523 (1955); Scripps Memorial Hosp. v. California Employment Comm'n, 24 Cal. 2d 669, 673, 151 P.2d 109, 112 (1944) (an exhaustion rather than a primary jurisdiction case); Lachman v. Cabrillo Pac. Univ., 123 Cal. App. 3d 941, 177 Cal. Rptr. 21 (1981); *In re* Steinberg, 197 Cal. App. 2d 264, 17 Cal. Rptr. 431, 434 (1962) (remedy cumulative).

185. See Flores v. Los Angeles Turf Club, 55 Cal. 2d 736, 13 Cal. Rptr. 201 (1961) (new remedy exclusive); McKee v. Bell-Carter Olive Co., 186 Cal. App. 3d 1230, 1239-46, 231 Cal. Rptr. 304, 310-14 (1986) (new remedy cumulative); Karlin v. Zalta, 154 Cal. App. 3d 953, 201 Cal. Rptr. 379 (1984) (new remedy exclusive).

186. National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 448-51, 189 Cal. Rptr. 346, 366-68 (1983). The Court indicated that because of the highly technical nature of the issues and the Water Board's expertise, it would be better to give exclusive jurisdiction to the Board. However, it felt constrained by contrary precedent. Instead, the Court interpreted relevant statutes to provide that a superior court can refer any issues to the Board as a referee or a master. This solution is wholly consistent with a system of primary jurisdiction that permits one or more of the issues in the case to be referred to an agency while the court retains the matter on its docket.

v. Klieger,[187] the issue was whether a damage action in tort by an employee against her employer for sexual harassment should be dismissed by reason of plaintiff's failure to exhaust the investigation and conciliation remedy under the Fair Employment and Housing Act (FEHA).[188] For the reasons that plaintiff's claim was based on common law, rather than on violation of the FEHA, and because the FEHC lacked power to award tort damages (as opposed to make-whole relief), the Court held that the remedy need not be exhausted and her suit could proceed.[189]

As an exhaustion of remedies case, the Court's decision in *Rojo* is unpersuasive. The case did not clearly fit any of the established exhaustion exceptions and the Supreme Court did not claim that it did.[190] In fact, a better analysis would be to treat the case as one involving a primary jurisdiction claim. The court had original

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187. 52 Cal. 3d 73, 276 Cal. Rptr. 130 (1990).

188. Under FEHA, the Department of Fair Employment and Housing investigates a discrimination claim and attempts to conciliate the dispute. If this is unsuccessful, on request it issues a "right to sue" letter permitting the complainant to file in court. Alternatively, the complainant can allow the Department to pursue her claim before the Fair Employment and Housing Commission. However, because FEHC lacks power to award compensatory and punitive damages, most complainants request right to sue letters and go to court. The issue in *Rojo* was whether the court could hear a common law tort case (as opposed to a claim based on the civil rights statute) where this administrative investigation and conciliation remedy had not been resorted to.

189. Similarly, see Horsemen's Benevolent & Protective Ass'n v. Valley Racing Ass'n, 4 Cal. App. 4th 1538, 6 Cal. Rptr. 2d 698 (1992) (exhaustion not required in contract dispute between horse owners and track operators since Horse Racing Board not empowered to grant contract damages).

190. Because the Fair Employment and Housing Commission could not award the damages plaintiff was seeking, it could be argued that the administrative remedy was inadequate. However, it could also be argued that the administrative remedy was adequate or at least useful, in that the Department's investigation could turn up useful evidence and the Department might have successfully settled the dispute, thus keeping it out of court. See Acme Fill Corp. v. San Francisco Bay Cons. & Dev. Comm'n, 187 Cal. App. 3d 1056, 1064, 232 Cal. Rptr. 348 (1986) (exhaustion required even though remedy could not provide all of the desired relief); Edgren v. Regents of Univ. of Cal., 158 Cal. App. 3d 515, 520, 205 Cal. Rptr. 6, 9 (1984) (exhaustion of University's personnel remedies required even though plaintiff seeks damages in tort).

jurisdiction over the employee's tort claim.[191] That lawsuit did not seek judicial review of administrative action; it sought tort damages against an employer. None of the reasons for applying primary jurisdiction applied: (1) the case was not technical and the agency had no real expertise to contribute, (2) the industry was not pervasively regulated, (3) there was no risk of conflicting court decisions, (4) there was no evidence that the Legislature intended such cases to be sent to the agency.[192] Thus the Court reached the correct result, although for the wrong reason.[193]

c. When primary jurisdiction applies: technical issues

As stated above, federal courts apply primary jurisdiction when a case involves difficult technical problems that require application of agency expertise. California cases have done the same while purporting to apply exhaustion of remedies.[194] *Karlin v. Zalta*[195] was a class action alleging a conspiracy to fix medical malpractice

191. A key part of the *Rojo* decision was the Court's determination that the Legislature had not preempted the common law tort action for damages for discrimination or sexual harassment. Rojo v. Klieger, 52 Cal. 2d 73, 73-82, 276 Cal. Rptr. 130, 133-40 (1990).

192. The Court held that the Legislature did intend that FEHA remedies be exhausted when plaintiff makes a claim for violation of the FEHA itself as opposed to a common law tort claim.

193. In the process it limited the reach of an earlier case, Westlake Community Hosp. v. Superior Court, 17 Cal. 3d 465, 131 Cal. Rptr. 90 (1976), in which a doctor seeking damages against a hospital that had expelled him from the staff was required to exhaust internal hospital remedies, even though those remedies did not include damages. This case was limited to remedies provided by private associations as distinguished from public agencies, as in *Rojo*. A more persuasive distinction of *Westlake* would be that it was an exhaustion case; the doctor was suing the hospital that provided the remedy in question, not a third party. Normally, in exhaustion cases, the remedy should be exhausted even though it is not completely adequate to satisfy all of the plaintiff's needs.

194. In National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 448-51, 189 Cal. Rptr. 346, 366-68 (1983), the Court held that the courts and Water Board had concurrent jurisdiction over cases involving conflict between appropriative water rights and the public trust doctrine. It also held that courts could refer especially difficult or technical issues to the Board as a referee or master. This is wholly consistent with primary jurisdiction which allows the assignment of one or more issues to an agency while the court retains the case on its docket.

