LEXSTAT CAL. CODE. CIV. PROC. 1085

*** THIS SECTION IS CURRENT THROUGH THE 2007 SUPPLEMENT ***
(ALL 2006 LEGISLATION)

CODE OF CIVIL PROCEDURE
Part 3. Special Proceedings of a Civil Nature
Title 1. Writs of Review, Mandate, and Prohibition
Chapter 2. Writ of Mandate

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Cal Code Civ Proc § 1085 (2006)

§ 1085. Issuing courts, and writ's mandates

(a) A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person.

(b) The appellate division of the superior court may grant a writ of mandate directed to the superior court in a limited civil case or in a misdemeanor or infraction case. Where the appellate division grants a writ of review directed to the superior court, the superior court is an inferior tribunal for purposes of this chapter.

HISTORY:

Enacted 1872. Amended Stats 1935 ch 52 § 2; Stats 1951 ch 1737 § 148, operative January 1, 1952; Stats 1998 ch 931 § 112 (SB 2139), effective September 28, 1998; Stats 1999 ch 344 § 17 (SB 210), effective September 7, 1999; Stats 2002 ch 784 § 75 (SB 1316).

NOTES:

Amendments:

1935 Amendment:

Substituted "municipal, justice's or police court" for "justice's or police court."

1951 Amendment:

Substituted "municipal or justice court" for "municipal, justice's or police court."

1998 Amendment:

(1) Designated the former section to be subd (a); **(2)** amended subd (a) by **(a)** substituting "A writ of mandate" for "It" at the beginning; **(b)** adding the commas after "trust, or station", and after "corporation, board"; and **(c)** substituting "the party" for "he" wherever it appears; and **(3)** added subd (b).

1999 Amendment:

Amended subd (b) by adding **(1)** "or in a misdemeanor or infraction case" at the end of the first sentence; and **(2)** the second sentence.

2002 Amendment:

Deleted ", except a municipal court," after "issued by any court" in subd (a).

Historical Derivation:

Practice Act § 467 (Stats 1851 ch 5 § 467).

Law Revision Commission Comments:

1998

Section 1085 is amended to accommodate unification of the municipal and superior courts in a county. *Cal. Const. art. VI, § 5(e).* It is also amended to reflect elimination of the justice court. *Cal. Const. art. VI, § § 1, 5(b).*

Subdivision (b) implements Constitution Article VI, Section 10. For guidance on what constitutes a limited civil case, see Section 85 & Comment.

1999

Section 1085 is amended to fully reflect the writ jurisdiction of the appellate division. *Cal. Const. art. VI, § § 10, 11(b).* See also *Penal Code § § 691(g)* ("misdemeanor or infraction case" defined), 1466 (appeal in misdemeanor or infraction case).

2002

Section 1085 is amended to reflect unification of the municipal and superior courts pursuant to *Article VI, Section 5(e), of the California Constitution.*

Cross References:

Issuance by Supreme Court justice in chambers: *CCP § 165*.

Power of court commissioners to hear and determine ex parte motions for writ: *CCP § 259*.

Mandate for administrative orders: *CCP § 1094.5*.

Service of copy of application: *CCP § 1107*.

Time returnable: *CCP § 1108*.

Application of code sections relating to practice: *CCP § 1109*.

Application of code provisions relating to new trials and appeals: *CCP § 1110*.

Action to enforce compliance with provisions requiring that zoning ordinances be consistent with general plan, pursuant to this chapter: *Gov C § 65860(b)*.

Action by applicant upon agency's failure to hold public hearing on development project: *Gov C § 65956*.

Writ to enjoin collection of tax prohibited: *Rev & Tax C § § 6931, 8146, 11571, 19081*.

Power of obligee to compel parking authority to perform contract: *Sts & H C § 33400*.

Right of bond holders to compel performance of provisions of ordinance, resolution or indenture: *Sts & H C § 35417*.

Jurisdiction to issue writ: Const Art VI § 10.

Compelling public utility to act: Pub U C § 2103.

Rules on original proceedings: *CRC Rule 56*.

Collateral References:

3 Witkin Summary (10th ed) Agency and Employment § 579.

5 Witkin Summary (10th ed) Torts § 17.

8 Witkin Summary (10th ed) Constitutional Law § § 1016, 1201.

9 Witkin Summary (10th ed) Corporations § 337.

10 Witkin Summary (10th ed) Parent and Child § 117.

Witkin Procedure (4th ed), "Attack on Judgment in Trial Court" § 236.

A Land Use Lawyer's Guide to Writs of Mandate. 1 Land Use Forum 262 (CEB, summer 1992).

Meeting statutory deadlines: Contractual and financial injury litigation. CEB Action Guide, Summer 1992.

Miller & Starr, Cal Real Estate 3d § § 15:80, 25:181, 25:217.

Law Review Articles:

Judicial review of administrative findings by mandamus. *27 Cal LR 738.*

Court review of administrative decisions. *29 Cal LR 146.*

Mandamus to enforce civil rights statutes. *30 Cal LR 563.*

Judicial review of determinations of administrative tribunals. *34 Cal LR 741.*

Appellate review with the extraordinary writs. *36 Cal LR 75.*

Extraordinary writs to review inferior court judgments. *36 Cal LR 558.*

Mandamus as original proceeding in California appellate courts. *15 Hast LJ 177.*

Judicial review of administrative action, and problems of pleading and procedure in mandamus action. *42 LA Bar B 159.*

Practice Tips: Challenging Dhs Temporary Actions Against Suspected Fraud. *27 Los Angeles Lawyer 18.*

Environmental protection; mandamus to require court action by state or local government attorney. *14 Santa Clara Law 319.*

Power of court to review exercise of official discretionary duty. *2 SCLR 87.*

Mandamus to determine correctness of answers to civil service examination questions. *7 SCLR 477.*

Mandamus to test title to office. *9 SCLR 211.*

Changes made by amendment of 1935. *9 SCLR 253.*

Mandamus to compel certification by trial judge of settled statement. *23 SCLR 579.*

Judicial review of decisions affecting eligibility for unemployment compensation. *27 SCLR 7.*

Mandate to cancel an illegal assessment or tax. *27 SCLR 436.*

Review of administrative board rulings. 14 St BJ 313.

Mandamus to review administrative agencies. 16 St BJ 306.

Extraordinary writs. 29 St BJ 467.

Court review of administrative decisions. *2 Stan LR 285.*

Licensed agency control of adoptions and judicial limitations thereon. *5 UCD LR 525.*

Judicial review of granting or denial of variance. *5 UCLA LR 182.*

Review of determination of eligibility for unemployment compensation. *5 UCLA LR 609.*

A Line in the Sand: Oceanfront Landowners and the California Coastal Commission Have Been Battling over Easements Allowing Public Access to Beaches. *27 Los Angeles Lawyer 24* (January).

Attorney General's Opinions:

Mandamus as remedy for public entity's refusal to provide legal defense on public employee's request. *39 Ops. Cal. Atty. Gen. 71.*

Writ of mandate proper remedy to compel counties and cities to collect fees for construction permits; terms such as "construction" "instrumentation," "permits," and "structures" to be given ordinary meaning. *55 Ops. Cal. Atty. Gen. 148.*

Annotations:

Availability of mandamus or prohibition to compel or to prevent discovery proceedings. *95 ALR2d 1229.*

Summary judgment in mandamus or prohibition cases. *3 ALR3d 675.*

Mandamus as remedy for infringement of accused's right to communicate with his attorney. *5 ALR3d 1360.*

Contempt adjudication or conviction as subject to review, other than by appeal or writ of error. *33 ALR3d 589.*

Mandamus to compel disciplinary investigation or action against physicians or attorney. *33 ALR3d 1429.*

Construction and application of *28 USCS § 1361* conferring on Federal District Courts original jurisdiction of actions in nature of mandamus to compel federal officer, employee, or agency to perform duty owed plaintiff. *13 ALR Fed 145.*

Citizen's action against administrator of Environmental Protection Agency to compel performance of nondiscretionary duty under § 505(a)(2) of Federal Water Pollution Control Act Amendments of 1972 *(33 USCS § 1365*(a)(2). *57 ALR Fed 851.*

When is order, remanding case, other than civil rights case, to state court from which case had been removed outside District Court's authority under *28 USCS § 1447*(c), so as to be reviewable by Court of Appeals notwithstanding provisions of *28 USCS § 1447*(d). *104 ALR Fed 864.*

Mandamus, under *28 USCS § 1361,* to obtain change in prison condition or release of federal prisoner. *114 ALR Fed 225.*

Hierarchy Notes:

Pt. 3 Note

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14. Discretion of Court

Appellate court's exercise of discretion to hear an original proceeding in mandate, instead of remanding the matter to the trial court for a hearing and initial adjudication, was appropriate in a dispute regarding a county's need for a special election because there were no relevant disputed factual issues and the petition raised a significant question of statewide importance. *Faulder v. Mendocino County Bd. of Supervisors (2006, 1st Dist) 144 Cal App 4th 1362, 51 Cal Rptr 3d 251, 2006 Cal App LEXIS 1827.*

A. GENERALLY

1. In General

An ordinance is a law within the meaning of this section. *Weisman v Board of Bldg. & Safety Comm'rs (1927) 85 Cal App 493, 259 P 768.*

Where the juvenile court found that two 15-year-olds who killed a store owner during a robbery were fit and proper subjects for treatment under the juvenile court law (*W & I C § 707*, subd. (e)), the People were entitled to appellate review, by extraordinary writ, of a finding of fitness. A juvenile court's fitness determination under *W & I C § 707*, subd. (e), is not an appealable order within the meaning of *Cal Rules of Court, Rule 1483*, because no statute authorizing appeal of an adverse ruling by either the People or the minor exists. The Courts of Appeal have long and consistently entertained petitions by the People to review error, pursuant to their original jurisdiction in proceedings for extraordinary relief. (*Cal. Const., art. VI, § 10*; *CCP § § 1085*, *1086*). That rule has been adopted in *Cal Rules of Court, Rule 1483(i)*, which specifically authorizes such review, and Rule 1483(g), which provides for a continuance of the jurisdiction hearing if the prosecuting attorney intends to seek such review. Such writ review is also consistent with the requirement of *W & I C § 707*, subd. (e), that the juvenile court recite the reasons under each of its criteria for its ruling that a minor is fit for treatment under juvenile court law. The apparent legislative purpose for the requirement corresponds to what we have recognized as the purpose for the parallel requirement that the juvenile court state the reasons for ruling that a minor is unfit under the statutory criteria of *W & I C § 707*, subd. (a), i.e., to facilitate expeditious appellate review. *People v Superior Court (Jones) (1998) 18 Cal 4th 667, 76 Cal Rptr 2d 641, 958 P2d 393.*

CCP § 1094.5 does not govern appellate review of a streambed alteration agreement; such review is by traditional mandamus, pursuant to *CCP § 1085*. *Environmental Protection Information Center v California Dept. of Forestry & Fire Protection (2005, Cal App 1st Dist) 2005 Cal App LEXIS 1906, 2005* Daily Journal DAR 14291.

2. Nature of Writ

Mandate is a flexible writ, whose use in modern times has been much extended. *Inglin v Hoppin (1909) 156 Cal 483, 105 P 582.*

Mandamus is an extraordinary remedy in the nature of an equitable interference supplementing the deficiencies of the common law. *Potomac Oil Co. v Dye (1909) 10 Cal App 534, 102 P 677.*

Mandamus is an extraordinary remedy issuing to compel an inferior tribunal, body, or person to perform an act which the law specially enjoins as a duty resulting from an office. *San Francisco v Superior Court of San Francisco (1928) 94 Cal App 318, 271 P 121.*

Mandamus is an equitable remedy. *Sutro Heights Land Co. v Merced Irrigation Dist. (1931) 211 Cal 670, 296 P 1088.*

Mandamus has none of the characteristics or functions of a criminal action and is independent thereof; hence an appeal from an order sustaining a demurrer to a petition for a writ of mandate to compel a prosecuting attorney to show cause why the petitioner was not granted a hearing on his petition for a writ of error coram nobis, habeas corpus, or a new trial, cannot be considered on appeal from an order made in the coram nobis proceeding. *People v Schunke (1951) 102 Cal App 2d 875, 228 P2d 620.*

Although mandamus is extraordinary legal remedy, it is in nature of equitable interference supplementing deficiencies of common law, and will ordinarily be issued where legal duty is established and no other means exists for enforcing it. *Dowell v Superior Court of San Francisco (1956) 47 Cal 2d 483, 304 P2d 1009.*

Application for writ of mandamus, while special proceeding, is also to some extent proceeding in equity. *Gonzales v International Asso. of Machinists (1963, 1st Dist) 213 Cal App 2d 817, 29 Cal Rptr 190.*

Judicial remedy of mandamus is not civil action but special proceeding of civil nature which is available for specified purposes and for which Code of Civil Procedure provides separate procedure. *Wenzler v Municipal Court for Pasadena Judicial Dist. (1965, 2nd Dist) 235 Cal App 2d 128, 45 Cal Rptr 54.*

The writ of mandate is an equitable remedy, and will not always issue as a matter of right. *McDaniel v San Francisco (1968, 1st Dist) 259 Cal App 2d 356, 66 Cal Rptr 384.*

In a proceeding brought pursuant to *CCP § 1085*, dealing with so-called "traditional mandate," by a physician and surgeon seeking review of a decision of the board of directors of a private hospital refusing to reappoint him to its medical staff, the trial court properly treated the proceeding essentially as though it had been brought pursuant to the provisions of *CCP § 1094.5*, dealing with so-called "administrative mandate." The decision of the board came within the terms of *CCP § 1094.5*, as a final adjudicatory order resulting from a proceeding in which a hearing is required, evidence is required to be taken and "discretion in the determination of facts is vested in the... board." The statute is not by its language or legislative history limited to review of administrative decisions by governmental agencies, and the rules for the conduct of hearings by private hospital boards are substantially the same as those provided by statute for hearings by public hospital boards. *Anton v San Antonio Community Hospital (1977) 19 Cal 3d 802, 140 Cal Rptr 442, 567 P2d 1162.*

Unless (1) a hearing, (2) the taking of evidence and (3) discretion to determine facts are all required by law (*CCP § 1094.5*, subd. (a)), the review of an administrative agency decision can be had only by traditional mandate (*CCP § 1085*). Those three elements codify the essence of adjudicatory function, as opposed to legislative or quasi-legislative function, in an administrative body. *Harris v Civil Service Com. (1998, 1st Dist) 65 Cal App 4th 1356, 77 Cal Rptr 2d 366.*

The fact that the administrative body acts in response to specific petitions or parties, and indulges in a hearing process, does not detract from the legislative nature of the action. Judicial review of a legislative or quasi-legislative action is made under ordinary mandamus (*CCP § 1085*) and is limited to an examination of the proceeding to determine whether the action of an administrative body has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether it has failed to give the notices and follow the procedures required by law. Stated another way, the mere fact that a proceeding before a deliberative body may possess certain characteristics of the judicial process does not convert legislative action into an adjudication of a private controversy. The ascertainment of facts as a basis for legislative action does not render the process judicial or anything less than quasi-legislative. Nor does the making of findings. Although a statutory obligation to make a "finding" is a characteristic shared with adjudicatory proceedings, it does not stamp the function with an adjudicative character. *Harris v Civil Service Com. (1998, 1st Dist) 65 Cal App 4th 1356, 77 Cal Rptr 2d 366.*

3. Purpose

The writ of mandate is not to be issued on mere technical grounds, its design being to do substantial justice and prevent substantial injury. *Neto v Conselho Amor da Sociedade No. 41 (1912) 18 Cal App 234, 122 P 973.*

Mandamus is an independent proceeding, having for its purpose the compulsion of an act which the law specially enjoins as a duty resulting from an office, trust, or station. *Boggs v Jordan (1928) 204 Cal 207, 267 P 696.*

The writ of mandamus is designed to provide a remedy where no other remedy exists, to supply defects of justice; and it will issue, to the end that justice be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right. *Drummey v State Board of Funeral Directors & Embalmers (1939) 13 Cal 2d 75, 87 P2d 848.*

Mandamus is used merely to compel the performance of ministerial duties. *Bodinson Mfg. Co. v California Employment Com. (1941) 17 Cal 2d 321, 109 P2d 935.*

The purpose of a writ of mandate is not to enforce abstract rights, nor may it be invoked to forestall anticipated error. *Friedland v Superior Court of Sacramento County (1945) 67 Cal App 2d 619, 155 P2d 90.*

Purpose of writ of mandate is to enforce performance of acts which the law specially enjoins as a duty resulting from office, trust or station, etc. *Bollotin v Workman Service Co. (1954) 128 Cal App 2d 339, 275 P2d 599.*

Purpose of writ of mandamus is to enforce clear right of particular petitioner against one who has legal duty to perform act necessary to enjoyment of such right. *Farrington v Fairfield (1961, 2nd Dist) 194 Cal App 2d 237, 16 Cal Rptr 119.*

The function of the writ of mandate is to compel the performance of a duty which the law specifically requires and which existed at the time of the alleged failure to act. *Forest Lawn Co. v City Council of West Covina (1966, 2nd Dist) 244 Cal App 2d 343, 53 Cal Rptr 452.*

The purpose of *CCP § 1094.5*, is to inquire into the validity of a final administrative order. Accordingly, that statute was an inappropriate mechanism by recipients of aid for dependent children to seek relief for benefits withheld pursuant to an invalid regulation, where the class that plaintiff sought to represent did not consist only of those individuals who had completed their administrative appeals process. The appropriate vehicle for such relief was *CCP § 1085*, the traditional mandamus action, which is appropriate to enforce ministerial duties. *Lowry v Obledo (1980, 3rd Dist) 111 Cal App 3d 14, 169 Cal Rptr 732.*

A traditional writ of mandate under *CCP § 1085*, is a method of compelling the performance of a legal, usually ministerial duty, whereas the purpose of an administrative mandamus proceeding, under *CCP § 1094.5*, is to review the final adjudicative action of an administrative body. Professional Engineers in *California Government v State Personnel Board (1980, 2nd Dist) 114 Cal App 3d 101, 170 Cal Rptr 547.*

Scope of review in traditional mandamus proceedings under *CCP § 1085* is limited to an examination of the record of the hospital proceedings to determine whether the action taken was substantively irrational, unlawful, or contrary to established public policy or procedurally unfair. *Pinhas v Summit Health, Ltd. (1989, CA9 Cal) 894 F2d 1024,* cert gr, in part *496 US 935, 110 L Ed 2d 660, 110 S Ct 3212* and affd *500 US 322, 114 L Ed 2d 366, 111 S Ct 1842.*

A traditional writ of mandate under *CCP § 1085*, is a method of compelling the performance of a legal, usually ministerial duty. Generally, a writ will lie when there is no plain, speedy, and adequate alternative remedy, the respondent has a duty to perform, and the petitioner has a clear and beneficial right to performance. *Pomona Police Officers' Assn. v City of Pomona (1997, 2d Dist) 58 Cal App 4th 578, 68 Cal Rptr 2d 205.*

CCP § 1085 authorizes courts to issue a writ of mandate to compel the performance of an act that the law specifically requires. Writ relief is available to compel a public officer to perform a mandatory, ministerial act. An act that involves the exercise of discretion is legislative, not ministerial. Writ relief is available to correct a legislative act if the public officer failed to exercise his or her discretion or acted so unreasonably or arbitrarily as to indicate an abuse of discretion as a matter of law. Thus, a writ is available to correct a legislative decision that is arbitrary, capricious, entirely lacking in evidentiary support, contrary to established public policy, unlawful, or procedurally unfair. *Public Defender Assn. v Board of Supervisors (1999, 4th Dist) 74 Cal App 4th 1327, 1332, 88 Cal Rptr 2d 788.*

Pursuant to *CCP § 1085(a)*, the issuance of a writ of mandate is permitted to compel the performance of an act that the law specially enjoins and the writ will lie where a petitioner has no plain, speedy, and adequate alternative remedy, the respondent has a clear, present, and usually ministerial duty to perform, and the petitioner has a clear, present, and beneficial right to performance. Mandate is not available to compel the exercise of discretion on the part of a public official, but it is available to correct an abuse of discretion. *Kong v City of Hawaiian Gardens Redevelopment Agency (2002, 2nd Dist) 101 Cal App 4th 1317, 125 Cal Rptr 2d 1.*

B. PRINCIPLES AND CONDITIONS

4. In General

Action above and beyond that required by a statute cannot be compelled by mandamus proceedings. *Davis v Porter (1885) 66 Cal 658, 6 P 746.*

No court should allow the writ to compel a technical compliance with the letter of the law, where such compliance will violate its spirit. *Gammon v McKevitt (1920) 50 Cal App 656, 195 P 726.*

A writ of mandate should not issue except to compel the performance of an act which the law specifically enjoins. *Abbott v Superior Court of California (1924) 69 Cal App 660, 232 P 154.*

The statute does not give a suitor an unconditional right to seek a writ of mandate. *Brougher v Board of Public Works (1930) 107 Cal App 15, 290 P 140.*

It is a general rule that the facts as they existed at the time the application for a writ of mandamus is made determine the right of the petitioner and the duty of the respondent. *Christ v Superior Court of San Francisco (1931) 211 Cal 593, 296 P 612.*

Petitioners' right to relief by mandamus is determinable by the facts as they existed at the time that petition was filed. *Palmer v Fox (1953) 118 Cal App 2d 453, 258 P2d 30.*

It is not by office of person to whom writ of mandamus is directed, but nature of thing to be done, that propriety of mandamus is to be determined. *Jenkins v Knight (1956) 46 Cal 2d 220, 293 P2d 6.*

Writ of mandate will be granted only when it is shown that petitioner's, and not another's, property rights are jeopardized. *Crestlawn Memorial Park Asso. v Sobieski (1962, 2nd Dist) 210 Cal App 2d 43, 26 Cal Rptr 421.*

If a writ of prohibition is uncalled for but facts warrant positive relief, writ of mandate may issue. *Williams v Superior Court of Stanislaus County (1964, 5th Dist) 226 Cal App 2d 666, 38 Cal Rptr 291.*

The proper method of obtaining judicial review of most public agency decisions is by instituting a proceeding for a writ of mandate. Statutes provide for two types of review by mandate: ordinary mandate and administrative mandate (*CCP § § 1085, 1094.5*). The nature of the administrative action or decision to be reviewed determines the applicable type of mandate. In general, quasi-legislative acts are reviewed by ordinary mandate and quasi-judicial acts are reviewed by administrative mandate. But the judicial review via administrative mandate is available only if the decision resulted from a proceeding in which by law: 1) a hearing is required to be given, 2) evidence is required to be taken, and 3) discretion in the determination of facts is vested in the agency. Thus, ordinary mandate is used to review adjudicatory actions or decisions when the agency was not required to hold an evidentiary hearing. *Bunnett v Regents of University of California (1995, 6th Dist) 35 Cal App 4th 843, 41 Cal Rptr 2d 567.*

5. Equitable Considerations

Although mandamus is classed as a legal remedy, its issuance is largely controlled by equitable principles, and one who seeks it must come into court with clean hands. *Hutchison v Reclamation Dist. No. 1619 (1927) 81 Cal App 427, 254 P 606.*

The "clean hands" doctrine is applicable generally to mandamus proceedings. *Dierssen v Civil Service Com. (1941) 43 Cal App 2d 53, 110 P2d 513.*

The remedy of mandamus is of an equitable nature, and in proper cases the court in the exercise of a wise discretion may refuse relief notwithstanding the undoubted right of the applicant. *El Camino Land Corp. v Board of Supervisors (1941) 43 Cal App 2d 351, 110 P2d 1076.*

The clean hands doctrine may be invoked in a mandamus proceeding. *McCarthy v Oakland (1943) 60 Cal App 2d 546, 141 P2d 4.*

Mandamus is generally classed as legal remedy, but whether it should be applied is largely controlled by equitable considerations. *Dowell v Superior Court of San Francisco (1956) 47 Cal 2d 483, 304 P2d 1009.*

Mandamus being essentially equitable in nature, doctrine of "clean hands" is applicable. *Allen v Los Angeles County Dist. Council of Carpenters (1959) 51 Cal 2d 805, 337 P2d 457.*

Mandamus is an action where equitable principles apply, and the issuance of the writ is frequently a matter for the court's discretion. *Bruce v Gregory (1967) 65 Cal 2d 666, 56 Cal Rptr 265, 423 P2d 193.*

Although mandamus is generally classed as a legal remedy, the question of whether it should be applied is largely controlled by equitable considerations. *San Diego County Dep't of Public Welfare v Superior Court of San Diego County (1972) 7 Cal 3d 1, 101 Cal Rptr 541, 496 P2d 453.*

In an action brought by the purchaser of an automobile on behalf of herself and a class of purchasers against the foreign manufacturer and domestic distributors of the automobile for conspiracy to fix prices in violation of the Cart-

wright Act (*Bus. & Prof. Code, § 16700* et seq.), an appeal by the plaintiff from the trial court's order dismissing the class action after denial of her motion for class certification was not dismissed even though such appeal was not from a final judgment. Because plaintiff had justifiably relied on persuasive authority for filing an appeal rather than seeking a writ of mandate, and in the interest of justice, she was entitled to have the issues considered on their merits, and the appeal was treated as a mandate proceeding. *Rosack v Volvo of America Corp. (1982, 1st Dist) 131 Cal App 3d 741, 182 Cal Rptr 800.*

Administrative mandamus is not limited, on its face at least, to governmental as opposed to nongovernmental agencies. As to the scope of both versions of mandamus, traditional mandamus (*CCP § 1085*) is available not only to compel official acts on the part of governmental agencies, but also to compel nongovernmental bodies or officers to perform their legal duties. Administrative mandamus (*CCP § 1094.5*), by using substantially identical language, was intended to apply to the same spectrum of agencies. *Saleeby v State Bar (1985) 39 Cal 3d 547, 216 Cal Rptr 367, 702 P2d 525.*

The California Constitution grants the Supreme Court, the Courts of Appeal, and superior courts original jurisdiction to issue writs of mandate. The purpose of the writ of mandate is to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he or she is entitled, and from which he or she is unlawfully precluded by such inferior tribunal, corporation, board, or person. As with habeas corpus, the party seeking mandate relief makes application by filing a verified petition. If the petition appears sufficient on its face, the court may issue an alternative writ, which is analogous in some ways to the writ of habeas corpus or order to show cause. The alternative writ commands the respondent either to do the act required to be performed, or to show cause before the court why he or she has not done so. As in a habeas corpus proceeding, the respondent or real party in interest may then file a return explaining why the petitioner is not entitled to the requested relief, the petitioner may then submit an answer and an evidentiary hearing may be held to resolve contested issues of fact. If, after these proceedings on the alternative writ, the court concludes that the petitioner is entitled to the relief requested, the court then grants the relief by directing issuance of a peremptory writ of mandate. *Townsel v Superior Court (1999) 20 Cal 4th 1084, 1088, 86 Cal Rptr 2d 602, 979 P2d 963.*

6. Enforcement Illegal or Unjust; Public Interest

A writ of mandate will not issue where it will work injustice, or introduce confusion and disorder, or operate harshly, or will not promote substantial justice; nor will it issue where the writ if granted could not be enforced and would be unavailing. *Board of Education v Common Council of San Diego (1900) 128 Cal 369, 60 P 976.*

Mandamus will not lie to compel the performance of acts which are illegal, contrary to public policy, or which tend to aid in an unlawful purpose. *Cook v Noble (1919) 181 Cal 720, 186 P 150.*

The writ of mandate is, in a measure at least, a discretionary writ, and will not be granted where its enforcement would work an injustice or accomplish a legal wrong; it will not issue to compel an auditor to draw his warrant for an illegal claim even though it has been audited and allowed by the board which is charged with that responsibility. *California Highway Com. v Riley (1923) 192 Cal 97, 218 P 579.*

While the writ of mandate is, in a measure, a discretionary writ, and will not issue where its enforcement will work an injustice or accomplish a legal wrong, where one has a substantial right enforceable by a mandamus and which cannot otherwise be enforced and a failure of justice would result in refusing it, he is entitled to the writ as a matter of right, and it is an abuse of discretion to refuse it. *Williams v Stockton (1925) 195 Cal 743, 235 P 986.*

Mandamus is equitable remedy and will not be used to compel performance of acts which are illegal, contrary to public policy or which tend to aid unlawful purpose, and as such may not be used to compel issuance of building permit, culmination of plan to circumvent *Subdivision Map Act. Pratt v Adams (1964, 1st Dist) 229 Cal App 2d 602, 40 Cal Rptr 505.*

Mandamus will not lie to compel performance of acts that are void, illegal, contrary to public policy, or that tend to aid in unlawful purpose. *Plum v Healdsburg (1965, 1st Dist) 237 Cal App 2d 308, 46 Cal Rptr 827.*

Writ of mandate should never issue to compel act that will tend to unlawful purpose. *Slater v City Council of Los Angeles (1965, 2nd Dist) 238 Cal App 2d 864, 47 Cal Rptr 837.*

Though generally writ of mandate will be granted only where necessary to protect substantial right and it is shown that some substantial damage will be suffered if writ is denied, exception is recognized where question is one of public

right and object of writ is to secure performance of public duty. *Fuller v San Bernardino Valley Municipal Water Dist. (1966, 4th Dist) 242 Cal App 2d 52, 51 Cal Rptr 120.*

Mandamus will be granted to protect a party against substantial damage, not to vindicate abstract claims; issuance of the writ is not a matter of right, but involves a consideration of its effect in promoting justice; and the likelihood of public detriment warrants denial of relief. *Rivera v Division of Industrial Welfare (1968, 3rd Dist) 265 Cal App 2d 576, 71 Cal Rptr 739.*

7. Clear and Certain Right to Writ

The writ of mandate is a prerogative writ, and in order to entitle the petitioner to such relief, it must plainly appear that he is entitled to it and that it is the duty of the inferior board, tribunal or person to perform the act which it is claimed the same refuses to perform. *Gray v Mullins (1910) 15 Cal App 118, 113 P 694.*

Mandamus will lie to enforce a particular action by an inferior tribunal or officer, where the law clearly establishes the petitioner's right to such action. *Harelson v South San Joaquin Irrigation Dist. (1912) 20 Cal App 324, 128 P 1010.*

Where a party has a clear legal right for which mandamus is the appropriate remedy, the writ should not be withheld because he may be ultimately unsuccessful in gaining the relief sought. *Lindsay Strathmore Irrigation Dist. v Superior Court of Tulare County (1932) 121 Cal App 606, 9 P2d 579.*

If the existence of the right to mandamus is doubtful, the writ will be denied. *American Sec. Co. v Forward (1934) 220 Cal 566, 32 P2d 343,* affd *294 US 692, 79 L Ed 1232, 55 S Ct 403.*

To authorize the writ there must be a clear case to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. *American Sec. Co. v Forward (1934) 220 Cal 566, 32 P2d 343,* affd *294 US 692, 79 L Ed 1232, 55 S Ct 403.*

Mandamus is an extraordinary remedy which is equitable in nature; there is no absolute right to the writ, the necessity of which must be clearly established; it will not issue in doubtful cases, or if it would result in a grievous public or private wrong even though it be in compliance with the technical letter of the law. *Clough v Baber (1940) 38 Cal App 2d 50, 100 P2d 519.*

The right to the writ of mandate must be shown to be clear and certain. *Wallace v Board of Education (1944) 63 Cal App 2d 611, 147 P2d 8.*

To authorize issuance of a writ of mandate there should be not only a want of specific legal remedy, but also a specific legal right; the party to be coerced must be bound to act and if the existence of a right is doubtful, the writ will be denied. *Potter v City Council of Port Hueneme (1951) 102 Cal App 2d 141, 227 P2d 25.*

A private individual is entitled to writ of mandate only where he has some private or particular interest to be subserved, or some particular right to be preserved or protected by the writ independent of that which he holds for the public at large, and unless this right is made to appear the application should be denied. *Potter v City Council of Port Hueneme (1951) 102 Cal App 2d 141, 227 P2d 25.*

Mandamus issues only to compel performance of act that law specially enjoins; applicant for writ must show that his right thereto is clear and certain. *City Council of Santa Monica v Superior Court of Los Angeles County (1962, 2nd Dist) 204 Cal App 2d 68, 21 Cal Rptr 896.*

Essential to issuance of writ of mandamus are clear, present and usually ministerial duty by party to whom writ is directed and clear, present and beneficial right in petitioner of the writ to performance of that duty. *Baldwin-Lima-Hamilton Corp. v Superior Court of San Francisco (1962, 1st Dist) 208 Cal App 2d 803, 25 Cal Rptr 798.*

Applicant for writ of mandate must show that his right thereto is clear and certain, for remedy of mandamus is not matter of right but is awarded in exercise of sound judicial discretion. *Berry v Coronado Board of Education (1965, 4th Dist) 238 Cal App 2d 391, 47 Cal Rptr 727.*

Writ of mandate will issue when act to be done is purely ministerial, and discretion is not involved, and applicant shows that he is clearly entitled to writ, though it be directed to municipality and its elective officers. *Monarch Cablevision, Inc. v City Council of Pacific Grove (1966, 1st Dist) 239 Cal App 2d 206, 48 Cal Rptr 550.*

Where the facts are undisputed and the law establishes the right of a party to an order or to the relief which the court has refused, a writ of mandamus will lie. *Kaiser Foundation Hospitals v Superior Court of Los Angeles County (1967, 2nd Dist) 254 Cal App 2d 327, 62 Cal Rptr 330.*

One of the essential conditions for the issuance of the writ of mandate is a showing on the part of the applicant that he has a clear legal right to the performance of the act the writ would compel. *McDaniel v San Francisco (1968, 1st Dist) 259 Cal App 2d 356, 66 Cal Rptr 384.*

The right to a writ of mandamus must be demonstrated by clear, certain, and positive evidence. *California Federation of Teachers v Oxnard Elementary Schools (1969, 2nd Dist) 272 Cal App 2d 514, 77 Cal Rptr 497.*

Under *CCP § 1085*, a writ of mandate will lie only "to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust or station," and the two basic requirements essential to the issuance of the writ are a clear, present and usually ministerial duty upon the part of the respondent, and a clear, present and beneficial right in the petitioner to the performance of that duty. *Loder v Municipal Court for San Diego Judicial Dist. (1976) 17 Cal 3d 859, 132 Cal Rptr 464, 553 P2d 624.*

Mandamus was proper remedy for a retired police chief seeking benefits under a collective bargaining agreement, provided he could show he was entitled to be represented by the bargaining unit that entered into the agreement with the city, and that the city abused its discretion in excluding him from the unit. *Reinbold v Santa Monica (1976, 2nd Dist) 63 Cal App 3d 433, 133 Cal Rptr 874.*

What is required to obtain relief by a writ of mandamus is a showing by the petitioner of a clear, present, and usually ministerial duty on the part of the respondent, and a clear, present, and beneficial right in the petitioner to the performance of that duty. *Santa Clara County Counsel Attorneys Ass'n v Woodside (1994) 7 Cal 4th 525, 28 Cal Rptr 2d 617, 869 P2d 1142.*

A writ of mandate to compel the performance of an act that the law specifically enjoins (*CCP § 1085*) requires that there be a clear, present, ministerial duty upon the part of the respondent and a correlative clear, present, and beneficial right in the petitioner to the performance of that duty. This extraordinary writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law (*CCP § 1086*). *Sego v Santa Monica Rent Control Bd. (1997, 2d Dist) 57 Cal App 4th 250, 67 Cal Rptr 2d 68.*

Pursuant to former H & S C § 25356.1(g)(1), a potentially responsible party named in a final remedial action plan may seek judicial review of the plan by filing a petition for writ of mandate under *CCP § 1085*. the court must uphold the remedial action plan if it is based on substantial evidence available to the Department of Toxic Substances Control, pursuant to § 25356.1(g)(2). *Foster-Gardner, Inc. v National Union Fire Ins. Co. (1998) 18 Cal 4th 857, 77 Cal Rptr 2d 107, 959 P2d 265.*

CCP § 1085 authorizes a trial court to issue a writ of mandate to compel an act that the law specifically requires. A petitioner seeking a writ of mandate under this section is required to show the existence of two elements: a clear, present and, usually, ministerial duty on the part of the respondent, and a clear, present, and beneficial right belonging to the petitioner in the performance of that duty. Where the duty asserted is one allegedly arising out of statute and/or constitutional guaranty, an appellate court must engage in de novo review of a trial court's refusal to issue the writ. *Bergeron v Department of Health Services (1999, 5th Dist) 71 Cal App 4th 17, 83 Cal Rptr 2d 481, 21.*

Ordinarily, a petitioner seeking a writ of mandate or administrative mandate must show that he or she is beneficially interested in the outcome. Beneficially interested generally means the petitioner has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. The mandate statute speaks of compelling the respondent to perform a duty, on petition of the party beneficially interested. The terms are suggestive of the basic dual requirements for mandamus: (1) a clear, present duty on the part of the respondent; and (2) a clear, present, and beneficial right in the petitioner to the performance of that duty. *Sacramento County Fire Protection Dist. v Sacramento County Assessment Appeals Bd. (1999, 3rd Dist) 75 Cal App 4th 327, 331, 89 Cal Rptr 2d 215.*

Because a memorandum of understanding between a public employer and an employee's union provided the operator with adequate procedural due process, the agency had no duty to afford the employee a hearing. The employee's petition thus failed to state a cause of action for mandamus, and the trial court properly sustained a demurrer. *Jones v Omnitrans (2004, 4th Dist) 125 Cal App 4th 273.*

8. Party To Be Coerced Bound To Act

There must be a specific legal right to be enforced or protected and the party sought to be coerced must be bound to act in order to invoke mandamus. *San Diego v Andrews (1924) 195 Cal 111, 231 P 726.*

The party against whom the writ is sought must be under an obligation, imposed by law, to perform a duty in respect to the performance of which he may not exercise any discretion. *Noble v California Prune & Apricot Growers Asso. (1929) 98 Cal App 230, 276 P 636.*

To authorize issuance of writ of mandamus, party sought to be coerced must be bound to act. *Plum v Healdsburg (1965, 1st Dist) 237 Cal App 2d 308, 46 Cal Rptr 827.*

The trial court properly denied an individual's petition for a writ of mandate to compel the Department of Motor Vehicles (DMV) to disclose the names and addresses of those who paid the motor vehicle smog impact fee, in order to file a class refund claim under *Rev & Tax C § 6904*, based on her contention that the smog impact fee was unconstitutional. Nothing in § 6904 creates an express duty to disclose the names and addresses of a class of taxpayers. Indeed, the requirement of express authorization by each member of the class was intended to spare the state the cost of notifying class members in a subsequent class action. Given the strong state interest in strict legislative control of tax refund procedures, the absence of any provision requiring disclosure, the legislative intent that the state should be spared the expense of identifying and notifying the class, and the potential for abuse if disclosure is required without court supervision, the DMV had no implied duty to disclose the names and addresses of those who paid the smog impact fee in order to facilitate a class claim. *McCabe v Snyder (1999, 3rd Dist) 75 Cal App 4th 337, 341, 345, 89 Cal Rptr 2d 315.*

In an action for wrongful termination, an employee failed to exhaust grievance procedures because he did not appeal a grievance denial to its final conclusion, a writ proceeding under *CCP § 1094.5*. *Claudio v Regents of the University of California (2005, Cal App 3rd Dist) 2005 Cal App LEXIS 1815.*

9. Efficacy or Futility of Writ

Mandamus will not issue where respondents show that they are willing to perform the duty without the coercion of the writ. *George v Beaty (1927) 85 Cal App 525, 260 P 386.*

A writ of mandamus which will lead to confusion will not issue. *Crow v Board of Supervisors (1933) 135 Cal App 451, 27 P2d 655.*

A writ of mandate will not be granted unless it is necessary to protect a substantial right and upon a showing that substantial damages will be suffered by petitioner if the writ is denied. *Thomasson v Jones (1945) 68 Cal App 2d 640, 157 P2d 655.*

A writ of mandate will not issue to compel performance of acts which have no legal effect. *Lindquist v Superior Court of Los Angeles County (1949) 90 Cal App 2d 191, 202 P2d 620.*

10. -Moot Questions

Mandamus proceeding complaining of order that had been vacated presents moot question that will not be decided by court. *Crestlawn Memorial Park Asso. v Sobieski (1962, 2nd Dist) 210 Cal App 2d 43, 26 Cal Rptr 421.*

Writ of mandate should not issue to enforce abstract or moot right. *Slater v City Council of Los Angeles (1965, 2nd Dist) 238 Cal App 2d 864, 47 Cal Rptr 837.*

Dismissal of a foster parent's conviction under *Pen C § 273d* did not render a petition for writ of mandate filed by a department of children and family services moot because (1) the restriction upon licensing imposed by *H & S C § 1522* is not the sort of restriction from which *Pen C § 1203.4* was intended to release defendants, (2) *W & I C § 361.4(d)* expressly incorporates the provisions of *H & S C § 1522* that no exemption may be granted from certain disqualifying crimes, and thus (3) a dismissal of a non-exemptible conviction under *Pen C § 1203.4* does not render the conviction a nullity or exemptible for purposes of a relative placement under *W & I C § 361.4*. *Los Angeles County Dept. of Children & Family Services v Superior Court (2003, 2nd Dist) 112 Cal App 4th 509.*

Since an incidental damage claim seeks monetary relief, the express language of *Gov C § 945.4* requires presentation of a claim as a precondition to the filing of suit; therefore, summary judgment was properly entered on a mandate

petition seeking incidental damages after the equitable issues became moot. TrafficSchoolOnline, Inc. v *Clarke (2003, 2nd Dist) 112* Cal App 4th 736.

