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ADMINISTRATIVE LAW

A. Requirement of Factual Findings in Administrative Hearings: Enforcement of Substantive Standards for Land Use Variances

Topanga Association for a Scenic Community v. County of Los Angeles.[1] *Topanga* represents another link in the California Supreme Court's recent chain of decisions examining and expanding judicial review of the adjudicative decisions of administrative agencies. Read broadly, these cases create a new set of groundrules for all administrative proceedings in which quasi-judicial decisions are made after an agency hearing. As a result, factual findings in all such proceedings must henceforth be sufficiently precise to allow detailed judicial scrutiny, and many administrative proceedings may become mere aids to the exercise of independent judgment by a court.

In 1970 and 1971 the court expanded the judicial role in cases where review was based on a substantial evidence test by abandoning the requirement that agency findings be upheld if there were any substantial evidence, contradicted or uncontradicted, to support agency findings.[2] The court instead directed trial courts to review all relevant evidence in an administrative record, including that which contradicted agency findings.[3] In addition, the 1971 case of *Bixby v. Pierno*[4] reiterated California's "vested rights" doctrine, which provides that when administrative action affects a fundamental vested right courts will weigh the evidence and exercise independent judgment, rather than employ the substantial evidence standard of review. Although restricted to state agencies, *Bixby* laid the groundwork for *Strumsky v. San Diego County Employees Association*[5], in which the supreme court extended the independent judgment standard of review

1. 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974) (Tobriner, J.) (unanimous decision).

2. *See, e.g.*, Thompson v. Long Beach, 41 Cal. 2d 235, 241, 259 P.2d 649, 652 (1953). *See also* Netterville, *The Substantial Evidence Rule in California Administrative Law*, 8 STAN. L. REV. 563, 573 (1956).

3. Bixby v. Pierno, 4 Cal. 3d 130, 143 n.10, 481 P.2d 242, 251 n.10, 93 Cal. Rptr. 234, 243 n.10 (1971) (interpreting CAL. CODE CIV. PRO. § 1094.5(c)); LeVesque v. Workmen's Compensation Appeals Bd., 1 Cal. 3d 627, 637, 463 P.2d 432, 438-39, 83 Cal. Rptr. 208, 214-15 (1970) (interpreting CAL. LABOR CODE § 5952(d), a provision similar to the general substantial evidence review standard of CAL. CODE CIV. PRO. § 1094.5(c)); Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control, 2 Cal. 3d 85, 94, 465 P.2d 1, 6, 84 Cal. Rptr. 113, 118 (1970).

4. 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971).

5. 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

to local agency actions affecting fundamental vested rights, and indicated a willingness to liberally apply the vested rights label.[6]

In *Topanga*, the court decided that administrative agency rulings which are subject to review under the California administrative mandamus provision, Code of Civil Procedure section 1094.5,[7] must be supported by written findings, which in turn must be supported by substantial evidence considering the entire record. Justice Tobriner's opinion in *Topanga* did not explicitly recognize the decision's potential impact on the administrative process. Rather, the decision focused on the specific agency action being reviewed: the grant of a zoning variance by the Los Angeles Regional Planning Commission. The court concentrated on the role of variances in land use regulation and concluded that "[b]y setting forth a reasonable requirement for findings and clarifying the standard of judicial review, we believe we promote the achievement of the intended scheme of land use control."[8] On the basis of the record before it, the supreme court concluded that the findings of the Planning Commission were not sufficient to establish grounds for granting the challenged variance under standards enumerated in Government Code section 65906,[9] the state law governing variances.

This Note will first examine the court's treatment of the case in a land use context, and suggest that it represents a reasonable extension of the California judiciary's salutary movement toward strict scrutiny of variances. Next, the implications of the decision for administrative proceedings will be discussed, with emphasis on the potential conflict between existing standards and a broad new findings requirement. Finally, this Note will suggest possible ways by which the *Topanga* findings requirement can be reasonably applied in administrative contexts other than the one considered by the court.

I. FACTS IN *Topanga*

Topanga Canyon Investment Company desired to build a mobile home park on 28 acres of land in Topanga Canyon, located in the Santa Monica Mountain region of Los Angeles County. The property was zoned by county ordinance for light agriculture and single-family residences, with a one-acre minimum lot size. Over the opposition of the Topanga Association for a Scenic Community, a local property-owners' organization, the county zoning board recommended and the

6. *See generally* Note, *Scope of "Independent Judgment" Review*, 63 CALIF. L. REV. 27 (1974) (this issue).

7. (West 1970).

8. 11 Cal. 3d at 517, 522 P.2d at 19, 113 Cal. Rptr. at 842-43.

9. (West Supp. 1974).

regional planning commission granted a zoning variance for the mobile home park.[10] In its report the commission apparently justified the variance by concluding that the mobile home park would satisfy a demand for low-cost housing in the area, attract further investment, provide a needed firebreak, and would be considerably more profitable than single-family residence development.[11]

The community association failed to persuade the county board of supervisors that the variance had been improperly granted, and petitioned unsuccessfully for relief via administrative mandamus in the Los Angeles County Superior Court and the Court of Appeal for the Second District. By the time the case reached the California Supreme Court, the real party in interest, Topanga Canyon Investment Company, no longer owned the property. Still the court concentrated on the original mobile home park proposal because the challenged variance had been granted on the basis of that plan.[12]

II. VARIANCES: ZONING SAFETY VALVES OR SABOTEURS

Variances are generally viewed as safety valves since they can be used to ameliorate extraordinarily harsh effects which particular land use restrictions might have visited upon particular property owners.[13] Responsibility for administration and review of variance applications is generally vested in a board appointed by a local legislative body. Such boards have traditionally exercised much discretion in the performance of their functions;[14] many have employed procedures which the *Topanga* decision characterized as casual.[15] Use of zoning variances to subvert the intent of comprehensive zoning plans has been severely criticized.[16]

Section 65906 of the California Government Code provides substantive standards for the granting of variances.[17] This statute, part

10. 11 Cal. 3d at 510, 522 P.2d at 14, 113 Cal. Rptr. at 838.

11. *Id.* at 520, 522 P.2d at 20-21, 113 Cal. Rptr. at 844-45.

12. *Id.* at 510, 522 P.2d at 14, 113 Cal. Rptr. at 838.

13. Hamilton v. Board of Supervisors, 269 Cal. App. 2d 64, 65-66, 75 Cal. Rptr. 106, 108-09 (2d Dist. 1969); Tustin Heights Ass'n v. Board of Supervisors, 170 Cal. App. 2d 619, 627, 339 P.2d 914, 919 (4th Dist. 1951); Comment, *General Welfare, Welfare Economics and Zoning Variances*, 38 S. CAL. L. REV. 548, 574 (1965).

14. Siller v. Bd. of Supervisors, 58 Cal. 2d 479, 484, 375 P.2d 41, 44, 25 Cal. Rptr. 73, 76 (1962). *See generally* Comment, *Judicial Control over Zoning Boards of Appeal: Suggestions for Reform*, 12 U.C.L.A.L. REV. 937, 941 (1965); Comment, *Zoning: Variance Administration in Alameda County*, 50 CALIF. L. REV. 101, 107-11 (1962).

15. 11 Cal. 3d at 518, 522 P.2d at 19, 113 Cal. Rptr. at 843.

16. *See, e.g.*, FINAL REPORT OF THE JOINT COMM. ON OPEN SPACE LAND 99-103 *reprinted in* JOUR. CAL. S., Reg. Sess. (1970); R. BABCOCK, THE ZONING GAME 154-59 (1966); Bowden, *Article XXVIII—Opening the Door to Open Space Control*, 1 PAC. L.J. 461, 511 (1970).

17. CAL. GOV'T CODE § 65906 (West Supp. 1974) provides, in part:

of a general revision of California zoning law in 1965, applies only to counties and general law cities, except as expressly adopted by charter cities.[18] When the variance in *Topanga* was granted in 1970, the statute permitted both bulk and use variances. Bulk variances are exceptions to zoning requirements relating to dimensions of property, that is, yard, area, setback, or height restrictions. Use variances reflect exceptions to the uses permitted in a zone—in *Topanga*, for example, a use variance was granted permitting the mobile home park to be placed in an agricultural and single-family residence zone. Use variances are now prohibited by section 65906.[19]

The essence of the variance is a case-by-case evaluation of hardship, which can only be accomplished by an administrative body vested with some degree of discretion. If such agencies are not guided by specific criteria, however, they may adopt policies which render the zoning plan meaningless since each variance, by definition, contradicts the approved use of land in a zone. The administrative procedure may thus result in substantial "amendment" of a legislative enactment. Problems are compounded by the nature of some zoning boards. The *Topanga* opinion noted that the membership of some boards may not be adequately insulated from the interests which most frequently seek variances.[20]

a. Judicial review of variances

As quasi-judicial administrative decisions made on the basis of a hearing, variance determinations by local agencies are subject to review under the California administrative mandamus statute, Code of Civil Procedure section 1094.5.[21] Prior to 1966 the judicial attitude toward variances in California was deferential; up to that time there

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Variances from the terms of the zoning ordinance shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

18. CAL. GOV'T CODE § 65803 (West Supp. 1974) provides: "The provisions of this chapter shall not apply to a chartered city, except to the extent that the same shall be adopted by charter or ordinance of the city."

19. CAL. GOV'T CODE § 65906 (West Supp. 1974), as amended in 1970, now provides, in part: "A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property."

20. 11 Cal. 3d at 518, 522 P.2d at 19, 113 Cal. Rptr. at 843.

21. CAL. CODE CIV. PRO. § 1094.5(a) (West 1964) provides, in part:

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.

had been no reported cases in which a court overturned the grant of a variance.[22] The prevailing view was that variance decisions reviewed on applications for administrative mandamus should not be disturbed except on a showing of abuse of discretion.[23] This showing was especially difficult to make because California courts assumed that when a variance was granted the action was taken on the basis of substantial evidence and appropriate findings.[24] Although the standards under which proposed variances were to be judged emphasized the need for uniqueness or special hardship of an applicant,[25] zoning boards often ignored them, substituting their own conceptions of appropriate criteria.[26]

The judicial presumption that variance decisions were made on the basis of substantial evidence and appropriate findings has now been abandoned. In a series of cases beginning with *Cow Hollow Improvement Club v. Board of Permit Appeals*,[27] and culminating with *Topanga*, the California courts have carefully examined variance grants and the administrative records supporting them and have overturned variances when unsupported either by evidence or relevant findings. In *Cow Hollow* and a subsequent state supreme court case, *Broadway, Laguna, Vallejo Association v. Board of Permit Appeals*,[28] local rather than state law was in issue. San Francisco, where these cases arose, is a charter city and county and was exercising its power as a charter city[29] while granting variances in these cases.

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22. D. HAGMAN, J. LARSON & C. MARTIN, CALIFORNIA ZONING PRACTICE § 7.54 (1969).

23. *See, e.g.*, Bradbeer v. England, 104 Cal. App. 2d 704, 708, 232 P.2d 308, 311 (2d Dist. 1951).

24. *See, e.g.*, Siller v. Board of Supervisors, 58 Cal. 2d 479, 484, 375 P.2d 41, 44, 25 Cal. Rptr. 73, 76 (1962); Flagstad v. City of San Mateo, 156 Cal. App. 2d 138, 141-42, 318 P.2d 825, 827-28 (1st Dist. 1957).

25. In Flagstad v. City of San Mateo, 156 Cal. App. 2d 138, 318 P.2d 825 (1st Dist. 1957), for example, the local ordinance provided for the grant of a variance if it were found:

> a. That there are exceptional or extraordinary circumstances or conditions applicable to the property involved, or the intended use thereof, which do not apply generally to the property or class of uses in the district, so that a denial of the application would result in undne property loss;
>
> b. That such variance would be necessary for the preservation and enjoyment of a property right of the owner of the property involved;
>
> c. That the granting of such variance would not be detrimental to the public health, safety or welfare . . . .