195. 154 Cal. App. 3d 953, 979-87, 201 Cal. Rptr. 379, 394-400 (1984).

insurance rates in violation of state antitrust laws and seeking money damages. Insurance rate-fixing conspiracies are within the supervision of the Insurance Commissioner and are exempt from the antitrust laws. However the Commissioner has no power to award damages. The court dismissed the case under the exhaustion doctrine.

As a primary jurisdiction case, *Karlin* reached the right result, for the case required "a searching inquiry into the factual complexities of medical malpractice insurance ratemaking," whereas the statute "comprises a pervasive and self-contained system of administrative procedure for the monitoring both of insurance rates and the anticompetitive conditions that might produce such rates."[196] Consequently, *Karlin* fell within one or perhaps two of the established criteria for application of primary jurisdiction: (1) cases involving highly technical issues where the expertise of the agency would be helpful to courts and (2) cases where the Legislature intended that such cases be tried in the agency.[197]

However, appropriate procedure in *Karlin* would have called for the court to retain the case on its docket while it was being considered by the agency, so that if the agency found that the conspiracy existed and should not be exempted from the antitrust laws, plaintiff would retain its claim for damages without concern that the statute of limitations would run out on it.[198]

d. When primary jurisdiction applies: legislative intent

Another type of case in which primary jurisdiction applies is often referred to as "preemption": the Legislature intended this sort of case to be sent to an agency, thus preempting judicial remedies.

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196. 154 Cal. App. 3d at 983, 201 Cal. Rptr. at 397.

197. This branch of the case law is discussed in *infra* text accompanying note 199.

198. A similar error appears in Wilkinson v. Norcal Mutual Ins. Co., 98 Cal. App. 3d 307, 159 Cal. Rptr. 416 (1979), which involved an action by a single doctor claiming that his insurance rates were excessive. The court dismissed for failure to exhaust remedies instead of retaining the case on its docket for computation of damages in the event the agency found the rate to be excessive or illegal. See also Morton v. Hollywood Park, Inc., 73 Cal. App. 3d 248, 139 Cal. Rptr. 584 (1977).

For example, workers' compensation or unemployment compensation disputes between employer and employee must be tried before the appropriate agency, not in court. California cases correctly apply this doctrine, for example, refusing to allow trial courts to entertain cases involving agricultural labor disputes that should be heard before the Agricultural Labor Relations Board.[199]

e. Exigent circumstances

Even where a case probably should be sent to the agency because primary jurisdiction is applicable, a court should retain discretion to decide the case immediately because of exigent circumstances. For example, in *Department of Personnel Administration v. Superior Court*,[200] the issue was whether to send a case properly in the superior court for initial decision to the Public Employment Relations Board (PERB), which normally would have been required because of a statutory provision. However, purporting to apply the exhaustion exceptions for futility[201] and irreparable injury,[202] the

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199. United Farm Workers v. Superior Court, 72 Cal. App. 3d 268, 140 Cal. Rptr. 87 (1977). As that court put it, if unfair labor practice cases could be decided by judicial declaratory judgments, "the Board would be replaced by ad hoc determinations by already overcrowded courts. The legislative effort to bring order and stability to the collective bargaining process would be thwarted. The work of the Board would be effectively impaired, its decisions similar in impression to that of a tinkling triangle practically unnoticed in the triumphant blare of trumpets." 72 Cal. App. 3d at 272, 140 Cal. Rptr. at 90. In dictum, the court recognized a possible exception for extremely clear-cut statutory errors by the Board. See also Leedom v. Kyne, 358 U.S. 184 (1958).

Similarly, see San Diego Teachers Ass'n v. Superior Court, 24 Cal. 3d 1, 12-14, 154 Cal. Rptr. 893, 900-02 (1979) (Legislature intended to make issue of enjoining teacher strike a matter for exclusive initial jurisdiction of PERB); California Sch. Employees Ass'n v. Travis Unified Sch. Dist., 156 Cal. App. 3d 242, 250, 202 Cal. Rptr. 699, 703 (1984) (issue not one within PERB's exclusive initial jurisdiction); Wygant v. Victor Valley Joint Union High Sch. Dist., 168 Cal. App. 3d 319, 323-25, 214 Cal. Rptr. 205, 207-08 (1985) (same).

200. 5 Cal. App. 4th 155, 6 Cal. Rptr. 2d 714, 721 (1992).

201. The basis for the futility exception was that PERB had declined jurisdiction over the case.

202. An immediate judicial decision was needed because the issues involved the state's budget crisis and delay would have cost the jobs of additional state employees.

court retained the case. While the case should have been analyzed as one of primary jurisdiction, the court probably reached the correct result; this was an appropriate case for exercising discretion to retain the case even though normally under primary jurisdiction it would have been sent to the agency.

f. Incorrect results under California law

While courts have usually reached appropriate results despite relying on exhaustion rather than primary jurisdiction theory, this has not always been the case. Sometimes, cases legitimately in court have been dismissed for failure to exhaust administrative remedies because no exhaustion exception was applicable.[203] For example, *Yamaha Motor Corp., U.S.A. v. Superior Court*,[204] was a breach of contract action by a franchisee arising out of failure to supply the franchisee with a new product (RIVA) produced by Yamaha and other related breaches of contract.[205] Because the New Motor Vehicle Board has power to prevent modification of franchise contracts, the court held that the franchisee had to exhaust the remedy before the Board.

The *Yamaha* case seems wrong absent some indication the Legislature wished to preempt normal judicial contract remedies in motor vehicle cases. The Board could not provide contractual remedies such as damages.[206] Moreover, in another case involving a different franchisee, the Board had declined to provide relief because Yamaha had good cause to modify the contract and because the modification would not substantially affect the franchisee's investment. Yet the court held the futility exception to exhaustion was not applicable since the Board might distinguish

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203. See, e.g., Woodard v. Broadway Fed. Sav. & Loan Ass'n, 111 Cal. App. 2d 218, 244 P.2d 267 (1952) (judicial contest over election of directors — remedy before Federal Home Loan Bank Board must be exhausted).