Administrative mandamus proceeding under *CCP § 1094.5* could not be used to challenge a determination that a worker was an employee for purposes of unemployment compensation because the purpose of the writ would be to restrain the collection of a tax; such a proceeding was explicitly barred by *Cal. Const., art. XIII, § 32*, and *Unempl Ins C § 1851. First Aid Services of San Diego, Inc. v California Employment Development Dept. (2005, 4th Dist) 133 Cal App 4th 1470.*

11. -No Benefit Would Result

A writ of mandate will not issue to compel the performance of an act that will be wholly void, and of no possible benefit to the petitioner. *San Diego & A. R. Co. v California State Board of Equalization (1912) 164 Cal 41, 127 P 153.*

A writ of mandamus will not issue where it would be of no benefit to the applicant or to enforce a mere abstract right without substantial benefit to the petitioner. *Spotton v Superior Court of San Francisco (1918) 177 Cal 719, 171 P 801.*

A writ of mandate will not issue to enforce an abstract right when an event subsequent to the commencement of the proceedings makes the issuance of the writ of no practical benefit to the petitioner. *Clementine v Board of Civil Service Comm'rs (1941) 47 Cal App 2d 112, 117 P2d 369.*

The courts will not ordinarily issue a writ of mandate to enforce an abstract right of no practical benefit to the petitioner. *Terry v Civil Service Com. (1952) 108 Cal App 2d 861, 240 P2d 691.*

Courts generally will not issue writ of mandate to enforce abstract right of no practical benefit to petitioner, or where writ would be useless, unenforceable or unavailing; but where problem presented and principle involved is of great public interest, court may deem it appropriate to entertain proceedings rather than dismiss them as moot. *Kirstowsky v Superior Court of Sonoma County (1956, 3rd Dist) 143 Cal App 2d 745, 300 P2d 163.*

Administrative hearing that a municipal employee received following his termination for violation of a nondiscrimination policy satisfied the requirements of procedural due process for purposes of *CCP § 1094.5(b)* because the hearing occurred before an impartial decision maker, the employee was represented by counsel at the proceedings, the testimony of witnesses was submitted under oath, the hearings occurred on five dates over the course of four months, and there was a court reporter and a record. *Rosas v Town of Windsor (2005, ND Cal) 2005 US Dist LEXIS 27949.*

12. -Mandate Would Be Useless, Unavailing, or Unenforceable

A court will not do a vain fruitless thing or undertake by mandamus what cannot be accomplished; and to compel a district attorney against his will and contrary to his judgment merely to commence an action would be an idle thing, in the absence of power to compel him to prosecute it properly to final determination. *Boyne v Ryan (1893) 100 Cal 265, 34 P 707.*

Mandamus will not lie to compel the performance of a useless act, such as to compel a superior court to settle a proposed bill of exceptions preparatory to an appeal from a judgment where it appears from the petition for the writ that, on timely motion, the appeal will have to be dismissed. *Hotchkiss v Superior Court of Alameda County (1928) 204 Cal 667, 269 P 524.*

Where mandamus is unavailing, the court will decline to issue the writ though a clear legal right exists. *Kentfield v Reclamation Bd. of California (1934) 137 Cal App 675, 31 P2d 431.*

The writ of mandamus will not issue where it would be useless or unavailing to protect some substantial right. *Crowley v Board of Supervisors (1948) 88 Cal App 2d 988, 200 P2d 107.*

Mandate will not issue where its issuance will serve no useful purpose. *Rust v Roberts (1959, 3rd Dist) 171 Cal App 2d 772, 341 P2d 46* (disapproved on other grounds by *San Diego Professional Asso. v Superior Court of San Diego County, 58 Cal 2d 194, 23 Cal Rptr 384, 373 P2d 448).*

Mandamus will not be granted in cases in which, if issued, it would prove unavailing. *Casmalia School Dist. v Board of Supervisors (1960, 2nd Dist) 180 Cal App 2d 332, 4 Cal Rptr 656.*

A court of equity will invariably refuse to issue a writ of mandamus when it is useless, unenforceable or unavailing. *Genser v McElvy (1969, 2nd Dist) 276 Cal App 2d 709, 82 Cal Rptr 521.*

13. Demand and Refusal; Future Performance

A writ of mandamus will not be issued to be effectual only in the event that some tribunal, board, or officer subsequently determine the matter then pending before it in a certain way; the act which will be compelled must be one to the performance of which the complaining party is entitled at the institution of his proceeding; and it is the refusal or neglect to perform an act which is enjoined by the law as a present duty that serves as a foundation for the proceeding. *McGinnis v Mayor & Common Council of San Jose (1908) 153 Cal 711, 96 P 367.*

A duty must exist at the time of the application for mandamus to be enforceable thereby. *Kentfield v Reclamation Bd. of California (1934) 137 Cal App 675, 31 P2d 431.*

Before an appellate court will issue a writ of mandate compelling a superior court to act, a demand for action on that court should have been made, and a petition for a writ will be denied where the demand has not been made. *Bank of America Nat'l Trust & Sav. Asso. v Superior Court of Los Angeles County (1936) 15 Cal App 2d 279, 59 P2d 461.*

Mandamus will not issue to compel the performance of acts on the part of officers which they are not presently required to execute, but which they may merely have to do at some time in the future. *McMullen v Glenn-Colusa Irrigation Dist. (1936) 17 Cal App 2d 696, 62 P2d 1083.*

Mandamus will not lie to prevent the performance of future acts. *Communist Party of United States v Peek (1942) 20 Cal 2d 536, 127 P2d 889.*

Mandamus is never granted to compel the performance of an act until there has been an actual as distinguished from an anticipated refusal. *Friedland v Superior Court of Sacramento County (1945) 67 Cal App 2d 619, 155 P2d 90.*

Courts will not issue mandamus to become effective only if board acts in certain way. *Berkeley Unified School Dist. v Berkeley (1956, 1st Dist) 141 Cal App 2d 841, 297 P2d 710.*

Mere fact that refusal of demand for performance of act is anticipated does not warrant issuance of writ of mandamus directing performance of act. *Berkeley Unified School Dist. v Berkeley (1956, 1st Dist) 141 Cal App 2d 841, 297 P2d 710.*

Mandamus will not issue to compel performance of future acts or for mere anticipated or possible refusal to perform future duty. *Diller v Flynn (1964, 1st Dist) 226 Cal App 2d 449, 38 Cal Rptr 229.*

14. Discretion of Court

The grant of a writ of mandamus is not a matter of right, but is largely within the court's discretion; the writ will not issue where it would be of no benefit to the applicant, or if he does not establish his right to the relief sought; but the discretion of the court is not arbitrary and must be exercised in accordance with the established rules of law; it would be an abuse of discretion to refuse the writ to one who has a substantial right to protect or enforce what may be accomplished thereby, and for which there is no other plain, speedy, or adequate remedy in the ordinary course of law. *Gay v Torrance (1904) 145 Cal 144, 78 P 540.*

Mandamus is awarded not as a matter of right but in the exercise of a sound judicial discretion. *Hutchison v Reclamation Dist. No. 1619 (1927) 81 Cal App 427, 254 P 606.*

The court may not arbitrarily grant or refuse a writ of mandamus but its discretion is to be exercised in accordance with established rules. *Kentfield v Reclamation Bd. of California (1934) 137 Cal App 675, 31 P2d 431.*

The grant or refusal of the writ of mandate rests, to a considerable extent, in the discretion of the court, and a conclusion should be reached which will promote justice. *Betty v Superior Court of Los Angeles County (1941) 18 Cal 2d 619, 116 P2d 947.*

The issuance of a writ of mandamus rests within the discretion of the court, and is dependent on the circumstances; where the grant of the writ is likely to result in great public detriment the court is warranted in denying it. *Ferenz v Superior Court of Sacramento County (1942) 53 Cal App 2d 639, 128 P2d 48.*

Mandamus lies in court's discretion, but where one has substantial right which cannot be otherwise enforced he is entitled as matter of right to the writ, and it would be abuse of discretion to refuse it. *Dowell v Superior Court of San Francisco (1956) 47 Cal 2d 483, 304 P2d 1009.*

Issuance of mandamus lies within court's sound discretion, even where questions of constitutionality are raised. *Barnard v Municipal Court of San Francisco (1956, 1st Dist) 142 Cal App 2d 324, 298 P2d 679.*

Proceeding for writ of mandate is equitable proceeding, in which trial court is vested with wide discretion. *Allen v Los Angeles County Dist. Council of Carpenters (1959) 51 Cal 2d 805, 337 P2d 457.*

Proceeding for writ of mandate is equitable proceeding in which trial court is vested with wide discretion; doctrine of "unclean hands" was applicable in such proceeding where court determined that plaintiffs participated in conspiracy and that each of them sought aid of court with unclean hands in that they were unjust, unfair and inequitable in their acts and dealings. *Crestlawn Memorial Park Asso. v Sobieski (1962, 2nd Dist) 210 Cal App 2d 43, 26 Cal Rptr 421.*

Though granting or denying writ of mandamus lies ordinarily in court's discretion, where plaintiff shows compliance with requirements for its issuance, including lack of any plain, speedy and adequate remedy in usual course of law, he may be entitled to mandate as matter of right. *Flora Crane Service, Inc. v Ross (1964) 61 Cal 2d 199, 37 Cal Rptr 425, 390 P2d 193.*

A judge hearing a mandamus proceeding may properly consider, in deciding whether to issue a peremptory writ, all relevant evidence contemplated by the issues, including (except where passing on a demurrer) facts not existing until after the petition for writ of mandate was filed, and must apprise himself of any such facts which would render the dispute moot or the remedy useless. *Bruce v Gregory (1967) 65 Cal 2d 666, 56 Cal Rptr 265, 423 P2d 193.*

The decision whether to grant or deny a writ of mandate lies within the sound discretion of the court, and one of the chief considerations in the exercise of that discretion is the effect of the court's order in promoting the ends of justice. *McDaniel v San Francisco (1968, 1st Dist) 259 Cal App 2d 356, 66 Cal Rptr 384.*

The exercise of jurisdiction in mandamus rests to a considerable extent in the wise discretion of the court. *Wheelright v County of Marin (1970) 2 Cal 3d 448, 85 Cal Rptr 809, 467 P2d 537.*

Although a foster mother's conviction under *Pen C § 273d* continued to operate as a non-exemptible disqualifying criminal offense under *H & S C § 1522(g)*, it did not prohibit the trial court from exercising discretion to allow children to remain in their placement in the mother's home because *W & I C § 361.4* did not apply when the issue was whether a child was to be removed from an existing placement if a criminal records check revealed a conviction occurring after the placement; based on this, and because a department of children and family services did not allege that the trial court otherwise abused its discretion in refusing to remove children from their placement, the court denied the department's petition for a writ of mandate. *Los Angeles County Dept. of Children & Family Services v Superior Court (2003, 2nd Dist) 112 Cal App 4th 509.*

15. Existence of Other Remedy

The writ will be denied if relief may be obtained without its issuance and its issuance would injuriously affect the public interest. *Hutchison v Reclamation Dist. No. 1619 (1927) 81 Cal App 427, 254 P 606.*

Where the reviewing court deems the remedy by appeal adequate, it may deny mandamus. *Wells Fargo & Co. v San Francisco (1944) 25 Cal 2d 37, 152 P2d 625.*

A writ of mandate will issue only where a legal duty is established and no other sufficient means exists for such enforcement; the legal duty sought to be compelled must be one which the law specially enjoins. *Sherman v Quinn (1948) 31 Cal 2d 661, 192 P2d 17.*

Generally, extraordinary remedy of mandate is not available when other remedies at law are adequate. *Tevis v San Francisco (1954) 43 Cal 2d 190, 272 P2d 757.*

Mandamus will issue where there is no plain, speedy, and adequate remedy in ordinary course of law to compel performance of an act which the law specifically enjoins or to compel the admission of a party to the use and enjoyment of a right to which he is entitled and from which he is unlawfully precluded. *Sharff v Superior Court of San Francisco (1955) 44 Cal 2d 508, 282 P2d 896.*

Absent exceptional circumstances, petitioners for writ of mandate will normally be relegated to their remedies in court of general jurisdiction. *County of Los Angeles v Nesvig (1965, 2nd Dist) 231 Cal App 2d 603, 41 Cal Rptr 918.*

Mandamus, to effect execution under former CCP § 710 (see now *CCP § 708.710* et seq.), is not an appropriate remedy to deal with situations where, before the writ may properly issue, a determination must first be made that an assignment of a debt is a fraudulent transfer or that it merely creates a subordinate security interest. Use of the extraordinary remedy of mandamus is appropriate only when other remedies are inadequate. *Eilken v Morrison (1969, 2nd Dist) 3 Cal App 3d 25, 83 Cal Rptr 336.*

The general rule that mandamus will issue only after final order or decision of the administrative agency which is involved is subject to a limited number of exceptions. *Sail'er Inn, Inc. v Kirby (1971) 5 Cal 3d 1, 95 Cal Rptr 329, 485 P2d 529.*

A writ of mandate will lie where there is no plain, speedy, and adequate alternative remedy, where the respondent has a duty to perform, and where petitioner has a clear and beneficial right to performance. The petitioner has the burden to establish the inadequacy of other relief. *Pacific & Southwest Annual Conference of United Methodist Church v Superior Court of San Diego County (1978, 4th Dist) 82 Cal App 3d 72, 147 Cal Rptr 44.*

C. RIGHTS AND DUTIES ENFORCEABLE

16. In General

The writ of mandate is never employed for the purpose of trying title to property, whether the property be the right to land, or to an office, or to a franchise. *Gregory v Blanchard (1893) 98 Cal 311, 33 P 199.*

Mandamus cannot be invoked to compel performance of an act which cannot be performed within this state but must be done, if at all, in another state. *Hobbs v Tom Reed Gold Mining Co. (1913) 164 Cal 497, 129 P 781.*

The performance of a moral duty may not be compelled by mandate. *Ramsay v Cullen (1921) 56 Cal App 5, 204 P 251.*

Mandamus may not be issued to compel an executor to litigate a rejected claim in a foreign jurisdiction. *Park v Walsh (1927) 82 Cal App 379, 255 P 773.*

If action by two or more boards is made by law a prerequisite to action by a third party, mandamus will not lie to compel the third party to act in the absence of a showing that the boards did act; until such time, the third party has no legal duty to act. *Valley Motor Lines, Inc. v Riley (1937) 22 Cal App 2d 233, 70 P2d 672.*

A writ of mandate will not lie to compel a local union to restore to membership one expelled therefrom where he has failed to exhaust all remedies provided by the constitution and bylaws of the union, such as taking a final appeal to the general convention. *Bush v International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators (1942) 55 Cal App 2d 357, 130 P2d 788.*

Where attempt is made by mutual water company's successor in interest to cut off supply of water to which shareholder or user is entitled, injured person has remedy by suit in mandamus; thus, suit in equity to enjoin threatened transfer cannot be maintained. *Erwin v Gage Canal Co. (1964, 4th Dist) 226 Cal App 2d 189, 37 Cal Rptr 901.*

Writ of mandamus requiring savings and loan association to permit its director to inspect and make extracts of its records should be directed to only one present inspection by director and should not, by its terms, be extended to future inspections where there was nothing in record to indicate that association would not in future comply with law. *Diller v Flynn (1964, 1st Dist) 226 Cal App 2d 449, 38 Cal Rptr 229.*

Mandate will not lie to perform a future duty if no present duty to perform exists. *Fitch v Justice Court for Anderson Valley Judicial Dist. (1972, 1st Dist) 24 Cal App 3d 492, 101 Cal Rptr 227.*

By declaring a water shortage emergency condition and enacting a moratorium on new water service, a municipal water district acts in a legislative, rather than an adjudicatory, capacity. Such action by a water district is not subject to judicial review under *CCP § 1094.5* but is reviewable only by means of ordinary mandate under *CCP § 1085*, in which case the court is limited to a determination whether the district's actions were arbitrary, capricious, or entirely lacking in evidentiary support or whether the district failed to follow the procedure and give the notices required by law. *Swanson v Marin Municipal Water Dist. (1976, 1st Dist) 56 Cal App 3d 512, 128 Cal Rptr 485.*

Inasmuch as there was no requirement of a hearing upon an appeal made pursuant to Cal. Admin. Code, tit. 8, § 303, subd. (e), providing that if appeal was made to the full Fair Employment Practice Commission, the commission should review the entire file and may in its discretion hear the parties, former Lab C § 1428, providing that every final order or decision of the commission was subject to judicial review in accordance with the law, would be construed as requiring review of dismissals pursuant to *CCP § 1085*, providing for ordinary mandamus, rather than to *CCP § 1094.5*, providing for administrative mandamus. Meaningful judicial review of a dismissal by the commission of an employment discrimination complaint does not require formal findings of fact, provided the court has an adequate record from which it can determine whether the agency's action was arbitrary, capricious or an abuse of discretion. *Mahdavi v Fair Employment Practice Com. (1977, Cal App) 67 Cal App 3d 326, 136 Cal Rptr 421.*

In a proceeding for a writ of mandamus to vacate a city's decision suspending a police officer for three days, placing him in the status of a probationary employee for six months and reducing his pay grade by two steps, the trial court properly reviewed the matter pursuant to *CCP § 1094.5*, the administrative mandamus statute, rather than that of traditional mandate pursuant to CCP § 1085, and properly employed the independent judgment test. The record indicated that in the course of the disciplinary hearing, the city administrator was required to apply previously adopted rules to specific facts to reach a conclusion affecting the probationary and pay grade rights of the officer. *Estes v Grover City (1978, 2nd Dist) 82 Cal App 3d 509, 147 Cal Rptr 131.*

In an action by a developer against a city, the trial court erred in its conclusion that the denial of the developer's application for rezoning property was a quasi-judicial act reviewable under *CCP § 1094.5* (administrative mandamus), rather than a legislative act reviewable under *CCP § 1085* (ordinary mandamus). Although a decision granting a variance, a conditional use permit, or an exception to use is an administrative act, a decision on an application for rezoning is a legislative act. *Toso v Santa Barbara (1980, 2nd Dist) 101 Cal App 3d 934, 162 Cal Rptr 210.*

The superior court properly denied a petition for peremptory writ of mandate sought by a city police chief under *CCP § 1085*, to require the city to either rescind its decision to assign him to a new position or to grant him an administrative appeal of that decision. The chief was transferred to the new position pending a hearing on his application for disability retirement, which was ultimately denied. The city's decisions to reassign the officer and its subsequent denial of his application for disability retirement affected his employment and were clearly adjudicatory. Therefore, the trial court properly determined the officer was required to petition for relief under *CCP § 1094.5*, rather than under § 1085. *Tielsch v City of Anaheim (1984, 4th Dist) 160 Cal App 3d 570, 206 Cal Rptr 738.*

Whether a petitioner must proceed under *CCP § 1094.5*, to obtain judicial review of a local agency's action, or is entitled to petition under § 1085 depends on the type of action undertaken by the local agency. Generally speaking, 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. The former may be reviewed by ordinary mandate under § 1085, but the adjudicatory nature of the latter act requires that judicial review proceed pursuant to § 1094.5. *Tielsch v City of Anaheim (1984, 4th Dist) 160 Cal App 3d 570, 206 Cal Rptr 738.*

The intent of the Legislature in enacting *CCP § 1094.5* (adminstrative mandamus), was to authorize judicial review only of the exercise by an administrative agency of an adjudicatory or quasi-judicial function. Where an agency is exercising a quasi-legislative function, however, judicial review must proceed under ordinary or traditional mandamus (*CCP § 1085*). The distinction between the quasi-legislative and quasi-judicial decision contemplates the function performed rather than the area of performance. The mere fact that an agency proceeding may contain certain characteristics of the judicial process does not convert the proceeding into a quasi-judicial function. *Langsam v City of Sausalito (1987, 1st Dist) 190 Cal App 3d 871, 235 Cal Rptr 672.*

Because *Cal. Educ. Code § 44916* required new certificated teachers to be informed in writing of the employee's classification at the time of initial employment during each academic year, and the teacher was not informed of the classification until two weeks after the teacher began work, the teacher was not given timely notice of the teacher's status and under § 44916, the teacher was considered a probationary employee; because the teacher was not given timely notice of the school district's decision not to rehire the teacher, the district was obligated, pursuant to *Cal. Educ. Code § § 44949*, subd. (a), 44955, subds. (a), (c), to reemploy the teacher, who was entitled to a writ of mandate to compel such pursuant to Cal. *Code Civ. Proc. § 1085*, subd. (a). *Kavanaugh v West Sonoma County Union High School Dist. (2003) 29 Cal 4th 911, 129 Cal Rptr 2d 811, 62 P3d 54.*

Challenge to a county retirement system's decision to increase employer contributions was not subject to an anti-SLAPP motion because the system's decision, from which the challenge arose, was not an act in furtherance of the right to free speech. To decide otherwise would have significantly burdened the petition rights of those seeking mandamus

review for most types of governmental action because many of the public entity decisions reviewable by mandamus or administrative mandamus were arrived at after discussion and a vote at a public meeting. *San Ramon Valley Fire Protection Dist. v Contra Costa County Employees' Retirement Assn. (2004, 1st Dist) 125 Cal App 4th 343.*

In a city's action seeking the return of funds deposited in a bank, a writ of mandate against the bank under *CCP § § 1085, 1086* was improper because the asserted duty to return the funds did not arise from any office, trust, or station occupied by the bank or from the operation of *Gov C § § 53635.2, 53642, 53644. City of King City v Community Bank of Central California (2005, 6th Dist) 131 Cal App 4th 913.*

17. Title to Office

The rule that title to office cannot be incidentally determined in mandamus is merely one of procedure, and is not jurisdictional, and its application to a particular case involved only the exercise of a sound legal discretion; where there are two persons each claiming to be de facto holder of an office, each of whom has appointed a different person as his secretary, the situation is one of sufficient urgency to warrant the maintenance by one of such appointees of a proceeding in mandamus against the auditor for the approval of his claim for salary, in which proceeding it may be incidentally determined who is the de facto office holder. *McKannay v Horton (1907) 151 Cal 711, 91 P 598.*

Title to office cannot be tried by mandamus, but where the writ is invoked to enforce a specific duty, aid will not be refused merely because occupancy or incumbency or title to an office is incidentally involved. *Petersen v Morse (1920) 48 Cal App 428, 192 P 51.*

Generally, title to public office cannot be tried in a mandamus proceeding for the reason that quo warranto is an adequate remedy; it is however proper in mandamus to determine whether the office claimed by a person legally exists; and title to office may incidentally be determined in mandamus, a discretion resting with the court to determine whether the title should be so determined. *Stout v Democratic County Cent. Committee (1952) 40 Cal 2d 91, 251 P2d 321.*

Title to public office cannot be tried in mandamus proceedings; it is only when title is incidentally involved that mandamus will lie. *Board of Supervisors v Superior Court of Nevada County (1957, 3rd Dist) 150 Cal App 2d 618, 310 P2d 37.*

Though mandate ordinarily is not appropriate remedy to determine title to public office, where two persons are purported to hold office, mandamus lies to determine which is the de facto officer, and, while legal title is not adjudicated, court examines question of legal title, and person having best claim thereto is held to be the de facto officer. *Woodmansee v Lowery (1959, 2nd Dist) 167 Cal App 2d 645, 334 P2d 991.*

18. Civil Rights

Mandamus may be issued to compel the admission of a party to the use and enjoyment of a right from which he is unlawfully precluded, including civil rights covered by *CC § 51. Stone v Board of Directors (1941) 47 Cal App 2d 749, 118 P2d 866.*

Civil right may be enforced by mandamus. *Wrather-Alvarez Broadcasting, Inc. v Hewicker (1957, 4th Dist) 147 Cal App 2d 509, 305 P2d 236.*

In a city's action seeking the return of funds deposited in a bank, a writ of mandate against the bank under *CCP § § 1085, 1086* was improper because the asserted duty to return the funds did not arise from any office, trust, or station occupied by the bank or from the operation of *Gov C § § 53635.2, 53642, 53644. City of King City v Community Bank of Central California (2005, 6th Dist) 131 Cal App 4th 913.*

On appeal from a mandamus action by voters, the reviewing court found that no substantial evidence, as required by *CCP § 1085*, showed improper involvement of a private corporation in California's fax voting scheme. *Bridgeman v. McPherson (2006, 3d Dist) 141 Cal App 4th 277, 45 Cal Rptr 3d 813, 2006 Cal App LEXIS 1067.*

19. Contractual Rights and Duties

Contract obligations cannot be enforced by mandate. *Barber v Mulford (1897) 117 Cal 356, 49 P 206.*

Performance of duties of a water company under a contract cannot be enforced by mandate. *Perrine v San Jacinto Valley Water Co. (1906) 4 Cal App 376, 88 P 293.*

If a contractual right is so inseparably bound with an imperative duty laid on public officials by law as to require the performance of the duty of the officers to further secure such right, mandamus may be invoked to coerce such official action. *Moreing v Shields (1915) 28 Cal App 513, 152 P 964.*

The obligation of a contract creating a relation upon which the law imposes rights and duties enforceable by mandate may be enforced by mandamus. *Noble v California Prune & Apricot Growers Asso. (1929) 98 Cal App 230, 276 P 636.*

Writ of mandate is not available for settlement of purely private controversies arising out of contract, express or implied, or negligent or other wrongful conduct. *Bollotin v Workman Service Co. (1954) 128 Cal App 2d 339, 275 P2d 599.*

In a mandamus proceeding to compel the governing board of a county unified school district to reinstate a tenured teacher who inadvertently failed to give the district timely notification, pursuant to Ed. Code, § 13260, of his intent to remain in the employ of the district for the subsequent school year, the trial court properly found that the board abused its discretion in refusing to reemploy the teacher, where substantial evidence showed that the board had become aware of the teacher's intent to remain employed shortly after the last day for such notification, had taken no action whatsoever to employ another teacher, and thus had suffered no prejudice by the teacher's inadvertent failure to notify the board of his intent to remain employed with the district. *California Teachers Asso. v Governing Board of Mariposa County Unified School Dist. (1977, 5th Dist) 70 Cal App 3d 833, 139 Cal Rptr 155.*

Because a grievance against a public employer was untimely filed, a union had no right to the appeal procedure under the parties' memorandum of understanding and was not entitled to a writ of mandate. *American Federation of State, County & Municipal Employees, Local 1902 v Metropolitan Water District of Southern California (2005, Cal App 2nd Dist) 2005 Cal App LEXIS 129.*

20. Duties of Corporations and Officers

Mandamus is a proper remedy for enforcing the statutory duty of a corporation on whom is impressed a public trust for the furnishing of water to all those who come within the class or community for whose alleged benefit it was created. *Price v Riverside Land & Irrigating Co. (1880) 56 Cal 431*.

A stockholder of a corporation is entitled to bring mandamus proceedings to compel its secretary to permit him to inspect its books, without showing any reason or occasion for making the examination. *Johnson v Langdon (1902) 135 Cal 624, 67 P 1050.*

Mandamus lies to compel the officers of a mining corporation organized in another state, with its mining property located therein, but having its principal place of business in this state, and with its directors residing here, to deliver an order to the superintendent of the mining property to permit a stockholder to examine the mine, under former CC § 589 (see now *Pub Res C § 3984* in the absence of evidence of the law of the foreign state. *Hobbs v Tom Reed Gold Mining Co. (1913) 164 Cal 497, 129 P 781.*

Mandamus will lie at the instance of the stockholders of a corporation to compel a recalcitrant board of directors to call an annual meeting of stockholders for the purpose of electing a board of directors. *Stabler v El Dora Oil Co. (1915) 27 Cal App 516, 150 P 643.*

The right of a stockholder of a corporation to inspect the corporation books may be enforced by mandamus. *Webster v Bartlett Estate Co. (1917) 35 Cal App 283, 169 P 702.*

A writ of mandamus to compel a corporation and its secretary to transfer a certificate of stock on the books of the corporation will be denied where such certificate, which constitutes community property, has been indorsed and delivered to the petitioner by her husband without consideration therefor, and without the consent of the wife thereto, and the wife has given notice to the corporation of her objection to the transfer of said certificate; under such circumstances a proceeding in equity is the most appropriate remedy. *Mahl v E. A. Portal Co. (1927) 81 Cal App 494, 254 P 278.*

Mandamus is the proper remedy where a stockholder in a mutual water company is denied his proportionate share of water. *Lindsay-Strathmore Irrigation Dist. v Wutchumna Water Co. (1931) 111 Cal App 688, 296 P 933.*

The duty of a corporation to file amended articles of incorporation is one compellable by mandamus in a proper case. *Pratt-Low Preserving Co. v Jordan (1933) 217 Cal 292, 18 P2d 676.*

Mandamus will issue to compel a corporation to permit a shareholder to inspect its books when the condition mentioned in former CC § 355 (see now *Corp C § § 1600* et seq.) exists. *Private Investors, Inc. v Homestake Mining Co. (1936) 11 Cal App 2d 488, 54 P2d 535.*

A mandamus proceeding by a corporation to compel a former officer to turn property over to the corporation, is not a proceeding on a contract under § 395, and the corporation's claim for money damages is merely incidental to the main proceeding to compel performance of a duty imposed by law. *Liberal Catholic Church v Rogers (1944) 65 Cal App 2d 196, 150 P2d 486.*

A medical staff bylaw of a private hospital that required that an applicant for staff privileges possess the "ability to work with others" could not be said to be invalid on the ground it was so vague and uncertain as to provide a substantial danger of arbitrary or discriminatory application. In the context of the bylaw, the rule required that an applicant demonstrate that he had the ability to "work with" others in the hospital environment in a manner which would insure "that any patient treated by [him] in the hospital will be given a high quality of medical care." Thus, it was required to be read to demand a showing, in cases of rejection on that ground, that an applicant's inability to work with others in the hospital setting was such as to present a real and substantial danger that patients treated by him might receive other than a high quality of medical care at the facility if he were admitted to membership. As so construed, the bylaw did not suffer from substantive irrationality. *Miller v Eisenhower Medical Center (1980) 27 Cal 3d 614, 166 Cal Rptr 826, 614 P2d 258.*

D. DUTIES OF PUBLIC OFFICERS, BOARDS, AND COMMISSIONS

(1) GENERALLY

21. In General

One other than an officer cannot be compelled to perform an official act. *Leach v Aitken (1891) 91 Cal 484, 28 P 777.*

The provisions of *CCP § § 312* and *338* are applicable to actions in mandamus to enforce a statutory liability. *Dillon v Board of Pension Comm'rs (1941) 18 Cal 2d 427, 116 P2d 37.*

It is proper office of writ of mandamus to force particular action by officer, when law clearly established petitioner's right to such action, and, in particular, to compel act by officer who refuses to perform under erroneous conception of his duties. *Berkeley Unified School Dist. v Berkeley (1956, 1st Dist) 141 Cal App 2d 841, 297 P2d 710.*

A petition for a writ of mandate under *CCP § 1085*, rather than under *CCP § 1094.5*, is appropriate to review administrative action of an agency acting in a legislative capacity. *Davies v Contractors' State License Board (1978, 1st Dist) 79 Cal App 3d 940, 145 Cal Rptr 284.*

A mandamus proceeding instituted by a physician to compel a private hospital to permit the physician to use the hospital's chronic renal hemodialysis facility was a proceeding for traditional mandate (*CCP § 1085*), rather than a proceeding in administrative mandamus (*CCP § 1094.5*), where the challenged hearing and decision of the hospital's executive committee and board of trustees concerned the question of whether the hospital should continue its "closed-staff" rule governing operation of the facility, a matter clearly "quasi-legislative" in nature, rather than the question of application of such a rule to the petitioner physician individually. *Lewin v St. Joseph Hospital (1978, 4th Dist) 82 Cal App 3d 368, 146 Cal Rptr 892.*

Mandamus is available to compel a public agency to perform an act prescribed by law. It is available to compel a public agency's performance or correct an agency's abuse of discretion whether the action being compelled or corrected can itself be characterized as "ministerial" or "legislative." Once the Legislature has created a duty in a public agency, a court may not limit, on public policy grounds, the availability of a writ of mandate to enforce that duty. *Santa Clara County Counsel Attorneys Ass'n v Woodside (1994) 7 Cal 4th 525, 28 Cal Rptr 2d 617, 869 P2d 1142.*

Application of a deferential standard of review in denying a union's mandamus petition under *CCP § 1085(a)* to compel a city to arbitrate a bargaining impasse was error; because a finding of necessity permitted acts outside the city's ordinary powers, review was *de novo*. *San Francisco Fire Fighters Local 798 v City & County of San Francisco (2005, Cal App 1st Dist) 2005 Cal App LEXIS 69.*

22. Discretionary or Permissive Duties or Acts; Compelling Exercise of Discretion

Mandamus will not lie to enforce the exercise of discretion in a particular manner. *Stanley-Taylor Co. v Board of Supervisors (1902) 135 Cal 486, 67 P 783.*

Whenever a discretion is reposed in a body as to when it shall act, that act shall be seasonably taken, and if the discretion is unduly prolonged, the court will by mandamus compel action to be taken. *Kentfield v Reclamation Bd. of California (1934) 137 Cal App 675, 31 P2d 431.*

Though mandamus will not lie to compel the performance of a purely discretionary act by an officer in a particular manner, where the facts as admitted or proved are susceptible of but one construction or conclusion, the officer may be compelled to act accordingly. *Ferrill v Ellis (1942) 50 Cal App 2d 743, 123 P2d 857.*

Mandamus may not compel the exercise of official discretion in any particular manner; it may only direct that the officer act, and must leave the matter as to what action he will take to his determination. *Patten v County of San Diego (1951) 106 Cal App 2d 467, 235 P2d 217.*

Mandamus is not available to compel the exercise of a public officer's discretion in a particular manner. *Litzius v Whitmore (1970, 1st Dist) 4 Cal App 3d 244, 84 Cal Rptr 340.*

Though ordinarily mandamus may not be available to compel the exercise by a court or officer of the discretion possessed by them in a particular manner, or to reach a particular result, mandamus does lie to command the exercise of discretion. *In re Veterans' Industries, Inc. (1970, 2nd Dist) 8 Cal App 3d 902, 88 Cal Rptr 303.*

A petition for a writ of mandamus under *CCP § 1085*, seeking to require the Insurance Commissioner and the Secretary of Business and Transportation to collect certain data pertaining to companies engaged in the insurance business, including the sex and race of employees and board of directors, the nature and location of real property owned by the companies and tax savings resulting from Proposition 13, did not state a cause of action, where the statutory duties allegedly requiring the collection of such data were defined in the broadest of terms, where the Legislature had not specified any procedures to be employed in that performance, and where it was not alleged that defendants failed to perform any of the duties explicitly exacted by any of the various statutes. The Legislature's silence as to method necessarily imported that defendants were invested with discretion in selecting and taking administrative actions pursuant to the statutes. The remedy of traditional mandamus provided by *CCP § 1085*, will not lie to control the manner in which an administrative officer is to exercise discretion lawfully entrusted to him. *Women Organized for Employment v Stein (1980, 1st Dist) 114 Cal App 3d 133, 170 Cal Rptr 176.*

A petitioner may not by writ of mandate under *CCP § 1085*, seek to control the manner in which a public official's discretion is exercised. *Parker v Dumke (1981, 5th Dist) 117 Cal App 3d 237, 172 Cal Rptr 577.*

Provisions in *Cal. Health & Safety Code § 41865(m),* (n) under the Connelly-Areias-Chandler Rice Straw Burning Reduction Act of 1991, *Cal. Health & Safety Code § 41865* et seq., directing state agencies to develop and prepare a diversion plan and progress report are within the category of quasi-legislative acts, and the subsections do not eliminate agency discretion but require it; since the manner of preparation and their contents were left to the discretion of the agencies involved, review was limited to the determination of whether the findings, conclusions, and recommendations were arbitrary, capricious, or unsupported by substantial evidence, and the court noted that traditional mandamus under Cal. *Code Civ. Proc. § 1085* could not be used to force the exercise of discretion in a particular manner or to reach a particular result as contended by rice growers who sought such a writ against the agencies. *Carrancho v California Air Resources Bd. (2003, Cal App 3rd Dist) 2003 Cal App LEXIS 1405.*

Mandate petition was properly denied by a trial court because an employer did not violate *Lab C § 4850* by refusing to cash-out excess unused vacation time under Los Angeles County, Cal., Code § 6.18.080E for two disabled employees prior to retirement for purposes of determining pension payments; because the excess vacation time was merely an entitlement that the employees might have reasonably received as a condition of employment, *Lab C § 4850* did not apply. *Los Angeles County Prof. Peace Officers' Assn. v County of Los Angeles (2004, Cal App 2nd Dist) 2004 Cal App LEXIS 171.*

Trial court properly denied plaintiff's *CCP § 1085* petition for a writ of mandate to compel compliance with the "mandatory statutory duties" imposed by the California Beverage Container Recycling and Litter Reduction Act, including but not limited to, *Pub Res C § 14501(g)* because § 14501(g) is a general statement of legislative intent that does not impose any affirmative duty that would be enforceable through a writ of mandate. Furthermore, the California Department of Conservation has discretion to exempt convenience zones from the certified recycling center or location requirement in Pub *Pub Res C § 14571*, pursuant to *Pub Res C § 14571.8*, and a writ of mandate will not lie to control

the Department's discretion as to establishing certified recycling centers or locations within convenience zones. *Shamsian v. Department of Conservation (2006) 136 Cal App 4th 621, 39 Cal Rptr 3d 62, 2006 Cal App LEXIS 163.*