Id. at 139, 318 P.2d at 826.

26. *See* Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 284 (1962); Comment, *Zoning: Variance Administration In Alameda County*, 50 CALIF. L. REV. 101, 111-12 (1962).

27. 245 Cal. App. 2d 160, 53 Cal. Rptr. 610 (1st Dist. 1966).

28. 66 Cal. 2d 767, 427 P.2d 810, 59 Cal. Rptr. 146 (1967).

29. CAL. CONST., art. XI, § 6 provides that a charter city and county may exercise the powers of a charter city.

Local law in San Francisco paralleled the state variance requirements,[30] and also required "the administrative board to specify its subsidiary findings and its ultimate conclusions."[31] In *Cow Hollow*, Judge Molinari of the First District Court of Appeal held that San Francisco's City Planning Code, by its findings requirement, limited the discretion of the board of permit appeals and required that the reviewing court scrutinize the findings to determine whether substantial evidence supported the board's actions. In *Broadway, Laguna* the board had found that a proposed high-rise apartment building would be of benefit to the community and that a more reasonable profit could be made if a variance was granted to San Francisco's limit on the ratio of building floor area to lot size. On review the supreme court, in an opinion by Justice Tobriner, held that these findings were legally insufficient to support grant of a variance under the terms of the San Francisco ordinance.

Cow Hollow, Broadway, Laguna, and some later cases based on local law[32] marked the increasingly skeptical judicial attitude toward variances. The courts caught up with the commentators and began expressing the view that improper use of variances undermined the integrity and effectiveness of zoning laws.[33] The same view was expressed in *Hamilton v. Board of Supervisors*,[34] the first case to reflect judicial review under the *state* variance standards of Government Code section 65906. In *Topanga*, the California Supreme Court looked to section 65906 for substantive criteria, rather than an applicable local zoning ordinance,[35] and looked beyond a local

30. *Compare* CAL. GOV'T CODE § 65906 *with* the requirements for a San Francisco variance set out in the *Cow Hollow* decision, 245 Cal. App. 2d 160, 166 n.1, 53 Cal. Rptr. 610, 613 n.1.

31. Broadway, Laguna, Vallejo Ass'n v. Bd. of Permit Appeals, 66 Cal. 2d at 772, 427 P.2d at 814, 59 Cal. Rptr. at 150. The findings requirement was absent in previous cases such as Siller v. Board of Supervisors, 58 Cal. 2d 479, 375 P.2d 41, 25 Cal. Rptr. 73 (1962), and provided the basis on which the court distinguished them.

32. *See, e.g.*, Zakessian v. City of Sausalito, 28 Cal. App. 3d 794, 105 Cal. Rptr. 105 (1st Dist. 1972); Robison v. City of Oakland, 268 Cal. App. 2d 269, 74 Cal. Rptr. 17 (1st Dist. 1968).

33. The variance sought by the developer in this case would confer not parity but privilege; to sanction such special treatment would seriously undermine present efforts to combat urban blight and municipal congestion through comprehensive zoning codes. So selective an application of the provisions of the City Planning Code would destroy the uniformity of the zoning laws which is their essence.

Broadway, Laguna, Vallejo Ass'n v. Board of Permit Appeals, 66 Cal. 2d at 781, 427 P.2d at 819, 59 Cal. Rptr. at 155.

34. 269 Cal. App. 2d 64, 75 Cal. Rptr. 106 (2d Dist. 1969). *Hamilton* intimated, but did not rule, that section 1094.5 required factual findings to support the variance grant.

35. 11 Cal. 3d at 512, 522 P.2d at 15, 113 Cal. Rptr. at 839, *citing* Los Angeles County Zoning Ordinance No. 1494, section 522.

ordinance requiring administrative findings to rest its holding on an interpretation of Code of Civil Procedure section 1094.5.[36]

b. Topanga's impact on judicial review of variances

The *Topanga* decision makes clear that Government Code section 65906 provides minimum substantive standards on which variance applications are to be judged in counties and general law cities.[37] Local law can set stricter standards but cannot retreat from those of section 65906. No decision was reached on the consequences of an administrative mandamus review where section 65906 criteria are met but the zoning board is charged with abusing its discretion under a stricter local ordinance. Presumably, the local ordinance would then control.

By its treatment of section 65906's requirements the court may have indicated that it would view with displeasure substantive standards in chartered cities which fall very far below those set forth in the state law, especially with regard to use variances of the *Topanga* variety.[38] In the emphasis on its concern that variances not be used to subvert zoning plans, and in its general application of section 65906 to the facts of *Topanga*, a strong antivariance attitude may be discerned.[39] Of particular concern to the court was the size of the parcel involved in *Topanga*.[40] Variances granted to large parcels present greater threats to a comprehensive plan than those granted to small parcels, which are more likely to exhibit the unique characteristics for which variances are appropriate.

The court apparently wanted to promote comprehensive land use decisionmaking by strictly separating legislative and administrative functions and by protecting legislative programs from backdoor administrative alteration. To implement this policy the court demanded that zoning boards support their decisions with specific findings of fact and law based upon the administrative record. The *Topanga* opinion reasoned that the legislature, in enacting section 1094.5, had contemplated that a reviewing court would examine the relationships between evidence, findings, and the final administrative decision in

36. *Id.* at 514 n.11, 522 P.2d at 16 n.11, 113 Cal. Rptr. at 840 n.11, *citing* Los Angeles County ordinance section 639 which provided: "After a hearing by a zoning board, the said zoning board shall report to the commission its findings and recommend the action which it concludes the commission should take."

37. *Id.* at 518 n.18, 522 P.2d at 18 n.18, 113 Cal. Rptr. at 844 n.18.

38. Virtually all of California's major cities are chartered. Although only about 2% of the state's land area is contained within chartered cities, more than 50% of its population lives in them. Thus, any variation between land use controls on non-chartered versus chartered cities will have a significant impact on the population of California.

39. *Cf.* 11 Cal. 3d at 518-22, 522 P.2d at 70-71, 113 Cal. Rptr. at 844-46.

40. *Id.* at 522, 522 P.2d at 22, 113 Cal. Rptr. at 846.

determining whether there had been abuse of discretion. The court noted that by directing the judicary's attention to these relationships, the legislature must have intended administrative agencies to state findings of fact in more than conclusory terms.[41]

Justice Tobriner's opinion says little about the specific form such findings must take, either in variance cases or in other administrative proceedings. Expressly disapproved are two earlier cases which allowed findings to parrot the language of applicable substantive legislation.[42] Meaningful judicial review does not require that variance board findings "be stated with the formality required in judicial proceedings,"[43] but they must be sufficient to "expose the board's mode of analysis to an extent sufficient [to facilitate review]".[44]

As the next part of this Note contends, *Topanga* may have a significant impact on many administrative proceedings. But its substantive effect on land use regulation is uncertain. Though the opinion signifies a strict judicial attitude towards variance awards, local communities will still be able to grant zoning exceptions through the use permit. Under this device, city or county legislative bodies specify that particular uses may be allowed in a zone, subject to the discretion of an administrative body.[45] The purpose of enumerating such special uses is to allow

> the inclusion in the zoning pattern of uses . . . essentially desirable . . . but which because of the nature thereof or other concomitants (noise, traffic, congestion, effect on values, etc.), militate against their existence in every location in a zone, or any location without restrictions tailored to fit the special problems which the uses present.[46]

Though this procedure, unlike the variance, increases legislative control over land use by requiring the legislature to specify in advance the uses to be permitted, it, too, is open to abuse. Typically, the legislative standard for granting of the permit is quite lax. In contrast to the show of hardship required for a variance, the finding of a use permit normally requires only a finding that the proposed use "is not detrimental to the neighborhood."[47] California courts have consistently

41. *Id.* at 515, 522 P.2d at 17, 113 Cal. Rptr. at 841.

42. Kappadahl v. Alcan Pacific Co., 222 Cal. App. 2d 626, 639, 35 Cal. Rptr. 354, 362 (1st Dist. 1963); Ames v. City of Pasadena, 167 Cal. App. 2d 510, 516, 334 P.2d 653, 657 (2d Dist. 1959).

43. 11 Cal. 3d at 517 n.16, 522 P.2d at 18 n.16, 113 Cal. Rptr. at 842 n.16.

44. *Id.*

45. D. HAGMAN, J. LARSON & C. MARTIN, CALIFORNIA ZONING PRACTICE § 7.56 (1969).

46. People v. Perez, 214 Cal. App. 2d 881, 885, 29 Cal. Rptr. 781, 783 (App. Dep't Super. Ct. 1963).

47. D. HAGMAN, J. LARSON & C. MARTIN, CALIFORNIA ZONING PRACTICE § 7.66

refused to strike down such vague standards, holding that their breadth does not constitute an improper delegation of power by the local legislature.[48]

The *Topanga* fact situation offers an example of how the use permit procedure could be used to undermine comprehensive land use planning. Instead of seeking a variance, backers of the mobile home park could have attempted to secure an amendment to the basic county zoning ordinance allowing mobile home parks in the desired area subject to the grant of a use permit upon a finding that the use was not detrimental. The findings rendered by the variance board could well have been sufficient to satisfy this substantive requirement. Since the county zoning board, the county planning commission, and the board of supervisors voted in favor of the project, this procedure might well have been successful in obtaining a legally airtight grant of permission for the trailer park.

III. ADMINISTRATIVE MANDAMUS AND THE REQUIREMENT OF ADMINISTRATIVE FINDINGS

Justice Tobriner's opinion in *Topanga* emphasized the importance of administrative findings in variance proceedings. But since the court's decision requiring detailed factual findings was made on the basis of Code of Civil Procedure section 1094.5, the ruling will apparently apply to *all* administrative adjudicatory decisions within the scope of section 1094.5—that is, all adjudicatory agency decisions made on the basis of a legally required hearing.[49] To the extent that a stat-

(1969); Cunningham, *Land Use Control: The State & Local Programs*, 50 IOWA L. REV. 367, 400 (1965).

48. Stoddard v. Edelman, 4 Cal. App. 3d 544, 84 Cal. Rptr. 443 (2d Dist. 1970).

49. *See* 10 JUDICIAL COUNCIL OF CAL., BIENNIAL REPORT 26, 45 (1944); W. DEERING, CALIFORNIA ADMINISTRATIVE MANDAMUS § 2.2 (1966) [hereinafter cited as DEERING]. Administrative mandamus cannot be used to review legislative or ministerial decisions; it applies only to activities in which administrative decisions are based on agency determinations of facts and their application to specific private interests. *See* Keeler v. Superior Court, 46 Cal. 2d 596, 597, 297 P.2d 967, 968 (1956); Kleps, *Certiorarified Mandamus Reviewed, The Courts and California Administrative Decisions, 1949-1959*, 12 STAN. L. REV. 554, 555-57 (1960). In the *Topanga* case the supreme court noted the quasi-judicial character of variance proceedings as contrasted to the legislative nature of zoning ordinance promulgation. 11 Cal. 3d at 517, 522 P.2d at 18, 113 Cal. Rptr. at 842. The distinction involved basically corresponds to Professor Davis's distinction between formulation of orders and rules. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 5.01 (1972).