204. 185 Cal. App. 3d 1232, 230 Cal. Rptr. 382 (1986).

205. For example, plaintiff alleged Yamaha's bad faith abandonment of advertising of its other products due to emphasis on the new one. It also alleged discrimination against plaintiff in the allocation of motorcycles in retaliation for Van Nuys' objections to Yamaha's policies.

206. For that reason, it is arguable that the *Yamaha* case was overruled by *Rojo v. Klieger*, discussed *supra* in text accompanying notes 187-93.

the prior case. This seems like the wrong question to be asking. The franchise contract did not contain a provision allowing the manufacturer to modify it; it would appear that the statute left the franchisee a choice whether to pursue its remedies before the Board or to go to court for breach of the franchise agreement.

Thus *Yamaha* was a primary jurisdiction, not an exhaustion case. Using primary jurisdiction theory, the court should have kept the case, but using exhaustion theory it required the case to be dismissed. The result of this sort of reasoning was not only to force the franchisee to utilize a misfitting set of remedies but also to probably lose its right to damages entirely, even if the Board sustained its position, since the statute of limitations might well run on the contract claim. In a case of competing trial jurisdiction between court and agency, the presumption should be in favor of retaining the case in court, not dismissing it, absent a strong reason to apply primary jurisdiction and send it to the agency.

4. Recommendation

Because California cases have confused exhaustion of remedies and primary jurisdiction, I suggest that a statutory provision in a new APA should recognize the difference. Because the instances in which primary jurisdiction should apply are difficult to reduce to a simple formula, however, the statute probably should not try to articulate such a formula.

A statute might provide first that a court should send an entire case, or one or more issues in a case, to an agency for an initial decision where the Legislature intended that the agency have exclusive jurisdiction over that type of case or issue. Second, the statute might provide that a court could, in its discretion, also send a case, or one or more issues in the case, to an agency for initial decision where the benefits to the court in doing so outweigh the extra delays and costs to litigants inherent in doing so. The statute, or a comment, should also point out that the court in its discretion could request that the agency file an amicus brief setting forth its

views on the case as a less expensive alternative to actually shipping the case over to the agency.[207]

The comment might then suggest the situations in which the court should exercise this discretionary power.[208] These would include (1) the matter is highly technical and agency expertise would be helpful to the court in resolving the issue; (2) the industry is so pervasively regulated by the agency that the regulatory scheme would be jeopardized by judicial interference; (3) there is a need for uniformity that would be jeopardized by the possibility of conflicting court decisions.

C. RIPENESS

The doctrine of ripeness in administrative law counsels a court to refuse to hear an on-the-face attack on an agency rule or policy until the agency takes further action to apply it in a specific factual situation. Ripeness is distinguishable from exhaustion of remedies because the exhaustion doctrine requires plaintiff to take all possible steps to deal with the problem at the agency level before coming to court. Ripeness, on the other hand, requires a court to stay its hand until the agency (as distinguished from the plaintiff) has taken further steps.

The ripeness doctrine is well accepted in California administrative law,[209] often arising as a question of judicial discretion as to whether to issue a declaratory judgment.[210] Because the judicially defined test appears to be working well, and because it requires a balancing test that is difficult to reduce to statutory form, I believe it is unnecessary to enact statutory provisions codifying the ripeness doctrine. However, there should be a comment to the exhaustion section making it clear that the Legislature recognizes

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207. See Distrigas of Mass., Inc. v. Boston Gas Co., 693 F.2d 1113 (1st Cir. 1982) (agency's views are needed but not necessary to have full-fledged agency proceeding to obtain these views).

208. A more detailed set of standards for exercising discretion are spelled out in Botein, *supra* note 172, at 878-90.

209. See 2 G. Ogden, California Public Agency Practice § 51.01 (1992).

210. Section 1061.

the existence of the ripeness doctrine and does not believe there is any necessity to change or codify it.

The leading case applying the ripeness doctrine in the administrative context is *Pacific Legal Foundation v. Coastal Commission*[211] in which plaintiff attacked the Commission's guidelines on coastal access on their face. The California Supreme Court ordered the case dismissed because of a lack of ripeness. The Court indicated a preference for adjudicating such cases in the context of an actual set of facts so that the issues could be framed with enough definiteness to allow courts to dispose of the controversy. Yet it also indicated that courts would resolve such disputes if deferral would cause lingering uncertainty, especially where there is widespread public interest in the question. It observed that courts should not issue advisory opinions; the issue must be such that the court's judgment would provide definite and conclusive relief.[212]

To decide when the courts should address challenges to guidelines before they have been applied to plaintiff, the *Pacific Legal Foundation* Court adopted the balancing test articulated in the leading federal case, *Abbott Laboratories v. Gardner*.[213] *Abbott Laboratories* evaluates ripeness claims by assessing and balancing two factors: the fitness of the issues for immediate judicial review and the hardship to the plaintiff from deferral of review.

Generally issues are considered fit for immediate review if they are part of final agency action (i.e., the agency is not reconsidering the rule and it is issued in formal fashion from a high level within the agency) and the issue is basically legal rather than factually oriented.[214] In *Pacific Legal Foundation*, the issues were not fit for

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211. 33 Cal. 3d 158, 188 Cal. Rptr. 104 (1982).

212. See Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 109 Cal. Rptr. 799 (1973) (declaratory judgment on effect of general plan on plaintiff's property calls for advisory opinion as the judgment would not resolve controversy between parties).

213. 387 U.S. 136 (1967). BKHN, Inc. v. Department of Health Servs., 3 Cal. App. 4th 301, 4 Cal. Rptr. 2d 188 (1992), also employs the *Abbott Labs* methodology.