23. -Control of Review of Discretion

Mandamus will lie to compel the exercise of discretion; but when discretion has been exercised, it will not lie to control the judgment of an officer or tribunal having discretionary or judicial functions. *Jacobs v Board of Supervisors (1893) 100 Cal 121, 34 P 630.*

Mandamus will not lie to control the discretion of the governing body of a municipality as to whether it will advertise an application for a franchise. *McGinnis v Mayor & Common Council of San Jose (1908) 153 Cal 711, 96 P 367.*

While mandamus will not lie to control the discretion of an inferior tribunal or officer, it will lie to force a particular action when the law clearly establishes the petitioner's right thereto; although the writ will not issue against an auditing body to allow a claim where the determination of whether the claim should be allowed involve the exercise of some quasi-judicial or discretionary power, the nature of the claim may be such as not to require the exercise of any judgment or discretion whatever. *Jackson v Wilde (1921) 52 Cal App 259, 198 P 822.*

Mandamus will not control discretion, but is appropriate only to compel the performance of a duty or an act by an officer, etc., which the law makes it incumbent on him as such to perform. *Lucchesi v Superior Court of California (1924) 68 Cal App 634, 229 P 996.*

An officer in whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as part of his official function. *Hansen v State Board of Equalization (1941) 43 Cal App 2d 176, 110 P2d 453.*

Mandamus may not be employed to compel a public administrative agency possessing discretionary power to act in a particular manner; the court in response to appropriate application may compel such agency to act, but it may not substitute its discretion for the discretion properly vested in the agency. *Lindell Co. v Board of Permit Appeals (1943) 23 Cal 2d 303, 144 P2d 4.*

A public officer may be compelled by mandamus to perform an act which it is his legal duty to perform, but the court in such proceedings may not control the exercise of the officer's discretion nor substitute its discretion; a mandamus will not issue to force the exercise of discretion in a particular manner. *Allen v Bowron (1944) 64 Cal App 2d 311, 148 P2d 673.*

Mandamus may not be issued to control the exercise of discretion by an officer or an inferior tribunal. *Friedland v Superior Court of Sacramento County (1945) 67 Cal App 2d 619, 155 P2d 90.*

Mandamus may not be employed to effect a desired decision contrary to the opinion of an official or a board vested with discretionary power. *Redding v Los Angeles (1947) 81 Cal App 2d 888, 185 P2d 430.*

Mandamus will not lie to control discretion within the area lawfully entrusted to an administrative agency. *Faulkner v California Toll Bridge Authority (1952) 40 Cal 2d 317, 253 P2d 659.*

Mandamus may issue to compel performance of an act which law specifically enjoins, but will not lie to control discretion within area lawfully entrusted to an administrative board. *San Francisco v Superior Court of San Francisco (1959) 53 Cal 2d 236, 1 Cal Rptr 158, 347 P2d 294.*

The writ of mandamus is available to compel the performance of an act which the law specially enjoins (*Code Civ Proc, § 1085*), but it is limited to the enforcement of purely ministerial duties and will not lie to control discretion within the area lawfully entrusted to an administrative body. *Gong v Fremont (1967, 1st Dist) 250 Cal App 2d 568, 58 Cal Rptr 664.*

Mandamus issues under *Code Civ Proc, § 1085*, only to compel performance of an act which the law specially enjoins, and it will not lie to control discretion within the area lawfully entrusted to an administrative agency. *Hilton v Board of Supervisors (1970, 2nd Dist) 7 Cal App 3d 708, 86 Cal Rptr 754.*

Mandamus will not lie to control discretion within an area lawfully entrusted to an administrative board. *McLeod v Board of Pension Comm'rs (1970, 2nd Dist) 14 Cal App 3d 23, 94 Cal Rptr 58.*

The remedy of mandamus (*Code Civ Proc, § 1085*), is applicable against a county, city, or other public body or public officer, but the writ will not lie to control discretion conferred upon a public officer or agency. *People ex rel. Younger v County of El Dorado (1971) 5 Cal 3d 480, 96 Cal Rptr 553, 487 P2d 1193.*

The appropriate remedy for the California Coastal Zone Conservation Commission's conduct purportedly in excess of its jurisdiction in hearing an appeal from the regional commission's order granting a permit for development of certain coastal lands was administrative mandamus under *CCP § 1094.5*, rather than "traditional" mandamus under *CCP § 1085*, to compel affirmance of the regional commission's approval of the permit. *State v Superior Court of Orange County (1974) 12 Cal 3d 237, 115 Cal Rptr 497, 524 P2d 1281.*

While mandamus will not lie to control the exercise of discretion by a city official, the writ is available to correct abuse of discretion. The traditional mandamus provisions of *CCP § 1085*, may be employed to compel the performance of a duty which is purely ministerial in character; but they cannot be applied to control discretion as to a matter lawfully entrusted to a city. *Terminal Plaza Corp. v City and County of San Francisco (1986, 1st Dist) 186 Cal App 3d 814, 230 Cal Rptr 875.*

24. -Abuse of Discretion

Mandamus may issue to correct an abuse of discretion. *Wood v Strother (1888) 76 Cal 545, 18 P 766.*

Generally mandamus will not lie to compel a public officer to exercise his discretion in any particular manner, but where the law imposes on him specific duties and he either whimsically or arbitrarily refused to perform those duties, or where his refusal to perform is based on an erroneous conclusion of his legal duties, or where the right of the individual is so fixed that the refusal of the official to act is a clear abuse of discretion, mandamus is the proper remedy. *Hartsock v Merritt (1928) 94 Cal App 431, 271 P 381.*

A writ of mandate may not issue to compel an officer or board to act in any particular way except in the performance of ministerial duties, and never to control the exercise of discretion unless it has been abused. *Morales v Ingels (1938) 30 Cal App 2d 182, 85 P2d 907.*

The remedy of mandamus is available where a local board has acted arbitrarily and clearly in abuse of its discretion. *Naughton v Retirement Board of San Francisco (1941) 43 Cal App 2d 254, 110 P2d 714.*

Where a public board is vested with a discretion, mandamus is not a proper remedy to compel the manner of its exercise except to correct a manifest abuse of discretion. *Allan v Board of Administration of City Employees' Retirement System (1942) 55 Cal App 2d 815, 131 P2d 604.*

Mandamus is a proper remedy to compel a city council or a city service board to perform mandatory duties prescribed by charter; it will not issue to compel the performance of duties in a particular way; the exercise of discretion on the part of such officers will not be interfered with in mandamus proceeding except for arbitrary disregard of the law or for flagrant abuse of discretion. *Leftridge v Sacramento (1943) 59 Cal App 2d 516, 139 P2d 112.*

The writ of mandate is not a writ of right to be freely issued whenever a court disagrees with the policy of administrative action; it is limited to compelling the performance of an act which the law has specifically enjoined as a duty, and where a statute gives an administrative body discretion to act under certain circumstances, mandamus will not lie to compel the exercise of that discretion in a particular manner, but only to order the correction of arbitrary or capricious actions. *Hunt v State Board of Chiropractic Examiners (1948) 87 Cal App 2d 98, 196 P2d 77.*

Independently of § 1094.5, a writ of mandate may not be used to review the quasi-legislative action of an administrative body, but is available to correct an abuse of discretion on the part of an administrative agency where the action involved is quasi-judicial in nature. *Brock v Superior Court of San Francisco (1952) 109 Cal App 2d 594, 241 P2d 283.*

While mandamus will not lie to control discretion exercised by public officer or board, it will lie to correct abuse of discretion by such officer or board. *Baldwin-Lima-Hamilton Corp. v Superior Court of San Francisco (1962, 1st Dist) 208 Cal App 2d 803, 25 Cal Rptr 798.*

While writ of mandamus does not lie to control discretion conferred on public officer or agency, it will issue on showing of fraud, arbitrary action or abuse of discretion. *Bowles v Antonetti (1966, 1st Dist) 241 Cal App 2d 283, 50 Cal Rptr 370.*

The courts will interfere by mandamus when the action taken by an administrative board is so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. *Sanders v Los Angeles (1970) 3 Cal 3d 252, 90 Cal Rptr 169, 475 P2d 201.*

In addition to employing mandamus to correct errors of inferior tribunals and to prevent a failure of justice or irreparable injury where there is a clear right but an absence of any other adequate remedy, mandamus may be employed to prevent an abuse of discretion or to correct an arbitrary action that does not amount to the exercise of discretion. *In re Veterans' Industries, Inc. (1970, 2nd Dist) 8 Cal App 3d 902, 88 Cal Rptr 303.*

A writ of mandate will issue to correct a flagrant abuse of discretion or arbitrary disregard of the law by an administrative board. *McLeod v Board of Pension Comm'rs (1970, 2nd Dist) 14 Cal App 3d 23, 94 Cal Rptr 58.*

Mandamus will lie to correct an abuse of discretion including an abuse occurring by virtue of a failure to exercise discretion. *Betancourt v Workmen's Compensation Appeals Board (1971, 3rd Dist) 16 Cal App 3d 408, 94 Cal Rptr 9.*

Charter school was properly granted a writ of mandate compelling a public school district to provide such facilities to the charter school serving students in the public school district because *Ed C § 47614* unambiguously required a public school district to provide facilities to a charter school based on projections that the requisite number of students from the district would be attending the charter school the following year and because the charter school's request for such facilities setting forth the number of student currently and anticipated to be enrolled in each grade level was sufficiently detailed to make its projection of 110 students inherently reasonable. *Sequoia Union High School Dist. v Aurora Charter High School (2003, 1st Dist) 112 Cal App 4th 185.*

Review of a local entity's legislative determination is through ordinary mandamus under *CCP § 1085*. Such review is limited to an inquiry into whether the action was arbitrary, capricious, or entirely lacking in evidentiary support. This test has also been formulated to add an inquiry into whether the agency's decision was contrary to established public policy, unlawful, or procedurally unfair. However the test is formulated, the ultimate questions, whether the agency's decision was arbitrary, capricious, entirely lacking in evidentiary support, contrary to established public policy, unlawful, or procedurally unfair, are essentially questions of law. With respect to these questions the trial and appellate courts perform essentially the same function, and the conclusions of the trial court are not conclusive on appeal. The only exception is where there are foundational matters of fact as to which the trial court's findings could be conclusive on appeal, where supported by substantial evidence. *Mike Moore's 24-Hour Towing v City of San Diego (1996, 4th Dist) 45 Cal App 4th 1294, 53 Cal Rptr 2d 355.*

25. Ministerial Duties

The well established principle that the State cannot be sued without its consent is not applicable as a defense to an action in mandamus to compel a public officer to perform a duty especially enjoined on it by law. *U'Ren v State Board of Control (1916) 31 Cal App 6, 159 P 615.*

Mandamus is the proper remedy to compel the performance of a ministerial act. *Williams v Stockton (1925) 195 Cal 743, 235 P 986.*

Where the discretion of an officer ceases, and the act which he is under a duty to perform is ministerial, his duty becomes absolute and can be compelled through mandamus. *Pacific Palisades Asso. v Huntington Beach (1925) 196 Cal 211, 237 P 538.*

A writ will not issue to compel one officer to perform the duties imposed by law upon another officer, but only to compel the performance of an act which the law especially enjoins upon a particular officer. *Bandini Estate Co. v Payne (1935) 10 Cal App 2d 623, 52 P2d 959.*

Where a public officer's duties are clearly defined by statute and are purely ministerial, a writ of mandate will issue to compel him to perform them. *Mill Valley v Saxton (1940) 41 Cal App 2d 290, 106 P2d 455.*

A duty resting on a public official to perform may be enforced by a writ of mandamus. *Styring v Santa Ana (1944) 64 Cal App 2d 12, 147 P2d 689.*

Mandamus lies to compel performance of a ministerial duty, such as signing a bond or warrant or issuing a warrant. *Paso Robles War Memorial Hospital Dist. v Negley (1946) 29 Cal 2d 203, 173 P2d 813.*

A writ of mandate does not lie at the suit of everyone having a cause of action against a person occupying public office; it lies only to compel the performance of an act which the law specifically enjoins as a duty resulting from such office. *Draper v Grant (1949) 91 Cal App 2d 566, 205 P2d 399.*

Where there is no room for discretion in the performance of an act which the law specially enjoins as a duty resulting from an office, mandamus is proper. *Hawthorn v Beverly Hills (1952) 111 Cal App 2d 723, 245 P2d 352.*

Where the duty is one specifically enjoined by reason of an office, trust or station, a writ of mandate will issue. *Palmer v Fox (1953) 118 Cal App 2d 453, 258 P2d 30.*

When an official is required and authorized to do a prescribed act on a prescribed contingency, his functions are ministerial only, and mandamus may be issued to control his action on the happening of the contingency. *Palmer v Fox (1953) 118 Cal App 2d 453, 258 P2d 30.*

Critical question in determining if act required by law is ministerial in character is whether it involves exercise of judgment and discretion. *Jenkins v Knight (1956) 46 Cal 2d 220, 293 P2d 6.*

Mandamus may be issued by any court to any board or person to compel performance of act which law specifically enjoins as duty resulting from office. *Cameron v Escondido (1956, 4th Dist) 138 Cal App 2d 311, 292 P2d 60.*

Mandamus lies to compel performance of act which law specifically enjoins as duty resulting from office held by person to whom writ is directed. *Berkeley Unified School Dist. v Berkeley (1956, 1st Dist) 141 Cal App 2d 841, 297 P2d 710.*

Mandamus lies to compel municipal board and officers to do an act specifically enjoined by law. *Chapin v City Com. of Fresno (1957, 4th Dist) 149 Cal App 2d 40, 307 P2d 657.*

When official is required and authorized to do prescribed act on prescribed contingency, his functions are ministerial only, and mandamus may be issued to control his actions on happening of contingency. *Ellis v City Council of Burlingame (1963, 1st Dist) 222 Cal App 2d 490, 35 Cal Rptr 317.*

Though mandamus is proper remedy to compel performance of ministerial act, ministerial officer cannot be forced to do that which is plain duty under law prohibits. *Plum v Healdsburg (1965, 1st Dist) 237 Cal App 2d 308, 46 Cal Rptr 827.*

A mandamus proceeding challenging the method of administering the general welfare assistance program in five counties properly named the directors of the county departments of public welfare as defendants and it was not necessary that the county boards of supervisors be joined. *Welf. & Inst. Code, § § 10800-10803*, which impose on the supervisors the duty of providing aid to county indigents, also require each board to establish a county department of social services, and to appoint a director for such department, who shall be subject to the general direction of the board, and who shall, for and in its behalf, have full charge of the county department and the responsibility of administering and enforcing the code provisions pertaining to public social services. Moreover, in carrying out statutory and related social service obligations imposed on the boards of supervisors, the county directors act in a ministerial capacity, and thus any improper action or failure to act may be attacked by mandamus. *Rogers v Detrich (1976, 3rd Dist) 58 Cal App 3d 90, 128 Cal Rptr 261.*

Ordinary mandamus (*CCP § 1085*) is particularly applicable to compel the issuance of building and use permits, since they are generally ministerial in character. Where a city had adopted an ordinance providing that a building permit would be issued if the development plans submitted with an application complied with existing laws, the issuance of the permit not therefore being left to the discretion of the building inspector, and where the city had also adopted an ordinance providing that issuance of a use permit was mandatory once it was determined that the applicant had complied with a previously approved development plan, the issuance and denial of building and use permits were ministerial acts reviewable by ordinary mandamus under *CCP § 1085*. Court *House Plaza Co. v Palo Alto (1981, 1st Dist) 117 Cal App 3d 871, 173 Cal Rptr 161.*

In two separate *CCP § 1085*, mandamus proceedings, the trial court did not err in overruling the motions of the Division of Fair Employment Practices (Division) and the Fair Employment Practice Commission (Commission) to quash an alternative writ of mandamus seeking to restrain the Division and Commission from proceeding to hearing on an accusation charging a corporation with violation of the Fair Employment Practices Act under former Lab. Code, § 1410 et seq. (now *Gov. Code, § 12900* et seq.). Overruling the motion was proper, where the corporation's application for mandamus relief asserted the Commission lacked jurisdiction to hear issues raised in the accusation and that the Di-

vision failed to comply with all conditions precedent to issuance of an accusation, and the court believed a peremptory writ would be proper if in fact there had been a clear noncompliance with a condition precedent, since then dismissal of the accusation would be a ministerial act due to the Commission's lack of subject matter jurisdiction. *Motors Ins. Corp. v Division of Fair Employment Practices (1981, 2nd Dist) 118 Cal App 3d 209, 173 Cal Rptr 332.*

Where approval of a project requires only a ministerial act, without the exercise of discretion, mandamus is available to compel performance of the ministerial act (*CCP § 1085*). Conversely, the writ will not lie to control discretion conferred upon a public officer or agency. *Findleton v Board of Supervisors (1993, 3rd Dist) 12 Cal App 4th 709, 15 Cal Rptr 2d 665.*

A writ of mandate (*CCP § 1085*) will issue against a county, city, or other public body or against a public officer. However, the writ will not lie to control discretion conferred upon a public officer or agency. Two basic requirements are essential to the issuance of the writ: a clear, present, and usually ministerial duty upon the part of the respondent, and a clear, present, and beneficial right in the petitioner to the performance of that duty. *Venice Town Council v City of Los Angeles (1996, 2nd Dist) 47 Cal App 4th 1547, 55 Cal Rptr 2d 465.*

A writ of mandate may be issued by any court to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station. To warrant such relief, the petitioner must demonstrate that there is no other plain, speedy and adequate remedy, the public official or entity had a ministerial duty to perform, and the petitioner had a clear and beneficial right to performance. Generally, § 1085 may only be employed to compel the performance of a duty which is purely ministerial in character. A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists. Discretion, on the other hand, is the power conferred on public functionaries to act officially according to the dictates of their own judgment. Here, a writ of mandate was appropriate to require the general manager of a city public utilities department to sign a public works contract after the city's public utilities commission had passed an original resolution awarding the contract to plaintiff contractor pursuant to competitive bidding laws, such action by the manager being ministerial. *Transdyn/Cresci, JV v City and County of San Francisco (1999, 1st Dist) 72 Cal App 4th 746, 85 Cal Rptr 2d 512.*

The superior court had subject matter jurisdiction over an action by a home study traffic school for a writ of mandate compelling a court administrator to approve its program, since *Cal Const art VI § 10* and *CCP § 1085(a)* explicitly vested the power to issue a writ of mandate in the superior court; i.e., to order a person such as a court administrator to comply with an alleged legal duty. Since the trial court had subject matter jurisdiction it could not order transfer of the case to the Court of Appeal under *CCP § 396. Trafficschoolonline, Inc. v Superior Court (2001, 2nd Dist) 89 Cal App 4th 222, 107 Cal Rptr 2d 412.*

In the absence of legislation adopted by a city providing a credit for private open space pursuant to *Gov C § 66477*, the city had no ministerial duty to provide a subdivision developer with a specific amount of credit for private open space, and the developer had no right to performance of such a duty. Consequently, the developer was not entitled to a writ of mandate under *CCP § 1085* compelling the city to give the developer a private open space credit. *Heights v. City of Santa Cruz (2006) 138 Cal App 4th 914, 42 Cal Rptr 3d 96, 2006 Cal App LEXIS 548.*

(2) OFFICERS AND BOARDS SUBJECT TO WRIT

26. In General; Executive Officers

Where no discretion exists and specific legal duty is imposed, ministerial in character, officer of executive department of government, like any other citizen, is subject to judicial process. *Jenkins v Knight (1956) 46 Cal 2d 220, 293 P2d 6.*

The exercise of the court's power in the event of the refusal of the executive to carry out a clear legislative mandate is ordinarily by writ of mandate. *People v Horton (1968, 4th Dist) 264 Cal App 2d 192, 70 Cal Rptr 186.*

27. -Governor

The governor is subject to a writ of mandate. *O'Brien v Olson (1941) 42 Cal App 2d 449, 109 P2d 8.*

Governor should not be exempt from judicial process solely because he is chief executive and, like subordinate officer, he is amenable to mandamus to compel discharge of ministerial duty which body of citizens has right to have performed. *Jenkins v Knight (1956) 46 Cal 2d 220, 293 P2d 6.*

Many acts of governor are inherently executive or political in nature, such as granting pardons, calling special sessions of Legislature and signing or vetoing bills, and courts will not interfere with their performance, since they require exercise of judgment or discretion. *Jenkins v Knight (1956) 46 Cal 2d 220, 293 P2d 6.*

It is as important to enforce ministerial duties imposed on governor by people through Constitution as those prescribed by *Legislature. Jenkins v Knight (1956) 46 Cal 2d 220, 293 P2d 6.*

Writ of mandamus will issue to compel governor to perform ministerial acts required by law. *Jenkins v Knight (1956) 46 Cal 2d 220, 293 P2d 6.*

28. County and Municipal Officers and Boards

Either certiorari or mandamus is an appropriate remedy by which to test the proper exercise of discretion vested in a local board. *Walker v San Gabriel (1942) 20 Cal 2d 879, 129 P2d 349.*

There is no discretion involved when an obligee seeks to enforce his obligation against a municipality, and the writ will issue as a matter of right. *May v Board of Directors (1949) 34 Cal 2d 125, 208 P2d 661.*

A city council is a board which may appropriately be directed to perform a statutory duty. *American Distilling Co. v City Council of Sausalito (1950) 34 Cal 2d 660, 213 P2d 704.*

A writ of mandamus will issue as against a city or other public body or officer whenever law and justice requires such action. *Housing Authority of Los Angeles v Los Angeles (1952) 38 Cal 2d 853, 243 P2d 515.*

Mandamus is proper remedy to compel city council or city civil service board to perform its mandatory duties prescribed by charter. *Walker v County of Los Angeles (1961) 55 Cal 2d 626, 12 Cal Rptr 671, 361 P2d 247.*

Use of writ of mandate to review local board's exercise of quasi-judicial powers invokes remedy of "administrative mandamus" pursuant to § 1094.5, rather than traditional action in mandamus under this section. *Allen v Humboldt County Board of Supervisors (1963, 1st Dist) 220 Cal App 2d 877, 34 Cal Rptr 232.*

Mandamus is a proper remedy to compel city officials to perform their charter-prescribed duties; and where these duties are continuing ones, the writ may be directed to future action. *Squire v San Francisco (1970, 1st Dist) 12 Cal App 3d 974, 91 Cal Rptr 347.*

A court order compelling city officials or agencies to comply with the city charter, as interpreted by the court, does not constitute an interference with the administrative discretion of such city officials or agencies. *Squire v San Francisco (1970, 1st Dist) 12 Cal App 3d 974, 91 Cal Rptr 347.*

Mandamus is the proper remedy to compel a city council or civil service board to perform its mandatory duties prescribed by a city charter. *Le Page v Oakland (1970, 1st Dist) 13 Cal App 3d 689, 91 Cal Rptr 806.*

Mandamus lies to compel a county and appropriate county departments to negotiate with a public employees' union, pursuant to the requirements of state and county legislation, the matter of the size of the caseload carried by county social service eligibility workers. *Los Angeles County Employees Asso. v County of Los Angeles (1973, 2nd Dist) 33 Cal App 3d 1, 108 Cal Rptr 625.*

Mandamus was a proper remedy for a retired police chief seeking benefits under a collective bargaining agreement, provided he could show he was entitled to be represented by the bargaining unit that entered into the agreement with the city, and that the city abused its discretion in excluding him from the unit. *Reinbold v Santa Monica (1976, 2nd Dist) 63 Cal App 3d 433, 133 Cal Rptr 874.*

A city council in enacting or amending a zoning ordinance is not required to make express findings of fact as to the public purpose of the ordinance or its relation to the police power since rezoning of real property by a city is a legislative function and is, therefore, reviewable by ordinary mandamus pursuant to *CCP § 1085*, and since findings are not required as to legislative functions of administrative agency. *Ensign Bickford Realty Corp. v City Council of Livermore (1977, 1st Dist) 68 Cal App 3d 467, 137 Cal Rptr 304.*

A county board of supervisor's decision approving a final subdivision map is a ministerial act reviewable by ordinary mandamus pursuant to *CCP § 1085. Youngblood v Board of Supervisors (1978) 22 Cal 3d 644, 150 Cal Rptr 242, 586 P2d 556.*

In an action by a union seeking a writ of mandate requiring a city to recognize the union as a recognized employee organization under the Meyers-Milias-Brown Act (*Gov. Code, § 3500* et seq.) for an appropriate bargaining unit consisting of firemen, fire engineers, and fire captains, the fact that the city had already determined that the fire captains were management employees and therefore excluded from the unit did not require the trial court to determine, on its own review, what the appropriate unit should be. The unit was for the city to determine after consulting with the union, and such determination could be judicially upset only for an abuse of discretion, applying the traditional tests associated with a mandamus proceeding brought under *CCP § 1085*. *Covina-Azusa Fire Fighters Union v Azusa (1978, 2nd Dist) 81 Cal App 3d 48, 146 Cal Rptr 155.*

A fire fighters' union properly sought relief in traditional mandamus (*CCP § 1085*) from a city council order prohibiting firemen from using city facilities for washing personal automobiles, rather than by way of administrative mandamus (*CCP § 1094.5*), where the union did not seek review of an administrative hearing before the city council per se, but sought broader relief aimed at the avoidance of the car washing prohibition in its entirety on the ground of an alleged abuse of discretion on the part of the city in enacting the rule contrary to the provisions of the Meyers-Milias-Brown Act (*Gov. Code, § 3500* et seq.). *Vernon Fire Fighters, etc. v Vernon (1980, 2nd Dist) 107 Cal App 3d 802, 165 Cal Rptr 908.*

While mandamus will not lie to control the discretion exercised by a public officer or board, it will lie to correct an abuse of discretion by such officer or board. *Vernon Fire Fighters, etc. v Vernon (1980, 2nd Dist) 107 Cal App 3d 802, 165 Cal Rptr 908.*

Actions taken by a city in its legislative capacity in rejecting a developer's request for a one-year extension of the time allowed by a municipal zoning ordinance for the commencement of a building project, though not reviewable by administrative mandamus (*CCP § 1094.5*), was reviewable under *CCP § 1085*, which provides for the traditional writ of mandate. Such judicial review was limited to an examination of the proceedings to determine whether the city's actions were arbitrary or capricious, or entirely lacking in evidentiary support, or whether the city failed to follow the procedure and give the notices required by law, and required that the legislative determination of the city be upheld if there was any reasonable basis to support it, the motives of the city council in making the determination being of no relevance. Court *House Plaza Co. v Palo Alto (1981, 1st Dist) 117 Cal App 3d 871, 173 Cal Rptr 161.*

29. Administrative Agencies, Boards, and Commissions

The writ of mandamus is a command to a person as distinguished from a command to an office, and cannot be issued as against a board on the theory that, while such board at the time of issuance thereof is complying with the law, a subsequent election of new members might cause a change of mind on the part of the board. *George v Beaty (1927) 85 Cal App 525, 260 P 386.*

Historically, the writ of mandamus has been used for far narrower purposes than those for which it is used in this State today; mandamus has traditionally been merely a proceeding to compel the performance of ministerial duties and has not been widely used as a method for reviewing the decisions of administrative agencies. In this state however it is now established that mandamus is the remedial writ which will be used to correct those acts and decisions of administrative agencies which are in violation of law, where no other adequate remedy is provided; in this use of the remedy, many historical theories concerning mandamus (as for example the technicalities of the rule of discretion in the inferior officer will bar the issuance of the writ) will not always be applicable; thus the writ has been used not only to compel administrative action refused in violation of law, but also to annul or restrain administrative action already taken which is in violation of laws; the writ may therefore be used not only to compel the performance of a ministerial act, but also in the proper case to review the final acts and decisions of the statewide administrative agencies which do not exercise judicial power. *Bodinson Mfg. Co. v California Employment Com. (1941) 17 Cal 2d 321, 109 P2d 935.*

The fairness of a hearing as well as the reasonableness and presence or absence of arbitrary or capricious action on the part of a board can be determined by the issuance of a writ of mandate by a competent court when the statute under which the board functions makes it mandatory upon it to grant an applicant a fair hearing. *Bila v Young (1942) 20 Cal 2d 865, 129 P2d 364.*

Where a board acts on conflicting evidence, mandate will not issue to review its proceedings. *Wallace v Board of Education (1944) 63 Cal App 2d 611, 147 P2d 8.*

A court is without power to substitute its discretion for that of the Board of Medical Examiners respecting the discipline to be imposed upon a practitioner. *King v Board of Medical Examiners (1944) 65 Cal App 2d 644, 151 P2d 282.*

Although specific provision is made for the use of the writ of mandamus to review proceedings of particular administrative agencies (*Gov C § 11523*), remedy is not limited to review of those agencies or to agencies having formally adopted the procedure of those mentioned in the administrative procedure act; the framers of § 1094.5, relating to the inquiry by mandamus into the validity of administrative orders or decisions, intended it to set forth a procedure whereby judicial review can be had by writ of mandate after formal adjudicatory decision by "any" administrative agency. *Temescal Water Co. v Department of Public Works (1955) 44 Cal 2d 90, 280 P2d 1.*

According to *CCP § 1094.5*, the appropriate method of reviewing facts of a quasi-judicial agency is administrative mandamus. The statute governs review by mandamus after a formal adjudicatory decision by an administrative agency, and the decisive question is whether the agency exercises an adjudicatory function in considering facts presented in an administrative hearing. The statute authorizes judicial review only of the exercise by an administrative agency of an adjudicatory or quasi-judicial function, and it was not intended that the statute apply to any quasi-legislative acts of an administrative body. Judicial review of quasi-legislative acts of an administrative agency must be made under the ordinary mandamus provisions of *CCP § 1085*, and not under administrative mandamus. *Santa Cruz v Local Agency Formation Com. (1978, 1st Dist) 76 Cal App 3d 381, 142 Cal Rptr 873.*

Actions taken by an administrative agency in its legislative capacity are reviewable under *CCP, § 1085*, the traditional writ of mandate. Judicial review is limited to an examination of the proceedings before the agency to determine whether its action has been arbitrary or capricious, or entirely lacking in evidentiary support, or whether it has failed to follow the procedure and given the notices required by law. *Karlson v Camarillo (1980, 2nd Dist) 100 Cal App 3d 789, 161 Cal Rptr 260.*

Two highway patrol officers were not entitled to have a decision of the State Personnel Board affirming their suspension without pay for ten days for violations of highway patrol regulations governing reimbursement of employees for overtime meals reviewed by ordinary mandamus since the imposition of a short suspension without pay for violating highway patrol rules was not an abuse of discretion, and thus, was not reviewable by ordinary mandamus. *Taylor v State Personnel Board (1980, 1st Dist) 101 Cal App 3d 498, 161 Cal Rptr 677.*

Invalid regulations promulgated by the Department of Social Services need not be applied or enforced in statutory "fair hearings," and if they are, judicial review may be invoked by "administrative" mandamus pursuant to *CCP § 1094.5* (*Welf. & Inst. Code, § 10962*). Furthermore, interested persons who are not entitled to such "fair hearings," because they are neither applicants for, nor recipients of, public social service benefits, and who otherwise have standing to complain, still may challenge invalid regulations by mandamus pursuant to *CCP § 1085*, or by action for declaratory relief pursuant to *CCP § 1060* (*Gov. Code, § 11350*). *Woods v Superior Court of Butte County (1981) 28 Cal 3d 668, 170 Cal Rptr 484, 620 P2d 1032.*

A petition for a *CCP § 1085*, writ of mandamus is a legally appropriate remedy for challenging the authority of the Division of Fair Employment Practices (Division) and the Fair Employment Practices Commission (Commission) to proceed to hearing on an accusation by the Division charging violation of the Fair Employment Practices Act (former Lab. Code, § 1410 et seq., now *Gov. Code, § 12900* et seq.) on the ground that the Commission lacked jurisdiction to hear issues raised in the accusation because it failed to comply with all of the conditions precedent to the issuance of an accusation. *Motors Ins. Corp. v Division of Fair Employment Practices (1981, 2nd Dist) 118 Cal App 3d 209, 173 Cal Rptr 332.*

Unlike the broad scope of review provided in administrative mandamus proceedings, review by ordinary mandamus is confined to an examination of the agency proceedings to determine whether the action taken is arbitrary, capricious or entirely lacking in evidentiary support, or whether it failed to conform to procedures required by law. Such limited judicial review forecloses inquiry as to the agency's reasons for its legislative action. So long as a reasonable basis for such action exists, the motivating factors considered in reaching the decision are immaterial and supportive findings are not required. The limited scope of review of quasi-legislative administrative action is grounded upon the doctrine of separation of powers which sanctions legislative delegation of authority to an appropriate administrative agency and acknowledges the presumed expertise of the agency. In technical matters requiring the assistance of experts and the study of marshalled scientific data, courts will permit administrative agencies to work out their problems with as little judicial interference as possible. *Stauffer Chemical Co. v Air Resources Board (1982, 1st Dist) 128 Cal App 3d 789, 180 Cal Rptr 550.*

The Commission on Judicial Performance appealed from an order granting a petition for writ of mandate filed by The Recorder, a legal newspaper, in an effort to compel the commission to disclose how individual commissioners voted in formal disciplinary proceedings concerning a municipal court judge and in subsequent formal proceedings re-

garding judicial discipline. The central issue involved the commission's interpretation of Proposition 190, Const art VI § 18(i) and (j). The commission claimed it had fully complied with the mandate of § 18(j) by conducting all formal proceedings in open session, under rules it adopted after the passage of Prop 190. However, the court held that the vote of the individual members was an integral part of the "proceedings" of the commission that must be "open to the public" in any case in which the commission determines to initiate formal disciplinary proceedings against a judge. Thus, the commission had no discretion to withhold from "the public" information about how the individual commissioners voted, and the trial court did not err by issuing a writ of mandamus to compel its release. *The Recorder v Commission on Judicial Performance (1999, 1st Dist) 72 Cal App 4th 258, 85 Cal Rptr 2d 56, 268, 282.*

In a case regarding whether petitioner doctor indiscriminately recommended the medicinal use of marijuana to one of his patients, where the Medical Board of California obtained an order from respondent, and the Superior Court of Los Angeles County (California), directed the doctor to comply with the administrative subpoena for the patient's records, the appellate court granted the doctor's petition for a writ of mandate and ordered the trial court to vacate its order enforcing the subpoena for the patient's medical records; Medical Board failed to demonstrate sufficient facts to support a finding of good cause to invade the patient's right of privacy in his medical records. *Bearman v Superior Court (2004, Cal App 2nd Dist) 2004 Cal App LEXIS 438.*

Where mother filed a petition against a county seeking a writ of administrative mandamus to compel the county's social service agency to grant her a hearing to challenge its decision to file a report with the Child Abuse Central Index (CACI) naming her as a suspected child abuser under the Child Abuse and Neglect Reporting Act, *Pen C 11164* et seq., the court held that the Act presented a very real risk of error in identifying a person as a suspected child abuser; reporting limitations, notification requirement, and expungement remedy impliedly recognized that a person named as a suspected child abuser was entitled to present a timely challenge to a previously filed report; the mother had to be given a reasonable opportunity to rebut the charge and was entitled to relief in the form of a writ of mandamus. *Burt v County of Orange (2004, Cal App 4th Dist) 2004 Cal App LEXIS 1035.*

Traditional writ of mandate under *CCP § 1085* is a method for compelling a public entity to perform a legal and usually ministerial duty; the trial court reviews an administrative action pursuant to § 1085 to determine whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or whether the agency failed to follow the procedure and give the notices the law requires. Although mandate will not lie to control a public agency's discretion, that is to say, force the exercise of discretion in a particular manner, it will lie to correct abuses of discretion; in determining whether an agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld. *Klajic v Castaic Lake Water Agency (2004, Cal App 2nd Dist) 2004 Cal App LEXIS 1243.*

(3) PARTICULAR DUTIES AND ACTS OF PUBLIC OFFICERS, BOARDS, AND COMMISSIONS

30. In General

Mandamus lies to compel the surveyor general to comply with a judgment of the court under former Pol C § 3416 in an action between contestants as to the purchase of state land. *Laugenour v Shanklin (1880) 57 Cal 70.*

The power of the Surveyor General on an application to purchase state lands under former Pol C § 3498 was neither judicial nor unlimited, but merely ministerial, and he was subject to the compulsion of a writ of mandate. *Jordan v Kingsbury (1914) 25 Cal App 166, 143 P 69.*

Mandamus will lie to compel a city clerk to file petitioner's official oath as city collector, where he is legally entitled to have such oath filed. *Spaulding v Desmond (1922) 188 Cal 783, 207 P 896.*

An appeal from a judgment denying a writ of mandate to compel the warden to institute a judicial inquiry into the sanity of a prisoner under sentence of death will be dismissed on motion, where the record discloses no tenable ground for attack on the judgment, and where such appeal is taken solely for delay of execution of the sentence. *Williams v Duffy (1948) 32 Cal 2d 578, 197 P2d 341.*

Validity of proceedings had before an action taken by County Regional Planning Commission cannot be determined by action in mandamus under this section, but by writ of review or mandamus under § 1094.5. *Triangle Ranch, Inc. v Union Oil Co. (1955, 2nd Dist) 135 Cal App 2d 428, 287 P2d 537.*

Institution of proceedings by warden to determine present sanity of prisoner awaiting execution may not be compelled by mandamus. *Rupp v Teets (1957) 48 Cal 2d 647, 312 P2d 5,* affd *357 US 549, 2 L Ed 2d 1531, 78 S Ct 1263.*

Mandamus is proper remedy to compel city clerk to publish ordinance whereby city is attempting to set up parking district if proposed ordinance meets requirements of the law, since act demanded is ministerial duty. *Palm Springs v Ringwald (1959) 52 Cal 2d 620, 342 P2d 898.*

The Medi-Cal legislation calls for a regulation establishing rates or a rate formula for nursing home care, and nursing homes are entitled to a writ of mandate compelling the Director of Health Care Services to perform this duty as one enjoined on him by law. *California Asso. of Nursing Homes, etc. v Williams (1970, 3rd Dist) 4 Cal App 3d 800, 84 Cal Rptr 590.*

Mandamus is appropriate for challenging the constitutionality or validity of statutes or official acts. *Wenke v Hitchcock (1972) 6 Cal 3d 746, 100 Cal Rptr 290, 493 P2d 1154.*

A husband and wife with whom a county welfare department had placed a child for adoption were entitled to procedural due process in connection with the department's termination of the placement. While former CC § 224n, see now *Fam C § 8704*, relating to placement by adoption agencies and termination thereof in the discretion of the agency at any time prior to the granting of a petition for adoption expresses no requirement for investigation, hearing or findings as the basis for removal of the child, or for judicial review to guard against the possibility of arbitrary action, enforced removal of the child from the home is obviously such a "grievous loss" as to amount to deprivation of a fundamental interest outweighing, in the absence of imminent danger to the child, any state interest in summary termination. *C. v Superior Court of Sacramento County (1973, 3rd Dist) 29 Cal App 3d 909, 106 Cal Rptr 123.*

The trial court properly granted a peremptory writ of mandate ordering a city council and the city clerk to accept, approve, and record a developer's final subdivision tract map, where the council had previously approved the tentative tract map, though it had, at that time, imposed an additional condition on the developer, and where the city engineer had advised the council that all applicable conditions of the tentative map had been satisfied, and had recommended that the final map be approved. Former B & P C § 11611 (see now *Gov C § 66458*), provides, in effect, that a final map "shall" be approved if it conforms to state law and local ordinances, and former B & P C § 11529 (see now *Gov C § 66442*), and local ordinances make it clear that the duty to determine the compliance of a final tract map with applicable state and local law and to imposed technical conditions has been delegated to the city engineer. The duty of the city council under the circumstances shown was administrative, ministerial, and mandatory, and the court was therefore authorized by *CCP § 1085*, to compel performance of that duty by mandamus. *Great Western Sav. & Loan Asso. v Los Angeles (1973, 2nd Dist) 31 Cal App 3d 403, 107 Cal Rptr 359.*