In a recent case the supreme court split over the issue of whether the Los Angeles City Council could enact special ordinances creating oil drilling districts, without first making express findings as to the possibility of environmental impact. The majority, per Justice Tobriner, relied on an analysis of various sections of the California Environmental Quality Act (CAL. PUB. RESOURCES CODE § 21050 *et seq.*) to frame such a requirement. No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 79-81, 529 P.2d 66,

ute or regulation requires such a hearing, application of section 1094.5 is straightforward. Where statutes are not explicit, the California courts have come to rely on broad statutory construction to require hearings in almost every instance where facts are in controversy.[50] Administrative mandamus thus applies to a large and varied set of activities.[51] Of these, zoning variance and business licensing proceedings are the most commonly challenged. Only when a statute explicitly dispenses with hearings does section 1094.5 clearly cease to be available as a means for challenging quasi-judicial administrative action.[52]

a. The potential requirement of a complete evidentiary record

Under section 1094.5(b) three basic questions may be raised on review: whether there was lack of agency jurisdiction, whether a fair hearing was offered, and whether there was any prejudicial abuse of agency discretion. The subsection provides:

> Abuse of discretion is established if the respondent has not proceeded in a manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

73-74, 118 Cal. Rptr. 34, 41-42 (1974). Justice Clark, in dissent, complained that the court had functionally applied the *Topanga* requirement of administrative findings to a legislative decision. 13 Cal. 3d at 89-90, 529 P.2d at 80-81, 118 Cal. Rptr. at 48-49.

50. *Cf.* Endler v. Schutzbank, 68 Cal. 2d 162, 180-81, 436 P.2d 297, 309-10, 65 Cal. Rptr. 297, 309-10 (1968) (requiring Commissioner of Corporations to fashion hearing procedure where no statutory requirement); Fascination, Inc. v. Hoover, 39 Cal. 2d 260, 269, 246 P.2d 656, 661 (1952). *See generally* Deering, *Preliminary Considerations*, in CALIFORNIA ADMINISTRATIVE AGENCY PRACTICE §§ 1.13-1.29 (M. Nestle ed. 1970). With the erosion of a distinction between privileges and rights as a basis for establishing due process requirements for a hearing, the California courts may become even more expansive in their extension of hearing requirements.

51. *See* DEERING, *supra* note 49, at § 2.7 (Supp. 1974), Appendix A (state level activities & Appendix B (representative local activities). These appendices represent the most complete, available lists of activities covered by section 1094.5. Another representative list of local agencies includes:

> City councils, boards of trustees, school boards, boards of freeholders, charter revision commissions, zoning boards, planning commissions, variance boards, appeal boards under building codes, fire and police appeals boards, pension and retirement boards, civil service and merit system boards and commissions, civil parade boards, business licensing boards, parks and playgrounds boards, recreation commissions, animal shelter boards, zoo boards, library boards and many others.

Strumsky v. San Diego County Employees Ass'n, 11 Cal. 3d 28, 46-47 n.1, 520 P.2d 29, 41 n.1, 112 Cal. Rptr. 805, 817 n.1 (Burke, J., dissenting).

52. Such provisions are rare, but may be illustrated by several cases involving disciplinary actions by an agency. *See* Eye Dog Foundation v. State Bd. of Guide Dogs for the Blind, 67 Cal. 2d 536, 545-47, 432 P.2d 717, 723-25, 63 Cal. Rptr. 21, 27-29 (1967); Patton v. Board of Harbor Comm'ns, 13 Cal. App. 3d 536, 541-42, 91 Cal. Rptr. 832, 835-36 (2d Dist. 1970). *Cf.* Ratliff v. Lampton, 32 Cal. 2d 226, 230, 195 P.2d 792, 795 (1948) (dictum).

The statutory relationship between findings and decisions is the peg on which the supreme court fastened its holding in *Topanga*. Only the relationship between findings and decisions was actually reviewed by the court; it did not compare the hearing transcript to the resultant findings.[53] By its treatment of the findings requirement, however, the court may have indicated an increasing concern about the completeness of the evidentiary record subject to review under section 1094.5. This is an issue which has received scant attention from the California courts.[54] If section 1094.5 is interpreted to give petitioners the opportunity to acquire complete evidentiary records, just as the *Topanga* court read the statute to require factual findings, then a significant development in administrative procedure will have occurred.[55]

Such a requirement logically follows from the required "on the whole record" review utilized in California administrative mandamus under the substantial evidence standard.[56] A reviewing court must consider all relevant evidence on the administrative record; if relevant evidence is missing, then review is hindered. This is, of course, even more significant for cases in which independent judgment review applies, since a court is called upon to weigh the evidence presented by both sides. A less than complete record means that different evidence will be considered by the court than by the agency.

Interpreting the statute to require that agencies create complete records and base their decisions on those records obviates the need to base such a requirement on due process grounds. Only one California case seems to have used due process to find an administrative record inadequate.[57] Under such an analysis, lack of an adequate evidentiary record deprives a petitioner of the opportunity for fair judicial review of administrative action.

Whether based upon section 1094.5 or on due process, the implications of such an explicit requirement are broad. Agencies would be less able to rely on extra-record information in reaching decisions. Further, they might face the practical burden of exactly recording evi-

53. 11 Cal. 3d at 519 n.19, 522 P.2d at 20 n.19, 113 Cal. Rptr. at 844 n.19.

54. DEERING, *supra* note 49, § 9.5 (Supp. 1974).

55. The burden is on a petitioner to produce a transcript when one can be obtained. *See* DEERING, *supra* note 49, § 13.21 and cases cited therein. Where a hearing body preserves a less than complete record and there is no statutory duty to preserve a record, the California courts have not developed a clear rule or rationale on how to proceed. *See* DEERING, *supra* note 49, § 9.5.

56. See text accompanying notes 2 & 3 *supra*.

57. Aluisi v. County of Fresno, 159 Cal. App. 2d 823, 324 P.2d 920 (4th Dist. 1958).

dence received at even the most minor types of proceedings.[58]

Discussion of the many facets of this area is, however, beyond the scope of this Note, and change in current record requirements certainly calls for a more definite foundation than is provided in *Topanga*. The remainder of the Note will address the issue on which *Topanga* focused: the need for basic findings of fact on which ultimate findings in administrative proceedings are based.

b. California administrative findings before Topanga

Administrative findings can be either ultimate or basic. Ultimate findings are usually expressed in the language of statutes, *e.g.*, a rate is reasonable, the property is unique and subject to hardship under present zoning. Basic findings are those on which ultimate findings rest, more detailed than ultimate findings but less detailed than a summary of the evidence.[59] The *Topanga* opinion required that *basic* findings be promulgated in all administrative adjudications subject to review under section 1094.5.

The desirability of administrative findings to explain adjudicatory decisions is uniformly accepted.[60] Major reasons for a findings requirement, reviewed by the court in *Topanga*, are: (1) to aid a reviewing court in analyzing the grounds on which an administrative decision was reached and whether evidence sustains these grounds; (2) to improve the administrative process by encouraging careful agency analysis and discouraging random leaps from evidence to conclusions; and (3) to apprise the parties to an agency proceeding of the basis for the administrative decision.[61]

California courts have developed a flexibile approach to the content of findings. The basic principles have been that agencies make findings clear enough to apprise parties of the reasons for a decision and to enable reviewing courts to determine if an agency correctly applied the law.[62] When findings are not expressly required by statute, the courts have sometimes implied the existence of necessary findings from a decision,[63] or permitted findings which follow statutory lan-

58. See note 51 *supra* for examples of the numerous activities covered if a section 1094.5 rationale is used.

59. K. DAVIS, ADMINISTRATIVE LAW TEXT § 322 (1972).

60. *Id.* F. COOPER, 2 STATE ADMINISTRATIVE LAW 469-71 (1965).

61. 11 Cal. 3d at 515-16, 522 P.2d at 17-19, 113 Cal. Rptr. at 841-42.

62. *See* Swars v. Council of City of Vallejo, 33 Cal. 2d 867, 871, 206 P.2d 355, 358 (1949). *Swars* is an early landmark administrative findings case in California.

63. *See, e.g.*, Albonico v. Madera Irrigation Dist., 53 Cal. 2d 735, 741, 350 P.2d 95, 98, 3 Cal. Rptr. 343, 346 (1960); Sacramento Municipal Util. Dist. v. Pacific Gas & Electric Co., 72 Cal. App. 2d 638, 647, 165 P.2d 741, 746 (3d Dist. 1946).

guage or the language of accusations, *i.e.*, ultimate findings.[64] Willingness to accept such conclusory findings in support of a decision has depended on the degree to which they enable intelligent review and inform the parties. Where a statute appears to call for more detailed findings, the courts have been meticulous in upholding such requirements.[65]

The single most generally applicable findings statute is California Government Code section 11518, part of the state Administrative Procedure Act.[66] Section 11518 and Code of Civil Procedure section 1094.5 were adopted at the same time,[67] both as the result of an exhaustive review of administrative procedure made by the California Judicial Council.[68] Section 11518 provides:

> The decision shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any. *The findings may be stated in the language of the pleadings or by reference thereto . . . .*[69]

This statute has been interpreted to require no more than finding of necessary ultimate facts.[70] Significantly, many other states have more stringent basic findings requirements, often modeled on section 12 of the Model State Administrative Procedure Act:

> A final decision shall include findings of fact and conclusions of law, separately stated. *Findings of fact, if set forth in a statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.*[71]

The California statute does not refer to basic or underlying facts. Since section 11518 was enacted simultaneously with Code of Civil Procedure section 1094.5, consistent requirements were probably in-

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64. *Cf.* Southern Cal. Jockey Club, Inc. v. California Horse Racing Bd., 36 Cal. 2d 167, 177-78, 223 P.2d 1, 8 (1950); DEERING, *supra* note 49 § 5.45.

65. *See* Cal. Motor Transport Co. v. Public Util. Comm'n, 59 Cal. 2d 270, 379 P.2d 324, 28 Cal. Rptr. 868 (1963) (review on certiorari, CAL. PUBLIC UTILITIES CODE § 1705 (1958); Bostick v. Martin, 247 Cal. App. 2d 179, 55 Cal. Rptr. 322 (4th Dist. 1966) (CAL. FINANCIAL CODE § 5513 (1958).

66. CAL. GOV'T CODE §§ 11370-11528 (West 1970).

67. Section 1094.5 was adopted in 1945. Ch. 868, § 1, [1945] Cal. Stat. 1636. The administrative adjudication sections of the California Administrative Procedure Act, CAL. GOV'T CODE §§ 11500 to 11528, were first adopted in the same year. Ch. 867, § 1, [1945] Cal. Stat. 1626. The APA sections on rulemaking, CAL. GOV'T CODE §§ 11371 to 11445, were added in 1947. Ch. 1425, § 1, [1947] Cal. Stat. 2984.

68. 10 JUDICIAL COUNCIL OF CAL., BIENNIAL REPORT (1944).

69. (West 1970) (emphasis added).

70. *Cf.* Martin v. Alcoholic Beverage Control Appeals Bd., 52 Cal. 2d 238, 248, 340 P.2d 1, 7 (1959). The statutory requirement allowing findings to be stated in the language of pleadings has been approved. *Cf.* Stoumen v. Munro, 219 Cal. App. 2d 302, 311, 33 Cal. Rptr. 305, 310 (1st Dist. 1963).

71. MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1970) (emphasis added). *See generally* F. COOPER, 2 STATE ADMINISTRATIVE LAW 469-78 (1965).

tended, requiring only ultimate findings in the adjudicatory activities subject to the California Administrative Procedure Act.

c. The effect of Topanga

The *Topanga* decision, read broadly, impliedly overrules the California cases which have held that basic findings are not always required,[72] and particularly those which held that they are not always necessary under Government Code section 11518.[73] Justice Tobriner's opinion was somewhat ambiguous in describing the nature of administrative findings which will satisfy its interpretation of section 1094.5. The court was concerned with understanding the "analytic route"[74] traveled from evidence to action and found a need for findings to bridge the "analytic gap"[75] between raw evidence and the ultimate decision or order. Eminent authorities cited by the court were generally those which have promoted a requirement of basic findings,[76] but only in footnotes does the opinion place its strongest indications that basic, factual findings are what the court demands.[77]

Although this requirement of basic findings may be a justifiable outcome from a policy perspective, it is not one which is supported by the evidence considered in the *Topanga* case. The plaintiff community association did not even raise the issue in its petition for hearing in the supreme court,[78] probably because there was an applicable local ordinance which required findings.[79] It must be surmised that the court was waiting for a proper hook on which to hang a new findings requirement based on section 1094.5. This challenge to a variance presented the California Supreme Court with just such an opportunity.

An inherent tension exists between variances and zoning schemes reflecting comprehensive plans. The potential effect of variances on land use plans requires that granting of variances be limited solely to

72. See notes 63 & 64 *supra.*

73. See note 70 *supra.*

74. 11 Cal. 3d at 515, 522 P.2d at 17, 113 Cal. Rptr. at 841.

75. *Id.*

76. The court cites K. DAVIS, ADMINISTRATIVE LAW TREATISE (1958); F. COOPER, STATE ADMINISTRATIVE LAW (1965); Judge Bazelon's opinion in Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), and several United States Supreme Court opinions. 11 Cal. 3d at 515-16, 522 P.2d at 17-18, 113 Cal. Rptr. at 841-42.

77. The court disapproves language in two variance cases which permitted findings to be stated in the language of statutes, and quotes a popular land use treatise on the necessity for basic findings in variance granting proceedings. 11 Cal. 3d at 516-17 nn. 15, 16, 522 P.2d at 18 nn.15, 16, 113 Cal. Rptr. at 842 nn.15, 16.

78. Letter from David L. Caplan, attorney for petitioners, to Louis S. Weller, Nov. 6, 1974, on file in office of *California Law Review.*

79. See note 36 *supra.*

those applicants whose property is uniquely affected by a zoning ordinance. The state has set up specific standards for grant of variances.[80] Informed review of variance decisions, both by the parties and the courts is clearly in the public interest and consistent with the state's interest in land use regulation. In fact, the importance of the individual interests possessed by parties who challenge variances could eventually lead the supreme court to reverse its current position and to determine that this question involves "fundamental vested rights" with judicial review based upon an independent judgment rather than a substantial evidence review standard.[81]

Other administrative proceedings may not give rise to the same considerations as those reviewed by the supreme court in *Topanga.* The findings requirement of the Administrative Procedure Act covers a variety of agencies,[82] some of which may have additional findings regulations. Local agencies may or may not have statutory findings requirements. In many cases, especially those relating to the granting of licenses to engage in business or professions where administrative policies are not at stake, no conflict between administrative action and policy exists which needs to be carefully controlled. To the degree that adjudicative decisionmaking in both state and local agencies has been covered by procedural safeguards which control harmful agency discretion, the *Topanga* court's rationale that findings in support of a decision are needed to control abuse becomes less important. Further, some functions may be so trivial that the burden of findings would add greatly to costs and time involved.[83]

Prediction of the increased workload which a requirement of detailed written findings would impose on all administrative agencies subject to section 1094.5 is difficult, and should not be the determinative factor. But the court in *Topanga* gave no attention to the statewide effect of its decision and should at least have confronted the matter directly, since it may lead to significant pressure on the agen-

80. CAL. GOV'T CODE § 65906 (West 1964), sets out standards for variance awards in counties and general law cities.

81. In a footnote, the *Topanga* opinion did not discuss whether grants of variances or objections to such grants involve fundamental vested rights: "Petitioner does not suggest, nor do we find, that the present case touches upon any vested right." 11 Cal. 3d at 510 n.1, 522 P.2d at 14 n.1, 113 Cal. Rptr. at 837 n.1. Therefore, the substantial evidence test remains the standard for judicial review of variances. *See* Siller v. Bd. of Supervisors, 58 Cal. 2d 479, 484, 375 P.2d 41, 44, 25 Cal. Rptr. 73, 76 (1962). It could be argued, however, that the right of property owners to maintain the nature of their areas or neighborhoods, as protected by a given operable zoning classification, is a fundamental vested right.

82. *See* CAL. GOV'T CODE § 11501(b) (West Supp. 1974) for a complete list.

83. Justice Burke's list of local activities subject to section 1094.5 is demonstrative. See note 51, *supra.*

cies. A blanket requirement of basic findings in all proceedings governed by administrative mandamus may not allow for legitimate flexibility necessary to the conduct of administrative activities. The *Topanga* case simply does not provide an ample basis on which to impose this requirement onto so many different types of proceedings.

d. Moderating the effect of Topanga

Because it did not use absolute language, the court in *Topanga* has left itself a viable means to retreat from its potentially extreme position. First, it can avoid conflict with Government Code 11518 and cases interpreting that section by limiting its holding to instances in which that state statute does not apply. The variance procedure reviewed in *Topanga* was a local agency proceeding not subject to the state Administrative Procedure Act and section 11518. Section 1094.5 can properly be considered superior to local statutes which either fail to specify or set low standards for findings, but cannot be so easily accepted where it impinges on the specific state statute. If section 11518 needs to be reinterpreted and expanded, this should be legislatively accomplished. Although findings requirements have grown out of judge-made law, the regulation of administrative procedure has largely been taken over by statute. The court cannot mount a very persuasive argument that section 1094.5 was intended to alter section 11518 when they were adopted at the same time, as part of a common plan. If the supreme court prefers the provisions of the Model State Administrative Procedure Act, it should wait until the legislature enacts them before it enforces them against state agencies.

Another way for the court to moderate its position is to retain the case-by-case analysis which has marked California's past approach to administrative findings. Although a somewhat more precise findings requirement is probably desirable and is supported by the trend in other states, necessity for detail will vary according to the complexity of the factual background to agency action. The purposes of findings—enabling judicial review, providing information to parties, and promoting agency precision—can be accomplished without drastically altering state law. *Topanga* provides a good case history of administrative procedures which need careful judicial review and where findings are essential. This was recognized by local ordinance. If limited to variance-granting procedures, the supreme court's decision should evoke no serious criticism. When, however, less significant or complex decisions are made by local agencies, the standards for findings should take this into account.[84]

84. This approach was recognized in a recent case which extended *Topanga's* findings requirement to administrative proceedings involving "vested rights" and thus subject

At the very least, the court should quickly clarify the meaning of the *Topanga* decision. If a circumspect approach to a requirement of findings under section 1094.5 is adopted, then *Topanga* will represent a reasonable extension of the court's legitimate concern for land use planning. Coupled with the abolition of use variances under Government Code section 65906, the decision reduces the chances that administrative action will threaten the integrity of zoning plans. If, however, the court wishes to utilize a broad view of the scope of section 1094.5, and chooses to read a rigid requirement of basic findings into that statute, it has gone too far.

Louis S. Weller

B. Scope of "Independent Judgment" Review

Strumsky v. San Diego County Employees Retirement Association.[1] The supreme court held first that a trial court must exercise its independent judgment on the evidence when reviewing, in a proceeding for a writ of mandate,[2] a decision of a *local* administrative agency[3]

to independent judgment review. Hadley v. City of Ontario, 43 Cal. App. 3d 121, 117 Cal. Rptr. 521 (4th Dist. 1974). The opinion in *Hadley* carefully explained that "Findings may be formal or informal *and may in some cases be contained in the order made.*" *Id.* at 128, 117 Cal. Rptr. at 518 (emphasis added).

1. 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974) (Sullivan, J.) (4-3 decision), *modified,* 11 Cal. 3d 312 (1974) (applying the holding to all pending and future appeals and trials).

2. The scope of review on administrative mandamus is governed by California Code of Civil Procedure section 1094.5, which provides, in pertinent part:

> (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. . . .
>
> (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; and 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.

CAL. CODE CIV. PRO. § 1094.5 (West 1974). *See generally* W. DEERING, CALIFORNIA ADMINISTRATIVE MANDAMUS §§ 5.1-5.75 (1966 & Supp. 1974).

3. As used in this Note, the term "local agency" includes agencies of all local

which affects a fundamental vested right. Secondly, it concluded that the right to a service-connected death allowance was such a right. In so holding, the court drastically increased the scope of the judiciary's substantive power at the expense of administrative power in California.

The basic objective in defining the scope of judicial review is to ensure protection of certain important rights while also preventing judicial substitution of judgment on issues which are committed to administrative discretion by statute. The most prevalent standard for scope of judicial review, the substantial evidence test, upholds the agency on questions of fact when there is reasonable evidence in the light of the whole record to support its decision.[4] Under the independent judgment test, the court goes one step further and substitutes its judgment for that of the agency on the merits of the underlying factual question.[5] The former test emphasizes judicial restraint, whereas the latter protects certain rights which are deemed to be too important to be left to final administrative extinction.

Because the record in this case contained substantial evidence to support each side, the standard of review was critical to the result. The plaintiff claimed that the stress and tension of her husband's law enforcement job had exacerbated his congenital heart condition and contributed to his subsequent death. She argued therefore that she was entitled to elect a higher service-connected death pension pursuant to Government Code section 31787, instead of a normal allowance pursuant to section 31781.1.[6] At a hearing of defendant's Board of Retire-

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government units and state agencies of local jurisdiction. For an example of the latter, see Atchison, T. & S.F. Ry. v. Kings County Water Dist., 47 Cal. 2d 140, 302 P.2d 1 (1956).

4. *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01 *et seq.* (1958 & Supp. 1970). The supreme court later in this same term clarified the standard of substantial evidence review in 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) (agencies must set forth findings of fact, substantial (reasonable) evidence must support the findings, and the findings as a matter of law must support the decision). *See* Note, *Requirement of Factual Findings in Administrative Hearings; Enforcement of Substantive Criteria for Zoning Variances*, 63 CALIF. L. REV. xxx (1974) (this issue).

5. This test is also known as weight of the evidence review or limited trial de novo. In a nutshell, the court reviews the correctness of the decision, rather than its mere reasonableness. Netterville, *Judicial Review: The "Independent Judgment" Anomaly*, 44 CALIF. L. REV. 262, 279 (1956). There are various refinements of the test, dealing with the extent to which new evidence can be introduced in court, which will not be discussed here. *See* Dare v. Bd. of Medical Examiners, 21 Cal. 2d 790, 136 P.2d 304 (1943); CAL. CODE CIV. PRO. § 1094.5(d) (West 1974).

6. If the death was determined to be service-connected, the allowance was half of the member's salary at death, here $452.58 per month. CAL. GOV'T CODE § 31787 (West 1968). If it were not, the normal allowance would have been 60 percent of the normal retirement allowance, or $181.03 per month in this case. CAL. GOV'T CODE § 31781.1 (West 1968). 11 Cal. 3d at 33 & n.1, 520 P.2d at 32 & n.1, 112 Cal. Rptr. at 808 & n.1.

ment, three doctors reported that the stress of the deceased's occupation may have substantially contributed to the arteriosclerosis and coarctation which caused his death. A fourth doctor believed that the employment contributed to only "an infinitesimal extent" compared to the congenital defect. The Board voted 4-3 to deny the higher death benefits. The trial court denied the plaintiff's petition for a writ of mandate because the Board's findings were supported by substantial evidence. The judge indicated, however, that he would have found for the widow if this had been a case calling for the exercise of independent judgment.