214. A case is ripe where it has reached, but not yet passed, the point where the facts have sufficiently congealed to permit an intelligent and useful decision

immediate review because the Court found it difficult to assess the guidelines in the abstract. Everything would turn on the specific factual context in which they would be applied. The guidelines were flexible, general, and not even mandatory. Thus the lack of concreteness mandated a deferral of review.[215]

The hardship to plaintiff from deferral of review often arises from the fact that the rule confronts plaintiff with an immediate and serious dilemma: comply with the rule (abandoning a planned course of conduct) or risk violation of the rule (with serious legal and practical consequences). In *Pacific Legal Foundation*, there was no such dilemma: nobody would have a problem until they actually applied for a permit. Possibly, the Court conceded, people would be inhibited in their planning (for example, they might hesitate to hire an architect), but that was not sufficient hardship.[216]

Undoubtedly, the Court would take account of the public interest in evaluating the ripeness equation: the public interest might be served by providing an immediate answer to a difficult question, thus avoiding piecemeal litigation;[217] or it might be served by

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to be made. Sherwyn v. Department of Social Servs., 173 Cal. App. 3d 52, 218 Cal. Rptr. 778 (1985); California Water & Tel. Co. v. County of Los Angeles, 253 Cal. App. 2d 16, 61 Cal. Rptr. 618 (1967).

215. Similarly, see *BKHN*, 3 Cal. App. 4th at 301 (issue of whether state law ever provides joint and several liability for cleanup costs too difficult to answer in abstract).

216. See also *BKHN*, 3 Cal. App. 4th at 301 (P not seriously harmed by delay in getting answer to question of whether state law ever provides joint and several liability for cleanup costs); Newland v. Kizer, 209 Cal. App. 3d 647, 659, 257 Cal. Rptr. 450, 457 (1989) (no immediate need to construe statute providing time for patient at decertified nursing home to find a new home because no immediate threat of decertification); Teed v. State Bd. of Equalization, 12 Cal. App. 2d 162, 55 P.2d 267 (1936) (letter from Board contains no threats, merely informs P that current practice will be continued).

217. See Californians for Native Salmon v. Department of Forestry, 221 Cal. App. 3d 1419, 271 Cal. Rptr. 270 (1990) (agency policy of ignoring laws regarding timber harvest plans — declaratory judgment would avoid piecemeal litigation); Selinger v. City Council of Redlands, 216 Cal. App. 3d 259, 264 Cal. Rptr. 499 (1989) (public interest requires that court reach issue of interpretation of state law deeming application approved after one year); Regents of Univ. of Cal. v. State Bd. of Equalization, 73 Cal. App. 3d 660, 140 Cal. Rptr. 857 (1977)

deferring review and allowing the administrative or legislative process to run its course.[218] These factors vary enormously from case to case, which makes it difficult to reduce the ripeness formula to statutory form.

Since California law, exemplified by *Pacific Legal Foundation*, correctly applies the federal ripeness test, and because of the highly abstract and case-specific nature of the ripeness equation, I see little reason to try to reduce the test to statutory form. However, it should be made clear in a comment that the new legislation (including specific provisions on exhaustion and primary jurisdiction) is not intended to disapprove the prevailing judicial approach.

D. Statute of Limitations on Seeking Review of Adjudicatory Action

A new judicial review statute should impose a uniform limitations period. Present law has scattered and inconsistent provisions.

1. Present Law

Under present law, two generic statutes provide the limitations period for large numbers of agency adjudicatory actions. Under Government Code Section 11523, adjudicatory decisions under the existing APA are subject to a 30-day limitation period.[219] The 30-

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(public interest in answering question about taxability of University property); California Water & Tel. Co. v. County of Los Angeles, 253 Cal. App. 2d 16, 61 Cal. Rptr. 618 (1967) (whether county ordinance regulating water company is preempted by state law).

218. See Zetterberg v. Department of Pub. Health, 43 Cal. App. 3d 657, 118 Cal. Rptr. 100 (1975) (review would interfere with political process).

219. This provision puts considerable weight on the distinction between adjudicatory action, reviewable under Section 1094.5, and other agency action reviewable under traditional mandamus, as to which no special statute of limitation applies. See Morton v. Board of Registered Nursing, 235 Cal. App. 3d 1560, 1 Cal. Rptr. 2d 502 (1991) (Board's action reviewable under Section 1094.5 so 30-day period applies).

The 30-day period of Section 11523 is a statute of limitations, not a jurisdictional provision, and therefore is subject to the same rules applicable to any statute of limitations. As a result, the agency can be estopped to plead the statute if its representations resulted in a petitioner's failure to meet the deadline. Ginns v. Savage, 61 Cal. 2d 520, 39 Cal. Rptr. 377 (1964).

day period runs from the last day on which reconsideration can be ordered.[220] Petitioner must request the agency to prepare the record (including a transcript), and the agency must supply it within 30 days after the request. If the petitioner requests the agency to prepare the record within 10 days after the last day on which reconsideration can be ordered, the time for filing a petition for writ of mandate is extended until 30 days after delivery of the record.

Code of Civil Procedure Section 1094.6 applies to judicial review of local adjudicatory agency action (other than school districts).[221] The limitation period is 90 days following the date on which the decision becomes final. If there is no provision for reconsideration of the decision, the decision is final on the date it is made. If there is provision for reconsideration, the decision is final on the expiration of the period for which reconsideration can be sought. If reconsideration is sought, the decision is final on the date reconsideration is rejected.[222]

Section 1094.6 provides that the agency must deliver the record to the petitioner within 90 days after it is requested; if such request is filed within 10 days after the decision becomes final, the time for filing a petition is extended to not later than the 30th day following the date on which the record is either personally delivered or

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220. The power to order reconsideration expires 30 days after delivery or mailing of a decision, or on the date set by the agency as the effective date of the decision if that occurs prior to expiration of the 30-day period, or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. Gov't Code § 11521. See also De Cordoba v. Governing Bd., 71 Cal. App. 3d 155, 139 Cal. Rptr. 312 (1977); Koons v. Placer Hills Union Sch. Dist., 61 Cal. App. 3d 484, 132 Cal. Rptr. 243 (1976). Both cases hold that where an agency makes its decision effective immediately, thus precluding reconsideration, the 30-day period runs from the date of delivery or mailing of the formal agency decision.