In an action brought by a public employee against a city and its civil service commission under the California Fair Employment and Housing Act (FEHA; *Gov C § § 12900* et seq.) for alleged gender discrimination in the cancellation of civil service examinations and eligible lists on which the employee had placed number one, the trial court properly denied the petitions for traditional and administrative mandate (*CCP § § 1085, 1094.5*), finding the cancellation nondiscriminatory and supported by the administratively determined adverse impact on African-American applicants. It was undisputable that the city's civil service commission had ultimate discretion under the charter to devise, administer and assess the tests, and then to adopt or not adopt them or the tentative eligibility lists. The undisputed finding of adverse impact was, on its face, a sufficient reason to exercise discretion to cancel the tests. There was no legal duty to adopt the tests or to try to validate them. A court cannot, for the benefit of one protected group, compel a validation study through administrative mandate where an agency has properly exercised its discretion to cancel an employment test shown to have adverse impacts on another protected group. *Harris v Civil Service Com. (1998, 1st Dist) 65 Cal App 4th 1356, 77 Cal Rptr 2d 366.*

CCP § 1085 permits judicial review of ministerial as well as legislative acts. Mandate will lie to compel performance of a clear, present, and usually ministerial duty in cases where a petitioner has a clear, present, and beneficial right to performance of that duty. Mandate also lies to correct the exercise of discretionary legislative power, but only if the action taken is fraudulent or so palpably unreasonable and arbitrary as to reveal an abuse of discretion as a matter of law. Here, defendant city, which operated a water system for the benefit of its residents and had also served private customers and several water districts in the unincorporated area of plaintiff county, did not have a duty to provide new water hookups outside city limits, and its policy confining new water hookups to properties within its borders was neither arbitrary nor palpably unreasonable. Thus, the trial court erred when it ordered rescission of the policy and directed defendant to provide new service connections to the unincorporated area on the basis that the policy was arbitrary. *County of Del Norte v City of Crescent City (1999, 1st Dist) 71 Cal App 4th 965, 84 Cal Rptr 2d 179, 968, 972.*

Dismissal of writs of mandate brought by beneficiaries of California's Medi-Cal program, pursuant to Cal. *Code Civ. Proc. § § 1094.5* and *1085*, seeking reimbursement for covered services, was reversed and remanded where the State had failed to establish a reasonable procedure by which recipients could obtain prompt reimbursement for covered services. *Conlan v Bonta' (2002, 1st Dist) 102 Cal App 4th 745, 125 Cal Rptr 2d 788.*

Court affirmed the denial of rice growers' petition for a writ of mandate pursuant to Cal. *Code Civ. Proc. § 1085* against state agencies in connection with their preparation of a diversion plan and progress report under *Cal. Health & Safety Code § 41865(m)*, (n) of the Connelly-Areias-Chandler Rice Straw Burning Reduction Act of 1991, *Cal. Health & Safety Code § 41865* et seq.; the court found that the plan and report passed muster under the court's deferential standard of review, the documents properly reflected consideration by the agencies of the relevant factors affecting the development of off-field uses for rice straw and a rational connection between those factors and purpose of the statute to divert 50 percent of the straw, and the documents were not arbitrary, capricious, or without evidentiary support. *Carrancho v California Air Resources Bd. (2003, Cal App 3rd Dist) 2003 Cal App LEXIS 1405.*

31. Admission to Public Office

Mandamus will not lie to compel the board of fire commissioners of a county or city to admit a person claiming to be a member thereof in the place of an incumbent asserting a right to the place, and actually enjoying its benefits and discharging its duties, with the assent of the other members of the board. *Kelly v Edwards (1886) 69 Cal 460, 11 P 1.*

A person unlawfully excluded from an office may properly use mandamus proceedings to compel his admission, where the law furnishes no other remedy and, to promote the ends of justice, one should be afforded. *Nider v City Com. of Fresno (1939) 36 Cal App 2d 14, 97 P2d 293.*

A municipal employee claiming that he is entitled to a civil service rating which has been denied him may apply for a writ of mandate to compel the civil service commission to admit him to the position to which he claims he is entitled. *Leahey v Department of Water & Power (1946) 76 Cal App 2d 281, 173 P2d 69.*

Where a public office is occupied by a de facto incumbent, mandate will not lie at the request of an outsider seeking some incident to the office or outright admission to the office. *Klose v Superior Court of San Mateo County (1950) 96 Cal App 2d 913, 217 P2d 97.*

32. -Appointments and Promotions

Mandamus does not lie to compel a board of fire commissioners to appoint the petitioner to the position of secretary of the board where the freeholders' charter under which such a position is to be filled does not entitle him to such office. *Maxwell v Board of Fire Comm'rs (1903) 139 Cal 229, 72 P 996.*

The fact that an official has a discretion to appoint eligible persons out of a designated class of individuals does not preclude his being compelled to perform this duty, if it is an imperative duty, by mandamus. *Independence League v Taylor (1908) 154 Cal 179, 97 P 303.*

A writ of mandamus to compel a board of supervisors to appoint a member of an irrigation district, on the ground that there is a vacancy, the application showing that the position is occupied by one who is performing the duties of the office with the acquiescence of his associates and under claim of right, could not be granted until it had been established by judicial process that there is a vacancy to be filled. *Drescher v Board of Supervisors (1923) 191 Cal 234, 215 P 902.*

Mandamus lies to compel a board of supervisors to fill a vacancy in the office of a justice of the peace in a justice's court in a city operating under a freeholders' charter. *Platnauer v Board of Supervisors (1924) 65 Cal App 666, 225 P 12.*

A writ of mandate will not lie to direct a municipal civil service commission to place a police officer on the eligible list for promotion at a particular place, but may be used to direct a commission to exercise its discretion in this respect. *Conroy v Civil Service Com. (1946) 75 Cal App 2d 450, 171 P2d 500.*

Party aggrieved by appointment of one not orthodox Rabbi to act as State Kosher Food Law Representative of state is not without direct remedy; former Cal Const Art XXIV § 2 subd (c) (see now *Cal Const Art VII § 2*) makes dismissal of public officers duty of State Personnel Board, and though board has wide discretion to decide whether to institute administrative proceedings against ineligible representative, abuse of discretion is subject to judicial control by writ of mandate. *West Coast Poultry Co. v Glasner (1965, 2nd Dist) 231 Cal App 2d 747, 42 Cal Rptr 297.*

33. -Reinstatement

Mandamus is the proper remedy to compel the reinstatement of a civil service employee who has been demoted to a half-time position at a reduced salary pursuant to a city ordinance but not in accordance with charter provisions and civil service regulations. *Lotts v Board of Park Comm'rs (1936) 13 Cal App 2d 625, 57 P2d 215.*

In a proceeding for writ of mandate to compel petitioner's reinstatement to a classified civil service position from which he was allegedly discharged, where the city charter required that certificate of service of notice of discharge should show whether service was made personally or by leaving a copy of the notice of the last known place of residence of the employee, a certificate was fatally defective in failing to state the manner in which service was made. *Hayman v Los Angeles (1936) 17 Cal App 2d 674, 62 P2d 1047* (disapproved on other grounds by *Conti v Board of Civil Service Comm'rs, 1 Cal 3d 351, 82 Cal Rptr 337, 461 P2d 617).*

Proper remedy of ousted members of board of commissioners of city housing authority for reinstatement in their offices was mandamus, not quo warranto. *Housing Authority of Needles v City Council of Needles (1962, 4th Dist) 208 Cal App 2d 599, 25 Cal Rptr 493.*

34. Bonds

Where official duty is in connection with California Toll Bridge Authority Bonds, the issuance of which is duly authorized mandamus lies to compel its performance. *California Toll Bridge Authority v Kuchel (1952) 40 Cal 2d 43, 251 P2d 4.*

Mandamus lies to compel the secretary of a municipal improvement district to publish notice of sale of district bonds in manner directed by the board of directors of the district. *Solvang Municipal Improv. Dist. v Jensen (1952) 111 Cal App 2d 237, 244 P2d 492.*

Mandate is proper remedy to require district clerk to publish and mail notice of sale of sewer district bonds, and where object of proceeding is to establish validity of district and its right to issue bonds, it is proper to invoke original jurisdiction of *District Court of Appeal. Fairfield-Suisun Sewer Dist. v Hutcheon (1956, 3rd Dist) 139 Cal App 2d 502, 294 P2d 102.*

A municipal utility district was entitled to a peremptory writ of mandate directing its treasurer to execute bonds that had been authorized by the district's electorate in a bond election and that had been ordered issued and sold by a resolution of the board of directors of the district. *East Bay Municipal Utility Dist. v Sindelar (1971, 1st Dist) 16 Cal App 3d 910, 94 Cal Rptr 431.*

35. -Signing Bonds

In a mandamus proceeding to require a city treasurer to sign bonds authorized by electors to raise funds to supply transportation between the city and another city, the writ will not be denied on the ground that the latter's consent to the operation of the bus line had not been obtained, since it cannot be assumed that the buses will be operated over the streets of the other city without its consent. *Mill Valley v Saxton (1940) 41 Cal App 2d 290, 106 P2d 455.*

Mandamus lies to compel a city treasurer and clerk to sign and countersign water works bonds in the absence of a legal barrier justifying their refusal to do so. *Glendale v Chapman (1951) 108 Cal App 2d 74, 238 P2d 162.*

Mandamus is appropriate remedy to compel city officers to sign revenue bonds where proposed issue meets requirements of law. *Oxnard v Dale (1955) 45 Cal 2d 729, 290 P2d 859.*

To compel city treasurer to sign bonds authorized to be issued pursuant to former Gov C § § 43648 et seq., if proposed issue met requirements of law, could be done by mandamus. *Walnut Creek v Silveira (1957) 47 Cal 2d 804, 306 P2d 453.*

A writ of mandate will not issue to compel the secretary of a county water district to sign bonds for an improvement district within the water district where no reason is given why the bonds, after authorization, were not printed and presented to the secretary for his signature, and where it cannot be assumed that when the secretary was presented with the bonds he refused to sign them. *Northridge Park County Water Dist. v McDonell (1958, 3rd Dist) 158 Cal App 2d 123, 322 P2d 25.*

36. -Payment of Interest

Where the provisions of a municipal charter make it the duty of the treasurer to pay the interest of certain bonds when the same falls due out of a fund provided for the purpose, such payment is a duty specially enjoined by law on the officer which may be enforced by mandamus. *Meyer v Porter (1884) 65 Cal 67, 2 P 884.*

Where the duty of a city treasurer to pay interest on bonds of the city extended only to the payment of annual interest mandamus will not lie to compel him to pay interest on the interest due on the coupons which were not paid at maturity. *Davis v Porter (1885) 66 Cal 658, 6 P 746.*

Mandamus lies to compel the treasurer of an irrigation district to pay interest on bonds issued by the district. *Hewel v Hogin (1906) 3 Cal App 248, 84 P 1002.*

The liability of the treasurer of an irrigation district for interest on interest on bond coupons of the district is not enforceable by mandate. *Hewel v Hogin (1906) 3 Cal App 248, 84 P 1002.*

Mandamus is the proper remedy to compel the board of directors of an irrigation district to pay, from available funds, the owner of matured bonds and interest-bearing coupons the amount to which he is entitled; and in ascertaining the official duties of the board or its officers, the court may construe a statute necessarily involved or determine its constitutionality. *Clough v Baber (1940) 38 Cal App 2d 50, 100 P2d 519.*

County auditor may be compelled to pay valid judgment against county sanitation district for bond interest. *Mitchell v County Sanitation Dist. Number One (1957, 2nd Dist) 150 Cal App 2d 366, 309 P2d 930.*

37. Elections and Referenda

Mandamus does not lie to compel a board of supervisors to permit the election officers of a precinct to authenticate returns made to them. *Gibson v Twaddle (1905) 1 Cal App 126, 81 P 727.*

The proper remedy for the refusal of commissioners appointed to give notice of an election held under a statute fixing a boundary line between two counties and to canvass thereof, for the refusal of the commissioners to canvass the returns of the election is by mandamus to compel the proper exercise of their ministerial functions thereunder. *Cerini v De Long (1908) 7 Cal App 398, 94 P 582.*

The appellate court has jurisdiction in an original proceeding in mandamus, on a proper showing, to direct the board of supervisors of a county, acting as a board of canvassers of the returns of an election for the office of presidential electors, to perform the duty imposed on it by law as to the mode and manner of canvassing such returns; and where it appears that such duty is not being performed or is performed in a manner otherwise than provided by law, mandamus is a proper remedy. *People ex rel. Del Valle v Butler (1912) 20 Cal App 379, 129 P 600.*

Mandamus will not lie to compel the canvass of returns of a void recall election. *Wilson v Blake (1915) 169 Cal 449, 147 P 129.*

Mandamus does not lie against the secretary of state to compel him to disregard referendum certificates filed in his office and to proceed with the statute, upon the ground that others than the signers of the referendum petition affixed the dates to their signatures, where the clerk or registrar attached his certificate to the petition that a certain number of signatures were of qualified electors entitled to sign the petition and transmitted it to the secretary. *Boggs v Jordan (1928) 204 Cal 207, 267 P 696.*

Mandamus will lie to compel a city clerk to certify as sufficient a petition for a recall election where he fraudulently or arbitrarily fails to perform his duty to examine the individual certificates for recall to determine whether they comply with the city charter and to certify that fact to the council where a sufficient number of valid certificates are filed. *Hartsock v Merritt (1928) 93 Cal App 365, 269 P 757.*

Mandamus will lie to compel a registrar of voters to omit the name of a certain person from the list of candidates for an office, and from the ballots to be prepared, where fraud has been committed on the electors, the signors to the sponsorship certificate and the other candidates for the same office, in the procurement of the papers for the candidacy of said person. *Gilmore v Jordan (1934) 1 Cal 2d 347, 35 P2d 517.*

In a proceeding in mandamus to compel the board of directors of an irrigation district to meet and count all of the votes cast at an election in said district, where it appeared that the election was void, it would have been an idle act to

order the questioned ballots counted, and a writ was denied. *Barry v Board of Directors of Imperial Irrigation Dist. (1935) 7 Cal App 2d 412, 46 P2d 298.*

A petition for a writ of mandamus to compel the omission of names of persons from the ballots to be used at an election was denied in the discretion of the court where it appeared that the ballots had already been printed and distributed to certain voters. *Stracke v Farquar (1942) 20 Cal 2d 82, 124 P2d 9.*

Mandamus is the proper remedy to compel the secretary of state and a county registrar of voters to omit from a general election ballot any reference to the office of a superior court judge, the incumbent of which had died after April 1st in an election year and after his reelection at the primary. *French v Jordan (1946) 28 Cal 2d 765, 172 P2d 46.*

Notwithstanding city ordinance which city council declared had been rejected received a majority of votes cast, it is not abuse of discretion to deny writ of mandate to compel council to declare that ordinance was adopted, in view of provision in ordinance and described in ballots requiring that, for passage, ordinance receive three-quarters of votes cast. *Hass v Palm Springs (1956, 4th Dist) 139 Cal App 2d 73, 293 P2d 61.*

A petition for referendum of a county ordinance, as certified by the county clerk, is prima facie correct, but is not conclusive; it may be challenged and reviewed by a court in mandamus proceedings. *Wheelright v County of Marin (1970) 2 Cal 3d 448, 85 Cal Rptr 809, 467 P2d 537.*

Mandamus is the proper remedy to compel an officer to conduct an election according to law. *Wenke v Hitchcock (1972) 6 Cal 3d 746, 100 Cal Rptr 290, 493 P2d 1154.*

A proper case for the exercise of the Supreme Court's original jurisdiction for relief by way of mandamus to compel a registrar of voters to accept petitioner's nomination papers for the office of supervisor of a particular supervisorial district was presented, where it appeared that resolution of the controversy between the parties as to the effect of a certain judicial decision on petitioner's residence qualifications was urgent, and that the lower courts were unlikely to afford him relief in the face of that decision, which was apparently adverse to his contentions. *Wenke v Hitchcock (1972) 6 Cal 3d 746, 100 Cal Rptr 290, 493 P2d 1154.*

Mandamus will not issue to prevent the official recordation of the vote of the people under their reserved legislative power regardless of the unconstitutionality of the measure, if any; the courts should not interfere with the exercise of the electorate's franchise for the purpose of determining the question of constitutionality, a matter that can, if necessary, be more appropriately passed on after the election. Thus, mandamus did not lie to prevent a county clerk from performing the ministerial act of counting and canvassing, and from publishing the results of, the votes cast in an initiative referendum as to whether an ordinance establishing a county housing authority should be enacted, notwithstanding that there was precedent that the issue was not a proper one for referendum. *Martinez v Board of Supervisors (1972, 1st Dist) 23 Cal App 3d 679, 100 Cal Rptr 334.*

Petitioners were entitled to a writ of mandate to compel the clerk of a charter city to accept and process an initiative petition to bar the city from constructing, owning and operating a golf course despite the council's decision to do so, where that decision was essentially legislative in nature, the clerk's duties with respect to the petition appeared to be purely ministerial, the ordinance proposed by petitioners was not patently invalid, and no compelling showing for judicial interference with the initiative process was made. *Duran v Cassidy (1972, 5th Dist) 28 Cal App 3d 574, 104 Cal Rptr 793.*

Because there was no case law on whether *Gov C § 12172.5* precluded the state attorney general (AG) from instigating suits under *Elec C § 12280*, it was a novel issue of state law under *28 U.S.C.S. § 1367*(c)(1); therefore, the AG was entitled to a remand of his action for a writ of mandate under *CCP § 1085* requiring a county and clerk to comply with *Elec C § 12280*. *California Ex Rel. Lockyer (2006) 416 F Supp 2d 797, 2006 US Dist LEXIS 9894.*

38. -Calling Election or Referendum

Mandamus does not lie to compel the governor to issue a proclamation calling a special election to be held on a particular date for the submission of a constitutional amendment as provided in a measure adopted by the legislature but not signed by him. *Hatch v Stoneman (1885) 66 Cal 632, 6 P 734.*

Since a city council has no discretion to refuse to act on the petition in reference to the calling of an election, mandamus will lie on the face of a sufficient petition, on which the council have refused to act, at the suit of any one or

more of the electors whose names appear thereon, to compel it to act. *Good v Common Council of San Diego (1907) 5 Cal App 265, 90 P 44.*

Where, under a municipal charter providing for the recall of elective officers, petitions for the recall of six members of the city council signed by the requisite number of qualified electors were certified by city clerk, and there was no evidence to the contrary, it became the official duty of the city council to fix a date for such recall election, and where, through the machinations of its members desired to be recalled, the council refused to act, the superior court, on the petition of one of the qualified electors, who was also a taxpayer, properly issued its writ of mandate to compel the city council to fix the date of such election. *Conn v City Council of Richmond (1911) 17 Cal App 705, 121 P 714.*

Mandamus does not lie to compel the directors of an irrigation district to call an election relative to the levying of an assessment in accordance with the Bridgeford Act § 59, where a petition by a certain per cent of qualified electors has been filed requesting such an election, since nothing in the statute requires the board to call the election. *Imperial Land Co. v Imperial Irrigation Dist. (1915) 26 Cal App 529, 147 P 593.*

Even where the technical rules of law authorize it, the issuance of a writ of mandamus is to a large extent discretionary with the court; such a writ should not issue to compel the board of trustees of a city to adopt a resolution and call a special election for the purpose of determining whether the city shall be consolidated with another city and assume its share of the bonded indebtedness of the latter, it being alleged in the petition that a previous resolution and notice calling for a special election for such purpose were defective, where it appears that the election called by said defective resolution was held and that a large majority of the voters of the city were opposed to consolidation. *Fawkes v Burbank (1922) 188 Cal 399, 205 P 675.*

Upon the failure of the legislative body to call an election under Stats 1913 p 577, relating to the consolidation of municipal corporations, where a valid petition for such consolidation is filed, the superior court, upon complaint of any person aggrieved thereby, may by writ of mandate compel such body to determine whether a valid petition has been filed. *People ex rel. Ryan v San Diego (1925) 71 Cal App 421, 236 P 377.*

An application for mandamus to compel a city clerk to certify and file petitions containing more words than provided by the city charter, for the recall of city councilmen, and to compel the council to call a special election, will be denied, as there is no duty specially enjoined upon the clerk to select a specified number of words from the petition. *Bricker v Banks (1929) 98 Cal App 87, 276 P 399.*

A proceeding in mandamus to compel the government to call an election to fill a vacancy in the state assembly was dismissed as moot where, a few hours before the decision was to be filed, the court was notified that the Governor had called the election. *Mitchell v Warren (1950) 95 Cal App 2d 594, 213 P2d 413.*

Mandamus is proper remedy to compel city and its officials to submit ordinance to referendum. *Atlas Hotels, Inc. v Acker (1964, 4th Dist) 230 Cal App 2d 658, 41 Cal Rptr 231.*

39. Enactment or Repeal of Laws

Mandamus does not lie to compel a legislative body to repeal a statute upon the ground that it was passed with a fraudulent intent to accomplish an unlawful object. *Ramsay v Cullen (1921) 56 Cal App 5, 204 P 251.*

Mandamus will not lie to compel the examination and certification by a city clerk under the initiative provisions of a city charter of a proposed ordinance which would be void. *Myers v Stringham (1925) 195 Cal 672, 235 P 448.*

Mandamus is a proper remedy to test the propriety of the action of a county board of supervisors in denying a petition demanding that an ordinance imposing a sales tax as authorized by *Rev & Tax C § § 7200-7207*, be repealed or submitted to the voters of the county. *Geiger v Board of Supervisors (1957) 48 Cal 2d 832, 313 P2d 545.*

Since enactment of rezoning ordinance is legislative matter, city council cannot be compelled by mandamus to enact one. *Johanson v City Council of Santa Cruz (1963, 1st Dist) 222 Cal App 2d 68, 34 Cal Rptr 798.*

Writ of mandamus may not be employed to command city council to perform legislative act in particular manner; hence court had no jurisdiction to issue writ of mandate to compel city council to annul resolution and order vacating and abandoning public street. *Bowles v Antonetti (1966, 1st Dist) 241 Cal App 2d 283, 50 Cal Rptr 370.*

The enactment of a zoning ordinance, as well as the vacating of such an enactment, is purely a legislative act and a governmental function; and property owners seeking to rescind a rezoning amendment to a county zoning ordinance

could not allege that it was the ministerial duty of the county board of supervisors to rescind the ordinance involved. *Hilton v Board of Supervisors (1970, 2nd Dist) 7 Cal App 3d 708, 86 Cal Rptr 754.*

Owners of real property were not entitled to mandamus (*Code Civ Proc, § 1085*) to compel supervisors to rescind a rezoning amendment to a county zoning ordinance on the grounds they were not asking that the board of supervisors perform a legislative act, but, on the contrary, that the court order the board to undo what had been done illegally, in that the planning commission had recommended amendment of the ordinance without following the notice procedure prescribed by statute (*Gov Code, § 65854*, subd (a)), or, as further alleged, without taking the required steps of initiating such amendment by a verified petition, where allegedly confusing and misleading notice was merely permissive and additional to published notice, which was mandatory under the amending procedure, where the requirements of the Gov Code (§ § 65853 through 65857) contained no provision requiring initiation of such amendment by a verified petition, and where there was no allegation by the property owners that they were misled by two mailed notices into staying away from a rezoning hearing nor any statement that they did or did not attend such hearing or that they protested the form of notice challenged if they did attend. *Hilton v Board of Supervisors (1970, 2nd Dist) 7 Cal App 3d 708, 86 Cal Rptr 754.*

The appropriate vehicle for review of a zoning ordinance on the ground that it is discriminatory is by ordinary mandamus (*CCP § 1085*), rather than inverse condemnation. *Pan Pacific Properties, Inc. v County of Santa Cruz (1978, 1st Dist) 81 Cal App 3d 244, 146 Cal Rptr 428.*

The proceedings of a city which led to amendments in its general zoning plan were legislative in character, and thus traditional mandamus (*CCP, § 1085*) was the appropriate method of review of the validity of the amendments. Throughout the history of the consideration of the amendments, the city council's concern was their effect on the community as a whole. Its dominant concern was how to integrate the land parcels concerned into the city's total program, including considerations of residential development, schools, open spaces, agricultural development and commercial and economic development. *Karlson v Camarillo (1980, 2nd Dist) 100 Cal App 3d 789, 161 Cal Rptr 260.*

Zoning restriction on development of "big box" retail stores with full service grocery departments bore a reasonable relationship to the general welfare and, thus, was a constitutional exercise the city's police power. The court noted that traditional mandamus under *CCP § 1085* was the proper remedy for the constitutional challenge, rather than administrative mandamus under *CCP § 1094.5*. *Wal-mart Stores v. City of Turlock (2006, 5th Dist) 138 Cal App 4th 273, 41 Cal Rptr 3d 420, 2006 Cal App LEXIS 474.*

40. Enforcement of Police and Criminal Laws

Mandamus is the proper remedy to compel a district attorney under a mandatory duty to abate a nuisance to institute the abatement proceedings. *Board of Supervisors v Simpson (1951) 36 Cal 2d 671, 227 P2d 14.*

Ordinarily a district attorney cannot be compelled by mandamus to prosecute a criminal case except when a mandatory duty to prosecute is imposed upon him and the statute leaves him no discretion to exercise. *Board of Supervisors v Simpson (1951) 36 Cal 2d 671, 227 P2d 14.*

Generally mandamus will not lie to compel district attorney to prosecute every charge of crime made to him; it would frustrate true purposes of law enforcement to require district attorney to dissipate his efforts on personal grievances, fanciful charges and idle prosecution. *Taliaferro v San Pablo (1960, 1st Dist) 187 Cal App 2d 153, 9 Cal Rptr 445.*

Though writ of mandate should not be used to interfere with administrative officer's discretionary powers and considerable latitude must be allowed police chief in deployment of his officers, performance of essentially similar duties by two separate ranks of officers, in violation of city's express purpose to have similar requirements and rates of pay within same class specifications, in accordance with permanent plan of police chief may be prevented by courts. *Mullins v Toothman (1965, 1st Dist) 231 Cal App 2d 756, 42 Cal Rptr 254.*

The failure of a district attorney to prosecute a charge of perjury was not an abuse of discretion which could be remedied by writ of mandate, where such duty, entailed by Gov Code. § 26501, was discretionary, although the mandate petition's verified allegations that a person gave perjured testimony in an administrative proceeding involving petitioner's application for admission to the medical staff of a hospital must have been taken as admitted, absent a denial thereof. *Ascherman v Bales (1969, 1st Dist) 273 Cal App 2d 707, 78 Cal Rptr 445.*

Except where a statute clearly makes prosecution mandatory, a district attorney is vested with discretionary power in the investigation and prosecution of charges, and a court cannot control this discretionary power by mandamus. *Ascherman v Bales (1969, 1st Dist) 273 Cal App 2d 707, 78 Cal Rptr 445.*

Gov Code, § 26501, entrusting prosecution of public offenses to the district attorney, vests in him the discretionary power to institute criminal proceedings, and, unless a statute clearly makes prosecution mandatory, a court cannot control such statutory power by mandamus. *People v Vatelli (1971, 1st Dist) 15 Cal App 3d 54, 92 Cal Rptr 763.*

41. Licenses, Permits, and Certificates

Mandamus is the proper remedy to secure the restoration of a professional license, where the licensee has been improperly deprived of it by a statewide administrative board. *Dare v Board of Medical Examiners (1943) 21 Cal 2d 790, 136 P2d 304.*

Where a city council revoked a valid permit to drill and operate an oil well, and the licensee had acted on such valid permit, he could by mandamus compel the city council to annul the revocation. *Trans-Oceanic Oil Corp. v Santa Barbara (1948) 85 Cal App 2d 776, 194 P2d 148.*

Conduct of deputy, assigned to represent county engineer in matter of processing applications and issuing building permits within a city, in referring an applicant to city clerk is in effect a refusal to act, within the rule making officer's refusal to perform duty a prerequisite to issuance of mandamus. *Palmer v Fox (1953) 118 Cal App 2d 453, 258 P2d 30.*

Writ of mandate will not lie to control exercise by San Francisco Board of Permit Appeals of its official discretion or to alter or review action taken in proper exercise of such discretion. *Iscoff v Police Com. of Francisco (1963, 1st Dist) 222 Cal App 2d 395, 35 Cal Rptr 189.*

Mandamus to the Department of Motor Vehicles to set aside the suspension of a motorist's driver's license was not the proper method of challenging the first of two drunk-driving convictions upon which the suspension was based, where the conviction appeared regular on its face, and where, though an allegation of such conviction was stricken on motion of the prosecution in the second case, no judicial determination as to its validity was made. *Williams v Department of Motor Vehicles (1969, 2nd Dist) 2 Cal App 3d 949, 83 Cal Rptr 76.*

One who had had his driver's license suspended for a second conviction of drunk driving within seven years (*Veh C § 13352*) was not entitled to challenge the constitutionality of the first conviction by a petition for writ of mandate in the superior court directing the Department of Motor Vehicles to restore his driving privilege, where, though petitioner alleged that at the time of his first conviction in a municipal court he had not been represented by counsel on entering his plea of guilty, no attempt had been made to have the validity of that conviction determined by the municipal court that convicted him of the second offense. *Houlihan v Department of Motor Vehicles (1970, 1st Dist) 3 Cal App 3d 915, 83 Cal Rptr 885.*

In distinguishing between quasi-legislative and adjudicatory determinations by a public agency, to determine whether a reviewing court must proceed in ordinary mandamus under *CCP § 1085*, or under *CCP § 1094.5*, legislative action is the formulation of rules to be applied in all future cases while an adjudicatory act involves the application of rules to a specific set of existing facts. An act undertaking to determine a question of right or obligation or of property, is to that extent a judicial one. Hence, permit proceedings under the California Coastal Zone Conservation Act of 1972 are to be considered adjudicatory or quasi-judicial, requiring permit and exemption decisions by the coastal commission to be reviewed under *CCP § 1094.5*. *Patterson v Central Coast Regional Com. (1976, 1st Dist) 58 Cal App 3d 833, 130 Cal Rptr 169.*

The passage of a ballot measure designed to control growth by limiting the issuance of building permits did not affect the authority of the city council to act on an application for approval of subdivision maps (*Gov C § § 66410-66499.58*), by the owners of a residential subdivision in the city. Thus, the landowners were entitled to a writ of mandate (*CCP § 1085*), compelling the city to act on such application under Subdivision Map Act standards. However, they could not convey or develop their subdivision until such approval had been obtained and the city had granted a development allotment for their residential development under the standards set forth in the ballot measure. *Simac Design, Inc. v Alciati (1979, 1st Dist) 92 Cal App 3d 146, 154 Cal Rptr 676.*

Department of Motor Vehicles had no duty to determine the validity of an out of state conviction for drunk driving in a California proceeding to suspend the driver's driving privilege; the driver could not collaterally attack the Arizona

conviction by a petition for writ of mandate under *CCP § 1085*. *Gaston v Department of Motor Vehicles (1991, 1st Dist) 230 Cal App 3d 74, 281 Cal Rptr 173.*

Where the California Board of Registered Nursing declined to accept an out-of-state college's nursing program as equivalent to California's minimum requirements pursuant to C *B & P C § 2736(a)(2)*, the college was not entitled to a writ of mandate under either *CCP § § 1085* or *1094.5* because the board properly exercised its statutory discretion. *Excelsior College v. California Bd. of Registered Nursing (2006) 136 Cal App 4th 1218, 39 Cal Rptr 3d 618, 2006 Cal App LEXIS 224.*

42. -Issuance

Mandamus does not lie to compel the surveyor general to issue a patent to an applicant to purchase reclaimed swamp and overflow lands, where a contest as to the right to purchase such lands has been referred to the superior court, though the petitioner might have become entitled to a patent before the order of reference, as the suit therein affords an adequate remedy. *Blakeley v Kingsbury (1907) 6 Cal App 707, 93 P 129.*

Where the matter of the issuance of permits by police commissioners to carry weapons is in their discretion, a writ of mandate will not lie to compel such issuance. *United States Protective Asso. v Board of Police Comm'rs (1910) 14 Cal App 249, 111 P 755.*

The writ of mandamus is a proper remedy to control an alleged abuse of discretion and to compel a city council to issue a permit for the operation of a riding academy. *Bleuel v Oakland (1927) 87 Cal App 594, 262 P 477.*

In a proceeding in mandamus to compel the issuance of a building permit, petitioner was not entitled to relief where no application for a permit had been made in writing as required by the local ordinances, and before the time of trial a zoning ordinance, prohibiting construction of the type of building sought to be constructed, had been finally adopted. *Lima v Woodruff (1930) 107 Cal App 285, 290 P 480.*

In a proceeding in mandamus to compel the issuance of a permit to collect garbage, it was held that the provision of an ordinance to the effect that it was mandatory on the board of health to issue such a permit when it appeared in the application that 20 per cent of the users of garbage service in the district signed a petition stating that they were receiving inadequate service, imposed purely ministerial functions on the board and not judicial functions, and the board was not required to hold a hearing or to verify the facts stated in the application papers in compliance with the clause of the ordinance. *Serv-U-Garbage Co. v Board of Health (1930) 107 Cal App 386, 290 P 519.*

Mandamus will not issue to compel a county to issue to recipients of old age aid duplicate warrants to replace those that have been lost or destroyed where such recipients have not shown that they have complied with the provisions of former W & I C § § 140, 2183.1 (see now *W & IC § 10072*) requiring the filing of an affidavit. *Board of Social Welfare v County of Los Angeles (1945) 27 Cal 2d 98, 162 P2d 627.*

A writ of mandate will not issue to compel the state gas and oil supervisor to issue a permit to drill for oil and gas on properties owned by the petitioners, since there is no section in the Public Resources Code which requires him to issue or the petitioners to obtain a permit before commencing the drilling of a well. *Bernstein v Bush (1947) 29 Cal 2d 773, 177 P2d 913.*

On appeal from judgment granting writ of mandate requiring city and its officers to license business establishment, decision of Board of Permit Appeals must be sustained if it is supported by substantial evidence. *Hora v San Francisco (1965, 1st Dist) 233 Cal App 2d 375, 43 Cal Rptr 527.*

Parties seeking judicial relief by mandamus from order of State Board of Optometry refusing to issue branch office license could proceed under *CCP § 1085*, relating to issuance of "traditional writ," rather than under *CCP § 1094.5*, and were not bound by time limit prescribed by Government Code, where it was clear that board was not called on to make factual determination within its quasi-judicial function, but rather to decide question of law. *Rich v State Board of Optometry (1965, 1st Dist) 235 Cal App 2d 591, 45 Cal Rptr 512.*

In a proceeding in mandamus to require a city and a county to issue press identification cards to reporters for plaintiff weekly newspaper, plaintiff could not base a claim of denial of due process of law on the fact that the sheriff, who issued county passes, had not been authorized to do so, or that there were no legally determined guidelines for issuance of such passes by either the sheriff or the city chief of police, where, in seeking mandamus, plaintiff tacitly recognized the sheriff's authority to issue press passes, where the sheriff clearly had discretion to permit or not permit certain per-

sons to cross police lines, where it was not established that he exercised his discretion unreasonably, where the city code gave the board of police commissioners reasonable discretion to limit the number of press passes and to deny press passes, and where it was not shown that in denying press passes to plaintiff's employees the chief of police exercised his discretion unreasonably or in violation of the municipal code. *Los Angeles Free Press, Inc. v Los Angeles (1970, 2nd Dist) 9 Cal App 3d 448, 88 Cal Rptr 605.*

The remedy of "traditional" mandamus afforded by *CCP § 1085*, may be employed to compel performance of a duty which is purely ministerial in character, but cannot be applied to control discretion as to a matter lawfully entrusted to an administrative agency. Thus, the remedy afforded by that statute could not be used to compel the California Coastal Zone Conservation Commission to issue a permit for the development of certain coastal lands, in view of the provision of the California Coastal Zone Conservation Act of 1972 (former Pub Res C § 27000 et seq., see now *Pub Res C § 30000* et seq.) entrusting determination of an applicant's qualifications for a permit to the commission's discretion. *State v Superior Court of Orange County (1974) 12 Cal 3d 237, 115 Cal Rptr 497, 524 P2d 1281.*

Mandate did not lie under *CCP § § 1085(a), 1086*, in an owner's action seeking to compel the California Department of Motor Vehicles (DMV), to renew the registration of a vehicle without a salvage certificate; no ministerial duty existed because *Veh C § 11515(b)* did not authorize the DMV to reconsider the insurer's determination that the vehicle was a total loss salvage vehicle under *Veh C § 544*, the alleged duty would be contrary to law, and there was no showing that the owner's legal remedy of an action against the insurer for damages was inadequate. *Moran v. California DMV (2006, 4th Dist) 2006 Cal App LEXIS 736.*

43. Payment of Claims and Governmental Obligations

When a legal tender, within the time specified by statute, of an amount sufficient to discharge a tax claim is made to a tax collector mandamus lies to compel him to issue the usual receipt. *Spring Valley Water Co. v Planer (1927) 88 Cal App 170, 263 P 323.*

Mandamus lies to compel a city auditor to notify the city treasurer that there was sufficient money in a fund in the city treasury to pay all outstanding warrants, including a warrant owned by the petitioner, where a city ordinance made it the auditor's duty to comply with the petitioner's demand, and to notify the city treasurer of the numbers of the warrants redeemable from such fund. *Voorhees v Gunsul (1934) 1 Cal 2d 199, 34 P2d 161.*

Mandate is the only remedy of those aggrieved by the decisions of the social welfare board denying old age compensation where no method of review of the board's decisions is provided by the *Welfare & Institutions Code. Bila v Young (1942) 20 Cal 2d 865, 129 P2d 364.*

Mandamus is the proper proceeding to initiate the municipal action, required by a municipal charter, as a condition precedent to qualify civil service employees for overtime pay. *Scannell v Murphy (1947) 82 Cal App 2d 844, 187 P2d 790.*

Mandamus, rather than a contempt proceeding, is the proper method by which to test the validity of a claim for accounting services rendered pursuant to a contract with a grand jury, and also to test validity of a court order requiring the county auditor to pay such claim. *Uhler v Superior Court of Fresno County (1953) 117 Cal App 2d 147, 255 P2d 29.*

Mandamus is a proper proceeding to enforce right of municipal employees to receive vacation pay to which they are entitled under provisions of municipal charter. *Tevis v San Francisco (1954) 43 Cal 2d 190, 272 P2d 757.*

It was not error to sustain demurrer without leave to amend to cause of action seeking writ of mandate to review decision of board of supervisors in rejecting claim for damages for loss of livestock alleged killed by dogs, where board in passing on claim, was acting in quasi-judicial capacity and its discretion could not be reviewed by mandamus. *Adams v County of San Joaquin (1958, 3rd Dist) 162 Cal App 2d 271, 328 P2d 250.*

Duty of city controller to certify availability of funds for city's obligations, being expressly imposed by law, is ministerial and may be compelled by mandamus. *Flora Crane Service, Inc. v Ross (1964) 61 Cal 2d 199, 37 Cal Rptr 425, 390 P2d 193.*