In California the independent judgment test had been used to review administrative deprivation of vested rights, unless the agency involved had express constitutional authority for an exercise of judicial functions.[7] The novelty of the *Strumsky* decision lay in its application of this rule. First, the court interpreted the relevant parts of the state constitution to hold that local agencies have no positive authority for the exercise of judicial power. Second, the court included in the "fundamental vested rights" category a right which is economically fundamental to the individual but not vested in the conventional understanding of the term.

The first two parts of this Note discuss the constitutional sources of authority and the definition of fundamental vested rights. These parts are interrelated because the judicial power is equivalent to the power to affect fundamental vested rights. The second part also explores some alternative solutions to the issues raised in *Strumsky* and presents the author's solution: a compromise which would subject all nonconstitutional agency adjudications, including those of local agencies, to the same rigorous definition of those rights which are vested and which, therefore, require the judiciary to exercise an independent judgment standard of review. The third part assesses the probable impact of the *Strumsky* decision.

I. CONSTITUTIONAL AUTHORITY OF LOCAL AGENCIES

Traditionally, California law has exempted two classes of agencies from independent judgment review even if vested rights were affected: agencies which had been granted limited judicial power by the state constitution,[8] and local agencies. All other agencies were prohibited from performing judicial functions by the separation of powers doc-

7. Bixby v. Pierno, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971).

8. Examples of constitutional agencies are: Regents of the University of California, CAL. CONST. art. IX, § 9; Public Utilities Commission, CAL. CONST. art. XII, § 22; State Board of Equalization, CAL. CONST. art. XIII, § 9; State Personnel Board, CAL. CONST. art. XXIV, §§ 2, 3.

trine.[9] The doctrine did not bar constitutional agencies from exercising such powers because article III allows for express, constitutionally-designated exceptions. Local agencies were unaffected because the doctrine did not apply below the state level.[10] However, the present court concluded that although the separation of powers clause did not *prevent* the exercise of judicial powers by local agencies, there was still a need for a positive constitutional grant of authority to *permit* the exercise of such powers. The court found this authority lacking in the sections of the constitution previously assumed to have conferred judicial powers on local agencies.

The following sections will analyze the court's treatment of those articles, VI and XI, and criticise the majority's separation of powers technique. This part concludes with a proposed due process analysis which justifies the court's general conclusion that local agencies may sometimes be subject to independent judicial review, and links the constitutional analysis to the vested rights test.

a. Article VI

Prior to 1950, article VI, section 1 provided that the judicial power of the state was vested in the state courts and in "such inferior courts as the Legislature may establish in any incorporated city or town, township, county or city and county."[11] This section had been interpreted to mean that the legislature could vest judicial power in local agencies as "inferior courts."[12] After it was amended in 1950, this section read as follows: "The judicial power of the State shall be vested in . . .

9. "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." CAL. CONST. art. III, § 3.

10. People v. Provines, 34 Cal. 520 (1868). This case—heavily relied upon by the dissent—explained that the mischief against which separation of powers was aimed came from the leading officers of the state, and that the danger from inferior officers was slight enough that control of them could be left exclusively to the legislature. *Id.* at 537. *See also* Wulzen v. Bd. of Supervisors, 101 Cal. 15, 25-26, 35 P. 353, 356 (1894).

11. 11 Cal. 3d at 37, 520 P.2d at 35, 112 Cal. Rptr. at 811.

12. 11 Cal. 3d at 37-38, 520 P.2d at 35, 112 Cal. Rptr. at 811, and cases cited therein.

The majority opinion carefully showed how this interpretation was based upon misconstruction of the language in the two leading cases: Standard Oil Co. v. State Bd. of Equalization, 6 Cal. 2d 557, 561, 59 P.2d 119, 121 (1936) (which held that "except for local purposes," article VI, section 1 disposed of the whole judicial power of the state); Drummey v. State Bd. of Funeral Directors, 13 Cal. 2d 75, 81, 87 P.2d 848, 852 (1939) (which stated that the judicial power vests entirely in the courts "except as to local boards, and the railroad and industrial accident commissions, which are governed by special constitutional provisions"). 11 Cal. 3d at 37-40, 520 P.2d at 35-37, 112 Cal. Rptr. at 811-13.

a Supreme Court, district courts of appeal, superior courts, municipal courts, and justice courts."[13] It is uncontested that the amendment eliminated the inferior courts rationale.

The *Strumsky* court reached its result by developing from article VI a requirement that grants of judicial power must be express, and then by analyzing article XI to find that it contained no such express grant. Its reasoning is epitomized in one sentence: "[T]he fact that agencies below the state level are not *prevented* from exercising judicial powers by the separation-of-powers doctrine in no way implies in and of itself that they *may exercise* such powers."[14] The court then asserted that all local powers are ultimately derived from the state constitution, and that "the Legislature is limited in the nature and extent of the powers which it may grant" by articles IV, V, and VI.[15] Regarding the judiciary article, the court held that the 1950 amendment concentrated all of the judicial power in the courts and constitutional agencies, so that the legislature was without authority to bestow judicial power through the conduit of article XI.[16]

The weaknesses of the majority's argument are illustrated by Justice Burke's dissent. In essence, the argument based upon article VI is misconceived because it and article III (the separation of powers doctrine) only apply to *state* government and *state* powers. The *Provines* case established these points in 1868, along with the conclusion that the entire subject of local government is left to the legislature subject only to express limitations.[17] The legislature, when it creates local agencies, is not delegating judicial, legislative, or executive power. It is simply exercising its legislative power to pass laws and create agencies to administer them.[18] The statement of the majority is an excellent presentation of the theory of separation of powers at the state level, but is not convincing as an explanation of why local agencies may be reviewed by a standard stricter than the substantial evidence rule.

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13. Assembly Constitutional Amendment No. 49, 1949 Cal. Stat. 3291. Article VI was repealed and re-enacted in 1966. The text is substantially unchanged.

14. 11 Cal. 3d at 36, 520 P.2d at 34, 112 Cal. Rptr. at 810.

15. *Id.* at 40, 520 P.2d at 37, 112 Cal. Rptr. at 813. Article IV creates the state legislative branch and article V creates the executive branch.

16. Both sides treated the effect of the 1950 amendment as the focus of the case. The dissent pointed out that it is absurd to discover such a change after 24 years, noting that the cases of Savage v. Sox, 118 Cal. App. 2d 479, 258 P.2d 80 (1st Dist. 1953), and Berggren v. Moore, 61 Cal. 2d 347, 392 P.2d 522, 38 Cal. Rptr. 722 (1964), had held that the amendment was intended only to abolish the multitude of inferior courts then existing.

17. People v. Provines, 34 Cal. 520, 532-34 (1868).

18. McGovney, *The California Chaos in Court Review of the Decisions of State Administrative Agencies*, 15 S. CAL. L. REV. 391, 409 (1942).

b. Article XI

After holding that article VI as it now stands is not a separate source of authority for local agency judicial powers, the majority noted that such express powers are not contained in article XI either. This article states in broad language that "[t]he Legislature shall provide for county powers . . . [and] provide for city powers."[19] The remaining provisions allow cities and counties to establish their own powers by charter.[20] In the entire article there is neither an express grant nor an express prohibition of "judicial" powers, yet the breadth of the terms would seem to give support to the dissent's theory of implied of inherent powers,[21] which would include quasi-judicial functions.[22]

c. A proposed due process analysis

In the absence of express language, the policy question is one of whether such powers should be implied. The solution should derive from the nature and definition of the rights in question. The majority relies upon the *Bixby* rationale that some rights are too important to be left solely to administrative extinction.[23] Given such rights, there is no rational basis for giving local agencies more deference than state agencies; the potential abuses and need for protection are the same. The correct reason for requiring an express constitutional provision be-

19. CAL. CONST. art. XI, §§ 1(b) & 2(a), respectively.

20. Section 5(a) provides that a charter city "may make and enforce all ordinances and regulations in respect to municipal affairs . . . ." Section 5(b) allows city charters to provide for certain other powers, "in addition to those provisions allowable by this Constitution . . . ." Section 7 allows a city or county to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

21. *Compare* the majority treatment of this theory, 11 Cal. 3d at 36-37 n.7, 520 P.2d at 34 n.7, 112 Cal. Rptr. at 810 n.7 *with* Justice Burke's reliance on it, 11 Cal. 3d at 51 n.5, 520 P.2d at 44-45 n.5, 112 Cal. Rptr. at 820-21 n.5.

22. "Quasi-judicial" is a useful term only in defining the threshold for application of California Code of Civil Procedure section 1094.5. As such, it allows for a unified procedure to review all administrative decisions that involve factfinding, and leaves the test which will be used on review to depend upon the right or function determined to be present. The test used in subsection (a) provides for use of mandamus if the proceeding is one "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 . . . ." This definition embraces both judicial and executive functions, which neither the majority nor the dissent distinguished. See text accompanying note 35 *infra.*

23. Bixby v. Pierno, 4 Cal. 3d 130, 144, 481 P.2d 242, 252, 93 Cal. Rptr. 234, 244 (1971). See text following note 48, *infra.*

Another argument against the implication of powers is that the legislature proposed a constitutional amendment which would have limited court review of local agency decisions to the substantial evidence test. Senate Constitutional Amendment No. 8, 1941 Cal. Stat. 3549. The amendment failed. The *Strumsky* majority reasoned that there would have been no need for such an amendment if article XI already implied these powers. 11 Cal. 3d at 42 n.15, 520 P.2d at 38-39 n.15, 112 Cal. Rptr. at 814-15 n.15.

fore the courts relinquish independent judgment review might be founded in concepts of due process which the court does not articulate.

Article I, section 13, of the California Constitution provides, *inter alia*: "No person shall . . . be deprived of life, liberty, or property without due process of law . . . ." This provision was not mentioned in the majority opinion, nor in the leading case of *Bixby v. Pierno*,[24] as a foundation for the vested rights test or as a key to the definition of judicial powers. It may well be that the due process clause could serve both of these purposes, hence bridging several conceptual gaps in the *Strumsky* opinion.

Following a small number of now discredited federal cases, two older California decisions held that independent judicial review was necessary to save an administrative deprivation of rights from being a violation of due process.[25] While this doctrine is contrary to the current rule in federal courts, it does serve as a point of departure for analyzing the judiciary's role.

This perspective provides a definition of "judicial power" which would illuminate the application of separation of powers theory. The judicial power, as one commentator has noted, is "the authority to hear and make enforceable decisions of controversies concerning the alleged invasion of existing legal rights."[26] The executive power is that of performing "all acts necessary and appropriate to applying or enforcing statutes and administrative rules, other than clearly judicial func-

24. 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971).

25. Laisne v. State Bd. of Optometry, 19 Cal. 2d 831, 845-47, 123 P.2d 457, 465-66 (1942); Drummey v. State Bd. of Funeral Directors, 13 Cal. 2d 75, 84-85, 87 P.2d 848, 853-54 (1939). In *Drummey* the court stated:

> [F]or a purely administrative board to deprive a person of an existing valuable privilege without the opportunity of having the finality of such action passed upon by a court of law, would probably violate the due process clause of the federal Constitution. Although there is some confusion in the federal cases, the more recent decisions of the United States Supreme Court have indicated that if binding fact-finding power is conferred on purely administrative boards, and if courts in reviewing the administrative board's actions do not exercise an independent judgment on the facts as well as on the law, then the party adversely affected, at least where constitutional rights are involved, has been deprived of due process.

13 Cal. 2d at 84, 87 P.2d at 853. Although the *Laisne* case did mention the due process clause of the state constitution, these two cases were ostensibly based upon the requirements of the fourteenth amendment of the United States Constitution, as interpreted in the following cases: St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); Crowell v. Benson, 285 U.S. 22 (1932); and Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920). The holdings of the two California cases were criticized in Chief Justice Gibson's dissent in *Laisne* for not following the majority federal rule. 19 Cal. 2d at 855-59, 123 P.2d at 470-72. Even so, the California Supreme Court could interpret the state due process clause to require more judicial review than the fourteenth amendment does. *See generally* Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973).