221. The section applies only to decisions made, after hearing, that suspend, demote, or dismiss an officer or employee; revoke or deny an application for a permit, license, or other entitlement; or deny an application for a retirement benefit or allowance. All other local adjudications, such as land use planning decisions, are not subject to the 90-day rule of Section 1094.6.

222. Section 1094.6(b).

mailed to the petitioner or his attorney.[223] Finally, the agency must provide notice to the party that the time within which judicial review must be sought is governed by Section 1094.6;[224] cases have held that the 90-day period is tolled until such notice is provided.[225]

The 30- or 90-day periods provided by Sections 11523 and 1094.6 are not extended for an additional five days (or ten days outside the state) because the decisions were mailed.[226]

Various other sections applicable to particular agencies contain different provisions relating to the timing of review of adjudicatory action that are inconsistent in various ways with the two generic sections already summarized.[227]

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223. Section 1094.6(d).

224. Section 1094.6(f).

225. El Dorado Palm Springs, Ltd. v. Rent Review Comm'n, 230 Cal. App. 3d 335, 281 Cal. Rptr. 327 (1991) (notice can be oral or written); Cummings v. City of Vernon, 214 Cal. App. 3d 919, 263 Cal. Rptr. 97 (1989).

226. Tielsch v. City of Anaheim, 160 Cal. App. 3d 576, 206 Cal. Rptr. 740 (1984). The same is true of the limitations period for appealing a decision of the Agricultural Labor Relations Board to the court of appeal. Mario Saikhon, Inc. v. Agricultural Labor Relations Bd., 140 Cal. App. 3d 581, 189 Cal. Rptr. 632 (1983). But the contrary is true in workers' compensation cases. Villa v. Workers' Compensation Appeals Bd., 156 Cal. App. 3d 1076, 203 Cal. Rptr. 26 (1984).

227. A sampling of such statutes follows: There is a 90-day limitation period from the date a driver's license order is noticed. Veh. Code § 14401(a). There is a 30-day limitation period after issuance of decisions of the Agricultural Labor Relations Board. Lab. Code § 1160.8. The provision relating to Public Employment Relations Board is similar. Gov't Code § 3542. A six-month period is provided to appeal decisions of the Unemployment Insurance Appeals Board; it runs from date of decision or from the date the decision is designated as a precedent decision, whichever is later. Unemp. Ins. Code § 410. Decisions of the Workers' Compensation Appeals Board must be appealed within 45 days after a petition for reconsideration is denied or (if the petition is granted) 45 days after the filing of an order of reconsideration. Lab. Code § 5950. Welfare decisions of the Department of Social Services can be appealed within one year after notice of decision. Welf. & Inst. Code § 10962. One year is allowed to challenge various state personnel decisions, including decisions of the State Personnel Board, although remedies are limited unless the challenge is made within 90 days. Gov't Code § 19630. Litigants have 90 days to challenge decisions of zoning

Finally, a great deal of state and local agency action is not subject to any special limitation period at all. This includes both adjudicatory action that is not under the APA or Section 1094.6,[228] as well as a vast array of more generalized agency action. In such cases, the limitations period are those provided by general provisions of the Code of Civil Procedure: either the three-year statute for liabilities created by statute[229] or the four-year statute applicable when no other period of limitation applies.[230] Since these limitation periods are far too long for judicial review of agency action,[231] courts generally impose shorter limitation periods under the doctrine of laches.[232]

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appeal boards (and the board must be served within 120 days of its decision). Gov't Code § 65907.

These statutes contain no provision tolling limitations where the agency is late in delivering the record. Probably the court cannot allow equitable tolling in such cases. California Standardbred Sires Stakes Comm. v. California Horse Racing Bd., 231 Cal. App. 3d 751, 282 Cal. Rptr. 656 (1991); Sinetos v. Department of Motor Vehicles, 160 Cal. App. 3d 1172, 207 Cal. Rptr. 207 (1984). *Contra* Liberty v. California Coastal Comm'n, 113 Cal. App. 3d 501, 170 Cal. Rptr. 247 (1981) (statute should be tolled to prevent Commission from perpetrating injustice by holding up preparation of the record).

228. Monroe v. Trustees of Cal. State Colleges, 6 Cal. 3d 399, 99 Cal. Rptr. 129 (1971) (refusal to reinstate professor discharged 16 years before for refusal to sign loyalty oath); Ragan v. City of Hawthorne, 212 Cal. App. 3d 1368, 261 Cal. Rptr. 219 (1989) (refusal to hold hearing required by APA); County of San Diego v. Assessment Appeals Bd. No. 2, 148 Cal. App. 3d 548, 554, 195 Cal. Rptr. 895, 898 (1983) (property tax decision of Appeals Board); Aroney v. California Horse Racing Bd., 145 Cal. App. 3d 928, 193 Cal. Rptr. 708 (1983) (exclusion order from racetrack).

229. Section 338(a); Green v. Obledo, 29 Cal. 3d 126, 140 n.10, 172 Cal. Rptr. 206, 214 n.10 (1981) (obligation to pay welfare benefits is liability created by statute).

230. Section 343. See California Administrative Mandamus §§ 7.9-7.10, at 244-46 (Cal. Cont. Ed. Bar, 2d ed. 1989).

231. See Conti v. Board of Civil Serv. Comm'rs, 1 Cal. 3d 351, 357 n.3, 82 Cal. Rptr. 337, 340 n.3 (1969); Aroney v. California Horse Racing Bd., 145 Cal. App. 3d at 933, 193 Cal. Rptr. at 710; Cameron v. Cozens, 30 Cal. App. 3d 887, 106 Cal. Rptr. 537 (1973).

232. See Conti v. Board of Civil Serv. Comm'rs, 1 Cal. 3d 351, 357 n.3, 82 Cal. Rptr. 337, 340 n.3 (1969); 2 G. Ogden, California Public Agency Practice §

2. Recommendations

A new statute should provide a single limitation period, at least for all adjudicatory action taken by state or local agencies. This section canvasses some of the policy problems that must be considered in drafting such a provision.

a. When period starts running

The time period provided should run from the effective date of the decision. A petition for judicial review filed before the effective date is premature.[233]

Under the Commission's draft administrative adjudication statute, the effective date of an order is 30 days after the decision becomes final unless the agency head orders a different date.[234] A decision should state the date when it is effective so that parties will have no doubt about when the statute of limitations on review starts running.