Mandamus was not available to petitioner seeking recovery of money paid through court into county treasury under circumstances which gave rise to quasi-contractual duty on part of county to repay money where, to establish petitioner's claim, it was not necessary for court to define official duties of any office, trust or station and where petitioner

suggested no reason why civil action was not adequate for his purpose. *Wenzler v Municipal Court for Pasadena Judicial Dist. (1965, 2nd Dist) 235 Cal App 2d 128, 45 Cal Rptr 54.*

The trial court properly granted a peremptory writ of mandamus compelling a city retirement board to fix plaintiff's pension rights under the disability retirement system in effect at the time he entered employment rather than under the one in effect at the time of his retirement, where plaintiff would receive substantially less each month under the amended provisions, where such reduction would amount to a loss of income of over $25,000 during plaintiff's life expectancy, and where the impact of the reduction would be in no way alleviated by the fact that, under the amended system, plaintiff's wife would receive a survivor's allowance should plaintiff predecease her. *Babbitt v Wilson (1970, 3rd Dist) 9 Cal App 3d 288, 88 Cal Rptr 623.*

Mandamus is the proper remedy to compel the Trustees of the California State University and Colleges to pay back salary wrongfully withheld from a state university academic employee. *Frost v Trustees of California State University & Colleges (1975, 1st Dist) 46 Cal App 3d 225, 120 Cal Rptr 1.*

A medical services provider had standing to bring a mandamus action to compel the controller to pay plaintiff money allegedly earned and owed for services to Medi-Cal patients. The trial court held that the controller was obliged under former Gov C § 926.15(a), (see now *Gov C § § 927* et seq.) to pay provider claims approved by a review processor for the Department of Health Services, less contested amounts, within 30 days after receipt. The Court of Appeal modified the judgment to require release of sums which had been approved, without prejudice to subsequent audits and claims for overpayment by the department, in compliance with the governing rules and regulations. *Doctor's Medical Laboratory, Inc. v Connell (1999, 2nd Dist) 69 Cal App 4th 891, 81 Cal Rptr 2d 829, 896.*

Former employees' petition for a writ of mandate was denied because a retirement association was not required to include a retention incentive relating to accrued sick leave in the calculation of retirement benefits because the one-time lump payment was only received after termination; pension benefits should not have varied based on the amount of an employee's accrued sick leave. *Salus v San Diego County Employees Retirement Assn. (2004, Cal App 4th Dist) 2004 Cal App LEXIS 478.*

Petition for writ of mandamus under *CCP § 1085* was an appropriate remedy for an inmate who sought compensation for lost personal property; the action was not subject to *Gov C § 905.2(b)*, the claims presentation requirement of the California Tort Claims Act, because the loss of the property was the result of governmental misconduct. *Escamilla v. California Dep't of Corrections & Rehabilitation (2006, 4th Dist) 2006 Cal App LEXIS 1092.*

In denying an employee organization's petition for a writ of mandate to compel the Department of Personnel Administration to grant correctional supervisors the same percentage salary raise as rank and file subordinates, the trial court properly concluded the Department's actions were not arbitrary, capricious, or inconsistent with state law. *Wirth v. State of California (2006, 3d Dist) 142 Cal App 4th 131, 47 Cal Rptr 3d 623, 2006 Cal App LEXIS 1282.*

44. -Default or Demand and Refusal as Conditions Precedent

The county treasurer who is the custodian of a sum deposited in court to abide its judgment has not refused to perform any act in connection with such deposit, as provided by this section, until he has refused to obey an order to pay out the money. *Higgins v Keyes (1907) 5 Cal App 482, 90 P 972.*

A judgment creditor of an irrigation district has a right to call on its board of directors to pay the judgment, and on their failure to do so, to have recourse to the supervisors, and, on their refusal to levy an assessment sufficient to pay the judgment, to apply for a writ of mandate to compel such levy. *Nevada Nat'l Bank v Board of Supervisors (1907) 5 Cal App 638, 91 P 122.*

In a proceeding in mandamus to compel the state controller and the state treasurer to credit certain moneys received from the general government to the proper state highway fund, it appearing to the court that those officials had at all times been willing, and were ready and willing, to credit any payments received from the general government on account of any co-operative projects to any fund or funds as may be lawfully designated by the state engineering department, the writ was denied. *Ellis v Chambers (1920) 49 Cal App 43, 198 P 221.*

Mandamus does not lie to restrain the Industrial Accident Commission from proceeding in a compensation case in contravention of an agreement between the insurance carrier and the widow of a deceased workman, where, despite the fact that the action was filed in the Superior Court before being filed with the commission, it does not appear that the

commission will refuse a request for a discretionary stay. *Giacalone v Industrial Acci. Com. (1953) 120 Cal App 2d 727, 262 P2d 79* (disapproved by *Scott v Industrial Acci. Com., 46 Cal 2d 76, 293 P2d 18).*

In proceedings involving claims for wages by municipal employees or by parties to contract with municipality, an ordinary action at law for damages is generally adequate, and a writ of mandate will be denied where there is a mere claim for damages for breach of contract and no necessity for obtaining approval of claim by public officials. *Tevis v San Francisco (1954) 43 Cal 2d 190, 272 P2d 757.*

45. -Examination and Allowance of Claim

Mandamus lies to compel the board of education to approve the petitioner's demand upon the common school fund for a balance due as salary as a storekeeper under a contract with the board, as no adequate remedy lies at law. *Ross v Board of Education (1912) 18 Cal App 222, 122 P 967.*

Mandamus lies against the state board of control to allow and approve a sheriff's claim under Pol C § 4290 for expenses necessarily incurred in conveying persons to state institutions. *Hammel v Neylan (1916) 31 Cal App 21, 159 P 618.*

Mandamus lies to compel a county auditor to audit a claim for services by an investigator employed by the grand jury, if it is a legal charge against the county. *Woody v Peairs (1917) 35 Cal App 553, 170 P 660.*

Mandamus lies to compel the state board of control to audit and allow the petitioner's claim for his necessary traveling expenses as a state agent in returning to California a fugitive from justice, notwithstanding there is available a remedy at law under Stats 1893 p 57 and Stats 1921 p 1592, as such remedy is not equally beneficial or effective. *Dufton v Daniels (1923) 190 Cal 577, 213 P 949.*

The court in a mandamus proceeding will determine the legality of a claim against a municipal corporation when resisted by the auditor, and the approval of the claim by the city council after rejection by the auditor does not preclude the latter from raising the question of its invalidity. *Nightingale v Williams (1924) 70 Cal App 424, 233 P 807.*

The chief of police of a city who is duly and regularly appointed and confirmed by the city council and is eligible for that office and has qualified, is entitled to a writ of mandate directing the city auditor to allow a salary demand approved by the council. *Marshall v Williams (1927) 85 Cal App 507, 259 P 970.*

Before mandamus will issue to compel an officer or board to allow a claim against a municipality, it is essential that the claim be liquidated or be capable of exact determination, and this remedy is not available to enforce the payment of a claim unliquidated and indefinite in amount. *Los Angeles v Rounsavelle (1936) 15 Cal App 2d 750, 59 P2d 1075.*

Mandamus is the proper remedy to require the proper officer to examine and audit a claim, but not to interfere with his discretion in approving or rejecting it. *Draper v Grant (1949) 91 Cal App 2d 566, 205 P2d 399.*

Continued wrongful refusal by State Board of Control to act on claim before it does not leave claimant without remedy; in proper case, such refusal is controllable by mandamus. *Chas. L. Harney, Inc. v State (1963, 1st Dist) 217 Cal App 2d 77, 31 Cal Rptr 524.*

Where pension board fails, neglects or refuses to act on pension claim, the claimant may seek to compel board to act by petition for writ of mandamus. *Jones v Los Angeles (1963, 2nd Dist) 217 Cal App 2d 153, 31 Cal Rptr 761.*

46. -Issuance of Warrants or Orders for Payment

Mandamus lies to compel a board of education to draw its draft upon the school fund to pay for supplies purchased by it under contract, there being no other adequate remedy. *Raisch v Board of Education (1889) 81 Cal 542, 22 P 890.*

Mandamus will not lie to compel school trustees, who have wrongfully dismissed a teacher before the completion of her contract, to issue an order for the full amount of her salary, where no demand was made on them. *Shireley v Board of Trustees (1892) 31 P 365.*

Where the general fund for the fiscal year in which supplies were furnished by contract to prisoners in jails of a municipality, was totally exhausted, the reduction of the original claim therefor to a judgment against the political subdivision concerned does not increase the dignity of the claim so as to authorize the claimant to demand payment of it

from any fund not subject to the primary demand, and mandamus will not lie to compel the supervisors to order such judgment paid. *Goldsmith v Board of Supervisors (1896) 115 Cal 36, 46 P 816.*

Mandamus lies to compel a city board of education to issue an order on the county superintendent for a proper requisition in the amount of a claim of the petitioner against the board previously allowed by it. *Barber v Mulford (1897) 117 Cal 356, 49 P 206.*

Mandamus lies to compel a city council to draw a warrant in favor of the harbor master for the amount of a claim for fees allowed by the harbor commissioners under former Pol C § 2572, where payment has been refused upon the presentation of the commissioners' certificate for such amount. *Quigg v Evans (1898) 121 Cal 546, 53 P 1093.*

Where school trustees have drawn a warrant for the salary of a teacher, and the county superintendent refuses to issue a requisition on it, mandamus lies to compel its issuance. *Williams v Bagnelle (1903) 138 Cal 699, 72 P 408.*

Mandamus is an appropriate remedy to compel an auditing officer to issue a warrant for the compensation of the employees or officers of a city, county or state, where the amount thereof is so fixed by law, ordinance or otherwise that the act of auditing the same and drawing a warrant accordingly is merely ministerial in character. *Scott v Boyle (1912) 164 Cal 321, 128 P 941.*

Mandamus lies to compel the county auditor to draw his warrant in favor of the assignee of a creditor of the county as to the amount assigned prior to the filing with him of a transcript of a judgment against such creditor. *First Nat'l Bank v Tyler (1913) 21 Cal App 791, 132 P 1053.*

Mandamus lies to compel trustees of a reclamation district to draw a warrant in payment of a judgment against the district where the remedy under Pol C § 3453 is no longer plain, speedy, and adequate. *Hutchison v Reclamation Dist. No. 1619 (1927) 81 Cal App 427, 254 P 606.*

Where the board of directors of the Veterans Home of California refuses to act as required by law on due and proper proofs being made to moneys deposited by an inmate, an action seeking a direct money judgment will not lie, but the board may be compelled by writ of mandate to act and order the claim paid, and its secretary-treasurer may be compelled to pay the same, and thus any arbitrary action on the part of the board and its secretary-treasurer can be subject to control by a proper court. *McOmie v Board of Directors of Veterans' Home (1927) 88 Cal App 16, 263 P 253.*

City employees "laid off" for the good of the service were not entitled to a writ of mandamus to compel the issuance of warrants for their salary, where the order laying them off was made under a rule giving discretionary power to the city department to "lay off" employees. *Hayes v Long Beach (1930) 105 Cal App 94, 287 P 136.*

Mandamus lies to compel the Commissioner of Finance of Fresno to draw his purchase order and warrant for installment payments due under a valid contract whereby the city contracted for construction of aircraft hangars on its property. *Pipes v Hilderbrand (1952) 110 Cal App 2d 645, 243 P2d 123.*

A writ of mandate to compel county auditor to issue and pay warrants for employees of county engineer's office will be denied by District Court of Appeal where petitioner has failed to file his application in first instance in Superior Court and where he does not set forth circumstances which, in his opinion, render it proper that writ should issue originally from reviewing court, it never having been intended that such application should be filed in appellate court unless there is some good reason why it should not be filed in *Superior Court. County of Sacramento v Hastings (1955, 3rd Dist) 132 Cal App 2d 419, 282 P2d 100.*

Mandamus lies to compel city clerk to countersign warrant, regularly audited, allowed and approved by city council, in payment of publication cost of resolution of intention in proceeding for formation of parking district under Parking District Law of 1951. *La Mesa v Freeman (1955, 4th Dist) 137 Cal App 2d 813, 291 P2d 103.*

Where validity of petitioner's claim for services rendered county grand jury in examining accounts and records of county officer was established by compelte compliance with all statutory requirements concerning grand jury, court properly ordered issuance of writ of mandate compelling county auditor to issue and deliver warrant to petitioner. *Rambo v Mattox (1964, 4th Dist) 225 Cal App 2d 185, 37 Cal Rptr 174.*

Mandamus was the proper remedy to compel the Workmen's Compensation Appeals Board and its referee to issue an order to show cause why a carrier should not comply with the board's prior award in favor of a workman, where the workman did not seek to review the findings and award but was satisfied with it and merely wanted to enforce his rights under it, where he had exhaused his effective administrative remedies, and where the board and the referee, through a

mistaken belief in a nonexistent limitation of their right to control the carrier, were refusing to perform a duty which the law specifically enjoined upon them as a duty arising from their public office. *Betancourt v Workmen's Compensation Appeals Board (1971, 3rd Dist) 16 Cal App 3d 408, 94 Cal Rptr 9.*

47. -Payment or Discharge of Claim

Mandamus lies to compel the treasurer of a city and county to pay a judgment rendered against such city and county for damages for injuries to property caused by a mob or riot, where the supervisors have not authorized an appeal but it is taken from such judgment by the attorney for the city and county. *Bank of California v Shaber (1880) 55 Cal 322.*

Mandamus will not lie to compel the State Treasurer to pay moneys collected and specially appropriated under an invalid act into the general fund. *Camron v Weil (1881) 57 Cal 547.*

In a proceeding by mandamus to compel the supervisors of a county to "allow and pay" a judgment recovered against the county, the defense that the payment of the judgment will incur an indebtedness and liability exceeding the income for the year cannot be interposed; the judgment of the court in such a proceeding should order the board to allow the judgment but not to direct its payment. *Johnson v Board of Supervisors (1884) 65 Cal 481, 4 P 463.*

A city treasurer cannot be compelled by mandamus to set apart and appropriate to the interest and sinking fund any portion of a certain percentage of revenue derived from certain sources which by statute must be set apart and appropriated to such fund when such moneys have been previously paid out of the treasury on warrants drawn by the auditor, in payment of bills which had been audited by the board of trustees but which were not payable out of such fund. *Bates v Porter (1887) 74 Cal 224, 15 P 732.*

Where he has no funds in his hands applicable to the payment of such warrant, mandamus does not lie against a city and county treasurer to compel him to pay a warrant for damages awarded under a statute for improving a street. *Priet v Reis (1892) 93 Cal 85, 28 P 798.*

The treasurer of the city and county of San Francisco may not be compelled by mandamus to pay to the home for the care of inebriates of San Francisco the amount of fines collected by the police courts and deposited with him. *Home for Care of Inebriates v Reis (1892) 95 Cal 142, 30 P 205.*

Mandamus does not lie against the treasurer of a city and county to compel payment of a claim for the price of realty authorized to be purchased by the board of supervisors as a site for a smallpox hospital. *Von Schmidt v Widber (1894) 105 Cal 151, 38 P 682.*

Money advanced to the superintendent of streets of a city by a contractor to cover the compensation of a city engineer as part of the "incidental expenses" required by law to be so advanced to the superintendent, is held by the latter in his official capacity, and it is a duty enjoined on him by law to pay the sum to the party entitled thereto mandamus being the proper proceeding to enforce the rights of such party. *Fitzhugh v Ashworth (1897) 119 Cal 393, 51 P 635.*

While as a general rule no discretion is vested in the city treasurer with respect to the payment of warrants drawn by the proper officers, nevertheless if a claim is not a legal charge against the municipality, mandamus will not lie to compel its payment, even though it has been audited and allowed by the board charged with that duty. *Hodges v Kauffman (1928) 95 Cal App 598, 273 P 125.*

Where a municipal board has let a contract for local improvements in compliance with all the requirements of its charter as to form and procedure, mandamus will issue to compel the proper officer to pay for work performed under such contract. *Guy F. Atkinson Co. v Offner (1948) 86 Cal App 2d 92, 194 P2d 33.*

Mandamus lies to compel a city finance commissioner and the city to pay a progress estimate ordered paid by the city commissioner for work done under a valid public works contract. *Swanson v Hilderbrand (1949) 94 Cal App 2d 161, 210 P2d 95.*

Mandamus is a proper remedy to compel a city, which elected to have its firemen become members of the State Employee's Retirement System, to grant an injured fireman a leave of absence with pay as provided in *Lab C § 4850*, since the city's compliance with such code section is purely ministerial. *Hawthorn v Beverly Hills (1952) 111 Cal App 2d 723, 245 P2d 352.*

A writ of mandate could not issue to compel payment of funds presently held by a city and allegedly due the petitioners' judgment debtor or a bank where no evidence was presented that the city possessed any such funds. *Eilken v Morrison (1969, 2nd Dist) 3 Cal App 3d 25, 83 Cal Rptr 336.*

A writ of mandate could not issue to compel a city and a bank to pay into court all moneys allegedly owed to petitioners' judgment debtor, funds allegedly due the judgment debtor under a contract and that would come into the city's possession at some future time, where such funds could be reached by petitioners through an independent action at law or in equity, accompanied by an appropriate order preventing disbursement of the funds by the city to the bank during the pendency of the action, in which petitioners' claim of superior right to the funds as against the bank could be fully adjudicated. *Eilken v Morrison (1969, 2nd Dist) 3 Cal App 3d 25, 83 Cal Rptr 336.*

A writ of mandate could not issue to compel payment of funds by a city and a bank allegedly due petitioner judgment debtor, where the writ could not reach the funds, already disbursed by the city, even if it were subsequently determined that petitioner had a prior right to them. *Eilken v Morrison (1969, 2nd Dist) 3 Cal App 3d 25, 83 Cal Rptr 336.*

In the absence of an adequate remedy in the ordinary course of law, a mandamus proceeding in the Supreme Court was an appropriate remedy for the Attorney General to compel two counties to pay to the Tahoe Regional Planning Agency the sums budgeted for by the agency for 21/4 fiscal years under *Gov Code, § 66801*, art V, subds (a) and (e), where, under the wording of art VII, subd (a) of the same section, the counties were left with no discretion as to making such payments, and where the State of California had a beneficial right on behalf of the state's general citizenry, and an important interest as a party to the interstate compact involved and as a contributor to agency funds, in securing the agency's success in preserving the unique senic attributes of the region. *People ex rel. Younger v County of El Dorado (1971) 5 Cal 3d 480, 96 Cal Rptr 553, 487 P2d 1193.*

A probationary academic employee of a state university, who was rehired by the president of the university at the direction of the Chancellor of the California State University and Colleges, was not entitled to pay for a period in which he did not work following the decision of the university not to rehire him for the forthcoming academic year. Though *Ed. Code, § 24310*, provides for the payment of back salary in the event of revocation of orders of dismissal, demotion or suspension of either permanent or temporary academic employees, there is nothing in the statutes relating to academic employees or in grievance regulations promulgated by the chancellor to suggest that a rehired probationary employee is entitled to "back pay." *Frost v Trustees of California State University & Colleges (1975, 1st Dist) 46 Cal App 3d 225, 120 Cal Rptr 1.*

48. Public Contracts

Mandamus is the proper remedy to compel the chairman of a board of supervisors of a county to formally execute a contract, duly awarded by the board under public bid, for the erection of a building and to enter into a lease of the property to be used as a site for the proposed structure, as the facts present the case of a public officer refusing to perform a ministerial duty involving no discretion. *Slavich v Hamilton (1927) 201 Cal 299, 257 P 60.*

In a mandamus proceeding to compel the secretary of the state board of education to execute a contract, and as additional relief seeking a direction to the board to give effect to the contract, there was no error or abuse of discretion in refusing the additional relief, because the law does not enjoin the acts in question until the execution of the contract. *Silver Burdett Co. v State Board of Education (1940) 36 Cal App 2d 714, 98 P2d 533.*

Mandamus is the proper remedy by which a taxpayer and low bidder can compel the award of a contract for the publication of delinquent tax lists pursuant to a general statute, upon the ground of the invalidity of another statute upon the subject, under which the officer assumes to act. *Consolidated Printing & Publishing Co. v Allen (1941) 18 Cal 2d 63, 112 P2d 884.*

Where the Housing Authorities Law and the Housing Cooperation Law required a city to perform the terms of agreement entered into with the housing authority and to go forward with the exercise of the powers which it had agreed to undertake in cooperating with that authority, a writ of mandate will issue directing the city to perform the terms of such agreements and to proceed in the fulfillent of its obligations thereunder; a mere direction that the city so proceed is sufficent without directing these specific powers to be exercised. *Housing Authority of Los Angeles v Los Angeles (1952) 38 Cal 2d 853, 243 P2d 515.*

Mandamus is available to compel official to perform ministerial duty, and in proceeding brought for that purpose courts may determine validity of governmental contracts and laws authorizing prospective bond issues. *Metropolitan Water Dist. v Marquardt (1963) 59 Cal 2d 159, 28 Cal Rptr 724, 379 P2d 28.*

Mandamus is generally not appropriate remedy for enforcing contractual obligation against public entity, since contracts are ordinarily enforceable by civil action and since duty that writ of mandamus enforces is not contractual duty of entity but official duty of respondent officer or board. *Wenzler v Municipal Court for Pasadena Judicial Dist. (1965, 2nd Dist) 235 Cal App 2d 128, 45 Cal Rptr 54.*

It was proper to deny plaintiff's petition for writ of mandate to review and annul city council's award of community antenna television franchise to plaintiff's competitor and to compel council to accept plaintiff's proposal and to award franchise to it, where granting of franchise was legislative act involving exercise of discretion, and acceptance of plaintiff's proposal would constitute another legislative act also involving exercise of discretion. *Monarch Cablevision, Inc. v City Council of Pacific Grove (1966, 1st Dist) 239 Cal App 2d 206, 48 Cal Rptr 550.*

Mandamus is generally not an appropriate remedy for enforcing a contractual obligation against a public entity; contracts are ordinarily enforceable by civil actions, and the writ is not available unless the remedy by civil action is inadequate; and, the duty that the writ of mandamus enforces is not the contractual duty of the entity, but the official duty of the officer or board. *Culver City v State Board of Equalization (1972, 2nd Dist) 29 Cal App 3d 404, 105 Cal Rptr 602.*

The general rule that mandamus is not an appropriate remedy for enforcing a contractual obligation against a public entity is relaxed in cases involving a dispute as to the proper construction of a statute or ordinance defining or giving rise to the exercise of official duty, but, in a city's mandamus action to compel the correction of sales tax account records and for recovery of taxes erroneously distributed to another city, the general rule was applicable, where the trial court expressly found that the records had been corrected prior to the filing of the mandamus action. Moreover, the exception to the rule has been consistently confined to claims for wages by state or municipal employees. *Culver City v State Board of Equalization (1972, 2nd Dist) 29 Cal App 3d 404, 105 Cal Rptr 602.*

Appellate review of the award of a public contract is governed by certain well-established principles. Thus, in a mandamus action arising under *CCP § 1085*, review is limited to an examination of the proceedings before the agency to determine whether its findings and actions are supported by substantial evidence. The review is limited to an examination of the proceedings to determine whether the agency's actions are arbitrary, capricious, entirely lacking in evidentiary support or inconsistent with proper procedure. There is a presumption that the agency's actions are supported by substantial evidence, and the petitioner or plaintiff has the burden of proving otherwise. The appellate court may not reweigh the evidence and must view it in the light most favorable to the agency's actions, indulging all reasonable inferences in support of those actions. Mandamus is an appropriate remedy to compel the exercise of discretion by a government agency, but does not lie to control the exercise of discretion unless under the facts, discretion can only be exercised in one way. *MCM Construction, Inc. v City & County of San Francisco (1998, 1st Dist) 66 Cal App 4th 359, 78 Cal Rptr 2d 44.*

Where a condominium owner in an affordable housing project attempted to prepay the purchasing loan from the city and its development agency, a writ of mandate was properly issued to a city and its development agency, directing them to allow the owner to prepay their purchasing loan to the owner without requiring execution of a zero promissory note and second deed of trust; the latter were not necessary to preserve the restrictive covenants regarding income levels for occupants and purchasers, which restrictions also secured performance under the original deed of trust. *Dieckmeyer v Redevelopment Agency of Huntington Beach (2004, Cal App 4th Dist) 2004 Cal App LEXIS 779.*

49. -Acceptance or Rejection of Bids

Where a board of supervisors rejects all bids, although perhaps arbitrarily and capriciously, mandamus will not lie to compel it to award a printing contract to the lowest bidder where the charter provides that while contracts for printing shall be let to the lowest bidder, the board has discretion to reject all bids. *Stanley-Taylor Co. v Board of Supervisors (1902) 135 Cal 486, 67 P 783.*

Mandamus will lie at the instance of property owners to compel a city superintendent of the streets to enter into a contract with the successful bidder for street work to be done under the *Vrooman Act. Thoits v Byxbee (1917) 34 Cal App 226, 167 P 166.*

Court has no power to issue writ of mandate to require city official to award contract to next to lowest bidder should it be assumed that lowest bid should be disregarded. *Baldwin-Lima-Hamilton Corp. v Superior Court of San Francisco (1962, 1st Dist) 208 Cal App 2d 803, 25 Cal Rptr 798.*

It was within power of court to issue writ of mandate to correct abuse of discretion by commanding city official and city controller to refrain from proceeding to award or certify contract where city official's decision to disregard illegal and unenforceable provision of bid call had direct injurious result on one of bidders. *Baldwin-Lima-Hamilton Corp. v Superior Court of San Francisco (1962, 1st Dist) 208 Cal App 2d 803, 25 Cal Rptr 798.*

Superior court has full power to grant petition for writ of mandate to compel clerk of county board of supervisors to publish notice inviting bids for lease of county property and to pass on all issues in case; attempts by litigants to bypass courts of original jurisdiction are not ordinarily favored. *County of Los Angeles v Nesvig (1965, 2nd Dist) 231 Cal App 2d 603, 41 Cal Rptr 918.*

In seeking writ of mandate to compel clerk of county board of supervisors to publish notice inviting bids to lease portion of county's music center on lease-back basis after construction of buildings, circumstances were sufficiently exceptional to justify original application for writ to district court of appeal where music center was half- built and partly in operation. *County of Los Angeles v Nesvig (1965, 2nd Dist) 231 Cal App 2d 603, 41 Cal Rptr 918.*

A determination by an Urban Renewal Agency, whether it was a legislative or an administrative determination, that only one bidder qualified for a redevelopment project, was not subject on appeal to a de novo type of review, and an appellate court is not empowered to substitute its determination for that of a board in the absence of an abuse of discretion, fraud, collusion, or bad faith on the part of the board. *Old Town Development Corp. v Urban Renewal Agency (1967, 1st Dist) 249 Cal App 2d 313, 57 Cal Rptr 426.*

The principle that mandamus will not lie to control the discretion of an administrative board but only to correct an abuse of discretion did not apply to an action of an Urban Renewal Agency in determining that only one bidder qualified for a redevelopment project, where, to require renewal of bids would serve only to delay the selection already made and to give the relator, who had had an opportunity to submit a plan equally with the one chosen, an unfair advantage by providing it with an opportunity to revise and upgrade its plans, and where a contract had not yet been awarded so that there would be an opportunity at the time of the final action of the administrative body to direct its attention to any abuse of discretion. *Old Town Development Corp. v Urban Renewal Agency (1967, 1st Dist) 249 Cal App 2d 313, 57 Cal Rptr 426.*

In a mandamus proceeding by a developer against a municipal Urban Renewal Agency to compel it to rescind a resolution selecting a competing developer as the only one qualified to proceed with an alternative redevelopment plan, the same considerations which precluded relief in mandamus prevented recovery for breach of contract, where all proposals were at all times by the terms of the agency request for bidders subject to the right of the agency to reject any proposal. *Old Town Development Corp. v Urban Renewal Agency (1967, 1st Dist) 249 Cal App 2d 313, 57 Cal Rptr 426.*

The trial court properly refused to issue a writ of mandamus to interfere with proceedings taken by an Urban Renewal Agency where the questions raised in such proceedings were within the scope of the discretion of the agency to determine. *Old Town Development Corp. v Urban Renewal Agency (1967, 1st Dist) 249 Cal App 2d 313, 57 Cal Rptr 426.*

50. -Plans and Specifications

A proceeding in mandamus, seeking to compel the State Architect to revoke his approval of a change order providing for substitution of plastic pipe for metal pipe required under a school building contract, was rendered moot, and a judgment denying the writ was properly entered, where the plastic pipe had already been installed and encased in the walls and floor not only before the trial hearing but also before the school district was joined as an indispensable party, and where thus a writ would have been totally ineffectual, where, furthermore, although petitioners had diligently complained about the change order they had not started actual legal action until near the end of the installation period and had at no time instituted proceedings against the district to enjoin the use of plastic pipe or compel the use of metal, and where, to have stopped construction might have rendered the district liable for losses to the general contractor and loss of the use of the school for the period equivalent to such delay. *Genser v McElvy (1969, 2nd Dist) 276 Cal App 2d 709, 82 Cal Rptr 521.*

Assuming that plastic pipe, installed in a new school under a challenged change order could have been used but that the money paid for it could be recovered or a part of its agreed price retained, on the theory that the change order was ultra vires and that money cannot legally be paid for nonconforming work, a writ of mandamus requiring the State Architect to revoke his change order was not justified where, under the circumstances, including the fact that the installa-

tion of the pipe had already been completed when the school district was joined as an indispensable party, such revocation would have been unjust to the district and to those connected with the construction of the school. *Genser v McElvy (1969, 2nd Dist) 276 Cal App 2d 709, 82 Cal Rptr 521.*

51. Public Records, Books, and Documents

Mandamus does not lie to compel the secretary of the state board of health to permit the petitioner to inspect and take copies of written reports of doctors of a bacteriological examination of an alleged case of plague made for the board, which reports had been rightfully transmitted by the board to the governor. *McClatchy v Matthews (1901) 135 Cal 274, 67 P 134.*

Mandamus lies to compel the secretary of state to file articles of incorporation where the name of the corporation is not so similar as to mislead or deceive. *Rixford v Jordan (1931) 214 Cal 547, 6 P2d 959.*

In mandamus proceedings to compel a county official to make his records regularly available for inspection by petitioner in his private capacity, the trial court properly rested its denial of the writ on new regulations, approved by the court, even though they were introduced by the official after the complaint and answer were filed. *Bruce v Gregory (1967) 65 Cal 2d 666, 56 Cal Rptr 265, 423 P2d 193.*

A county tax collector's regulations respecting the inspection of his public records were a proper basis for the trial court denying a writ of mandamus to compel him to make them regularly available for inspection by petitioner in his private capacity, where, properly construed in favor of the broadest exercise by the public of the right of inspection, they were reasonably necessary to assure the orderly operation of his office. *Bruce v Gregory (1967) 65 Cal 2d 666, 56 Cal Rptr 265, 423 P2d 193.*

Mandate was the proper remedy to compel a county assessor to make available, for the State Board of Equalization's inspection, records in his custody relating to the property tax assessment of commercial aircraft operating in the county, in other words to compel him to comply with the ministerial duty imposed on him by law (*Code Civ Proc, § 1085*), where the statute empowering the board to have such records produced (*Gov Code, § 15612*) left no discretion in the assessor to withhold it from inspection. *State Board of Equalization v Watson (1968) 68 Cal 2d 307, 66 Cal Rptr 377, 437 P2d 761.*

In a mandamus proceeding, the trial court properly found that ordering the Department of Public Health to strike a birth certificate from its records would be an idle and useless act, where, though the certificate in question originally was improperly issued, the applicant was, at the time of trial, entitled to a birth certificate amended in the same particulars. *Karnes v State Dep't of Public Health (1969, 2nd Dist) 1 Cal App 3d 867, 81 Cal Rptr 904.*

Writ of mandate was properly issued, ordering a school district to disclose to real party in interest records regarding a district employee where the trial court found that the district's records regarded a complaint against the employee and the complaint was well-founded. *Bakersfield City School Dist. v Superior Court (2004, Cal App 5th Dist) 2004 Cal App LEXIS 772.*

52. Public Works and Improvements

Mandamus does not lie to compel the board of supervisors to act upon a petition asking them to fix a rate for the use of water for irrigation, in addition to that established by a former ordinance, in order to replace pipe of a water company, as the adding of an amount to the original rate to cover the cost of such replacement was within their discretion. *Berger v Justice (1906) 4 Cal App 532, 88 P 591.*

Before the appellate court can issue a writ of mandate requiring an irrigation district immediately to undertake the construction of projects authorized by the voters of the district, it must be shown that funds of the district are available for such work. *Nelson v Anderson-Cottonwood Irrigation Dist. (1921) 51 Cal App 92, 196 P 292.*

The duty of an irrigation district to furnish drainage to lands within the district requiring it is expressly enjoined by Stats 1907 p 569, and may be enforced by mandate. *Sutro Heights Land Co. v Merced Irrigation Dist. (1931) 211 Cal 670, 296 P 1088.*

A peremptory writ of mandate to compel the posting and publishing of notice inviting sealed bids for a public improvement will be denied where the time specified in the resolution for receiving such bids has expired. *Los Angeles v Offner (1941) 18 Cal 2d 859, 118 P2d 1.*

A complaint against the California Toll Bridge Authority and Department of Public Works to compel them to make an adequate study and investigation of an earth fill type of crossing as compared with proposed Richmond-San Rafael Bridge, and to consider whether the construction of such bridge will interfere with construction of water conservation facilities in that area fails to show that the authority abused its discretion in failing to make such a study and investigation, and an order sustaining a demurrer without leave to amend is proper, where the authority is not directed or empowered to study or consider water conservation problems as such, where the authority, prior to approving construction of bridge, had allowed plaintiffs and other opponents of bridge a substantial opportunity to be heard although the time allowed was less than that allowed proponents of bridge, and where the complaint shows that a duly constituted state agency has conducted a hearing and taken action which, on face of proceedings, appears to be within its allotted jurisdiction and a proper discharge of its statutory duty. *Faulkner v California Toll Bridge Authority (1952) 40 Cal 2d 317, 253 P2d 659.*

A county surveyor can be compelled by mandamus to approve a final subdivision map, where the petitioner has complied with all requirements and there is no room for exercise of any discretion by the surveyor. *Shorb v Barkley (1952) 108 Cal App 2d 873, 240 P2d 337.*

The implementation of a resolution, adopted by a duly constituted public commission, to relocate and restore a building within a historical monument, is a ministerial task for which a writ of mandamus will lie to compel its performance by the executive officers of the *Commission. Harbach v El Pueblo de Los Angeles State Historical Monument Com. (1971, 2nd Dist) 14 Cal App 3d 828, 92 Cal Rptr 757.*

Mandamus ordinarily is not appropriate to enforce the contractual obligations of a public body; and mandamus was especially inappropriate, at the instance of private citizens, to enforce a contract whose primary obligee, the federal Department of Transportation, has never charged the obligor, a municipal transit district, with a breach, in view of the federal government's pending choice either of withholding money payments or of suing for damages or specific performance. *McDonald v Stockton Metropolitan Transit Dist. (1973, 3rd Dist) 36 Cal App 3d 436, 111 Cal Rptr 637.*

In an action by a county board of supervisors seeking a writ of mandate relating to the funding, timing, and priorities of certain highway construction projects, neither traditional mandamus (*CCP § 1085*), nor administrative mandamus (*CCP § 1094.5*), was available to plaintiff, and the action was properly dismissed, where the relief prayed for sought to rescind quasi-legislative acts already undertaken by the commission not in abuse of its authority but pursuant to delegatory statutes prescribing legally adequate standards, and sought also to compel affirmative quasi-legislative action with regard to one of the projects concerned. *Board of Supervisors v California Highway Com. (1976, 3rd Dist) 57 Cal App 3d 952, 129 Cal Rptr 504.*

In a writ proceeding brought by a company that submitted the low bid on a contract to construct a public works project for a regional county sanitation district, in which plaintiff sought to compel the district to set aside its award of the contract to the second lowest bidder, review was governed by the principles of traditional mandamus (*CCP § 1085*) rather than administrative mandamus (*CCP § 1094.5*). The district's decision to award the contract to the second lowest bidder did not result from a proceeding in which a hearing is required by law and evidence must be taken (*CCP § 1094.5*), but rather was based on the documentation presented by the several bidders. Under traditional mandamus, review was limited to an examination of the proceedings before the agency to determine whether its actions had been arbitrary, capricious, or entirely lacking in evidentiary support, or whether it failed to follow proper procedures or failed to give notice as required by law. *Monterey Mech. Co. v Sacramento Regional County Sanitation Dist. (1996, 3rd Dist) 44 Cal App 4th 1391, 52 Cal Rptr 2d 395.*

Trial court did not err in denying a writ of mandate under *CCP § 1085* based on petitioners' argument that a city's approval of an extension of a wastewater recycling project was inconsistent with it general plan policies relating to protection of groundwater supply because the project posed no threat to the groundwater that was not addressed by prior documents and, given that the prior environmental reviews determined that the project was consistent with the city's general plan policies, the project could not be deemed arbitrary, capricious, unsupported or unfair. *Santa Teresa Citizen Action Group v City of San Jose (2003, 6th Dist) 114 Cal App 4th 689.*

Trial court erred in granting a charter city's petition for a writ of mandate to overturn a determination by the California Department of Industrial Relations (DIR) that a construction project financed in part with city funds was subject to the state's prevailing wage law, *Cal. Lab. Code § 1720* et seq.; the DIR properly determined that an animal shelter was a "public work" for purposes of the state's prevailing wage law. *City of Long Beach v Department of Industrial Relations (2003, Cal App 2nd Dist) 2003 Cal App LEXIS 1050.*

Because a county was statutorily required to trim or remove certain trees on county property that obstructed navigable airspace along the south side of an airport runway, a writ of mandate compelling the county to trim or remove the obstructing trees was properly issued. *Rancho Murieta Airport, Inc. v. County of Sacramento (2006, 3d Dist) 142 Cal App 4th 323, 2006 Cal App LEXIS 1305.*

53. -Inclusion or Exclusion of Property

Mandamus lies to compel a board of supervisors to grant a petition filed by the owner of land to have his lands in a reclamation district set off from such district, it appearing that the evidence before the supervisors was uncontradicted, competent and sufficient to prove satisfactorily all matters required by the statutes. *Inglin v Hoppin (1909) 156 Cal 483, 105 P 582.*

Mandamus lies to compel the board of directors of an irrigation district to exclude the petitioner's lands from the district where such lands are entitled to exclusion under the *Irrigation District Act. Harelson v South San Joaquin Irrigation Dist. (1912) 20 Cal App 324, 128 P 1010.*

Where property owners in proposed municipal water district obtained peremptory writ of mandate directing water district to terminate proceedings for annexation of certain lands, rights of property owners could not be affected by subsequent completion of purported annexation by district. *Fuller v San Bernardino Valley Municipal Water Dist. (1966, 4th Dist) 242 Cal App 2d 66, 51 Cal Rptr 130.*

Under the Municipal Water District Act of 1911, (*Wat Code, § 71000* et seq.) the actions of the board of directors of a municipal water district on petitions for exclusion of lands from the district and for consent to the annexation of such lands to another water district were governed solely by its quasi-legislative discretion as to what the directors thought was in the best interests of the district, and in such situation judicial review by ordinary mandamus is limited to an examination of the proceedings before the board to determine whether its action has been arbitrary, capricious or entirely lacking in evidentiary support, or whether it has failed to follow the procedure and give the notice required by law. *Wilson v Hidden Valley Municipal Water Dist. (1967, 2nd Dist) 256 Cal App 2d 271, 63 Cal Rptr 889.*