26. Conant, In Defense of Administrative Regulation, 39 Ind. L.J. 29, 51 (1963).

tions."[27] "Existing rights" in this framework are equivalent to "vested rights" as defined by traditional California case law. They are not typically at stake in the important executive functions of granting licenses, dispensing public benefits, and issuing executive orders.[28] They are at stake in cases resulting in cease and desist orders, reparations, and revocations of licenses.[29]

As established above, separation of powers does not apply at the local level, so that "judicial power" is not the proper focus of this case. Still, by using the due process equivalent—"deprivation of existing rights"—a similar result can be achieved. The danger in using a due process approach as a framework for judicial review is that it can be carried to the extreme of substantive due process, meaning that a right may not be even slightly affected unless a judge agrees that the result is correct.[30] This is a general danger of overreaching under the independent judgment test. Nevertheless, when contrasted to the conceptualism and absolutism of separation of powers theory,[31] the due process approach allows for judicial flexibility and discretion in framing the precise scope of review. In the time span before rights become vested, this test allows judicial supervision of both statutory procedures and constitutional rights,[32] but otherwise restrains substitution of judgment. In the time span after rights are vested, the court has the option of exercising full review but may voluntarily give more deference to the agency finding as various factors are elevated: the fullness

27. *Id.* at 43-44.

28. *Id.* at 45-48.

29. *Id.* at 57-59, 62-66.

30. M. CONANT, THE CONSTITUTION AND CAPITALISM 122-37, 137-47 (1974). This approach has been discredited in United States Supreme Court cases, beginning with Nebbia v. New York, 291 U.S. 502 (1934).

31. Separation of powers theory tends to degenerate into bare characterization of functions as judicial versus executive. Moreover, the result of a finding of judicial function is a demand for complete removal of the proceeding from the agency to the courts. These consequences can be avoided by a technique of review for violations of due process, with independent judgment exercised wherever the right is vested—thus making the administrative action not final and hence not judicial. Conant, *supra* note 26, at 65-66. The possible duplication of effort involved in a limited trial de novo must be evaluated as a discretionary factor.

32. For instance, possible abuses by discrimination against minorities at the licensing stage may be policed by the courts under an equal protection rubric. The courts will be able to prevent the discrimination with which Justice Mosk was concerned in *Bixby*, see note 53 *infra*, either by recognizing constitutional rights or by using the substantial evidence test.

Lack of any hearing at all is a violation of due process, which may be cured by independent judgment review. Alta-Dena Dairy v. County of San Diego, 271 Cal. App. 2d 66, 75-76, 76 Cal. Rptr. 510, 517 (4th Dist. 1969). Such review had already been applied to a local agency decision reached without a hearing. C.V.C. v. Superior Ct., 29 Cal. App. 3d 909, 106 Cal. Rptr. 123 (3d Dist. 1973) (adoption placement order under Civil Code section 224n, made by a county social welfare department).

and fairness of the procedure used by the agency, the degree of technicality of the fact question, and the confidence of the court and of the legislature in the particular agency.[33]

Since it is the very elevation and existing character of the rights which gives the judiciary its power to intervene, this same high standard should be used in measuring the right under the "fundamental vested rights" test. The next part will trace the development of this test in California and the failure of *Strumsky* to apply as strict a standard of vesting as would be called for by its constitutional analysis.

II. FUNDAMENTAL VESTED RIGHTS

The court's reasoning proceeded from an assumption that the present case involved an adjudicatory determination,[34] to a holding that there was no constitutional authority for the exercise of such power by a local agency, to the conclusion that the right involved was fundamental and vested so as to require the use of an independent judgment standard of review. The implication that the decision must be judicial; because it is adjudicatory and not legislative, is theoretically erroneous. The California Administrative Procedure Act,[35] however, reveals the same dichotomy. Nevertheless, such a structure obscures the large area of *executive* functions alluded to in the separation of powers clause.[36] A correct application of separation of powers theory would first inquire whether the function were truly judicial and then look for constitutional authority for its exercise. The fundamental vested rights test is an attempt to precisely define judicial functions, but it is also the test which is compelled by the due process clause. Both constitutional bases require a strict construction of the vested nature of the right. In *Strumsky* the court not only used a fanlty constitutional technique to achieve its result,[37] but even on its own terms the opinion does not use a vesting test which derives from a consistent definition of judicial functions.

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33. See text accompanying notes 60-63 *infra.*

34. The court said that "a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts." 11 Cal. 3d at 34 n.2, 520 P.2d at 33 n.2, 112 Cal. Rptr. at 809 n.2.

35. CAL. GOV'T CODE §§ 11370-528 (West 1966). Included within the term adjudication are both hearings to grant a license, section 11504, and hearings to revoke a license, section 11503. Thus the term "adjudicatory" as used in the APA is not coextensive with the term "judicial," which is a conclusion of the vested rights test, but is rather equivalent to the indefinite term "quasi-judicial." See note 22 *supra.*

36. CAL. CONST. art. III, § 3. See text at note 9 *supra.*

37. See text accompanying notes 13-23 *supra.*

a. The traditional rule

The traditional California treatment of review has evolved in license cases. The granting of a license is administrative, hence, reviewable under a substantial evidence test.[38] The revocation of a license is judicial, subject to independent review in court.[39] The underlying rationale for this distinction is the vested rights test; there is no right to a license before the initial administrative determination that one is to be granted, but a licensee threatened with revocation does possess a right to retain it. The vested rights test has also been used in a few instances not involving licenses, where the property concept of vesting is similarly easy to apply.[40]

California cases reviewing the grant of pension benefits or similar governmental benefit programs[41] have almost unanimously treated these as nonvested rights, and hence administrative decisions affecting them have only been subject to substantial evidence review. The rationale, in cases interpreting the same statute involved in this case, has been that the legislature set up a retirement board to exercise quasi-

38. McDonough v. Goodcell, 13 Cal. 2d 741, 749, 91 P.2d 1035, 1040 (1939); Akopiantz v. Board of Medical Examiners, 146 Cal. App. 2d 331, 334, 304 P.2d 52, 55 (1st Dist. 1956).

39. Dare v. Board of Medical Examiners, 21 Cal. 2d 790, 799-801, 136 P.2d 304, 309-10 (1943); Laisne v. State Bd. of Optometry, 19 Cal. 2d 831, 840, 123 P.2d 457, 463 (1942); Drummey v. State Bd. of Funeral Directors, 13 Cal. 2d 75, 84, 87 P.2d 848, 853 (1939).

40. Temescal Water Co. v. Department of Public Works, 44 Cal. 2d 90, 103, 280 P.2d 1, 9 (1955) (no right to a permit for diversion of water, but vested water rights of third-parties were recognized as a basis for independent review); Faulkner v. California Toll Bridge Authority, 40 Cal. 2d 317, 328, 253 P.2d 659, 667 (1953) (no right of bondholders to prevent construction of a competing bridge); Bevery Hills Fed. Sav. & Loan Ass'n v. Superior Court, 259 Cal. App. 2d 306, 316, 66 Cal. Rptr. 183, 187-88 (2d Dist. 1968) (no right to block license application of a competing organization). Rptr. 211 (1st Dist. 1972); CAL. WELF. & INST'NS CODE § 10962 (West 1972). These

41. The question of vesting is to be determined by a careful reading of the particular benefit statute. Rights are not vested if their creation is made conditional upon administrative findings, if the board's determinations are made final, or if the agency is given discretion to refuse benefits.

Review of welfare application decisions of the state Department of Social Welfare is limited to "questions of law." Taylor v. Martin, 28 Cal. App. 3d 1057, 105 Cal. Rptr. 211 (1st Dist. 1972); CAL. WELF. & INST'NS CODE § 10962 (West 1972). These decisions arise when that state agency reviews the decisions of county departments administering the many different welfare programs in this code.

Decisions of the California Unemployment Insurance Appeals Board are "final" except for judicial review. CAL. UNEMPL'T INS. CODE § 410 (West Supp. 1974). The standard of review is not specified. The cases continue to treat unemployment benefits as vested rights, following the case of Thomas v. California Employment Stabilization Comm'n, 39 Cal. 2d 501, 247 P.2d 561 (1952), even though this case was based upon "question of law" review and the statute has been amended since that time to make the board decisions "final." *See, e.g.*, Lacy v. Unemployment Ins. Appeals Bd., 17 Cal. App. 3d 1128, 95 Cal. Rptr. 566 (3d Dist. 1971).

judicial functions (administer the continuing program, including the making of factual determinations), and that courts will respect that statutory scheme since no benefit rights vest before such determinations are made.[42] A few courts have held that rights under other welfare statutes were vested if all of the statutory conditions had been complied with, thus opening an exception which the supreme court might have used in the present case.[43]

Thus the conclusion that rights are "vested" involves, for purposes of defining the scope of judicial review, several distinct formulations: (1) the agency has previously exercised its statutory powers of discretion to create a license or other right against the government; (2) the agency has been given little discretion, the statutory standards or administrative rules are clear, and they appear to have been met; (3) the petitioner has acquired rights by contract or within the traditional property law concepts of vesting; or (4) the petitioner has a reasonable expectation of being able to continue in a trade, business, or employment, or to receive benefits, although the right is something less than a constitutional right.[44] "Nonvested" rights are those which are dependent

42. Petry v. Board of Retirement, 273 Cal. App. 2d 124, 77 Cal. Rptr. 891 (2d Dist. 1969) (thigh and back injury); Rau v. Sacramento County Retirement Bd., 247 Cal. App. 2d 234, 55 Cal. Rptr. 296 (5th Cir. 1966) (disability); Lindsay v. San Diego County Retirement Bd., 231 Cal. App. 2d 156, 41 Cal. Rptr. 737 (4th Dist. 1964) (ulcer condition); Flaherty v. Board of Retirement, 198 Cal. App. 2d 397, 18 Cal. Rptr. 256 (2d Dist. 1961) (disability); Robinson v. Board of Retirement, 140 Cal. App. 2d 115, 294 P.2d 724 (2d Dist. 1956) (heart trouble presumption); Odden v. County Foresters, etc. Retirement Bd., 108 Cal. App. 2d 48, 238 P.2d 23 (2d Dist. 1951) (involving an identical heart trouble issue under CAL. GOV'T CODE § 32353 (West 1968)); Ware v. Retirement Bd., 65 Cal. App. 2d 781, 151 P.2d 549 (1st Dist. 1944) (disability).

43. Thomas v. California Employment Stabilization Comm'n, 39 Cal. 2d 501, 247 P.2d 561 (1952). The court stated:

> When a claimant has met all requirements of the act, and all contingencies have taken place under its terms, he then has a statutory right to a fixed or definitely ascertainable sum of money. . . . The determination of the exact amounts due is essentially a mathematical and mechanical process, and the administrative authorities have no discretion to withhold benefits once it is determined that the facts support his claim.

Id. at 504, 247 P.2d at 562.

In Sweesy v. Los Angeles Retirement Bd., 17 Cal. 2d 356, 361-63, 110 P.2d 37, 39-40 (1941), it was held that a widow's pension rights vested upon the contingency of being married to the deceased employee for five years before his retirement. This would appear to be a case where there is no discretion granted to the board, so that the right is vested purely by the statute.