The provision that a decision is effective 30 days after it is "final" requires that litigants know when a decision becomes final. The draft administrative adjudication statute contains a number of provisions relating to finality. A proposed decision may be summarily adopted as a final decision within 100 days after it is deliv-

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51.11 (1992); California Administrative Mandamus § 7.14, at 248-49 (Cal. Cont. Ed. Bar, 2d ed. 1989).

233. Government Code Section 11523 requires that the petition be filed "within" the 30-day period after the last day on which reconsideration can be ordered. I can see several possible problems here. A litigant might file too early and, not realizing the nature of the error, fail to meet the limitations period by filing anew after the effective date. Therefore, I suggest the prematurely filed petition toll the statute of limitations on seeking judicial review.

Another possible problem might arise where an agency decision states an effective date far in the future (i.e., provides for a very long stay of its order). This would delay the time at which a person can seek judicial review. Existing law permits only very short delays. Gov't Code § 11521(a). If the Commission considers the possibility of deferral of judicial review through a lengthy stay to be a problem, the statute could provide that a petition for judicial review could be filed at any time after the agency could no longer reconsider its decision. But this may be an unnecessary complication.

234. Section 650.110(a) in administrative adjudication draft attached to Memorandum, *supra* note 155. [Ed. note. This provision was not included in the Commission's final recommendation.]

ered to the agency head (or other period provided by regulation). The date of summary adoption would be the date the decision becomes final. The proposed decision also becomes final immediately upon issuance if it is unreviewable or upon a decision by the reviewing authority in the exercise of discretion to deny review. Finally, a proposed decision becomes a final decision 100 days after delivery of the proposed decision to the reviewing authority if the latter takes no action.[235]

Under the draft statute, a final decision is treated as final when it is "issued," although the agency has ten days to serve it on the parties.[236] However, a final decision can still be altered by the agency. Within 15 days following service of a final decision, any party can apply to the agency head to correct a mistake or clerical error in the final decision; the application is deemed denied if the agency head does not dispose of it within 15 days. The agency head also has 15 days to correct a mistake or clerical error on its own motion.[237]

Moreover, under the draft statute the agency can give further review to a final decision, either by petition or on its own motion; the power to grant further review to a final decision expires 30 days after service or other time provided by agency regulation.[238]

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235. See Sections 649.140-649.150 in administrative adjudication draft attached to Memorandum, *supra* note 155. [Ed. note. These provisions were not included in the Commission's final recommendation.]

236. Section 649.160(a) in administrative adjudication draft attached to Memorandum, *supra* note 155. [Ed. note. This provision was not included in the Commission's final recommendation.] I am not certain whether the draft defines "issued." Existing law defines it as the date that a decision is either delivered to the parties or mailed to the parties. See Sunnyside Nurseries, Inc. v. Agricultural Labor Relations Bd., 93 Cal. App. 3d 922, 929, 156 Cal. Rptr. 152, 155 (1979). But see Mario Saikhon, Inc. v. Agricultural Labor Relations Bd., 140 Cal. App. 3d 581, 189 Cal. Rptr. 632 (1983). But that would make no sense since the statute requires the decision to be delivered or mailed ten days after issuance. This provision should be reconsidered.

237. Section 649.170 in administrative adjudication draft attached to Memorandum, *supra* note 155. [Ed. note. This provision was not included in the Commission's final recommendation.]

238. Sections 649.210-649.220, in administrative adjudication draft attached to Memorandum, *supra* note 155. [Ed. note. These provisions were not included in the Commission's final recommendation.] The process of giving further

Clearly, once an agency has decided to provide further review of a final decision, that decision becomes unsuitable for judicial review until the agency has issued a new final decision.

These provisions relating to correction of mistakes or review of final decisions make it difficult to know whether an apparently final decision is in fact final. As a result, the judicial review statute of limitations should start running not on the date a decision is final but on its effective date, which is normally 30 days after the decision is final, unless the agency decision provides a different effective date.[239] When the 30-day period after the decision becomes final has expired, it is normally too late for the agency to correct mistakes or clerical errors and too late for it to grant further review of the decision.[240] And if the agency states an effective date for its decision that is shorter than 30 days after the decision becomes final, it should be clear from the statute that the agency cannot alter its decision after that effective date.[241]

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review to a final decision is often referred to as "reconsideration" under existing law.

239. *Cf.* United Farm Workers v. Agricultural Labor Relations Bd., 74 Cal. App. 3d 347, 141 Cal. Rptr. 437 (1977). The statute relating to the ALRB provided for judicial review within 30 days after issuance of the order. This period could not be extended by seeking reconsideration; the limitation period begins on the date of final order regardless of the pendency of a petition for reconsideration. Under the draft statute, the ALRB could continue to maintain the same rule, if it wished to do so, by causing the effective date of its orders to coincide with the date they are issued and disclaiming any power to reconsider them.

240. This is not quite correct, however, since both the provision for correction of mistakes and for review of a final decision provide that the time periods can be extended by regulation. Where an agency has extended these time periods by regulation, it is important that the agency extend the effective date of a final decision so that it occurs after there is no further possibility of change. If the agency has not done this, it should be clear that a petition for judicial review filed after the effective date cuts off the power of the agency to correct mistakes or grant review of a final decision, even if its regulations allow it do to so. See Section 649.170(f) (in administrative adjudication draft attached to Memorandum, *supra* note 155), which cuts off the power to correct mistakes after initiation of administrative or judicial review.