The board of directors of a water district under the Municipal Water District Law of 1911 (*Wat Code, § 71000*, et seq.), was exercising quasi-legislative powers rather than quasi-judicial powers in passing on petitioners' two petitions, one for exclusion of lands from the district, the other for consent to annexation of said lands to another district, and judicial review of such action must be made under ordinary mandamus (*Code Civ Proc, § 1085*), and not under administrative mandamus (*Code Civ Proc, § 1094.5*). *Wilson v Hidden Valley Municipal Water Dist. (1967, 2nd Dist) 256 Cal App 2d 271, 63 Cal Rptr 889.*

54. Rights and Duties of Sheriffs, Marshals, and Constables

Mandamus will not lie to compel a sheriff to issue a certificate and deed to a purchaser at a sale for taxes under an invalid assessment, nor where the petition does not aver that there was an assessment and levy for taxes, and that the same were unpaid. *Bosworth v Webster (1883) 64 Cal 1, 27 P 786.*

A writ of mandamus will lie to compel a sheriff to execute a writ of execution issued under a judgment rendered in the justice's court. *North P. C. R. Co. v Gardner (1889) 79 Cal 213, 21 P 735.*

Mandamus lies to compel a sheriff to redeliver property taken into his possession in a claim and delivery suit instituted by the petitioner and wrongfully redelivered to the defendant in the action. *Bailey v Security Trust Co. (1917) 34 Cal App 348, 167 P 409.*

Mandamus is the proper remedy to compel a sheriff to account and pay into the county's said treasury money received by him in his official capacity for services and supplies to be furnished by the county to the party making payment of the money. *County of Los Angeles v Cline (1921) 185 Cal 299, 197 P 67.*

Mandamus ordinarily is the proper means for compelling a sheriff to enforce a writ of possession. *Magnaud v Traeger (1924) 66 Cal App 526, 226 P 990.*

Mandamus will lie to compel a sheriff to release of record an attachment of real property upon the filing of a stay bond pending an appeal. *Johnston v Jones (1926) 78 Cal App 84, 248 P 286.*

Writ of mandate will not be issued to control discretion of public officer but will be issued to correct abuse of discretion and matter of determining duties to be performed by deputy marshal of Municipal court appointed to perform

duties of custodian of property is within discretion of marshal. *Broyles v Carter (1956, 2nd Dist) 142 Cal App 2d 647, 299 P2d 299.*

The trial court did not err when it denied plaintiff sheriff's deputies' petition for a writ of mandate and declaratory relief to require defendant county civil service commission to provide them administrative hearings on their employer's decision to transfer them from certain field positions to other types of assignments (*CCP § § 1085, 1060*). Contrary to plaintiffs' contention that they should be entitled under the county civil service rules to a hearing to appeal those personnel decisions, which arguably resulted in their "removal" from their former "positions" or assignments and, with respect to one plaintiff, a reduction in compensation (lack of overtime opportunities), the rule did not require such hearings. *Dobbins v County of San Diego Civil Service Com. (1999, 4th Dist) 75 Cal App 4th 125, 127, 89 Cal Rptr 2d 39.*

55. Schools and Colleges

The mere balloting by a majority of a quorum of the board of education for a teacher amounts only to an offer of employment, and where the board refuses to declare the teacher elected, this is in effect a revocation of the offer leaving nothing for the teacher to accept; hence mandamus will not lie to compel the board to declare such teacher elected. *Malloy v Board of Education (1894) 102 Cal 642, 36 P 948.*

Mandamus does not lie to compel a board of school trustees of a city in which there is no board of education to reinstate a teacher after dismissal by them and affirmance thereof by the county superintendent, where the statute conferring a fixed tenure of office upon teachers does not apply. *Taylor v Marshall (1910) 12 Cal App 549, 107 P 1012.*

Where a teacher has secured a judgment determining that she has not been legally discharged, mandamus is a proper remedy against the school board to collect the salary due to her. *Caminetti v Board of Trustees (1934) 1 Cal 2d 354, 34 P2d 1021.*

In a mandamus proceeding by teacher to obtain a reclassification at a higher salary rating and to compel payment of back salary at the higher rate, an award of back salary for a period of three years prior to the action is for the minimum period that the court could have awarded. *Fry v Board of Education (1941) 17 Cal 2d 753, 112 P2d 229.*

A judgment favorable to petitioner in a mandamus proceeding to compel a school district to reinstate her as a teacher, classify her as a permanent employee, and fix her salary is not, under the doctrine of res judicata, a bar to a mandamus proceeding to compel payment of the salary fixed in the prior proceeding where no issue was tendered or adjudication had in such proceeding with respect to payment of the salary. *Daugherty v Board of Trustees (1952) 111 Cal App 2d 519, 244 P2d 950.*

Where teacher's credential is revoked by state board and teacher is dismissed by city board, writ of mandate against city for reinstatement may not issue until state board grants teacher his credentials. *Lerner v Los Angeles City Board of Education (1963) 59 Cal 2d 382, 29 Cal Rptr 657, 380 P2d 97.*

Mandate was proper remedy for review of actions of school boards to dismiss probationary teachers at hearing under former Ed C § 13444. *Griggs v Board of Trustees (1964) 61 Cal 2d 93, 37 Cal Rptr 194, 389 P2d 722.*

Summary judgment procedure applies to mandamus actions and in mandamus proceeding to compel reemployment of state college teacher, it was not error to grant summary judgment to defendants on ground that plaintiff's grievance was moot where it was undisputed that plaintiff had resigned from his position. *Stanton v Dumke (1966) 64 Cal 2d 199, 49 Cal Rptr 380, 411 P2d 108.*

Mandamus is the appropriate remedy to test the constitutionality of the suspension and dismissal of students from a state university. *Goldberg v Regents of University of Cal. (1967, 1st Dist) 248 Cal App 2d 867, 57 Cal Rptr 463.*

The remedy of mandamus was available to a probationary teacher, as well as to a permanent teacher, who had been refused re-employment, to seek restoration to a position from which he claimed he was wrongfully excluded; any reason for distinguishing between a permanent and a probationary teacher in relation to a mandamus proceeding was eliminated by Ed Code, § 13443, which gave probationary teachers certain protection against nonrenewal of contracts which paralleled the rights of permanent teachers. *Thornton v Board of Trustees (1968, 5th Dist) 262 Cal App 2d 761, 68 Cal Rptr 842.*

A teachers' union was entitled to a writ of mandate to compel school officials to desist from enforcing any rule or regulation prohibiting school employees from circulating, for signatures, during duty-free lunch periods on school premises, a petition relating to the financing of public education which was addressed to concerned officials, where de-

fendants failed to demonstrate the existence of facts which might reasonably have led them to forecast substantial disruption of, or material interference with, school activities. *Los Angeles Teachers Union, etc. v Los Angeles City Board of Education (1969) 71 Cal 2d 551, 78 Cal Rptr 723, 455 P2d 827.*

Mandamus was the proper remedy to compel reinstatement of a male high school student suspended from attendance by the school district's governing board for violation of a void "dress policy" that "extremes of hair styles are not acceptable," where defendant school authorities were without discretion to exclude the petitioner under the suspension pronounced, and one day thereafter a necessary permit for school attendance at the school was issued by the school district of the student's residence pursuant to an agreement between the district of residence and that of his attendance entitling him to attend the latter school so far as the inter-district attendance agreement was concerned. *Myers v Arcata Union High School Dist. (1969, 1st Dist) 269 Cal App 2d 549, 75 Cal Rptr 68.*

In a mandamus action by a teachers' association and others against a school district, members of its board of trustees, and its superintendent, the trial court properly refused to compel re-employment of a school teacher who was also plaintiff organization's secretary, where the court found on substantial evidence that none of the defendants discriminated against the teacher because of her activities on behalf of plaintiff teacher's organization and found further that the reason she was not employed was either non-availability of a position or her individual personality problem, and where the teacher was only one of numerous credentialed applicants who were not employed by defendant district and there was no evidence that persons less qualified than she were in fact hired by defendant at that time. *California Federation of Teachers v Oxnard Elementary Schools (1969, 2nd Dist) 272 Cal App 2d 514, 77 Cal Rptr 497.*

A probationary teacher who was denied reemployment for cause, pursuant to former Ed C § 13443, was entitled to bring an action in mandamus to compel his reemployment. *Blodgett v Board of Trustees (1971, 1st Dist) 20 Cal App 3d 183, 97 Cal Rptr 406.*

Ordinary mandamus pursuant to *CCP § 1085*, and not administrative mandamus under *CCP § 1094.5*, was the proper remedy for a school teacher who contended that a school board had an obligation, even after notifying her of its final decision to terminate her at the end of the school year, to reassign her to any position which came available in the ensuing school year prior to the effective date of her termination, where the school board refused to act on the teacher's demand for reassignment when faced with that contention, and therefore refused to exercise discretion or to perform a ministerial act. *Wellbaum v Oakdale Joint Union High School Dist. (1977, 5th Dist) 70 Cal App 3d 93, 138 Cal Rptr 553.*

Under *CCP § 1085* (writ of mandate to compel performance of act law enjoins as duty resulting from office, trust or station) and *CCP § 1086* (mandate where no plain, speedy, and adequate remedy), a writ of mandate does not lie to control discretion conferred upon a public agency. Two basic requirements are essential to the issuance of the writ: a clear, present and usually ministerial duty on the part of the respondent, and a clear, present and beneficial right in the petitioner to the performance of that duty. Although mandate will not lie to control a public agency's discretion, that is to say, force the exercise of discretion in a particular manner, it will lie to correct abuses of discretion. In determining whether an agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld. *Helena F. v West Contra Costa Unified School Dist. (1996, 1st Dist) 49 Cal App 4th 1793, 57 Cal Rptr 2d 605.*

In an appeal from a traditional mandate proceeding reviewing an agency's policy decisions under *CCP § 1085* (writ of mandate to compel performance of act law enjoins as duty resulting from office, trust or station), the trial court's findings as to foundational factual matters are conclusive if supported by substantial evidence. Thereafter, the appellate court performs essentially the same function as the trial court-it determines if the agency's decision was arbitrary, capricious or entirely lacking in evidentiary support, contrary to established public policy, unlawful or procedurally unfair. *Helena F. v West Contra Costa Unified School Dist. (1996, 1st Dist) 49 Cal App 4th 1793, 57 Cal Rptr 2d 605.*

Charter school was entitled to mandamus relief under *CCP § 1085(a)* where a public school district, in response to a request for facilities, offered the use of classrooms at five different school sites; *Ed C § 47614(b)* requires reasonably equivalent and contiguous facilities, and the district failed to consider, pursuant to *Cal. Code Regs. tit. 5, § 11969.2(d)*, whether it could minimize the number of sites. *Ridgecrest Charter School v Sierra Sands Unified School Dist. (2005, Cal App 5th Dist) 2005 Cal App LEXIS 1032, 2005* Daily Journal DAR 7926.

Where the record before an appellate court indicated that although a historical society had requested that a city prepare the administrative record, it then failed to take any further necessary steps to obtain the record, such as paying the costs of preparation as ordered by the trial court or seeking modification of the trial court's order to permit a waiver of

costs or delayed payment, the trial court could reasonably conclude that the society had no good faith intention to obtain the record, file an opening brief, or pursue the litigation. Under those circumstances, the trial court did not abuse its discretion in granting a motion for dismissal of the society's petition for a writ of mandate that challenged the approval of a low income housing development on a site with historical signifi- cance, based on the society's failure to prosecute the matter. *Black Historical Society v City of San Diego (2005, Cal App 4th Dist) 2005 Cal App LEXIS 1856.*

56. Taxes and Assessments

It is the express statutory duty of a city and county auditor to recognize, compute, and enter the tax levy in accordance with the rate fixed by the board of supervisors, and mandamus will lie to compel the performance of such duty. *Morton v Broderick (1897) 118 Cal 474, 50 P 644.*

Mandamus does not lie to compel the state controller and treasurer to credit a county treasurer with the amount of a warrant accepted by the county treasurer from a landowner in part payment of an assessment upon a drainage district under the Refunding Act (Stats 1927 ch 774), as there is no provision in the act for the disposition of the warrants after their receipt by the county treasurer. *Christophel v Riley (1929) 206 Cal 242, 273 P 1064.*

Mandamus is a proper remedy by which to compel a county tax collector to receive a part only of the taxes indicated on the assessment roll as being due and a lien on certain property owned by a city, and to give a receipt in full, where the city claims that the special assessments comprising the remainder of the taxes are illegal and void, and its tender of the amount alleged to be properly due has been refused by the tax collector. *Pasadena v Welch (1933) 128 Cal App 646, 17 P2d 1058.*

Mandamus is proper to compel the issuance of an official receipt in full where taxes have been tendered to an assessor, which he refuses to accept. *Consolidated Title Sec. Co. v Hopkins (1934) 1 Cal 2d 414, 35 P2d 320.*

Mandamus does not lie to compel a county auditor and tax collector to reduce the amount of taxes levied against property, as neither of them has any legal duty or authority to fix or change the valuations of property or the amount of taxes to be levied thereon. *Bandini Estate Co. v Payne (1935) 10 Cal App 2d 623, 52 P2d 959.*

In a proceeding in mandamus to compel a city council to levy a tax or to appropriate available funds to meet the budget for a city employees' retirement fund, mandamus was a proper remedy, and it being considered that the duty was mandatory and a continuing one, any order with reference thereto could be made applicable not only to future appropriations but also future tax levies to be made and ordered by ordinance of the city council. *McAlpine v Baumgartner (1937) 10 Cal 2d 409, 74 P2d 753.*

Mandamus lies to compel city auditor to release funds withheld by him under erroneous belief that charter provision under which funds were collected is invalid. *Berkeley Unified School Dist. v Berkeley (1956, 1st Dist) 141 Cal App 2d 841, 297 P2d 710.*

The writ of mandate lies to compel the performance of a clear, present and ministerial duty which the law specially enjoins, and taxing authorities may be compelled by this writ to levy taxes or make assessments to provide funds required by law. *County of Sacramento v Hickman (1967) 66 Cal 2d 841, 59 Cal Rptr 609, 428 P2d 593.*

The trial court correctly denied mandamus to compel a county board of supervisors to earmark and spend a substantial part of the revenue from a transient-room tax for promotion and advertising of a particular area of the county, where the statute enabling general law counties to impose such a tax (former Gov C § 51030, see now *Rev & Tax C § § 7280* et seq.) said nothing of funding, appropriations, or objectives of expenditure, and where a preamble to the taxing ordinance declaring an intent to spend a substantial part of the revenue in the area from which the tax was derived would, if viewed as an operative ordinance, form a continuing appropriation of county revenue outside the annual budget, thus offending the state law's directions for county fiscal operation. *McCafferty v Board of Supervisors (1969, 3rd Dist) 3 Cal App 3d 190, 83 Cal Rptr 229.*

In setting a tax rate under a statutory delegation of authority, an administrative board or officer acts in a quasi-legislative capacity and though *CCP § 1094.5*, providing for administrative mandamus, applies only to administrative adjudications, not to quasi-legislative action, a party may seek review of a quasi-legislative action through *CCP § 1085*, providing for traditional mandamus. *Malibu West Swimming Club v Flournoy (1976, 3rd Dist) 60 Cal App 3d 161, 131 Cal Rptr 279.*

57. -Reassessments and Correction of Assessments

Mandamus lies to compel a city council to pass upon questions involved in protests against street assessments, and either to confirm or modify the assessments or order new ones, where the council has wrongfully refused to proceed with the hearing of the protests. *Title Ins. & Trust Co. v Lusk (1911) 15 Cal App 358, 115 P 53.*

Mandamus lies to compel the state board of equalization to assess property of a railroad as property used exclusively in the operation of its business in the state, under Const art XIII § 14, Act of April 1, 1911 (Stats 1911 p 530), where there is no conflicting evidence nor any dispute about the facts upon which the decision of the board depends. *San Diego & A. R. Co. v State Board of Equalization (1913) 165 Cal 560, 132 P 1044.*

In a mandamus proceeding by taxpayers to remedy the effect of allegedly wrongful property assessments made by an assessor, where the judgment was explicit in terms of the steps to be taken by the public officers it reached, the objectives to be pursued, and the methods to be used, but directed no specific result as to any individual assessments or taxpayers, the action was within the rule that while ordinarily mandamus may not be available to compel the exercise by a court or officer of the discretion possessed by them in a particular manner, it does lie to command the exercise of discretion-to compel some action upon the subject involved. *Knoff v San Francisco (1969, 1st Dist) 1 Cal App 3d 184, 81 Cal Rptr 683.*

When an officer dealing with assessments fails to act in accordance with the law, a writ of mandate can issue to compel the officer to comply. *Board of Supervisors v Archer (1971, 3rd Dist) 18 Cal App 3d 717, 96 Cal Rptr 379.*

A county assessment appeals board lawfully exercised its discretion with respect to an application filed by a taxpayer seeking an increase in another taxpayer's assessment, where it considered the application as a request that it invoke its jurisdiction to increase the assessment, held a hearing on that matter, and, as a result, determined not to invoke its jurisdiction. There is neither a statute nor a rule authorizing the filing of an application to increase the assessment on the property of another person, and if such an application is filed, a board is not required by law to act upon it. Mandamus therefore did not lie to compel the board to take different action. *Stevens v Fox Realty Corp. (1972, 2nd Dist) 23 Cal App 3d 199, 100 Cal Rptr 63.*

58. -Special Taxes and Assessments

An application for a writ of mandate requiring the county auditor to levy a special tax for high school purposes, on the ground that the rate fixed by the board of supervisors was too low, will be denied where the right to direct any other assessment has ceased to exist, and any other levy, if ordered, would but lead to confusion. *McDonald v Richards (1926) 79 Cal App 1, 248 P 1049.*

Mandamus to compel the board of supervisors of a county to levy a special tax, the assessment to be spread over the taxable property of a high school district, will not be issued by the Supreme Court where it appears that the time is past when this may be done, as said court will not issue its prerogative writs to compel the doing of idle acts. *Rice v McClellan (1927) 202 Cal 650, 262 P 1092.*

Mandamus is an appropriate remedy to compel a city auditor to extend on the city's property tax rolls a special levy to discharge payments on an authorized bonded indebtedness, where the taxing power sought to be exercised exists, and there is no express limitation on its exercise under the city charter except that the bonded indebtedness must be duly authorized. *Grass Valley v Walkinshaw (1949) 34 Cal 2d 595, 212 P2d 894.*

E. DUTIES OF COURTS AND JUDICIAL OFFICERS

(1) GENERALLY

59. In General

Prohibition does not ordinarily lie to secure a pretrial determination, at the appellate level, of intermediate rulings by a trial court on issues of law. *Van Halen v Municipal Court for Pasadena Judicial Dist. (1969, 2nd Dist) 3 Cal App 3d 233, 83 Cal Rptr 140.*

Mandate was an appropriate remedy for a city seeking to compel the trial court to set aside an order prohibiting the city from abandoning an eminent domain action, where the facts were established without essential dispute and the sole issue was whether those facts were sufficient, as a matter of law, to permit the setting aside of an abandonment, since, if they were not, the trial court was under a legal duty to deny the motion to set aside and to dismiss the action, and it

could be directed to perform that duty by writ of mandate, and where no other adequate remedy existed. *Torrance v Superior Court of Los Angeles County (1976) 16 Cal 3d 195, 127 Cal Rptr 609, 545 P2d 1313.*

Writ of mandate was issued, compelling the superior court to grant the California Department of Fair Employment and Housing's petition for an order compelling the real parties in interest's compliance with investigative discovery, in order for the department to investigate a complaint alleging discrimination based upon race and marital status. *Department of Fair Employment & Housing v Superior Court (2002, 5th Dist) 99 Cal App 4th 896, 121 Cal Rptr 2d 615.*

60. Restriction of Writ to Inferior Courts or Judges

The superior court cannot enjoin the execution of a mandate of the supreme court; the order of the supreme court must control, and any conflicting order from the superior court must be disregarded. *Quan Wo Chung & Co. v Laumeister (1890) 83 Cal 384, 23 P 320.*

A petition for mandamus directed by the superior court to itself will not lie. *Legg v Superior Court of Los Angeles County (1958, 2nd Dist) 156 Cal App 2d 723, 320 P2d 227.*

Superior court has no power, authority or jurisdiction to issue mandamus and prohibition against itself; Mandamus or prohibition may be issued only by court to another court of inferior jurisdiction. *Haldane v Superior Court of Los Angeles County (1963, 2nd Dist) 221 Cal App 2d 483, 34 Cal Rptr 572.*

Inmate petition for a writ of mandate/prohibition was denied, seeking to enjoin the California Supreme Court from ruling against the inmate on a petition for writ of mandate, to compel that court to reconsider its denial of the inmate's petition for review of a State Bar complaint about the inmate's attorney's performance; federal court lacked subject matter jurisdiction to compel a particular result by the *California Supreme Court. Shaheen v Cal. Supreme Court (2002, ND Cal) 2002 US Dist LEXIS 24969.*

61. Compelling Assumption and Exercise of Jurisdiction

Where the superior court is called upon to consider either the sufficiency of facts established by the record or facts determined by it upon evidence properly addressed to it, to give it jurisdiction, the Supreme Court cannot interfere with its determination by mandamus. *Cahill v Superior Court of San Francisco (1904) 145 Cal 42, 78 P 467.*

Mandamus lies to compel an inferior court to act within its jurisdiction when it has failed or refused to do so. *Golden Gate Tile Co. v Superior Court of San Francisco (1911) 159 Cal 474, 114 P 978.*

Where there is no conflict as to the facts, and in the judgment of the Supreme Court those facts confer jurisdiction and make it the clear duty of the lower court to proceed to the trial of a cause, and if there is no other adequate remedy the writ of mandate will issue commanding such action. *Hill v Superior Court of County of Sacramento (1911) 15 Cal App 307, 114 P 805.*

The superior court has no jurisdiction over an appeal from a justice court, in which there was a trial by jury, and judgment had not been entered in the docket in conformity with the verdict when the appeal was taken; where such premature appeal was dismissed by the superior court, regardless of the ground of dismissal, mandamus will not lie to compel the superior court to proceed to the trial thereof. *June v Superior Court of Sonoma County (1911) 16 Cal App 126, 116 P 293.*

Where a court fails to reset and try a cause on the ground that jurisdiction to try it has been lost, prior demand and refusal of the court to reset the contest for trial is not a condition precedent to a writ of mandamus. *Moore v Superior Court of California (1912) 20 Cal App 299, 128 P 946.*

A judge of the superior court may be compelled by a writ of mandate to proceed with the trial of either an issue of law or fact in an action rightly pending in his court when he refuses without legal reason so to do. *San Diego v Andrews (1924) 195 Cal 111, 231 P 726.*

If legal justification is disclosed for a judge of the superior court to refuse to proceed with the trial of either an issue of law or fact in an action rightly pending in his court, as, for example, his statutory disqualification, mandamus will not lie. *San Diego v Andrews (1924) 195 Cal 111, 231 P 726.*

Mandamus lies to compel a subordinate judicial tribunal to proceed and exercise its functions when it has neglected or refused to do so. *First Nat'l Bank v Superior Court of Los Angeles County (1925) 71 Cal App 64, 234 P 420.*

A writ of mandamus may not be used in any way to interfere with a proper exercise of discretion in acting on any matter before the court, but may be used to compel a court to act in a matter within the line of its duty. *Johnson v Superior Court of San Diego County (1929) 102 Cal App 178, 283 P 331.*

While mandamus is not available to compel the exercise by a court or officer of the discretion possessed by him in a particular manner or to reach a particular result, it does lie to command the exercise of discretion; that is to compel some action on the subject involved. *Hollman v Warren (1948) 32 Cal 2d 351, 196 P2d 562.*

Before seeking mandate in an appellate court to compel action by a trial court, a party should first request the lower court to act, and absent such request the writ ordinarily will not issue unless it appears that the demand would have been futile. *Phelan v Superior Court of San Francisco (1950) 35 Cal 2d 363, 217 P2d 951.*

A trial court is under a duty to hear and determine the merits of all matters properly before it which are within its jurisdiction, and mandate may be used to compel the performance of this duty. *Robinson v Superior Court of Los Angeles County (1950) 35 Cal 2d 379, 218 P2d 10.*

Mandamus may not issue to compel judicial action which is not within court's jurisdiction. *Daniels v Superior Court of Los Angeles County (1955, 2nd Dist) 132 Cal App 2d 700, 282 P2d 1000.*

Ancient office of writ of mandate was to compel court to hear and decide merits of matter within its jurisdiction. *State Market of Avenal, Inc. v Superior Court of Kings County (1959, 4th Dist) 172 Cal App 2d 517, 342 P2d 325.*

Court cannot, by holding without reason that it has no jurisdiction of proceeding before it, divest itself of jurisdiction and evade duty of hearing and determining it; hence, mandate will issue to compel hearing and determination of merits where court has merely sustained objection on jurisdictional grounds and left proceeding pending. *People v Superior Court of Los Angeles County (1965, 2nd Dist) 239 Cal App 2d 99, 48 Cal Rptr 445.*

62. -After Erroneous Decision as to Jurisdiction

Since the law especially enjoins the duty of hearing and determining all matters which are within the jurisdiction of a court and which come properly before it, mandate may issue where the court's determination that it is without jurisdiction is erroneous. *Cahill v Superior Court of San Francisco (1904) 145 Cal 42, 78 P 467.*

Where the superior court erroneously dismisses an appeal from a justice court over which it has jurisdiction, on the theory that it has no jurisdiction, mandamus will lie to compel it to hear and decide the cause. *Blake v Superior Court of Santa Clara County (1911) 17 Cal App 51, 118 P 448.*

Where the superior court dismisses a cause appealed thereto from the justice court, on the erroneous assumption that it has no jurisdiction to entertain the same, its action is tantamount to a refusal to hear and determine the cause, and a writ of mandamus, not a writ of review, is the proper remedy. *Widrin v Superior Court of California (1911) 17 Cal App 93, 118 P 550.*

When the trial court has decided, as a matter of law, on its construction of a statute, that it is without jurisdiction, mandamus to require the court to proceed with the trial is the proper remedy; and in such proceeding, where the superior court exceeded its jurisdiction in dismissing an appeal from the justice's court, mandamus was the proper remedy. *Traders Credit Corp. v Superior Court of Alameda County (1931) 111 Cal App 663, 296 P 99.*

Where a court has jurisdiction of a cause it should not be permitted by an arbitrary or erroneous order to divest itself of jurisdiction, but should be compelled by mandamus to proceed with the case to judgment. *Ingalls v Superior Court of Los Angeles County (1932) 121 Cal App 453, 9 P2d 266.*

Where a superior court has wrongfully divested itself of jurisdiction of a cause, mandate is a correct remedy to correct the error. *Washington Nat'l Ins. Co. v Superior Court of Riverside County (1933) 129 Cal App 430, 18 P2d 743.*

Mandamus will lie to compel the superior court to proceed with the hearing of a justice court appeal, when properly taken and the superior court has erroneously dismissed the same on the ground that it had not acquired jurisdiction thereof, and certiorari is not the only proceeding by which the erroneous action may be reached. *Williams v Superior Court of Alameda County (1935) 9 Cal App 2d 314, 49 P2d 1126.*

If a court is mistaken in its assumption that it does not possess the requisite jurisdiction, mandamus will issue to compel it to assume jurisdiction. *Katenkamp v Superior Court of Santa Barbara County (1940) 16 Cal 2d 696, 108 P2d 1.*

Where a court erroneously refuses to act on the theory that it has no jurisdiction, mandamus lies to compel it to hear and decide the case. *Stewart v Superior Court of Los Angeles County (1946) 29 Cal 2d 63, 172 P2d 683.*

Mandamus is available where the trial court has disposed of a matter by an order dismissing it or denying relief on the sole but erroneous ground of lack of jurisdiction. *Robinson v Superior Court of Los Angeles County (1950) 35 Cal 2d 379, 218 P2d 10.*

A trial court is under a duty to hear and determine the merits of all matters properly before it within its jurisdiction, and mandate may be used to compel the performance of this duty even where the court's refusal to pass on the merits is based on the considered but erroneous belief that it has no jurisdiction as a matter of law to grant the relief. *Schaefer v Superior Court of County of Santa Barbara (1952) 113 Cal App 2d 428, 248 P2d 450.*

Where court disposes of matter before it on ground that it has no jurisdiction and thereby precludes decision on the merits, mandamus may issue to compel court to decide issues on the merits. *Financial Indem. Co. v Superior Court of Los Angeles County (1955) 45 Cal 2d 395, 289 P2d 233.*

Mandamus is proper remedy to compel superior court to act if it erroneously refuses to assume and exercise jurisdiction. *St. James Church of Christ Holiness v Superior Court of Los Angeles County (1955, 2nd Dist) 135 Cal App 2d 352, 287 P2d 387.*

Where there has been refusal to exercise existing discretion or refusal to exercise jurisdiction because of mistaken view that same does not exist, error does not divest jurisdiction and its exercise can be compelled by appropriate proceeding, such as mandamus. In re Friedman on behalf of *Brumback (1956) 46 Cal 2d 810, 299 P2d 217.*

Writ of mandamus may properly be used to compel superior court to exercise its jurisdiction though its refusal to do so is based on considered, but erroneous belief that it has no jurisdiction as matter of law to grant relief requested, if no other adequate remedy exists. *Weber v Superior Court of Los Angeles County (1960) 53 Cal 2d 403, 2 Cal Rptr 9, 348 P2d 572.*

District court of appeal will not interfere with decision of inferior court where inferior court is called on to consider sufficiency of certain facts to give it jurisdiction, but if inferior court is not acting on any conflict of evidence in determining its want of jurisdiction but erroneously holds that as matter of law that it has no jurisdiction, it is duty of district court of appeal to mandate inferior court to take jurisdiction and perform duty imposed on it by statute. *Palmese v Superior Court of Los Angeles County (1961, 2nd Dist) 193 Cal App 2d 600, 14 Cal Rptr 453.*

Although petition for writ of certiorari seeks wrong relief, where lower court erroneously refuses to assume jurisdiction, there is no reason why appellate court should not grant appropriate writ of mandamus where complete record is before it. *Morrison Drilling Co. v Superior Court of Orange County (1962, 4th Dist) 208 Cal App 2d 740, 25 Cal Rptr 682.*

Availability of mandate is not limited to those situations where there has been abuse of discretion but also extends to cases where trial court refuses to exercise its discretion because of mistaken belief that court had no discretion in premises. *Erlich v Superior Court of Los Angeles County (1965) 63 Cal 2d 551, 47 Cal Rptr 473, 407 P2d 649.*

Mandate will issue to compel a hearing and determination on the merits where the lower court has erroneously declined jurisdiction. *Trickey v Superior Court of Sacramento County (1967, 3rd Dist) 252 Cal App 2d 650, 60 Cal Rptr 761.*

Mandate is an appropriate remedy to compel the exercise of discretion by a trial court when the court has refused to exercise its discretion because of a mistaken belief that it had none. *Nadler v Superior Court of Sacramento County (1967, 3rd Dist) 255 Cal App 2d 523, 63 Cal Rptr 352.*

63. Control or Review of Judicial Action or Discretion

Where the determination of a tribunal is intended to be final, it cannot be disturbed either by mandamus or in any other way. *Fairchild v Wall (1892) 93 Cal 401, 29 P 60.*

No rule of the law of mandamus justifies the ordering of a judge to make a different finding of fact. *Pipher v Superior Court of Amador County (1906) 3 Cal App 626, 86 P 904.*

Mandamus will not lie to control the determination of a court on matters of fact, calling for the exercise of judicial discretion. *American Well & Prospecting Co. v Superior Court of Kern County (1912) 19 Cal App 497, 126 P 497.*

A court cannot by mandamus be made to exercise its discretion in a particular manner. *Fairbank v Superior Court of San Joaquin County (1917) 34 Cal App 66, 166 P 864.*

When the act to be done is judicial or discretionary, the writ cannot direct what decision or judgment shall be rendered. *First Nat'l Bank v Superior Court of Los Angeles County (1925) 71 Cal App 64, 234 P 420.*

When the superior court has entertained jurisdiction of an action, its proceedings, however erroneous, may not be reviewed on application for mandamus. *Charles L. Donohoe Co. v Superior Court of Glenn County (1926) 79 Cal App 41, 248 P 1007.*

In cases wherein reasonable mind may differ as to a proper conclusion or judgment, it is not the office of mandamus to direct a decision or ruling. *Nessbit v Superior Court of Alameda County (1931) 214 Cal 1, 3 P2d 558.*

Mandamus cannot try the correctness of any discretionary ruling of a competent court made within its jurisdiction. *Shoemaker v Superior Court of Los Angeles County (1935) 4 Cal App 2d 586, 41 P2d 343.*

Mandamus will not lie where the thing sought involves the exercise of discretion. *Brown v Superior Court of Sierra County (1935) 10 Cal App 2d 365, 52 P2d 256.*

Unless it is shown that the duty to do the thing asked is unmixed with discretionary power or the exercise of judgment, mandate will not issue to compel action on the part of a judge. *Texas Co. v Superior Court of Los Angeles County (1938) 27 Cal App 2d 651, 81 P2d 575.*

Where a court accepts jurisdiction, a higher court will not issue a writ of mandate to compel the lower court to change its decision. *Texas Co. v Superior Court of Los Angeles County (1938) 27 Cal App 2d 651, 81 P2d 575.*

The exercise of the discretion of a judicial or quasi-judicial tribunal, in the determination of a controversy that is dependent on disputed facts, will not be controlled by the issuance of a writ of mandate. *Wallace v Board of Education (1944) 63 Cal App 2d 611, 147 P2d 8.*

Mandamus is available to compel a court to give a full hearing in a case before it, though the remedy is not available to inform the court as to how it should rule with respect to the merits. *Sampsell v Superior Court of Los Angeles County (1948) 32 Cal 2d 763, 197 P2d 739.*

There is no legal basis for compelling by writ of mandate action by trial court which should be obtained under established procedure. *Hall v Superior Court of Los Angeles County (1955) 45 Cal 2d 377, 289 P2d 431.*

Mandamus cannot be used to control discretionary act of superior judge. *People v Superior Court of San Francisco (1955, 1st Dist) 137 Cal App 2d 194, 289 P2d 813.*

Mandamus lies in proper case if court refuses to act at all or within time prescribed by law to grant or deny relief in matter in which it is its duty to act. *Estate of Vai (1959, 4th Dist) 168 Cal App 2d 147, 335 P2d 501.*

It is only where court has refused to perform clear duty, unmixed with discretionary power or exercise of judgment, that mandamus will issue; it is duty of petitioner to show that duty sought to be enforced did not involve judgment or discretion. *Taliaferro v Locke (1960, 1st Dist) 182 Cal App 2d 752, 6 Cal Rptr 813.*

While writ of mandate may, in proper case, be used to correct abuse of judicial discretion, it cannot be used to control discretionary acts of superior court judge. *People v Justice Court of Oroville Judicial Dist. (1960, 3rd Dist) 185 Cal App 2d 256, 8 Cal Rptr 176.*

A court may be compelled to act jurisdictionally, but having acted, mandamus will not lie to control its exercise of discretion, that is, to force an exercise of discretion in a particular manner. *Conway v Municipal Court for Beverly Hills Judicial Dist. (1980, 2nd Dist) 107 Cal App 3d 1009, 166 Cal Rptr 246.*

Inmate's conviction for committing a lewd act upon a child under age 14 based *Pen C § 803(g),* which extended the limitations period, was not an impermissible ex post facto law because § 803(g) was enacted before the original limitations period under *Pen C § 800* expired; hence, on the People's motion the court issued a peremptory writ of mandate, ordering the trial court to set aside its order granting habeas corpus to the inmate and to reinstate the inmate's conviction. *People v Superior Court (German) (2004, Cal App 2nd Dist) 2004 Cal App LEXIS 345.*

64. -Where Discretion Can Be Exercised in Only One Way

Mandamus will not lie to control the discretion of a court or of a judicial officer, or to compel its exercise in a particular manner, except in those rare instances where under the facts it can be legally exercised in but one way; in other words, a court can be compelled to act but, having acted, its act cannot be reviewed on mandamus. *Hilmer v Superior Court of San Francisco (1934) 220 Cal 71, 29 P2d 175.*

Mandamus will not lie to compel the court to act in a particular manner, unless the situation is one in which it can exercise its discretion in but one way. *Lissner v Superior Court of Los Angeles County (1944) 23 Cal 2d 711, 146 P2d 232.*

Mandamus will not lie to control discretion of court or judicial officer in particular manner, except when under facts it can be legally exercised in but one way. *Wadey v Justice Court, Upland Judicial Dist. (1959, 4th Dist) 176 Cal App 2d 426, 1 Cal Rptr 382.*

The writ of mandate, like other extraordinary writs, is not designed and should not be utilized to unduly control the ordinary activities of trial courts. In matters involving discretion it will not lie to control such discretion except in those rare instances where under the facts it can be exercised in but one way. *Kaiser Foundation Hospitals v Superior Court of Los Angeles County (1967, 2nd Dist) 254 Cal App 2d 327, 62 Cal Rptr 330.*

Mandamus will not lie to control the discretion of a court or judicial officer or to compel its exercise in a particular manner except when such discretion can be legally exercised in but one way under the facts. *Mannheim v Superior Court of Los Angeles County (1970) 3 Cal 3d 678, 91 Cal Rptr 585, 478 P2d 17.*

Mandamus will not lie to control the discretion of a court or judicial officer or to compel its exercise in a particular manner except in those rare instances when, under the facts, it can be legally exercised in but one way. *Whitney's at the Beach v Superior Court of San Francisco (1970, 1st Dist) 3 Cal App 3d 258, 83 Cal Rptr 237.*

Although mandamus cannot be issued to control a court's discretion, in unusual circumstances the writ will lie where, under the facts, that discretion can be exercised in only one way. *Babb v Superior Court of Sonoma County (1971) 3 Cal 3d 841, 92 Cal Rptr 179, 479 P2d 379.*

Sheriff's association failed to demonstrate that a county's denial of step increases to employees on leave pursuant to *Lab C § 4850* had a significant effect on the terms of employment because it did not demonstrate that any employee was entitled to a step increase or that any binding past practice was altered; therefore, a petition for a writ of mandamus, pursuant to *CCP § 1085*, was properly denied. *Riverside Sheriff's Assn. v County of Riverside (2003, 4th Dist) 106 Cal App 4th 1285, 131 Cal Rptr 2d 454.*

65. -Abuse of Discretion

Where there is an abuse of discretion, that is, if it clearly appears that the lower court has decided arbitrarily and without reason, its decision may be undone through the office of the writ of mandamus. *Ryan v Superior Court of Sacramento County (1920) 49 Cal App 71, 192 P 1036.*

Where a trial court is vested with discretion in the exercise of its judicial power, its exercise of such discretion will not be controlled except in case of palpable abuse. *Los Angeles Auto Tractor Co. v Superior Court of Los Angeles County (1928) 94 Cal App 433, 271 P 363.*

The writ may issue to require an inferior tribunal to perform a clear legal duty which the law especially enjoins when not to do so would amount to an abuse of discretion. *Lindsay Strathmore Irrigation Dist. v Superior Court of Tulare County (1932) 121 Cal App 606, 9 P2d 579.*

Mandamus may be used to correct abuse of judicial discretion. *People v Superior Court of San Francisco (1955, 1st Dist) 137 Cal App 2d 194, 289 P2d 813.*

Mandate lies to control judicial discretion when such discretion has been abused, and discretion is abused whenever, in its exercise, court exceeds bounds of reason, all circumstances before it being considered. *State Farm Mut. Auto. Ins. Co. v Superior Court of San Francisco (1956) 47 Cal 2d 428, 304 P2d 13.*