44. This formulation is vague and is not based upon case authority. It would seem to be appropriate for a situation, like that in McDonough v. Goodcell, 13 Cal. 2d 741, 91 P.2d 1035 (1939), where the petitioner had been in business for years and suddenly a licensing requirement was created by statute, or for a situation like that in Southern California Jockey Club v. California Horse Racing Bd., 36 Cal. 2d 167, 223 P.2d 1 (1950), where a routine annual renewal of a license was denied. On such facts, the petitioner has a due process claim for a deprivation of livelihood which ought to deserve a full judicial review. Note, *De Novo Judicial Review of State Administrative Findings,*

upon a certain administrative action as a precondition to coming into existence, which action is specified by statute as being within the discretion of the agency.

The vested rights test for distinguishing executive and judicial functions is a crude approximation of the more theoretically precise factors, which include relative competence and statutory delegation of power.[45] The test works fairly well because the granting of a license, for instance, usually involves a technical determination of professional competence, while the revocation of a license is normally the result of some alleged wrongdoing. Where these fact patterns are reversed, the test is not conceptually accurate.[46] The essential validity of the vested rights test is that it minimizes judicial intrusion into the spheres of license-granting and benefit-dispensing, which are organized around the executive values of expertise and efficiency, and focuses attention in each case upon some particular right which is being taken away and which justifies the unusual step of judicial substitution of judgment on underlying fact questions.

b. The Bixby expansion

Section 1094.5 of the Code of Civil Procedure does not mention vested rights, but was intended as a codification of the existing cases.[47] The theory behind the test was elaborated in the case of *Bixby v. Pierno*.[48] Because the case was decided using the substantial evidence test, its novel parts were dicta. The basic theory was that some rights are too important to be abrogated through a solely administrative process.[49] Proceeding from that innocuous generality the court announced:

> The courts must decide on a case-by-case basis whether an administrative decision or class of decisions substantially affects fundamental vested rights and thus requires independent judgment review

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65 HARV. L. REV. 1217, 1222 (1952). Thus, both of the above cases were probably wrongly decided because they treated the application-revocation distinction too formally. This rationale may also apply to employment extension rights of teachers and licensing of lawyers. Hallinan v. Commission of Bar Examiners, 65 Cal. 2d 447, 452 n.3, 421 P.2d 76, 80 n.3, 55 Cal. Rptr. 228, 232 n.3 (1966).

45. See text accompanying notes 60-63 *infra*.

46. See note 32 *supra* and note 69 *infra*.

47. See note 2 *supra* for the text of the section. For a summary of the case law to 1945, the date of its adoption, *see* JUDICIAL COUNCIL, TENTH BIENNIAL REPORT 133-45 (1944).

48. 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971). The plaintiff, a minority stockholder in a closely held corporation, sought judicial review of a decision of the Commissioner of Corporations that a proposed recapitalization was "fair, just and equitable." Ch. 384, § 25510 [1949] Cal. Stats. 70910 (now CAL. CORP. CODE § 25142 (West Supp. 1974)).

49. 4 Cal. 3d at 144, 481 P.2d at 252, 93 Cal. Rptr. at 244.

. . . .

> In determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation.[50]

The correct test under California precedents was review of deprivation of "constitutional or vested rights."[51]

In *Bixby*, the court's introduction of the term "fundamental" as a qualifier to vested rights was intended as a generous expansion upon the traditional cases holding that one could not be deprived of the opportunity to continue to practice one's trade without full court review.[52] The rationale was that mavericks and dissenters might otherwise be persecuted by their own trade group. Yet there is equally a threat to unconventional applicants for a license, as Justice Mosk pointed out in his concurring opinion.[53]

The objection to the *Bixby* presentation of this modifier is that it tends to remove a constraint on the judiciary by denigrating the role of the analysis of vesting. The "fundamental" test has no foundation in the constitution or precedents, and does not correspond to any proper definition of judicial functions, unless it is kept firmly tied to the concept of vesting. The "human terms"' 'test presents an opportunity for a court to invade the domain of the other two branches of government in a case whose equities invoke its sympathy. Yet these other two branches often affect fundamental rights within their spheres of operation, most particularly in the area of dispensing benefits, where the

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50. *Id.* The term "substantially affects" has no operational meaning according to the concurring opinion of Justice Burke. *Id.* at 153, 481 P.2d at 259, 93 Cal. Rptr. at 251. What is required is a complete deprivation or revocation of a vested right.

The court's contention that the standard of review will be determined on a "case-by-case" basis is also a misreading of the traditional test, for once a right is determined to be of a vested nature, anyone in the class deprived of it would seem to be entitled to review based upon the independent judgment of the trial court.

Northern Inyo Hosp. v. Fair Employment Practice Comm'n, 38 Cal. App. 3d 14, 112 Cal. Rptr. 872 (4th Dist. 1974), found that no fundamental vested right was affected because the employee (in a termination case) won before the agency, and the losing employer's right to set its own employment policy was not vested. This result, making the standard of review depend upon which party prevails, is contrary to the indication in *Bixby* that the review is set by the right and not by the result. 4 Cal. 3d at 148, 481 P.2d at 255, 93 Cal. Rptr. at 247. Yet such a variable rule can be implied from the due process emphasis on "deprivation," and the fact that the different parties do assert different interests.

51. Such was the accurate assessment of Justice Burke, dissenting in *Bixby*. 4 Cal. 3d at 152, 481 P.2d at 258, 93 Cal. Rptr. at 250.

52. See note 39 *supra*.

53. Bixby v. Pierno, 4 Cal. 3d 130, 161, 481 P.2d 242, 264, 93 Cal. Rptr. 234, 256. Justice Mosk would have abolished the vested rights restraints upon court substitution of judgment.

courts should not substitute their judgment *unless* the right has already vested in one of the senses defined above.

There is a place in deciding the proper scope of judicial review for consideration of the degree to which a right is fundamental, for under a due process theory there might be a point at which a right is vested but of such a minor or trivial nature that there is no offense to our sense of fairness in having the right extinguished by an administrative determination with only substantial evidence review. There does not appear to be any case reaching such a result in California.

c. *Application in Strumsky*

The *Bixby* dicta made clear that the right must be fundamental *and* vested, but the language about life situation opened up the possibility which was seized upon in *Strumsky*: a right which was economically quite important but not traditionally vested became an attractive candidate for judicial protection.

It is obvious, as the court said, that the widow's right to a pension which would allow her to be self-supporting was fundamental in human terms. This difference between retirement and having to work for a living was of immense importance to this plaintiff. Yet such logic seems to tie the right to the wealth or income of the plaintiff, which cannot here serve as a distinction of constitutional dimensions. This illustrates how the fundamental test can be used to establish a diluted standard of vesting.

The court's application of the vesting test sharply departs from traditional analysis. The majority argued that since the widow had acquired a vested right "in one pension or the other"[54] upon the death of her husband, only the judiciary could decide whether or not the death had been service-connected. The purpose of the vesting test is to avoid such review where the right does not vest until the happening of a contingency such as the administrative determination in question. Yet here the court's statement is tantamount to saying that a right is vested if it is merely being sought.[55] If a major point of the statutory scheme is to reserve the determination of facts primarily to the special-

54. 11 Cal. 3d at 46, 520 P.2d at 41, 112 Cal. Rptr. at 817.

55. None of the three cases cited by the supreme court for the general proposition that pension rights are vested held that they were vested in such a way that a court could substitute its judgment on the facts. Pearson v. County of Los Angeles, 49 Cal. 2d 523, 531-32, 319 P.2d 624, 629 (1957) (vested in the sense that a hearing is required before deprivation); Wallace v. City of Fresuo, 42 Cal. 2d 180, 183, 265 P.2d 884, 886 (1954) (vested in the sense that they cannot be impaired by a subsequent change in the statute); Dryden v. Bd. of Pension Commissioners, 6 Cal. 2d 575, 579-80, 59 P.2d 104, 106-07 (1936) (the vested right to a pension held to be a continuing one).

ized agency equipped to evaluate technical information,[56] this logic exposes agency decisionmaking to reversal by courts with less specialized expertise.

The question of vesting should properly be determined by a reading of the relevant statutory provisions. Unfortunately, not all statutes specifically state whether the right in question is vested, or whether it is to be determined with finality by the agency. Such is the case with the statute in *Strumsky*.[57] Nevertheless, it may be fair to assume, as most of the cases have,[58] that all factual questions relating to the administration of the act are left to the agency—and that essentially none of the rights are vested except the right to a basic pension.[59] On the other hand, the omission of a specific section setting forth the fact finding powers in relation to service-connected death benefits may have been deliberate.

d. Alternative solutions

There were other, less novel ways in which the court could have reached the same result in *Strumsky*. It could have analyzed the statutory framework as above and concluded that the factual question had not been intended for final decision by agency discretion. It could have found that the statutory conditions had been satisfied as a matter

56. This point was made by Justice Burke in his dissent. 11 Cal. 3d at 55, 520 P.2d at 47, 112 Cal. Rptr. at 823.

57. The key provision is California Government Code section 31720.5, which states:

> If a safety member . . . who has completed five years or more of service . . . under this retirement system . . . develops heart trouble, it shall be presumed in any proceeding under this chapter, by the board and the court in the absence of evidence to the contrary, that such heart trouble is an injury or disease occurring in and arising out of his employment.

CAL. GOV'T CODE § 31720.5 (West 1968).

Evidence to the contrary means competent evidence which would convince an ordinary person to a reasonable certainty that the presumption has been rebutted. 55 OP. ATT'Y GEN. 24 (1972). A weak argument can be made that the presumption "vests" the right by shifting the burden of going forward.

Section 31720.5 is included in the article of the California Government Code dealing with disability retirement. Section 31725 of that article provides for factfinding powers with respect to qualifications for these retirement benefits. "Permanent incapacity for the performance of duty shall in all cases be determined by the board." CAL. GOV'T CODE § 31725 (West 1968). Although the presumption of section 31720.5 does apply to the election of a service-connected benefit under section 31787, the code article which provides for the death benefit does not include a section, similar to 31725, dealing with factfinding powers.

58. *See* cases cited note 42 *supra*. A general factfinding power may be implied from section 31534, which gives the board power to "hear and decide" questions of fact after hearings before a referee. CAL. GOV'T CODE § 31534 (West 1968).

59. *See* Lyon v. Flournoy, 271 Cal. App. 2d 774, 780, 76 Cal. Rptr. 869, 873 (3d Dist. 1969), involving a challenge to a statutory change in the method of computing pension amounts after the particular plan was in operation.

of law, so that the right was legitimately vested. Perhaps the most obvious route would have been to find that there had been no substantial evidence that the death had *not* been service-connected since the testimony that the job factors had contributed only to an "infinitesimal extent" was not phrased in the negative.

Another approach the court might have taken would have been to determine the scope of review as a matter of judicial discretion, taking many relevant factors into account.[60] This would have involved an expansion of the California rule, which concentrates upon only two factors: the fundamentality of the right and the degree to which vesting of the right is within the agency's discretion. Additional factors which a court could consider are: (1) relative competence to determine the particular fact accurately—this would involve the degree to which technical expertise was useful and the closeness of the fact-finding function to the customary role of courts;[61] (2) fairness of the actual procedure used—this embraces such items as the absence of a hearing or a written record, the formality of the proceedings, the competency and training of the administrators, and any problems of bias or outside pressure;[62] (3) the extent to which adjudication is a necessary part of administering a comprehensive scheme—for example, the need for consistency in policymaking at the practical level, where it would be inadvisable for courts to judge related issues in piecemeal fashion; (4) relative efficiency in processing a volume of transactions—this is an empirical matter and would be closely related to the degree of specialization and familiarity with certain repetitious issues; (5) practical division of the work load—this would take into account the additional burdens on the court and the agency which would result from a reviewing decision, and would aim for a reduction in duplication of effort in line with implementation of the other factors; (6) constitutional considerations—at some point the attempt to give final power over legal issues to agencies may violate the separation of powers doctrine, the due process clause, or the right to a jury trial; and (7) the extent to which the case involves the elucidation of general principles compared to the determination of unique, temporal facts.[63]

Using such a discretionary approach, factors (1) and (3) might have allowed a court decision favorable to the plaintiff, because the

60. *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 30.08, 30.14 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 556-92 (1965); Davis, *Judicial Review of Administrative Action in West Virginia—A Study in Separation of Powers*, 44 W. VA. L.Q. 270, 369 (1938).