241. Such a provision should be added to the provisions relating to correction of errors and review of final decisions.

b. The limitation period

I believe that the statute should allow a 90-day limitation period for judicial review of adjudicatory action. The 30-day period in the existing APA seems too short, since persons often are not represented by counsel at the agency level and must secure counsel in order to appeal.[242] Section 1094.6 was enacted more recently than Section 11523 (1976 as opposed to 1945) and its 90-day period probably better represents current thinking about the appropriate limitation period.[243] This section would unify a large group of existing statutes that, without any rationale that I can perceive, provide for limitation periods between 30 days and one year.[244]

I believe that the new 90-day statute should also cover judicial review of an agency decision refusing to hold an adjudicatory hearing required by the APA or other law. Present law places such review under the three-year statute of limitations for actions on a liability created by statute.[245] This seems absurd; judicial review of such refusal should come quite quickly after the agency refuses to hold the hearing so that, if plaintiff is successful, the hearing can be held while the facts are still fresh.[246]

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242. For example, see Kupka v. Board of Admin. of PERS, 122 Cal. App. 3d 791, 176 Cal. Rptr. 214 (1981) (misunderstanding between petitioner and his attorney allowed 30-day period to slip by — court has no power to relieve default on grounds of mistake, inadvertence, or excusable neglect).

243. See Hittle v. Santa Barbara County Employees Retirement Ass'n, 39 Cal. 3d 374, 216 Cal. Rptr. 733 (1985), which held that the 90-day period of Section 1094.6 could not be shortened by local ordinances or retirement plans. The Court stated that as a matter of policy a 90-day period suffices to keep stale claims out of court, but any shorter period might impede the bringing of meritorious actions.

244. See *supra* note 227.

245. Ragan v. City of Hawthorne, 212 Cal. App. 3d 1368, 261 Cal. Rptr. 219 (1989). But see Farmer v. City of Inglewood, 134 Cal. App. 3d 130, 140-41, 185 Cal. Rptr. 9, 15 (1982), which applies the 90-day statute of Section 1094.6 to a situation in which a hearing was denied; the claim accrued when the hearing should have been granted, but was tolled until the time that the agency finally refused to grant one.

246. As discussed below, the applicable statute of limitations is tolled until an agency notifies a person of the applicable limitations period. In default of such

c. Statute of limitations for judicial review of non-adjudicatory agency action

I have suggested that a uniform 90-day period apply for judicial review of all state and local adjudicatory action. This recommendation applies to all situations (whether or not covered by the new APA) in which an on-the-record hearing is provided, whether required by constitution, statute, regulation, or custom. Generally, these are the actions covered by Section 1094.5 of existing law.[247]

Should we attempt at this time to prescribe a uniform statute of limitations for all other judicial review of agency action — for the vast array of actions challenged in court that are not adjudicatory in nature? These actions involve both attacks on agency regulations and on the vast array of generalized and individualized actions of agencies that are not required to be taken after provision of a hearing. Normally, judicial review of such actions is obtained through a writ of "traditional" mandamus[248] or through declaratory judgment.[249] Under present law, the normal statutes of limitation apply — three or four years after the right accrues. This really seems far too long a period of time in which to mount a challenge of agency action. In other situations, specific statutes prescribe time limits.[250]

I am reluctant to try at this time to prescribe a single limitation period for such a vast array of state and local actions. Perhaps it

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notice, the limitations period would be six months after the agency's final decision to refuse to provide a hearing.

247. Section 1094.5 applies to review of proceedings "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.…"

248. Section 1085. Traditional or ordinary mandamus applies where the defendant owes a non-discretionary duty to plaintiff (or possibly in cases of abuse of discretion). Judicial review of adjudicatory action under Section 1094.5, although also styled as mandamus, is in fact much more like the traditional writ of certiorari.

249. Section 1060. Judicial review of regulations is obtained through declaratory relief. Gov't Code § 11350. No statute of limitations is set forth.

250. See, e.g., Pub. Res. Code § 21167 (prescribing various limitation periods for different claims relating to environmental impact statements).

will be possible to do so in connection with a proposal for a single unified judicial review mechanism; I intend to propose one in the next installment of this study.

Just to identify one problem, it would not be good policy to state a uniform 90-day limitation provision for judicial review of regulations, since in many cases people are not even aware of a regulation until long after it has been adopted. Some federal statutes do impose such a limitation on challenging regulations, and they are generally considered as rather Draconian since so many potential challengers of the regulation are certain to be barred by the short limitation period. To name another problem, the vast array of agency actions that would be swept under such a uniform procedure lack commonality, so that it would be difficult to write a statute prescribing exactly when the cause of action accrues.[251] Thus I will revisit the subject of statutes of limitation for review of other agency actions in the next phase of this study.

d. Extension of time if agency delays providing record

Both generic statutes contain provisions extending the statute of limitations if the agency is slow in providing the record, including the transcript.[252] I suggest that a new generalized judicial review section contain a tolling provision of this type. Often, counsel must examine the record in order to decide whether it is sensible to seek judicial review; therefore, the record should be available before the decision to pursue review must be made.

Both generic statutes require that the record be requested within 10 days after the decision becomes final in order to trigger the extension provision. This seems too strict. I suggest that the extension provision be triggered if the request for the record is made

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251. See, e.g., Monroe v. Trustees of Cal. State Colleges, 6 Cal. 3d 399, 99 Cal. Rptr. 129 (1971) (refusal to reinstate professor discharged 16 years before for refusal to sign loyalty oath — statute starts running from refusal to reinstate, not from initial discharge).

252. However, if the material supplied by the agency omits an item which should have been included, the statute of limitations is not tolled until the missing item is supplied — at least where the petitioner is not prejudiced by the omission. Compton v. Mount San Antonio Community College Bd. of Trustees, 49 Cal. App. 3d 150, 122 Cal. Rptr. 493 (1975).

within 30 days after the effective date of the decision. Then the time to seek review would be extended until the later of the following: (1) 90 days after the effective date of the decision or (2) 30 days after the agency supplies the record.