Mandate lies to control judicial discretion when such discretion has been abused. *Whalen v Superior Court of Los Angeles County (1960, 2nd Dist) 184 Cal App 2d 598, 7 Cal Rptr 610.*

Generally, though mandate cannot be used to correct error by court acting within its jurisdiction, writ will lie where there is clear abuse of discretion and no adequate remedy at law. *Landis v Superior Court of Los Angeles County (1965, 2nd Dist) 232 Cal App 2d 548, 42 Cal Rptr 893.*

Mandate will not lie to compel trial court to exercise its discretion, but once discretion is exercised, mandate will lie to remedy abuse of discretion. *Cook v Superior Court of Los Angeles County (1966, 5th Dist) 240 Cal App 2d 880, 50 Cal Rptr 81.*

66. Review of Error

Mandamus is not a writ of error. *Puterbaugh v Wadham (1912) 162 Cal 611, 123 P 804.*

It is not the function of a writ of mandate to review error. *Lapique v Superior Court of Los Angeles County (1914) 24 Cal App 313, 141 P 223.*

Mandamus does not lie to correct mere error where an appeal is open to the moving party, and it may not be used to review reasonable deductions of a court on conflicting evidence or on conceded facts; but, the facts otherwise justifying it, the writ is proper where there is an entire absence of showing constituting good cause for the action of the lower court, in which case the appellate court may pass on the sufficiency of the findings as a question of law in determining the right of the trial court to take the action complained of. *Charles L. Donohoe Co. v Superior Court of Glenn County (1926) 79 Cal App 41, 248 P 1007.*

A purely clerical error, such as one with respect to the computation or statement of a sum, is an obvious error, and though it appears in the findings and conclusions of the court, and is carried into the judgment, it may and should be corrected by amendment without vacating the judgment; and the performance of this duty may be compelled by mandamus. *Chadwick v Superior Court of Los Angeles County (1928) 205 Cal 163, 270 P 192.*

The writ of mandamus cannot be used to correct errors either in the trial of law or fact; and in a proceeding to compel the trial court to take jurisdiction of a cause of action without amendment after the trial court had sustained a demurrer thereto, petitioner was not entitled to relief where it affirmatively appeared from the petition that she sought the correction of an alleged error of law in the trial court's ruling on the demurrer. *Phelps v Superior Court of Los Angeles County (1934) 138 Cal App 570, 32 P2d 995.*

By mandamus a lower court may be compelled to act jurisdictionally, but cannot by that means be compelled to act correctly; at least where there is a remedy by appeal, so long as the court acts within, and does exercise, its jurisdiction, an erroneous act equally with one which is legally correct gives immunity from control by mandamus. *Lincoln v Superior Court of Los Angeles County (1943) 22 Cal 2d 304, 139 P2d 13.*

The trial court has not only the power and exclusive jurisdiction to correct its own clerical errors, but also the duty to remedy them, the performance of which will be enforced by writ of mandate. *Boylan v Marine (1951) 104 Cal App 2d 321, 231 P2d 92.*

Writ of mandate cannot be made to serve purpose of writ of error. *Hobe v Madera Irrigation Dist. (1954) 128 Cal App 2d 9, 274 P2d 874.*

Mandamus will not issue to correct allegedly erroneous ruling made by court during trial. *People v Superior Court of San Francisco (1955, 1st Dist) 137 Cal App 2d 194, 289 P2d 813.*

(2) PARTICULAR DUTIES OR ACTS

67. In General

Where a judge on the filing of findings of fact and conclusions of law directed counsel to prepare an interlocutory judgment for the purpose of directing a referee to take an account between the parties, the rights of the parties are not finally determined, and the trial is not completed; and the mode of trial and the decision yet to be made are to be determined in the discretion of the trial court, which has the power to set aside the direction to prepare an interlocutory judgment, and to set the cause for trial; hence it cannot be compelled by mandamus to enter a judgment and decree on the findings of fact and conclusions of law. *Broder v Superior Court of Mono County (1894) 103 Cal 121, 37 P 143.*

Mandamus lies to compel a court to allow a court reporter's claim for services and to direct a warrant to issue, except where the judge denies that an order was made authorizing the services. *Pipher v Superior Court of Amador County (1906) 3 Cal App 626, 86 P 904.*

Absent a showing of abuse of discretion, the superior court having jurisdiction of an action in which a receiver of an insolvent banking corporation is appointed will not be compelled by mandamus to grant leave to sue the receiver in an independent action. *De Forrest v Coffey (1908) 154 Cal 444, 98 P 27.*

A petition for a writ of mandate to compel a superior court to permit a plaintiff in a civil action to prosecute the same in forma pauperis will be dismissed where after the filing of a petition the permission was granted, the matter becoming a moot question. *Wait v Superior Court (1917) 35 Cal App 330, 169 P 916.*

Where a certain jurisdiction has been conferred upon the court, it is the duty of the court to exercise it; hence, a judge of the superior court may be compelled by a writ of mandate to proceed with a hearing and determination of the petition to change a name of the petitioner regardless of the length of his residence in this *State. Turesky v Superior Court of Los Angeles County (1950) 97 Cal App 2d 838, 218 P2d 784.*

Mandamus lies to compel a superior court to assume jurisdiction, for purposes of process, over a foreign corporation doing business in this state. *Fielding v Superior Court of San Francisco (1952) 111 Cal App 2d 490, 244 P2d 968.*

Petition of judgment debtor who owned claim against his judgment creditor for writ of mandate to compel court to determine amount of claim before requiring collection of judgment was not foreclosed where trial court, in sustaining judgment creditor's demurrer and granting his motion for summary judgment in prior injunction proceeding, expressly did so on erroneous basis that it had no discretion. *Erlich v Superior Court of Los Angeles County (1965) 63 Cal 2d 551, 47 Cal Rptr 473, 407 P2d 649.*

In the absence of a notice to a county bureau of adoptions, the District Court of Appeal did not have jurisdiction to issue a writ of mandate directing the return of a child to the parties seeking to adopt him where the superior court, following its denial of their adoption petition, had ordered the child removed from their home and the county adoption bureau had placed the child in a foster home. *Superior Court of Los Angeles County v District Court of Appeal (1966) 65 Cal 2d 293, 54 Cal Rptr 119, 419 P2d 183.*

68. Attorneys

A writ of mandamus is an appropriate remedy where the trial court has refused to recognize the attorneys for the commissioner in a suit under § 13.12 of the Building & Loan Association Act by the association to enjoin further proceedings by the commissioner. *Evans v Superior Court of San Francisco (1939) 14 Cal 2d 563, 96 P2d 107.*

A mandamus proceeding in the Supreme Court is appropriate to review a pretrial order likely to have a substantial effect on an accused's right to a fair trial, and thus mandate will lie to rectify an order violating an accused's right to counsel before the constitutuonally defective trial is actually undertaken. *Smith v Superior Court of Los Angeles County (1968) 68 Cal 2d 547, 68 Cal Rptr 1, 440 P2d 65.*

69. Bonds or Security

Mandamus is an appropriate remedy for relief from an order permitting a litigant to proceed against a public entity without furnishing security for costs of the suit. *County of Sutter v Superior Court of Sutter County (1966, 3rd Dist) 244 Cal App 2d 770, 53 Cal Rptr 424.*

70. Change of Venue

In a mandamus proceeding to compel the trial court to grant a change of venue, the appellate court must make an independent evaluation of the facts. *Clifton v Superior Court of Humboldt County (1970, 1st Dist) 7 Cal App 3d 245, 86 Cal Rptr 612.*

The appropriate method to obtain relief from an order granting or denying a motion for change of venue is a petition for a writ of mandate pursuant to the provisions of *Code Civ Proc, § 400. Dunas v Superior Court of Los Angeles County (1970, 2nd Dist) 9 Cal App 3d 236, 87 Cal Rptr 719.*

A plaintiff in a civil action was not entitled to a review on the merits in a proceeding in mandamus to compel the trial court to vacate an order of the trial court granting defendants' motion for a change of venue, where notice of the

order granting defendant's motion was duly mailed to plaintiff's counsel, where plaintiff did not then petition for a writ of mandate within the time provided by *Code Civ Proc, § 400*, but instead noticed a motion for reconsideration of defendants' motion, and where the motion to reconsider was clearly an attempt to relitigate the merits of the original motion and was not authorized by any recognized procedure. *Dunas v Superior Court of Los Angeles County (1970, 2nd Dist) 9 Cal App 3d 236, 87 Cal Rptr 719.*

71. Trial or Hearing Generally

A superior court is not specially enjoined to proceed with the trial of an action in conformity with the directions of a remittitur within the contemplation of this section. *First Nat'l Bank v Superior Court of Los Angeles County (1925) 71 Cal App 64, 234 P 420.*

Where in a suit by a child against its father for support, the trial court erroneously sustained a demurrer to the complaint on the ground of the nonjoinder of the mother, and the child, instead of amending the complaint, applied to the district court of appeal which denied a mandate to compel the trial court to set the cause for trial, and denied a petition for a rehearing, and prior thereto the trial court entered a judgment against said child which became final, no appeal having been taken therefrom, the supreme court did not thereafter have jurisdiction to compel the trial court to set the cause for trial; but said judgment, not being granted on the merits, did not impair the right of the child to file a new suit. *Tuller v Superior Court of Los Angeles County (1932) 215 Cal 352, 10 P2d 43.*

Efforts to agree on a settlement of litigation out of court are to be commended, but when such efforts fail of fruition the litigants can rightfully demand that the trial proceed to judgment; and where, at the time the case went off calendar, the parties had orally agreed on most of the terms of the settlement, but a complete agreement was never reached, plaintiff was entitled to a writ of mandate to compel the court to proceed with the trial. *Burdge v Superior Court of Ventura County (1940) 41 Cal App 2d 547, 107 P2d 290.*

Mandamus is proper remedy to require trial court to consider issue on which it has not passed. *Grand Lake Drive In, Inc. v Superior Court of Alameda County (1960, 1st Dist) 179 Cal App 2d 122, 3 Cal Rptr 621.*

72. Time of Trial; Stay and Continuance

Where a continuance of a trial was granted at the request of a party, on condition that he pay certain designated items of costs, but actual payment of such sums was not exacted at the time of the postponement, it is within the discretion of the supreme court to refuse to issue a writ of mandate at the instance of such party to compel the trial court to set the cause for trial so long as such items remain unpaid. *Bashore v Superior Court of Tulare County (1907) 152 Cal 1, 91 P 801.*

The duty under *Pen C § 1368* not to proceed with the trial until a preliminary trial as to sanity has been had is within the contemplation of this section. *People v Grace (1926) 77 Cal App 752, 247 P 585.*

Mandamus lies to compel the court to set a case for trial where it refuses to do so without legal reason. *Lindsay Strathmore Irrig. Lindsay Strathmore Irrigation Dist. v Superior Court of Tulare County (1932) 121 Cal App 606, 9 P2d 579.*

Where there is need for immediate relief to stay proceedings in California courts until the determination of an action in another jurisdiction, and where a writ of prohibition is sought but a writ of mandate is the proper remedy, the court will grant the writ of mandate. *Simmons v Superior Court of Los Angeles County (1950) 96 Cal App 2d 119, 214 P2d 844.*

Mandamus lies to compel superior court to proceed with action stayed by order constituting abuse of discretion. *Pacific Engine & Machine Works v Superior Court of Del Norte County (1955, 3rd Dist) 132 Cal App 2d 739, 282 P2d 937.*

73. Trial by Jury

A writ of mandate is not an appropriate remedy to compel the superior court to allow a jury trial in a case wherein the right of trial by jury has been denied. *Widney v Superior Court of Los Angeles County (1927) 84 Cal App 498, 258 P 416.*

Mandamus is not the proper remedy to test the right to a jury as that is a question of law for determination by the court, and a remedy by appeal lies for the correction of any error therein. *Nessbit v Superior Court of Alameda County (1931) 214 Cal 1, 3 P2d 558.*

74. Parties

Mandamus is the proper remedy to compel a court to bring in a party to an action, where it has erroneously declined to make him a party on the ground that it has no jurisdiction to do so. *Connaway, In re (1900) 178 US 421, 44 L Ed 1134, 20 S Ct 951.*

Though the Supreme Court will not grant a writ of mandate where it clearly will result in no substantial benefit, yet where the superior court has denied a motion to bring in parties for want of power, and it cannot be said that the court would not be justified in bringing in the parties named, nor that the petitioner is not seeking a substantial benefit, he has the right to a writ of mandate to compel the trial court to exercise its jurisdiction by hearing and disposing of the motion. *De La Beckwith v Superior Court of Colusa County (1905) 146 Cal 496, 80 P 717.*

75. Pleadings and Issues Thereon

Assuming that the superior court has undisputed jurisdiction to act on an application of the plaintiff for permission to file an answer to a supplemental amended cross complaint filed at the conclusion of the trial, on order of the court to conform to the proof, mandamus to compel that court to permit the filing of such answer will be denied where the answer sought to be filed will serve no purpose. *Colburn Biological Institute v Superior Court of Los Angeles County (1935) 3 Cal App 2d 647, 40 P2d 298.*

Writ of mandate will ordinarily not lie to correct error committed by another court, but it will lie to compel superior court to set aside its order striking petitioner's separate defense from his answer in action at law and to reinstate such defense where facts pleaded, if proved, constitute absolute defense to action unless plaintiff proves facts which estop petitioner from asserting defense pleaded or established waiver of it, where defense must be pleaded in order to be proved, and where this remedy is neither speedy nor adequate. *Carter v Superior Court of Los Angeles County (1956, 2nd Dist) 142 Cal App 2d 350, 298 P2d 598* (disapproved on other grounds by *Unruh v Truck Ins. Exch., 7 Cal 3d 616, 102 Cal Rptr 815, 498 P2d 1063).*

Where trial court makes ruling that deprives party of opportunity to plead his cause of action or defense, relief by mandamus may be appropriate to prevent needless and expensive trial and reversal. *Tate v Superior Court of Los Angeles County (1963, 2nd Dist) 213 Cal App 2d 238, 28 Cal Rptr 548.*

Petitioner was not entitled to issuance of a writ of mandate to compel the trial court to set aside a judgment on the pleadings and proceed to trial of the issues raised in petitioner's complaint before such court without awaiting the determination of a pending appeal where all the contentions raised by petitioner had been raised and decided in such appeal and could not be litigated again in the mandamus proceeding. *County of Sacramento v Superior Court of Sacramento County (1969, 3rd Dist) 274 Cal App 2d 315, 79 Cal Rptr 139.*

Where it appears that the trial court has made a ruling which deprives a party of the opportunity to plead his cause of action or defense, relief by mandamus may be appropriate to prevent a needless and expensive trial and reversal; thus, such relief was appropriate in an action in which the court's striking of allegations of damage to plaintiffs' land and buildings with respect to their strict liability inverse condemnation count amounted, in effect, to the striking of that entire count. *Holtz v Superior Court of San Francisco (1970) 3 Cal 3d 296, 90 Cal Rptr 345, 475 P2d 441.*

In a civil action by the Attorney General charging false advertising and seeking several forms of relief, mandamus was appropriate to review rulings declaring that the complaint did not allege certain matters with sufficient specificity, and also striking all forms of relief sought by plaintiff other than an injunction in futuro. *People v Superior Court of Los Angeles County (1973) 9 Cal 3d 283, 107 Cal Rptr 192, 507 P2d 1400.*

76. -Demurrer

An order overruling a demurrer to a complaint, in effect constituting a refusal to pass upon the demurrer because of the petitioner's failure to comply with a court rule requiring a memorandum of authorities in support of the demurrer, constitutes a refusal to perform an act within the contemplation of the statute and mandamus will lie to compel the court to consider the demurrer. *Wigman v Superior Court of Los Angeles County (1925) 74 Cal App 132, 239 P 427.*

Mandamus is a proper remedy to compel a court to determine a general demurrer to a complaint which it had erroneously overruled on the ground that the demurrer was not accompanied with points and authorities as required by court rules, since that was in effect a refusal to consider the demurrer at all, and therefore a refusal to perform an act enjoined by law. *Dikkers v Superior Court of Los Angeles County (1948) 88 Cal App 2d 816, 199 P2d 709.*

It was an abuse of discretion for the trial court to refuse to hear and determine demurrers to a complaint for malicious prosecution and to order a stay of proceedings pending appeal of the action, and a writ of mandamus was properly granted to require vacation of the order and to compel the trial court to hear and determine the demurrers, where the sufficiency of the complaint was properly brought before the court by the demurrers. *James v Superior Court of San Francisco (1968, 1st Dist) 261 Cal App 2d 415, 67 Cal Rptr 783.*

77. -Amendment of Pleadings

Permission to file an amended and supplemental complaint, bringing new issues and new parties into an action stayed pending arbitration, or requiring the filing of a new complaint to bring these matters before the court and the filing of a motion for consolidation for trial after the issues are jointed are matters for the sound judgment of the trial judge. Absent a showing of abuse of discretion there is no groo require the trial court to permit the filing of an amended and supplemental complaint. *Cook v Superior Court of Los Angeles County (1966, 5th Dist) 243 Cal App 2d 622, 52 Cal Rptr 702.*

A trial court may deny the right to file a supplemental pleading where the new matter contained therein fails, as a matter of law, to constitute a defense; but where there is an abuse of discretion, a writ of mandate should issue, inasmuch as there is otherwise no adequate remedy. *Louie Queriolo Trucking, Inc. v Superior Court of Kern County (1967, 5th Dist) 252 Cal App 2d 194, 60 Cal Rptr 389.*

78. Discovery Procedures

Mandamus is a proper remedy to require procedure to perpetuate testimony where the petition for the order complies with § 2084. *Tone v Superior Court of Los Angeles County (1952) 111 Cal App 2d 110, 244 P2d 13.*

Writ of mandamus may issue not only to enforce proper discovery right, but also to prevent improper discovery proceedings including physical examinations. *Harabedian v Superior Court of Los Angeles County (1961, 2nd Dist) 195 Cal App 2d 26, 15 Cal Rptr 420.*

Mandamus is proper proceeding to require issuance of commission to take testimony out of state. *Beverly Hills Nat. Beverly Hills Nat'l Bank & Trust Co. v Superior Court of Los Angeles County (1961, 2nd Dist) 195 Cal App 2d 861, 16 Cal Rptr 236.*

Basic purpose of pretrial discovery, of which taking of depositions is part, is to expedite pending litigation; by repetitious applications for review of same order, this beneficial purpose would be thwarted. *Hagan v Superior Court of Los Angeles County (1962) 57 Cal 2d 767, 22 Cal Rptr 206, 371 P2d 982.*

Procedure of mandate constitutes proper method for obtaining relief in circumstance of discovery procedure, since no appeal lies from order denying discovery, and since review on appeal from such final order or judgment as may be made in proceeding in which discovery is sought would be inadequate remedy. *Regents of University of Cal. v Superior Court of San Francisco (1962, 1st Dist) 200 Cal App 2d 787, 19 Cal Rptr 568.*

Writ of mandamus may be issued not only to enforce proper discovery right, but also to prevent improper discovery proceedings. *Flora Crane Service, Inc. v Superior Court of San Francisco (1965, 1st Dist) 234 Cal App 2d 767, 45 Cal Rptr 79.*

Mandamus is proper remedy to review discovery procedures and to obtain relief from order denying party use of them. *Flora Crane Service, Inc. v Superior Court of San Francisco (1965, 1st Dist) 234 Cal App 2d 767, 45 Cal Rptr 79.*

Writ of mandamus will not issue to enforce discovery right or to prevent improper discovery proceedings, unless trial court abused its discretion. *Flora Crane Service, Inc. v Superior Court of San Francisco (1965, 1st Dist) 234 Cal App 2d 767, 45 Cal Rptr 79.*

Mandamus is a traditional and proper remedy for correcting abuses of discretion in discovery procedures, and the writ may issue not only to enforce a proper discovery right but also to prevent improper discovery. *Morris Stulsaft Foundation v Superior Court of San Francisco (1966, 1st Dist) 245 Cal App 2d 409, 54 Cal Rptr 12.*

In a mandamus proceeding, the trial court's denial of defendant's motion for discovery of certain of plaintiff's documents could not be sustained either by the court's decision that defendant did not need them to prepare for trial or because the court's discretion was involved, where its reasoning was misguided and not responsive to defendant's reasons justifying discovery. *Associated Brewers Distributing Co. v Superior Court of Los Angeles County (1967) 65 Cal 2d 583, 55 Cal Rptr 772, 422 P2d 332.*

Mandamus is the proper remedy to require the issuance of a commission to take testimony out of the state and to enforce a proper discovery right, but the burden is on the petitioner to make a clear showing in the Court of Appeal that the trial court abused its discretion in refusing such order. *Dow Chemical Co. v Superior Court of Los Angeles County (1969, 2nd Dist) 2 Cal App 3d 1, 82 Cal Rptr 288.*

The extraordinary writs of mandamus and prohibition are the proper remedies to review discovery procedure, and the propriety and justification of a party's refusal to answer on deposition cannot be raised on appeal. *Freidberg v Freidberg (1970, 3rd Dist) 9 Cal App 3d 754, 88 Cal Rptr 451.*

Decedent's brother was entitled to a writ of mandate compelling a superior court to grant his motion for a protective order in a will contest action by the decedent's daughter because the brother did not waive the privilege against the disclosure of income tax returns, implied under former Rev & Tax C § 19282, when he submitted returns to a bank in order to obtain a loan, especially in light of the fact that the right to privacy under *Cal. Const. art. I, § 1* also protected private financial documents submitted to a bank by its customers. *Fortunato v Superior Court (2003, Cal App 2nd Dist) 2003 Cal App LEXIS 1868.*

79. -Depositions

A judge in whose court an action is pending and before whom the deposition of a defendant is taken at the instance of the plaintiffs, should compel the witness to answer, and has no discretion to refuse to exercise the powers vested in him by law, so far as necessary to secure to such plaintiffs the right to take such deposition; and mandamus from the supreme court is the proper remedy to compel him to complete the taking of the deposition, and to employ the process of contempt against the witness to compel him to answer. *Crocker v Conrey (1903) 140 Cal 213, 73 P 1006.*

It is not in the discretion of a superior court to refuse to issue a commission or to take the deposition of a witness in the case as defined by the code, and, conceding that an order refusing to do this, made pending an appeal from the judgment, may be the subject of a direct appeal, that remedy is not exclusive, and mandamus will lie to enforce its issuance. *San Francisco Gas & Electric Co. v Superior Court of San Francisco (1908) 155 Cal 30, 99 P 359.*

Mandamus lies to compel a superior judge to require a witness in an action brought in another county to answer questions and complete a deposition commenced in the county where the court of such judge is located, there being no other plain, speedy and adequate remedy in the ordinary course of law. *Scott v Shields (1908) 8 Cal App 12, 96 P 385.*

Mandamus is the proper remedy to compel a court to assume or exercise jurisdiction in a proceeding to compel a witness to testify and to produce books and records at the taking of a deposition, where the court has jurisdiction and has refused on the ground of lack of jurisdiction, to proceed. *Austin v Turrentine (1939) 30 Cal App 2d 750, 87 P2d 72.*

If a trial court acts unreasonably or in such manner as to deny the right of a petitioner relating to the taking of depositions, it acts beyond its inherent power to exercise a reasonable control over proceedings connected with the litigation before it, and its action can be controlled by mandamus or other appropriate remedy. *Hays v Superior Court of Los Angeles County (1940) 16 Cal 2d 260, 105 P2d 975.*

In a mandamus proceeding to compel the superior court to order a nonresident plaintiff in an action against petitioners to appear and give her deposition therein, which action concerned the same property involved in an administration proceeding which, she alleged, brought her to this state, the writ issued, although she was no longer in this state, where it appeared that an order of the superior court sustaining her objections to giving such deposition was, in effect, an erroneous ruling that she was immune from the service of process in the deposition matter, for the reason that she was a nonresident and was in this state for the sole purpose of appearing in the administration proceeding. *Horn v Superior Court of Los Angeles County (1949) 94 Cal App 2d 283, 210 P2d 518.*

Mandamus lies to direct court to require answers to proper questions passed on deposition. *Paley v Superior Court of Los Angeles County (1955, 2nd Dist) 137 Cal App 2d 450, 290 P2d 617.*

To compel court to require party, whose deposition was taken as adverse party, to answer certain questions may be compelled by mandamus, where questions are legal and pertinent and proper when asked by party of adverse party under cross-examination upon deposition and where they can be answered by party without violating privilege under § 1881. *Wilson v Superior Court of Contra Costa County (1957, 1st Dist) 148 Cal App 2d 433, 307 P2d 37.*

Mandamus is proper remedy to correct order of court sustaining defendant's refusal to answer questions on deposition. *Tatkin v Superior Court of Los Angeles County (1958, 2nd Dist) 160 Cal App 2d 745, 326 P2d 201.*

If there is any evidence that supports any one of grounds urged for suppression of right to take depositions, supreme court in mandamus proceeding may not substitute its opinion for that of trial court, and order of trial court prohibiting petitioner from taking certain depositions must be sustained; but if there is no legal justification for such exercise of discretion, it must be held that abuse occurred. *Carlson v Superior Court of Los Angeles County (1961) 56 Cal 2d 431, 15 Cal Rptr 132, 364 P2d 308.*

Writ of mandate provides proper vehicle to review orders of court denying motions to take depositions of unserved defendant and certain witnesses, and to take deposition of such defendant as managing agent of corporate defendant or as person for whose immediate benefit action was being defended, where petition for writ presents important questions regarding procedure for taking of depositions in such circumstances. *Waters v Superior Court of Los Angeles County (1962) 58 Cal 2d 885, 27 Cal Rptr 153, 377 P2d 265.*

Appellate court cannot command trial court, by issuance of writ, to determine whether condemnee should seek information by deposition under § 2016, by propounding interrogatories under § 2030, or by requesting admissions under § 2033. *Mowry v Superior Court of El Dorado County (1962, 3rd Dist) 202 Cal App 2d 229, 20 Cal Rptr 698* (disapproved on other grounds by *San Diego Professional Asso. v Superior Court of San Diego County, 58 Cal 2d 194, 23 Cal Rptr 384, 373 P2d 448).*

Where a retired judge was appointed by a former employee's representative and an employer's representative to sit as one of three members on an employer's review board, which at the employee's request held a hearing on the propriety of the employee's termination and made a recommendation to the employer as to whether the termination decision should be upheld, the hearing was neither a mediation nor an arbitration so the board member could claim no privilege for refusing to disclose in discovery in subsequent litigation to which the board member was not a party what transpired in the hearing; hence, the court denied the board member's petition for a writ of mandate directing the trial court to vacate its order compelling the board member to provide such information in a deposition. *Saeta v Superior Court (2004, Cal App 2nd Dist) 2004 Cal App LEXIS 414.*

80. -Interrogatories

Mandamus is proper remedy to compel trial court to order party to answer interrogatories, but writ is not to be granted unless court has abused its discretion. *Smith v Superior Court of San Joaquin County (1961, 3rd Dist) 189 Cal App 2d 6, 11 Cal Rptr 165.*

If making of orders denying motions for further answers to written interrogatories constitutes abuse of discretion, mandate can be proper remedy; contrariwise, unless record shows such abuse, mandamus will not lie. *Coy v Superior Court of Contra Costa County (1962) 58 Cal 2d 210, 23 Cal Rptr 393, 373 P2d 457.*

If defendants felt that plaintiff's lateness in filing objections to their interrogatories was sufficiently prejudicial, they should have raised breach of procedure by writ of mandamus; since they failed to do so, error, if any, was not prejudicial. *Wooldridge v Mounts (1962, 2nd Dist) 199 Cal App 2d 620, 18 Cal Rptr 806.*

Mandamus may be used to compel trial court to order party to answer interrogatories propounded pursuant to § 2030, or to determine propriety of order quashing or refusing to quash subpoena duces tecum issued pursuant to § 1985, for use in conjunction with deposition on oral examination. *Flora Crane Service, Inc. v Superior Court of San Francisco (1965, 1st Dist) 234 Cal App 2d 767, 45 Cal Rptr 79.*

A trial court's order denying a motion to compel further answers to interrogatories is reviewable by mandamus, but review is limited to a determination of whether the trial court abused the discretion vested in it by *Code Civ Proc, § §*

2016-2036; such discretion, while broad, nevertheless must be exercised in the manner required by law. *Fuss v Superior Court of Los Angeles County (1969, 2nd Dist) 273 Cal App 2d 807, 78 Cal Rptr 583.*

81. Evidence

Mandamus will not lie to compel the superior court, on the trial of an appeal from a justice's court, to admit certain evidence which had been offered and rejected. *Scott v Superior Court of Yolo County (1888) 75 Cal 114, 16 P 547.*

Rulings on the admission or exclusion of evidence made on a hearing for the justification of a corporate security on a stay bond on appeal may not be attacked in a mandamus proceeding to compel the judge of the superior court to approve such bond, as the writ of mandate is not a writ of error. *Lyders v Superior Court of San Francisco (1933) 129 Cal App 635, 19 P2d 300.*

Mandamus may not be used to compel judge to admit or exclude evidence during trial, even if ruling is erroneous. *People v Superior Court of San Francisco (1955, 1st Dist) 137 Cal App 2d 194, 289 P2d 813.*

Argument that People will suffer wrong without remedy unless mandamus issues to correct erroneous ruling on evidence, even if true, should not be addressed to courts, but to *Legislature. People v Superior Court of San Francisco (1955, 1st Dist) 137 Cal App 2d 194, 289 P2d 813.*

Mandamus is proper remedy to secure production of evidentiary material improperly withheld, whether case be civil or criminal, and whether production be requested prior to or during trial. *Norton v Superior Court of San Diego County (1959, 4th Dist) 173 Cal App 2d 133, 343 P2d 139.*

Neither writ of prohibition nor writ of mandamus may be used to resolve issue as to admissibility of evidence. *Ballard v Superior Court of San Diego County (1966) 64 Cal 2d 159, 49 Cal Rptr 302, 410 P2d 838.*

Attorney who had rendered legal advice to a former corporation, since merged with another corporation, was improperly ordered to disclose the nature of legal advice given to the former corporation because the attorney-client privilege had passed to the newly merged corporation; hence, the attorney and the attorney's former firm were granted a writ of mandate, ordering the vacating of the order compelling such disclosure. *Venture Law Group v Superior Court (2004, Cal App 6th Dist) 2004 Cal App LEXIS 633.*

82. Dismissal

Where an action, originally brought against both the spouses, is dismissed as to the husband for failure to serve him with summons within the time limited by law, it cannot be further prosecuted against the wife, and mandamus will lie to compel its dismissal as to her, as there is no other plain, speedy, and adequate remedy available. *Horsburgh v Murasky (1915) 169 Cal 500, 147 P 147.*

The court's duty to dismiss an action for failure to bring it to trial within five years after the defendant has filed his answer may be enforced by mandamus. *Andersen v Superior Court of County of Napa (1921) 187 Cal 95, 200 P 963.*

It is only when there is an entire absence of any showing constituting good cause presented in the superior court on the hearing of a motion to dismiss an action that a writ of mandate to compel the dismissal may properly issue. *Charles L. Donohoe Co. v Superior Court of County of Glenn (1927) 202 Cal 15, 258 P 1094.*

When the superior court has denied a motion to dismiss an appeal from a judgment of the justice's court which motion is based on the ground that there is no proper record on appeal and that the judgment roll was not certified by the trial judge, the appropriate remedy, if petitioner is entitled to relief, is by a writ of mandate to compel the dismissal, rather than by a writ of certiorari to review the order. *Jacques v Superior Court of Santa Barbara County (1931) 114 Cal App 644, 300 P 472.*

In a proceeding in mandamus to compel a superior court to dismiss an action pending therein, where it appeared that the petitioner moved the superior court for a dismissal, that on such motion the question was presented as to whether a mutual exchange of letters between the parties agreeing to continuances of the day of trial was equivalent to a stipulation in writing extending the time of trial within the terms of § 583, and that the motion was heard on evidence not before the court in the present proceeding, the superior court's denial of said motion was a judicial determination of the issue of petitioner's right to a dismissal, and it having acted within its jurisdiction on a mixed question of law and fact its order, whether right or wrong, could not be controlled by mandamus. *Lake v Superior Court of San Francisco (1940) 39 Cal App 2d 247, 102 P2d 1107.*

It is only where there is an entire absence of any showing constituting good cause presented in a superior court on a hearing of a motion to dismiss that a writ of mandate to compel the dismissal of the action may properly issue. *Pacific Greyhound Lines v Superior Court of San Francisco (1946) 28 Cal 2d 61, 168 P2d 665.*

Former CCP § 583 (see now *CCP § § 583.110* et seq.) is mandatory, and its performance may be enforced by mandate. *People v Superior Court of San Francisco (1948) 86 Cal App 2d 204, 194 P2d 571.*

Mandamus would lie to compel dismissal pursuant to former CCP § 981a of an appeal from a justice court. *Sanford v Superior Court of Kern County (1952) 111 Cal App 2d 311, 244 P2d 463.*

Mandamus will lie to compel dismissal of action where entry of dismissal is not subject to any discretionary consideration and duty to enter dismissal becomes ministerial. *Silverton v Free (1953) 120 Cal App 2d 389, 261 P2d 17.*

Petitioners are not entitled to writ of mandamus to compel court to dismiss action, pursuant to former CCP § 583 (see now *CCP § § 583.110* et seq.), for failure to prosecute, where, in view of fact that when court denied their motion to dismiss the five-year period had not yet elapsed, determination of motion lay in court's discretion. *Bosworth v Superior Court of Los Angeles County (1956, 2nd Dist) 143 Cal App 2d 775, 300 P2d 155.*

Either a writ of mandate to compel dismissal or a writ of prohibition to prevent trial of an action is appropriate remedy after five-year period, prescribed by § 583 for bringing action to trial, has expired. *J. C. Penney Co. v Superior Court of Fresno County (1959) 52 Cal 2d 666, 343 P2d 919.*

Writ of mandate to compel dismissal of action is appropriate remedy after plaintiff's failure to return summons within three-year period prescribed by § 581a. *Carter v Superior Court of San Francisco (1960, 1st Dist) 187 Cal App 2d 1, 9 Cal Rptr 140.*

Failure to comply with requirements of former CCP § 583 (see now *CCP § § 583.110* et seq.), relating to dismissal for failure to bring action to trial within three years after remittitur has been filed following reversal of judgment, makes dismissal of action mandatory on court, and mandamus is proper remedy to effect such dismissal. *Mass v Superior Court of San Francisco (1961, 1st Dist) 197 Cal App 2d 430, 17 Cal Rptr 549.*

Either writ of mandate to compel dismissal of action or writ of prohibition to prevent further proceedings is appropriate remedy when plaintiff has failed to serve and return summons within three-year period prescribed by former CCP § 581a (see now *CCP § § 583.110* et seq.). *Dresser v Superior Court of Contra Costa County (1964, 1st Dist) 231 Cal App 2d 68, 41 Cal Rptr 473.*

Where a defendant seeks review by way of mandate of a denial of its motion to dismiss an action under former CCP § 581a (see now *CCP § § 583.110* et seq.) on the grounds that the summons was not served and returned within the statutory period, former CCP § 416.3 (see now *CCP § 418.10*), dealing with mandate in review of a motion to quash service of summons, is not applicable, so that time allowed for application for the writ is that provided by the general provisions concerning mandamus, *CCP § § 1084-1108. Coates Capitol Corp. v Superior Court of Alameda County (1967, 1st Dist) 251 Cal App 2d 125, 59 Cal Rptr 231.*

Mandamus is an appropriate remedy to obtain review of an order denying a motion to dismiss an action. *Big Bear Municipal Water Dist. v Superior Court of San Bernardino County (1969, 4th Dist) 269 Cal App 2d 919, 75 Cal Rptr 580.*

In hearing a motion to dismiss for failure to bring an action to trial within two years, under *CCP § 583*, subd (a) (see now *CCP § § 583.110* et seq.), a trial court exercises broad discretion in determining whether or not a showing of diligence or excuse for delay has been made, and a writ of mandamus to compel dismissal of the action may properly issue only when there is an entire absence of any showing constituting good cause. *Dunsmuir Masonic Temple v Superior Court of Siskiyou County (1970, 3rd Dist) 12 Cal App 3d 17, 90 Cal Rptr 405.*

On the transfer of an action to the proper court following a change of venue secured by defendants and a late payment of transfer costs by plaintiffs, the transferee court had no duty to return the file to the transferor court for dismissal; in the absence of duty, the transferee court could not be directed by a writ of mandate to do so, and defendants were not entitled to the writ after insisting in their briefs in the transferee court that plaintiffs had voluntarily submitted to its jurisdiction by paying transfer fees and after having taken advantage of the transferor court's assistance by obtaining on motion an order that certain questions be answered after the transfer order and before the payment of transfer fees, despite the prohibition in *CCP § 581b*, against further proceedings until transfer fees and costs are paid. *Moore v Superior Court of Sonoma County (1970, 1st Dist) 13 Cal App 3d 869, 92 Cal Rptr 23.*

83. New Trial

A writ of mandate lies to compel a referee to settle a statement on motion for a new trial in an action tried by him, and on his refusal to do so, the remedy by appeal, conceding it to exist, is inadequate. *Careaga v Fernald (1885) 66 Cal 351, 5 P 615.*

Where the trial judge refused to settle a statement on motion for a new trial, after a decision against a petition to revoke the probate of a will, on the ground that a new trial thereof could not be granted for want of jurisdiction to grant it, the proper remedy is by mandamus to compel the settlement of the statement. *Hartmann v Smith (1903) 140 Cal 461, 74 P 7.*

The duty of a judge to settle a statement on motion for a new trial may, in a proper case, be enforced by mandamus. *Vatcher v Wilbur (1904) 144 Cal 536, 78 P 14.*

Where superior court erroneously refuses to rule on motion for new trial, moving party's remedy is to apply to District Court of Appeal, before expiration period for determination of motion, for writ of mandate requiring trial court to hear motion, and if that remedy is not invoked before expiration of such period, District Court of Appeal cannot reinstate or revive motion in superior court. *Free v Furr (1956, 4th Dist) 140 Cal App 2d 378, 295 P2d 134.*

A moving party's only remedy for failure to hold a hearing on a motion for a new trial is by application for mandate to an appellate court, and even assuming such failure, in a trial on conditional sales contracts, it would not have the effect of invalidating the judgment; and errors which might have been pointed out at the hearing may be reviewed on appeal from the judgment. *Kimmel v Keefe (1970, 1st Dist) 9 Cal App 3d 402, 88 Cal Rptr 47.*

The trial court has the discretion to delay the determination of a new trial motion to any date within the 60-day period permitted by law and the further discretion to permit the motion to be denied by operation of law by expiration of the 60-day period without a determination being made; thus a writ of mandate is available to compel action on such a motion only where the trial court, because of a mistaken concept of the law or for any other reason, declines to rule thereon. *Meskell v Culver City Unified School Dist. (1970, 2nd Dist) 12 Cal App 3d 815, 96 Cal Rptr 773.*

84. Judgments and Decrees

Mandamus lies to compel entry of judgment where superior court refused to have judgment entered after demurrer was sustained without leave to amend and no appeal would lie from such refusal, and where a judgment must be entered to enable plaintiff to test on appeal propriety of order sustaining demurrer without leave to amend. *Berri v Superior Court of San Francisco (1955) 43 Cal 2d 856, 279 P2d 8.*