61. *See* 4 K. DAVIS, *supra* note 60, § 30.09.

62. *See* Note, *De Novo Judicial Review of State Administrative Findings*, 65 HARV. L. REV. 1217, 1220 (1952).

63. *See* 4 K. DAVIS, *supra* note 60, § 30.11.

agency's expertise was not superior to the court's on this factual question (not even the medical experts agreed on the cause of death) and there was a minimum of policymaking involved in the question. The policy was set by the presumption of Government Code section 31720-.5, which the court was quite competent to interpret. These points could have combined with the lack of a clear statutory delegation to justify the use of an independent judgment test on these facts.

The other factors in the above analysis would seem to favor a binding agency determination of cause of death. There do not seem to have been any objections to the procedure.[64] The board was most efficient in processing a volume of similar claims and it would be inadvisable for the courts to undertake this function systematically.[65] The burden on the courts should be a major factor in cases like this with marginally vested rights. Additionally, the fact to be determined was a one-time occurrence of little significance to anyone but the plaintiff.

The optimal solution for the basic problem in this area of law is to accept the court's holding restricting local agency powers, which will put all nonconstitutional agencies on an equal footing,[66] and combine this with a rule of independent judgment review of the deprivation of vested rights only, relying on a vigorous substantial evidence review for all other cases.[67] Uniform substantial evidence review is called for with all functions which are truly executive or administrative.[68] Under the

64. Justice Roth made this point in his dissent. 11 Cal. 3d at 56, 520 P.2d at 48, 112 Cal. Rptr. at 824.

65. This was a major concern of Justice Burke's dissent.

> [L]iterally thousands of routine agency decisions adjusting or decreasing economic benefits will henceforth be considered "fundamental," requiring our busy trial courts to independently evaluate and reweigh all factual aspects of these often complex and technical proceedings.

11 Cal. 3d at 55, 520 P.2d at 47, 112 Cal. Rptr. at 823. The extent to which such predictions will come true is considered in the concluding part of this Note.

66. The argument of this Note is that article XI contains enough local agency authority to meet separation of powers objections, but that it is not express enough in allowing judicial functions to negate review under the due process clause.

67. The full vigor of the substantial evidence test may be ensured by requiring written findings, see note 4 *supra*, and by considering the whole record when determining whether the supportive evidence is substantial. Certainly a great deal in the way of judicial supervision can be accomplished using a vigorous substantial evidence rule. See the opinions cited in note 68 *infra*.

68. Netterville, *The Substantial Evidence Rule in California Administrative Law*, 8 STAN. L. REV. 563, 590-93 (1956). See Justice Burke's concurring opinion in Bixby v. Pierno, 4 Cal. 3d 130, 151-60, 481 P.2d 242, 257-64, 93 Cal. Rptr. 234, 249 (1971) and Justice Gibson's dissenting opinin mi Laisne v. Board of Optometry, 19 Cal. 2d 831, 868, 123 P.2d 457, 477 (1942). The two justices, however, do not recognize the narrow area in which weight of the evidence review may be required because of the rights involved and the nonadministrative nature of the issue being decided.

A uniform but rigorous substantial evidence test is the rule in federal courts, based upon the theory that the reforms of the APA, 5 U.S.C. §§ 551 *et seq.* (1971), are suffi-

due process framework the courts may give additional deference as called for by the factors enumerated above.[69]

III. IMPACT OF THE CASE

The impact of *Strumsky* will certainly include a greater number of mandamus proceedings in state courts. The impact upon the quality of agency proceedings due to increased use of independent judgment review is uncertain. On the one hand, the agencies are deprived of final decisionmaking power in some cases and may become careless in their decisions. On the other hand, they are bound by due process considerations to render fair decisions, and will probably be more meticulous in the written record so as to substantiate their decisions.

Such a great impact upon local agencies was unnecessary on the facts of this case because the rights could have been found to be nonvested or the result could have been achieved under the substantial evidence test. Sooner or later full judicial review of local agency adjudicatory functions was inevitable, but the analysis should have rested on a due process instead of a separation of powers rationale.

a. Local agencies

A great number of administrative decisions are made by local agencies in this state.[70] All decisions of nonconstitutional agencies which affect vested rights are, following *Strumsky*, subject to review under the independent judgment test.[71] A number of appellate court

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cient to satisfy all due process objections. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

69. The argument that in some cases license revocation may be based upon the same technical incompetence that would have barred a license grant in the first place, and that therefore the agency is not really replacing the judiciary in its traditional role of assessing wrongdoing, has validity and should be implemented by upholding the order within judicial discretion to reaffirm that judgment, rather than by an obscuring of the vested rights line.

70. For an example of these, see the listing of agencies of the city and county of Los Angeles in W. DEERING, CALIFORNIA ADMINISTRATIVE MANDAMUS, Appendix B (1966).

> Local agencies enumerated in Justice Burke's dissent are:
> city councils, boards of trustees, school boards, boards of freeholders, charter revision commissions, zoning boards, planning commissions, variance boards, appeals boards under building codes, fire and police appeals boards, pension and retirement boards, civil service and merit systems boards and commissions, civic parade boards, business licensing boards, parks and playgrounds boards, recreation commissions, animal shelter boards, zoo boards, library boards and many others.

11 Cal. 3d at 46-47 n.1, 520 P.2d at 41 n.1, 112 Cal. Rptr. at 817 n.1.

71. Constitutional amendments to cover the myriad of local agencies in this state are unlikely. The problems left by the case may be solved more feasibly by amending the relevant statutes. Vesting can be made clearly contingent upon administrative findings of the preconditions—that function need not require special constitutional support,

cases have been remanded since *Strumsky* was decided. These have involved the trial court's use of the substantial evidence test in dealing with the reemployment of a probationary school teacher,[72] dismissal from civil service,[73] reinstatement of a policeman to regular duty,[74] termination of welfare benefits,[75] and disability pensions.[76] Many other important rights within the jurisdiction of local agencies may be expected to be raised on appeal.

b. Marginally vested rights

The holding which extends independent judgment review to rights which are considered vested, if in the opinion of the court the statutory prerequisites are complied with, is more novel and might have a greater impact than the local agency's holding. Under a literal reading of this case, any claimant henceforth seeking government benefits will merely have to raise a claim for higher benefits and he or she will be entitled to a full court review. This could put the agencies involved essentially out of business; they may become mere way stations or paper processors, without substantive authority. This result would be totally unacceptable because courts are simply not equipped to perform technical, mass-production processes such as claims disbursement or license-granting.

Such an impact may be avoided by amendment of the various benefit statutes to expressly rule out vesting, for purposes of judicial review, until after a board determines that such benefits are due. After the courts have had some experience with the volume of work generated they may welcome such amendments which clarify the time of vesting.

A direct application of *Strumsky*'s looser concept of vesting can be found in a recent court of appeal decision dealing with the procedure for obtaining a "vested right" exception to the permit requirement of the California Coastal Commission. That case held that at least some of the landowner's rights were fundamental and the court therefore

72. Young v. Governing Bd., 40 Cal. App. 3d 769, 115 Cal. Rptr. 456 (2d Dist. 1974).

73. Valenzuela v. Board of Civil Service Comm'rs, 40 Cal. App. 3d 557, 115 Cal. Rptr. 103 (2d Dist. 1974); Rigsby v. Civil Service Comm'n, 39 Cal. App. 3d 696, 115 Cal. Rptr. 490 (2d Dist. 1974); Perea v. Fales, 39 Cal. App. 3d 939, 114 Cal. Rptr. 808 (1st Dist. 1974).

74. Hadley v. City of Ontario, 43 Cal. App. 3d 121, 117 Cal. Rptr. 513 (4th Dist. 1974).

75. Le Blanc v. Swoap, 42 Cal. App. 3d 1016, — Cal. Rptr. — (1st Dist. 1974) (aid to the Needy Disabled [A.T.D.] program).

76. Craver v. City of Los Angeles, 42 Cal. App. 3d 76, 117 Cal. Rptr. 534 (2d Dist. 1974).

had to make an independent determination of "the extent of" such rights.[77]

Another recent case involving zoning held that a reviewing court had to apply the substantial evidence test when considering agency approval of a tentative tract map.[78] Apparently, no fundamental vested rights were considered to be involved. The same result has been reached on applications for environmental permits[79] and for water appropriation rights.[80] Thus, the vested rights line appears to have continuing vitality and *Strumsky* has not signaled the complete demise of substantial evidence review. The exception for constitutional agencies, even if the decisions of such agencies do affect vested rights, has also been reaffirmed.[81]

The aspect of the *Strumsky* case which treated the pension right as vested is likely to have a helpful effect in exposing statutes to careful scrutiny and in encouraging the legislature to think carefully about the delegation of discretion. The particular result in the case need have no effect beyond the immediate plaintiff if the court revises its holding in the future or if the legislature amends the act to clarify the factfinding powers of the retirement boards.

CONCLUSION

Both the majority and the dissent in *Strumsky* can be criticized. The majority definition of fundamental, vested rights is so vague as to

77. Transcentury Properties, Inc. v. State, 41 Cal. App. 3d 835, 116 Cal. Rptr. 487 (1st Dist. 1974); California Coastal Zone Conservation Act of 1972, CAL. PUB. RES. CODE §§ 27000, 27404 (West Supp. 1974). This holding found support in *Strumsky* and two other cases which had based the right explicitly upon the guarantee of due process. Flournoy v. State, 230 Cal. App. 2d 520, 530-33, 41 Cal. Rptr. 190, 196-97 (3d Dist. 1964); Trans-Oceanic Oil Corp. v. Santa Barbara, 85 Cal. App. 2d 776, 783-88, 194 P.2d 148, 152-54 (2d Dist. 1948).

78. Friends of Lake Arrowhead v. Board of Supervisors, 38 Cal. App. 3d 497, 113 Cal. Rptr. 539 (4th Dist. 1974); Environmental Quality Act of 1970, CAL. PUB. RES. CODE §§ 21168 (West Supp. 1974). The supreme court has said that there is no right to a variance. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 510 n.1, 522 P.2d 12, 14 n.1, 113 Cal. Rptr. 836, 837 n.1 (1974). The court has not decided whether the surrounding landowners have a vested right in preventing an illegal variance, but has indicated that such interests were protected by close judicial scrutiny under the substantial evidence test. *Id.* at 517, 522 P.2d at 19, 113 Cal. Rptr. at 843.

79. Plan for Arcadia, Inc. v. City Council, 42 Cal. App. 3d 712, 117 Cal. Rptr. 96 (2d Dist. 1974) (citizens group's interest in denial of a street widening plan was not a vested right, under the Environmental Quality Act of 1970, CAL. PUB. RES. CODE §§ 21000, 21168.5).

80. Bank of America v. State Water Resources Bd., 42 Cal. App. 3d 198, 116 Cal. Rptr. 770 (3d Dist. 1974) (the origin of the board's powers were also partly constitutional under article XIV, section 3).

81. Westlake Farms Inc. v. County of Kings, 39 Cal. App. 3d 179, 114 Cal. Rptr. 137 (5th Dist. 1974).