The existing judicial review statutes providing for review in the court of appeal or the Supreme Court, rather than the superior court, contain a different provision relating to the record. The agency must supply the record after the court clerk notifies the agency that a petition for review has been filed.[253] Thus in cases reviewed in the court of appeal or the Supreme Court, the record is not available to a petitioner at the time the decision to seek review is made.[254] I am uncertain whether this different pattern is required by the mechanics of appellate practice or whether the statute should make the same provision for cases reviewed in trial courts and appellate courts. Assuming the Commission decides to preserve the existing provisions that lodge appeals from certain agencies in the court of appeal or the Supreme Court,[255] it should also decide whether the provisions relating to the record should differ with respect to such appeals.

e. Notice to parties of limitation period

Section 1094.6 requires that the agency decision give notice that the time within which review must be sought is provided by that section.[256] Case law holds that such notice is required to start the 90-day period running.[257] I think that an agency decision should notify parties of the date by which review must be sought and it

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253. See Lab. Code §§ 1160.8 (Agricultural Labor Relations Board), 5951 (Workers' Compensation Appeals Board); Pub. Util. Code § 1756 (Public Utilities Commission).

254. Obviously such statutes contain no tolling provision relating to agency delays in furnishing the record, since the petition must be filed before the record is supplied.

255. The issue of the proper court in which to obtain review will be considered in the next phase of the study.

256. Vehicle Code Section 14401(b) and Unemployment Insurance Code Section 410 require similar notification.

257. El Dorado Palm Springs, Ltd. v. Rent Review Comm'n, 230 Cal. App. 3d 335, 281 Cal. Rptr. 327 (1991).

should actually give the date on which the limitation period runs out.[258] The present statutes applicable to judicial review of state agency action impose no duty on the agency to warn litigants of the short limitations period on seeking review.[259] Such statutes can function as a trap. Litigants who are not represented by counsel (and perhaps even some represented by inexperienced counsel) may inadvertently let the short period slip away.

Absent written notice[260] of the limitation period on seeking review, the 90-day statute of limitations should be tolled. However, the applicable limitations period, where no notice of the limitation date was given, should be a reasonable period, say six months after the effective date of the decision. It should not be the three or four year periods provided by the default statutes of limitation.

f. No extension because decision is mailed

In accordance with current law,[261] the statute should make clear that the limitation periods are not extended because the agency decision is mailed despite the provision in the draft statute that service or notice by mail extends any prescribed period of notice and any right or duty to do an act within a prescribed period.[262]

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258. The adjudication provisions of the statute should include information about the limitation period among the necessary elements of an agency final decision.

259. See Elliott v. Contractors' State License Bd., 224 Cal. App. 3d 1048, 274 Cal. Rptr. 286 (1990) (licensee wrote Board asking for information about appeal but it failed to respond — such facts do not estop Board from asserting limitations).

260. Case law under Section 1094.6 indicates that the notice can be written or oral. El Dorado Palm Springs, Ltd. v. Rent Review Comm'n, 230 Cal. App. 3d 335, 281 Cal. Rptr. 327 (1991). However, I believe that the notice should be written to avoid credibility disputes about whether oral notice was given.

261. Tielsch v. City of Anaheim, 160 Cal. App. 3d 576, 206 Cal. Rptr. 740 (1984). The workers' compensation rule is to the contrary. Villa v. Workers' Compensation Appeals Bd., 156 Cal. App. 3d 1076, 203 Cal. Rptr. 26 (1984).

262. Section 613.230, in administrative adjudication draft attached to Memorandum, *supra* note 155. [Ed. note. This provision was not included in the Commission's final recommendation.]

g. Other issues

The revised statute should confirm existing law (perhaps in a comment) that an agency can be estopped to plead the statute of limitations if a failure to seek review within the limitation period was attributable to misconduct of agency employees.[263] And a petition that is timely filed but has a technical defect (whether or not the defect is detected by the court clerk and whether or not the clerk refuses to file the defective petition) should not be dismissed even though the defect is corrected after the limitations period expires.[264] If a person is never notified of an agency decision (for example, because it is lost in the mail), a petition for review should be considered timely if filed within a reasonably short period after the person finally receives notice of the decision.[265] Finally, if the limitation period ends on a Sunday or holiday, it should be extended until the next following day.[266]

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263. Ginns v. Savage, 61 Cal. 2d 520, 39 Cal. Rptr. 377 (1964); California Administrative Mandamus § 7.17, at 251-52 (Cal. Cont. Ed. Bar, 2d ed. 1989). It may be that estoppel is permitted with respect to mandate petitions under Section 1094.5 in the superior court, but not with respect to cases filed in the court of appeal or the Supreme Court, since the time limits in the latter cases are jurisdictional. A late-filing petitioner should be able to assert an estoppel defense regardless of the court in which review is sought.

264. United Farm Workers v. Agricultural Labor Relations Bd., 37 Cal. 3d 912, 210 Cal. Rptr. 453 (1985); California Administrative Mandamus § 7.18, at 252 (Cal. Cont. Ed. Bar, 2d ed. 1989).

265. State Farm Fire & Casualty Co. v. Workers' Compensation Appeals Bd., 119 Cal. App. 3d 193, 173 Cal. Rptr. 778 (1981).

266. Alford v. Industrial Accident Comm'n, 28 Cal. 2d 198, 169 P.2d 641 (1946).

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

CLRC Staff Note. This background study is only available in the original printed copy, or the Commission's printed report, at 27 Cal. L. Revision Comm'n Reports 309 (1997), but not in electronic form. (Pages 311-402 omitted.)

A MODERN JUDICIAL REVIEW STATUTE TO REPLACE ADMINISTRATIVE MANDAMUS *

by Michael Asimow

November 1993

CONTENTS

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

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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 1085[4] 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

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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

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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 demurrer).[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]

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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 plaintiff[18] 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

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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 record[30] or

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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]

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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

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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]

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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 adjudicatory[43] as does the determination of whether procedural due process applies.[44]

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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.

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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

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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 action[59] is reviewable by a petition for judicial review[60] filed with

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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

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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

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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-

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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

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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

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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

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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-

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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 record[99] 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

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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-

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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]

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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

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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

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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 arose[118] or where plaintiff resides.[119]

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

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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

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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

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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-

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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 law[135] that allows the court to condition the granting of a stay upon posting of a bond in order to protect third parties.[136]

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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.