Where there is no triable issue of fact and a court errs in denying a motion for summary judgment, the ruling is an error in law and automatically is an abuse of discretion. *Whitney's at the Beach v Superior Court of San Francisco (1970, 1st Dist) 3 Cal App 3d 258, 83 Cal Rptr 237.*

A litigant whose motion for summary judgment has been denied has a direct appeal only from the judgment following trial if he is unsuccessful there, and mandamus is an available remedy to correct an abuse of discretion in the denial of a motion for summary judgment. *Bank of America v Superior Court of San Diego County (1970, 4th Dist) 4 Cal App 3d 435, 84 Cal Rptr 421.*

Where the facts were stipulated to between the parties and each party filed a motion for summary judgment, the denial of both motions by the trial judge constituted an abuse of the court's discretion and mandamus was a proper remedy. *Burke Concrete Accessories, Inc. v Superior Court of San Francisco (1970, 1st Dist) 8 Cal App 3d 773, 87 Cal Rptr 619.*

A writ of mandate is a proper remedy to compel a trial court to grant a motion for summary judgment where the affidavits in support of the moving party are sufficient to sustain a judgment in his favor, and his opponent does not by counter-affidavit show facts sufficient to present a triable issue of fact; the writ relief is to be used sparingly, with doubts resolved in favor of denial of review; the affidavits of the moving party are to be strictly construed and those of the opponent liberally construed. *Roman Catholic Archbishop v Superior Court of Alameda County (1971, 1st Dist) 15 Cal App 3d 405, 93 Cal Rptr 338.*

In a utility's action seeking a writ of mandamus compelling the state water resources department to make a formal determination that its revenue requirement, passed on to utilities, was just and reasonable by procedures under the Ad-

ministrative Procedure Act, the trial court properly issued a peremptory writ as to the just and reasonable determination because such was specifically required under *Wat C § 80110*, but the trial court should not have issued the writ insofar as it required the department to comply with procedures under the Administrative Procedure Act because the determining the revenue requirement was a statutory mandate and did not constitute a regulation. *Pacific Gas & Electric Co. v Department of Water Resources (2003, 3rd Dist) 112 Cal App 4th 477.*

85. -Default Judgments

After a service of summons has been set aside and vacated, and as long as the order therefor remains in force, the county clerk has no authority, and cannot be compelled by mandamus to enter the default of the defendant for failure to answer on the return of such vacated service. *Elder v Grunsky (1899) 127 Cal 67, 59 P 300.*

Where the facts are undisputed, and the law establishes the right of a party to an order, or to the relief which the court has refused, mandamus will lie; and where it is the duty of the court to enter the default of the defendant, which it has refused to do, owing to a misconception of the law, mandamus will lie to compel it to discharge this duty. *California Pine Box & Lumber Co. v Superior Court of San Francisco (1910) 13 Cal App 65, 108 P 882.*

Mandamus lies to compel the county clerk to enter a defendant's default only where no answer was filed within the statutory time, or such further time as may have been granted, and the petitioner applied for such default. *Davidson v Graham (1914) 24 Cal App 692, 141 P 834.*

Writ of mandamus may be issued by superior court to inferior court or court officer to compel performance of an act that the law specifically enjoins, such as entry of default judgment by clerk of municipal court, such duty being purely ministerial. *W. A. Rose Co. v Municipal Court for Oakland-Piedmont Judicial Dist. (1959, 1st Dist) 176 Cal App 2d 67, 1 Cal Rptr 49.*

Writs of prohibition ordering municipal court to desist from further proceedings in action and of mandate to compel clerk of municipal court to enter default in such action were properly issued by superior court where it determined that any remedy by appeal was not speedy or adequate in view of fact that municipal court was proceeding with action though it lost jurisdiction when plaintiff was improperly denied default and judgment under § 585 subd 1. *W. A. Rose Co. v Municipal Court for Oakland-Piedmont Judicial Dist. (1959, 1st Dist) 176 Cal App 2d 67, 1 Cal Rptr 49.*

While errors within court's jurisdiction ordinarily may not be corrected by writ of mandamus-in other words, mandamus may not be used as writ of error or review-Whether or not defendant has appeared in civil action is question of jurisdiction and failure to enter default when proper is matter of which mandamus will lie. *Taliaferro v Locke (1960, 1st Dist) 179 Cal App 2d 777, 4 Cal Rptr 223.*

86. -Issuance of Execution Upon Judgment

The issuing of an execution by a justice of the peace on a judgment rendered by him being the exercise of a ministerial function only, and a duty enjoined by law as resulting from his office, he can be compelled to perform it by writ of mandate. *Hamilton v Tutt (1884) 65 Cal 57, 2 P 878.*

Mandamus lies to compel a justice of the peace to issue execution upon a judgment which is merely erroneous and not void and from which no appeal was taken. *Hogue v Fanning (1887) 73 Cal 54, 14 P 560.*

Where the condition imposed in an order granting a new trial is not complied with, the motion for a new trial must be regarded as having been denied, and if no undertaking to stay execution has been filed, it is the duty of the county clerk, when requested by the plaintiff, to issue execution and, in case of refusal, he will be compelled to perform this duty by writ of mandate. *Garoutte v Haley (1894) 104 Cal 497, 38 P 194.*

Mandamus does not lie to compel the clerk of the superior court to issue execution upon a judgment obtained by the petitioner where the defendant failed to comply with a conditional order for a new trial, as the clerk cannot pass judicially upon the question as to whether the condition was performed. *Holtum v Greif (1904) 144 Cal 521, 78 P 11.*

Where a judge, on an application made under former CCP § 685 (see now *CCP § § 683.110* et seq.) for an order directing the issueance of an execution, states that the application will be granted and that he will sign the order when submitted, mandamus will not lie on his subsequent refusal to do so to compel him to sign the order, views so expressed not being construable as a grant of the application. *Lapique v Superior Court of Los Angeles County (1914) 24 Cal App 313, 141 P 223.*

Mandamus lies to secure the issuance of a writ of execution upon a judgment in the petitioner's favor, where the undertaking upon appeal from the judgment is insufficient under former CCP § 942 (see now CCp § 917.1) and there is not sufficient cash on deposit as provided by § 948. *De Garmo v Superior Court of County of Los Angeles (1934) 1 Cal 2d 83, 33 P2d 411.*

The writ of mandamus should issue where the court has erroneously refused to direct its clerk to issue an execution on a judgment within five years after it has granted a motion to revive the judgment on the ground that a sheriff's sale was void; the existence of the remedy under former CCP § 685 (see now *CCP § § 683.110* et seq.), whereby an order directing the issuance of a writ of execution may be procured on an affidavit showing the facts, is not a bar to a proceeding in mandamus to compel the issuance of execution on a judgment which has been revived under former CCP § 708 (see now *CCP § § 683.110* et seq.). *Betty v Superior Court of Los Angeles County (1941) 18 Cal 2d 619, 116 P2d 947.*

Mandamus is the proper remedy to compel the issuance of a writ of execution improperly refused. *Slater v Superior Court of Contra Costa County (1941) 45 Cal App 2d 757, 115 P2d 32.*

87. Vacating Judgments and Orders

The superior court is without jurisdiction to dismiss a justice court appeal solely on the ground that the provisions of former CCP § 1057a (see now *CCP § 995.640*) were not strictly complied with, and where an order is made dismissing an appeal on that ground, mandamus will lie to compel it to set aside such order and proceed with the trial of the action. *San Francisco O. T. Railways v Superior Court of Alameda County (1920) 48 Cal App 586, 192 P 116.*

The district court of appeal has jurisdiction to issue a writ of mandate to the superior court to set aside an order dismissing an appeal from a recorder's court. *Colton v Superior Court of San Bernardino County (1927) 84 Cal App 303, 257 P 909.*

Mandamus does not lie to compel a trial court to alter its decision in denying a motion to vacate its judgment. *Eureka Casualty Co. v Municipal Court of Los Angeles (1934) 136 Cal App 195, 28 P2d 708.*

Mandamus does not lie to correct errors of an inferior tribunal, and insofar as it seeks to avoid the force or effect of a judgment or order of such court, it constitutes a collateral attack thereon. *Grivi v Superior Court of Los Angeles County (1935) 3 Cal 2d 463, 45 P2d 181.*

A writ of mandate to compel the vacation of an interlocutory decree and a trial de novo on the ground of the retirement of the trial judge from the bench may be denied in the discretion of the court where it appears that he was reappointed, and that complete disposition of the cause by him can be procured. *Bartholomae Oil Corp. v Superior Court of San Francisco (1941) 18 Cal 2d 726, 117 P2d 674.*

Mandamus is the appropriate remedy where a lower federal court has erroneously entered an order of abatement; the fact that a libel in admiralty, abated on the ground that the petitioner is an alien enemy, might have been dismissed on other grounds, such as defects in the allegations of the libel, does not require the denial of mandamus by the supreme court without passing on the merits of the order of abatement, since, if there are other grounds for dismissal of the libel, the petitioner is entitled to have the lower court expressly pass on them, and to appeal from any adverse rulings thereon. *Ex parte Kumezo Kawato (1942) 317 US 69, 87 L Ed 58, 63 S Ct 115.*

A writ of mandate to the superior court is a proper remedy where, following affirmance of a police court's denial of a defendant's motion to vacate its judgment, he appealed from the denial of his motion to correct the record based on all the records of the case which showed a want of jurisdiction in the police court, and the superior court had no alternative except to order the police court to strike the judgment. *Andrews v Superior Court of San Joaquin County (1946) 29 Cal 2d 208, 174 P2d 313.*

Where the court acted judicially in denying a motion to set aside an information its order cannot be corrected by means of a writ of mandamus, since the writ of mandamus would be equivalent to a writ of error. *Nelson v Superior Court of California (1947) 77 Cal App 2d 783, 176 P2d 390.*

Mandamus is the appropriate remedy to compel a trial court to strike an order erroneously granting a new trial after remittitur with direction to enter a money judgment, although an appeal lies from such order, since mandamus may issue at the discretion of the court where the remedy of appeal is not speedy and adequate, and in such a case the appeal would present the very question determined on the prior appeal without any security for the payment of the judgment in the interim. *McCulloch v Superior Court of San Mateo County (1949) 91 Cal App 2d 641, 205 P2d 689.*

Mandamus is the proper remedy to secure the dissolution of a writ of attachment improperly issued where the lower court has improperly denied a motion for discharge. *Weaver v Superior Court of San Francisco (1949) 93 Cal App 2d 729, 209 P2d 830.*

Mandamus is a proper remedy if, on the facts shown, an order for perpetuation of testimony should be vacated or a subpoena duces tecum quashed. *Superior Ins. Co. v Superior Court of Los Angeles County (1951) 37 Cal 2d 749, 235 P2d 833.*

Mandamus lies to compel the superior court to quash a subpoena duces tecum issued by it and to vacate the order enforcing the same, where affidavits filed in support of applications for issuance of such subpoena are based on information and belief, and the books and records of petitioners, the production of which is desired, contains certain numerous trade secrets and other confidential matters, such as customers' names, prices, financial resources, etc., the disclosure of which would tend to do petitioners great harm and cause them irreparable injury, no showing having been made that such documents contain competent evidence which is material to the issues to be tried. *Lewis v Superior Court of Los Angeles County (1953) 118 Cal App 2d 770, 258 P2d 1084.*

A writ of mandate is appropriate remedy to require superior court to vacate an order for inspection of writings, where affidavit in support of writings, where affidavit in support of order is made on information and belief. *Proctor & Gamble Mfg. Co. v Superior Court of Marin County (1954) 124 Cal App 2d 157, 268 P2d 199.*

Where superior court did not have power to make order of dismissal under motion that did not comply with summary judgment provisions of § 437c, nor with any other statutory procedure, writ of mandate should issue directing that court to vacate order of dismissal theretofore made and proceed to hear matter by demurrer, summary judgment procedure, trial on merits or such other mode under law as facts may justify. *State Market of Avenal, Inc. v Superior Court of Kings County (1959, 4th Dist) 172 Cal App 2d 517, 342 P2d 325.*

Mandamus is proper procedure to compel superior court to set aside improper order; if order in question was within discretion of court, it was not improper. *Carlson v Superior Court of Los Angeles County (1961) 56 Cal 2d 431, 15 Cal Rptr 132, 364 P2d 308.*

Since order setting aside default is not appealable, mandamus is proper remedy if court, in entering it, acted in excessive jurisdiction or abused discretion. *Remainders, Inc. v Superior Court of Los Angeles County (1961, 2nd Dist) 192 Cal App 2d 411, 13 Cal Rptr 221.*

Mandamus will issue to compel trial court to vacate its order setting aside defendant's default which court entered on its own motion and without any showing of mistake, inadvertence, surprise or excusable neglect, since, such order being void, denial of writ would not result in trial on merits. *Remainders, Inc. v Superior Court of Los Angeles County (1961, 2nd Dist) 192 Cal App 2d 411, 13 Cal Rptr 221.*

Granting of peremptory writ to compel trial court to cacate its order setting aside default, such order being void because entered on court's own motion without any showing of mistake, inadvertence, surprise or excusable neglect, will not deprive defendants of their right to move court, pursuant to § 473, to have default vacated, nor will it deprive trial court of jurisdiction to act on such motion. *Remainders, Inc. v Superior Court of Los Angeles County (1961, 2nd Dist) 192 Cal App 2d 411, 13 Cal Rptr 221.*

Though party moving to vacate default judgment must show diligence regardless of whether other party suffered prejudice from delay, where neither moving papers nor petition for mandate attempted to show diligence and case law did not then clearly demand showing by petitioners, they should have opportunity to present it. *Brown v Superior Court of Sacramento County (1966, 3rd Dist) 242 Cal App 2d 519, 51 Cal Rptr 633.*

An order made by the court under *Pen Code, § 1385*, dismissing an action "in the furtherance of justice" is nonappealable, and the proper remedy to set aside such an order is mandamus. *People v Superior Court of San Francisco (1967, 1st Dist) 249 Cal App 2d 714, 57 Cal Rptr 892.*

Mandamus did not lie to vacate an order for new trial granted on the ground of "errors in law," where, although the failure of the trial court to specify its "reasons" was in violation of the 1965 amendments to *CCP § 657*, the order was timely made on proper motion served on the adverse parties, and therefore not void from its inception or in excess of jurisdiction. *Treber v Superior Court of San Francisco (1968) 68 Cal 2d 128, 65 Cal Rptr 330, 436 P2d 330.*

Mandamus lay to vacate an order setting aside a prior order to dismiss plaintiff's civil action for his failure to prosecute (former CCP § 583, see now *CCP § § 583.210* et seq.), where his notice of motion for reconsideration of the order

setting aside the dismissal had not been accompanied by any points and authorities, and where the order granting his motion was based on a declaration that failed to state why the contents therein had not been presented, earlier, in opposition to the motion to dismiss, and that did not purport to establish that such failure had been due to mistake, inadvertence, surprise or excusable neglect by himself or his counsel (*CCP § 473*). *San Francisco Lathing, Inc. v Superior Court of San Francisco (1969, 1st Dist) 271 Cal App 2d 78, 76 Cal Rptr 304.*

The People are entitled to a writ of mandate to compel the trial court to set aside its order, made in excess of its jurisdiction, granting defendant's motion to suppress, renewed at trial, which had previously been denied in pretrial proceedings, where no danger of trial or further retrial exists. *People v Superior Court of Butte County (1971) 4 Cal 3d 605, 94 Cal Rptr 250, 483 P2d 1202.*

Where all causes of action set forth in a complaint have a single subject and the trial court's order sustaining a demurrer, without leave to amend, disposes of less than all the causes, and thus, precludes an appeal, but effectively bars a substantial portion of plaintiff's cause from being heard on the merits, mandamus is an appropriate remedy to compel the trial court to vacate the order. *Vasquez v Superior Court of San Joaquin County (1971) 4 Cal 3d 800, 94 Cal Rptr 796, 484 P2d 964.*

Mandamus lies to review a judgment disposing of only one of several counts in a complaint in which all causes of action have a single object. *People v Superior Court (1972) 23 Cal App 3d 128, 100 Cal Rptr 38.*

Because companies were considered "common carriers" under *Cal. Civ. Code § 2168* when they operated a particular amusement park attraction, the superior court erred in finding otherwise; a petition for a writ of mandate was issued and the superior court was directed to vacate its previous ruling. *Gomez v Superior Court (2003, Cal App 2nd Dist) 2003 Cal App LEXIS 1051.*

88. Appeal

The former rule that when the superior court has dismissed an appeal from the justice court for want of jurisdiction, its action could not be disturbed, has been properly modified by allowing a writ of mandamus to compel it to entertain the appeal and try the case. *Golden Gate Tile Co. v Superior Court of San Francisco (1911) 159 Cal 474, 114 P 978.*

Where the superior court has appellate jurisdiction of a justice judgment, it should not be permitted by an arbitrary or erroneous order to divest itself of jurisdiction; a dismissal of the appeal is a refusal to hear or decide it, and mandamus is a proper remedy to compel the court to exercise its jurisdiction to entertain the appeal. *Golden Gate Tile Co. v Superior Court of San Francisco (1911) 159 Cal 474, 114 P 978.*

Where an appeal from a justice's court to the superior court has been properly taken, and the superior court has erroneously dismissed such appeal on the ground that it had not acquired jurisdiction thereof, mandamus will lie to compel the superior court to proceed with the trial of the cause. *Golden Gate Tile Co. v Superior Court of San Francisco (1911) 159 Cal 474, 114 P 978.*

Under former CCP § 978a, the sureties on an undertaking on appeal to the superior court had to be excepted to within five days after the filing of the bond regardless of the notice of the filing thereof provided in that section, and when the sureties were excepted to more than twelve days after the filing of the bond, though within five days after the notice of such filing, the exception was too late, and a dismissal of the appeal for failure of the sureties to qualify was erroneous, and mandamus would lie to compel the judge of the superior court to hear the appeal. *Widrin v Superior Court of California (1911) 17 Cal App 93, 118 P 550.*

Where an appeal from a justice court to the superior court was properly perfected, and the latter court erroneously dismissed the appeal on the ground that it had not been properly taken, a writ of mandate will lie to compel the superior court to restore the appeal to its calendar for trial. *Peacock v Superior Court of County of Solano (1912) 163 Cal 701, 126 P 976.*

Mandamus did not lie to compel a superior court to take jurisdiction of and hear a case on appeal from a justice court where notice of appeal was served, as there was no duty upon the superior court, nor any power resting therein, to do so except as former CCP § 974 provided. *Harpold v Superior Court of San Francisco (1922) 58 Cal App 629, 209 P 219.*

While it was a rule that where it was made clearly to appear that the superior court had improperly or erroneously dismissed an appeal from a justice court mandamus would lie to compel the former court to reinstate the appeal and

proceed with the trial, this rule could not apply where, so far as the record itself disclosed, the superior court was justified in dismissing the appeal on the ground of want of jurisdiction in that a jurisdictional prerequisite had not been followed in the taking of the appeal, to wit, the filing of an undertaking as required by former CCP § 978. *Lucchesi v Superior Court of California (1924) 68 Cal App 634, 229 P 996.*

89. -Bill of Exceptions

Mandamus will not lie to compel a judge to settle a bill of exceptions or statement when the counsel for the moving party failed to appear at the time fixed for the settlement, and thereafter withdrew the draft and amendments from the control of the judge, and held them for the month before presenting them for settlement without excuse for the delay; the fact that such failure to appear was through inadvertence cannot be considered in the supreme court on application for such mandamus, the only power to relieve from the inadvertence being in the court below. *Coffey v Grand Council (1891) 87 Cal 367, 25 P 547.*

Mandamus does not lie to compel a judge to settle a bill of exceptions after his term of office has expired. *Leach v Aitken (1891) 91 Cal 484, 28 P 777.*

Any legal excuse for neglecting the preparing and serving a bill of exception must be presented to the judge for his determination, and an erroneous ruling thereon may be corrected under mandamus from the supreme court; refusal of the judge who granted the permission to settle the bill prepared and served after expiration of the time allowed is an adjudication that the bill ought not to be settled, and if an application for mandamus to compel the settlement is dismissed for want of prosecution, it leaves the ruling as a final determination that the judge was justified in refusing to settle the bill, and his successor in office cannot be compelled by writ of mandate to settle it. *Visher v Smith (1891) 92 Cal 60, 28 P 94.*

Where a party is entitled to a bill of exceptions, either to be used on a motion for new trial or on appeal from a judgment, and has prepared and served it within proper time, the superior judge in office cannot properly refuse to settle the bill on the ground that his predecessor in office who tried the case had refused to settle it after his term of office had expired, and that mandamus was not allowed to compel such settlement because of such expiration of term, but the judge in office will be compelled by mandamus to settle the bill containing a record of the proceedings as a duty resulting from his office, though his discretion as to settle a particular bill, or inserting or excluding particular fact, cannot be controlled or reviewed on mandamus. *Leach v Pierce (1892) 93 Cal 614, 29 P 235.*

Whether or not the delay of a party in presenting a bill of exceptions is excusable, is a question of fact to be determined by the judge acting judicially on the evidence, and his decision cannot be controlled by mandamus unless his refusal to act involves an abuse of discretion. *Brown v Prewett (1892) 94 Cal 502, 29 P 951.*

Mandamus will lie to compel the settlement of a bill of exceptions prepared in time, which the judge has refused to settle on account of an objection of the opposite party for want of written notice of presentation, which has been waived by him. *Hicks v Masten (1894) 101 Cal 651, 36 P 130.*

An appeal will not lie from the refusal of the trial judge to settle a bill of exceptions on the ground that it had not been presented within the time allowed by law, there having been no application for relief under § 473; if the bill was presented in time and the trial judge erroneously concluded that it was not, the exclusive remedy is mandamus to compel the settlement. *Brode v Goslin (1910) 158 Cal 699, 112 P 280.*

On an appeal from a judgment in an equity case, purporting to be based on the verdict of a jury and attempted to be entered by the clerk without findings of fact or conclusions of law signed by the judge, matters occurring subsequent to the date of such judgment, viz, and order by the court purporting to vacate and set aside such judgment on the ground that it was inadequately entered, findings of fact and conclusions of law signed by the judge, and a judgment based on such findings, being immaterial to the appeal, their recital in the bill of exceptions is without prejudice to the applicant and they will not be stricken out by writ of mandate, even if such proceeding would lie to compel the striking out of matter from a settled bill of exceptions. *Holland v Superior Court of San Francisco (1915) 169 Cal 361, 146 P 878.*

The remedy for refusal to settle a bill of exceptions is by mandamus and not by appeal from the order of refusal. *Potter v Pigg (1917) 35 Cal App 707, 170 P 1066.*

A writ of mandate to compel the settlement of a bill of exceptions will not issue unless there is an appeal on which the bill could be used. *Spotton v Superior Court of San Francisco (1918) 177 Cal 719, 171 P 801.*

An order refusing to settle a bill of exceptions is not appealable, the remedy being by mandamus. *Howell v Pedersen (1919) 41 Cal App 45, 181 P 674.*

In a proceeding for a writ of mandate to compel a judge of the superior court to settle a proposed bill of exceptions, where it appears that the judge acted as attorney for the petitioner in presenting the bill of exceptions to his predecessor, and it is suggested that under these circumstances he is disqualified from acting and settling the bill of exceptions, the writ of mandate will be denied without prejudice to a further action in which another judge of said superior court is substituted in the event that there is a further refusal to settle the proposed bill. *Massachusetts Bonding & Ins. Co. v Superior Court of County of Kern (1923) 192 Cal 262, 219 P 741.*

A writ of mandamus to compel a trial court to settle a bill of exceptions different from the one allowed by it on the claim of petitioners that a portion of the bill is contrary to the evidence introduced, will not be granted in the absence of a showing that the petitioners suggested any statement in lieu of the portion to which objection is lodged, and in the absence of any showing that the matter explanatory of or in limitation of any part thereof was requested, and where every statement included in the portion objected to is literally true and there has been no refusal to include other testimony or to settle and certify a true bill. *Newton v Marsh (1928) 94 Cal App 141, 270 P 730.*

Where an appeal is taken too late, it will be dismissed on motion properly made and mandamus will not issue to compel the settlement of a bill of exceptions to be used thereon. *City of Pasadena v Superior Court of Los Angeles County (1931) 212 Cal 309, 298 P 968.*

Mandamus is not the proper proceeding for the correction for a bill of exceptions where a bill has been settled by the trial court, and what petitioner really seeks is not to compel its settlement, but to correct it as settled by compelling the omission of two amendments and the settlement of the bill as originally presented. *Fuhrman v Superior Court of San Francisco (1934) 2 Cal 2d 250, 39 P2d 802.*

A writ of mandate to compel the settlement of a bill of exceptions is not altogether a matter of right; and where the proposed bill of exceptions is lacking in the very essentials of a bill of exceptions, or the instrument submitted fails to show an attempt to present such a fair and bona fide statement of the case as entitles it to be considered and settled as a bill of exceptions and the trial court has granted the opponent's motion to strike it from the files, a writ will not issue. *Dainty Pretzel Co. v Superior Court of San Francisco (1935) 7 Cal App 2d 437, 45 P2d 817.*

Where a proposed bill of exceptions is lacking in the very essentials of such a bill, a writ of mandate will not issue to compel its settlement. *Ambrose v American Toll Bridge Co. (1938) 12 Cal 2d 276, 83 P2d 499.*

A writ of mandate to compel the settlement of a bill of exceptions is not altogether a matter of right, and where a proposed bill lacks in the very essentials of a bill of exceptions, the writ will not issue. *Nichols v Smith (1938) 25 Cal App 2d 94, 76 P2d 525.*

90. -Stay Bonds or Undertakings

On appeal from an order appointing a receiver, it is the duty of the judge of the superior court to fix the amount to be specified in an undertaking to stay the execution of the order pending the appeal; and in case of his refusal to do so the writ of mandate will lie to compel such action. *Winsor Pottery Works v Superior Court of California (1910) 13 Cal App 360, 109 P 843.*

Mandamus lies to compel the trial judge to fix the amount of a stay bond on an appeal from an order modifying, as to the possession of certain property, an interlocutory divorce decree which has become final as to the division of property. *Beverly v Guerin (1923) 64 Cal App 775, 222 P 834.*

A writ of mandate will issue against the superior court which has refused to hear and determine the question of sufficiency of surety on a stay bond given in connection with an appeal from a judgment rendered by said court, and also on an undertaking filed for the purpose of maintaining in force, pending appeal, an attachment, as the refusal relates to an act which the law specially enjoins as a duty resulting from the office of judge of said court. *Fix v Superior Court of Los Angeles County (1927) 86 Cal App 443, 260 P 845.*

An order refusing to approve a stay bond on appeal is not an appealable order, but even if such order were appealable, the right of appeal would be inadequate for the purpose of protecting either party in his statutory rights to a good and sufficient bond on appeal, and where the court unjustly refuses to approve the bond, mandamus is a proper remedy to compel the approval of the bond. *Lyders v Superior Court of San Francisco (1933) 129 Cal App 635, 19 P2d 300.*

A superior court is vested with jurisdiction to order an increase of the amount of an undertaking on an attachment; mandamus could not be used for the purpose of compelling the trial court to vacate and set aside its order directing an increase of the amount of the undertaking on such attachment; and a contention that defendant had failed to refute certain averments set forth in two affidavits filed in behalf of the petitioner, to the effect that at all times defendant had disclaimed any interest in or to the properties concerning which the levies were made and had asserted that his wife was the sole owner thereof, was entirely foreign to the jurisdictional issue and related exclusively to the question of the weight of evidence, where petitioner had taken the definite stand that defendant was the owner of said property, or of some definite interest therein, and had insisted on maintaining his levy, by filing an indemnifying bond, after the wife had filed a third party claim to the property. *Greene v Superior Court of San Francisco (1933) 133 Cal App 35, 23 P2d 785.*

Trial court may be compelled to fix amount of bond to stay on appeal execution of order appointing receiver. *Rondos v Superior Court of Solano County (1957, 3rd Dist) 150 Cal App 2d 304, 309 P2d 469.*

Mandate is appropriate to secure relief against a nonappealable order setting aside a default judgment on condition that defendants post a bond in the amount of $50,000, the bond amount being utterly disproportionate to whatever disadvantage the plaintiffs may have suffered from a 13-day delay in the filing of an appearance by defendants, such order vitally affecting the parties' relative positions in a pending lawsuit. *Kirkwood v Superior Court of Sacramento County (1967, 3rd Dist) 253 Cal App 2d 198, 61 Cal Rptr 316.*

91. -Preparation and Settlement of Transcript

Mandamus lies to compel a stenographic reporter to make a transcript of the trial where he wrongfully refuses to do so because his fees remain unpaid. *Harris v Burt (1920) 47 Cal App 480, 190 P 1058.*

Mandamus will not lie to compel the preparation of a transcript by the clerk of the court where the time within which the appeal may be taken has expired. *Voinich v Poe (1921) 52 Cal App 597, 199 P 74.*

An order by the trial judge striking his certificate from the clerk's transcript on appeal prepared under the alternative method is but an anciliary or procedural matter prescribed by statute in connection with the preparation of the record on appeal, and the making thereof neither adds to nor subtracts from the relief granted by the judgment; and, such order not being appealable, mandamus will not lie to compel the trial judge to certify a record on appeal from such order. *Lake v Harris (1926) 198 Cal 85, 243 P 417.*

Where an appellate court, in the exercise of its inherent appellate jurisdiction, has ordered the withdrawal of the transcript on appeal for amendment, so as to cause matters erroneously set forth in the clerk's transcript to be inserted in the reporter's transcript and for a proper certification of the same as amended, the trial court has no discretion in the premises and must give effect to the order of the appellate court, and mandamus is available to require it to certify to the correctness of the reporter's transcript. *Tasker v Warmer (1927) 202 Cal 445, 261 P 474.*

Where the answer to a petition for a writ of mandate to compel settlement of a transcript showed that the clerk of the court had already certified to a judgment roll containing everything asked for by the petitioner in her request for a transcript, not even excluding the opinion of the trial judge, it appears that there was nothing for the trial court to settle, it having no authority to certify to the clerk's transcript, and the petitioner was not entitled to the writ prayed for. *Best v Smith (1937) 22 Cal App 2d 363, 71 P2d 78.*

A trial judge cannot be compelled to certify a defective record, such as a reporter's transcript in a partition suit which contains only a portion of the proceedings had on the motion to confirm or modify the referee's report. *Machado v Superior Court of Luis Obispo County (1941) 44 Cal App 2d 81, 111 P2d 938.*

An appellant has right, enforceable by mandate, to have reporter of superior court prepare and file transcript and to have county clerk certify transcript after more than 30 days have expired from deposit of reporter's fees, and after superior court has ordered reporter not to prepare transcript in question until an appeal on another aspect of case has been completed. *Sullivan v Superior Court of San Francisco (1954) 128 Cal App 2d 476, 275 P2d 595.*

Mandamus lies to compel judge to settle statement on appeal which he arbitrarily and without justification refuses to settle unless furnished with complete transcript costing $1,300. *Eisenberg v Superior Court of Los Angeles County (1956, 2nd Dist) 142 Cal App 2d 12, 297 P2d 803.*

92. Costs and Fees

Inasmuch as there is no statute making the payment of jurors' fees in San Francisco a charge upon the public treasury, mandamus proceedings will not lie to compel the issuance of a certificate of the county clerk of the petitioner's attendance as a juror in such city and the amount payable to the latter. *Hilton v Curry (1899) 124 Cal 84, 56 P 784.*

Any error in awarding costs against a school district cannot be reviewed on an application for mandate. *Howe v Southrey (1904) 144 Cal 767, 78 P 259.*

Mandamus lies to compel the superior court to decide a motion to tax costs made after entry of judgment within the statutory period, and the fact that the order refusing to tax costs is appealable, is not of itself sufficient for holding the latter remedy exclusive. *Hennessy v Superior Court of California (1924) 194 Cal 368, 228 P 862.*

Petitioner seeking writ of mandate directing superior court to take certain action in connection with resettlement of transcript proceedings could not attack nunc pro tunc order, made for sole purpose of enabling judge under authority of former CCP § 1871(see now *Ev C § 730* et seq.) to order that witness be compensated out of county treasury as court-appointed expert rather than be paid ordinary witness fees. *Chessman v Superior Court of Los Angeles County (1958) 50 Cal 2d 835, 330 P2d 225.*

Mandamus is proper remedy to compel superior court to make order allowing petitioner to prosecute pending civil action without prepayment of jury fees. *Isrin v Superior Court of Los Angeles County (1965) 63 Cal 2d 153, 45 Cal Rptr 320, 403 P2d 728.*

93. Restitution

Mandamus will not lie to compel a city judge to return a fine erroneously imposed by him, since all moneys collected by him for the use of a city are immediately deposited in the city treasury, and the judge has no authority to withdraw them. *Draper v Grant (1949) 91 Cal App 2d 566, 205 P2d 399.*

A petition for mandamus to require restitution of real property to a lessee thereof, after reversal of an adverse judgment, became moot and the writ was denied where the appellate court filed a decision on rehearing holding that the lessee was entitled to unconditional restitution of the premises. *Boothe v Superior Court of Merced County (1949) 93 Cal App 2d 94, 207 P2d 897.*

Denial of writ of mandate was proper where it sought to compel municipal court and judge thereof to return to petitioner fine and assessment that he had paid after conviction under unconstitutional ordinance and return to him exhibits used as evidence at his trial but failed to allege any facts from which it could be determined that either judge or court was at any time under any duty to hand over to petitioner either money or exhibits. *Wenzler v Municipal Court for Pasadena Judicial Dist. (1965, 2nd Dist) 235 Cal App 2d 128, 45 Cal Rptr 54.*

Although mandate does not lie to control judicial discretion, except when that discretion has been abused, it is a remedy when the case is outside of the jurisdiction of the court or officer to which or to whom the writ is addressed; thus mandate is proper to compel the return of school personnel records seized by a sheriff by virtue of his official position as the result of a void court order and who claimed the right to deliver the records to a grand jury, where petitioner, board of school trustees, was the only one who had a right to the records and had no specific remedy in the ordinary course of law, as the sheriff was acting pursuant to a void order of the superior court. *Board of Trustees v Leach (1968, 3rd Dist) 258 Cal App 2d 281, 65 Cal Rptr 588.*

(3) PARTICULAR ACTIONS AND PROCEEDINGS

94. In General

A defendant, as a matter of right, is entitled to a writ of mandate to secure the dismissal of a suit to quiet title for failure to bring it to trial within the five year period after answers were filed, if there is nothing to show that the dismissal will work injustice or operate harshly or not promote substantial justice. *Larkin v Superior Court of County of Shasta (1916) 171 Cal 719, 154 P 841.*

Where in condemnation proceedings the court increased the amount of damages awarded by the jury, to be paid less than a month after the decree, mandamus lies to compel the court to modify the judgment to conform to the verdict, the remedy by appeal being inadequate. *San Francisco v Superior Court of San Francisco (1928) 94 Cal App 318, 271 P 121.*

It is not the mandatory duty of the superior court to grant a motion for judgment on the pleadings in every case where the answer fails to set up a good defense, and mandamus will not lie to compel such a judgment in a partition action, although the only affirmative defense is that a present sale would be unwise because of depressed condition of real property values, where there are no pleaded facts showing an abuse of discretion and the cause has been set for trial at an early date. *Harper v Superior Court of San Francisco (1934) 140 Cal App 5, 34 P2d 1063.*

In a mandamus proceeding to compel the dismissal of a pending action and cancel a deed of trust and foreclosure proceedings thereunder, where the petitioners, who were defendants in said action, applied for a nonsuit and judgment on the pleadings, and their application was denied, and the writ was sought on the grounds that a final judgment in a prior action in unlawful detainer against the plaintiff in the pending action was rejudicata, and the errors, if any, in denying the nonsuit and judgment on the pleadings could be corrected on appeal, the remedy of mandamus could not be invoked. *Anglo-California Nat'l Bank v Superior Court of Glenn County (1936) 15 Cal App 2d 676, 59 P2d 1053.*

Where the office of the writ of mandate is to compel performance of an act specifically enjoined by law, and does not lie to enforce the obligations of contract, nor to obtain a money judgment, where a judgment obtained in a condemnation suit bears interest under the statute, mandamus will lie to compel payment of interest on the decree fixing the compensation for the property condemned. *McPherson v Los Angeles (1937) 8 Cal 2d 748, 68 P2d 707.*

In a proceeding for a writ of prohibition to restrain the superior court from reviewing in a mandamus proceeding the evidence and proceedings before the state personnel board which led to a decision of that board reinstating petitioner as a referee of the industrial accident commission, although the decision of the state personnel board reinstating petitioner was made final and not subject to review, the superior court had power to review the evidence and proceedings before that board to determine whether it had jurisdiction to reinstate petitioner, and for that purpose could even receive evidence. *Cullinan v Superior Court of Sacramento County (1938) 24 Cal App 2d 468, 75 P2d 518.*

In a proceeding in mandamus to compel the insurance commissioner to issue a certificate of authority to do business as an insurance company, conceding that when the petition was filed, the petitioner had no cause of action to compel renewal of its certificate for the following fiscal year, the court was justified in retaining jurisdiction until all the issues in the action could be determined and all the differences between the parties arising thereunder were settled, under the rule that once having acquired jurisdiction of the subject matter of an action equity will retain it, to the end that a complete adjudication of all conflicts and rights may be had. *Imperial Mut. Life Ins. Co. v Caminetti (1943) 59 Cal App 2d 494, 139 P2d 693.*

While under the Soldiers' and Sailors' Civil Relief Act of 1940, courts may, in their discretion, refuse to stay proceedings in which a person in military service is involved, they are obligated not to do so unless they are of the opinion that the interests of such person will not be materially affected by a refusal. *McArthur v Shaffer (1943) 59 Cal App 2d 724, 139 P2d 959.*

In proceeding for writ of mandate to compel labor union to restore plaintiff to membership and to recover damages for alleged wrongful expulsion, plaintiff's refusal to answer questions concerning his membership in communist party, together with his lack of candor throughout his testimony and failure to offer evidence of his eligibility for membership justified trial court in refusing to issue writ directing his reinstatement to membership. *Allen v Los Angeles County Dist. Council of Carpenters (1959) 51 Cal 2d 805, 337 P2d 457.*

In proceeding for writ of mandate to compel labor union to restore plaintiff to membership and to recover damages for alleged wrongful expulsion, trial court properly assumed jurisdiction to determine cause on its merits as against union defendants. *Allen v Los Angeles County Dist. Council of Carpenters (1959) 51 Cal 2d 805, 337 P2d 457.*

Where in pending eminent domain proceeding defendants, in preparation for trial, filed and served on plaintiff school district written interrogatories calling for addresses and opinions of plaintiff's appraisers as to market value and severance damage, and trial court entered an order overruling plaintiff's objections as to interrogatories which plaintiff refused to answer, issuance of an alternative writ by Supreme Court to review propriety of that order was proper use of writ. *Oceanside Union School Dist. v Superior Court of San Diego County (1962) 58 Cal 2d 180, 23 Cal Rptr 375, 373 P2d 439.*

An application to a court of appeal for the issuance of a writ of mandate compelling an answer to a plaintiff's interrogatory in an action involving the question of rights to the underground water in plaintiff's water district area was a proper means of securing a decision as to whether the interrogatory called for the work product of the attorney for the real parties in interest (defendants in the water litigation), since the ruling of the trial court in a discovery proceeding is not directly appealable and the employment of this means of securing an authentic controlling decision on the point is

proper. *Tehachapi-Cummings County Water Dist. v Superior Court of Kern County (1968, 5th Dist) 267 Cal App 2d 42, 72 Cal Rptr 589.*

In an action for damages for false and malicious defamation by the news media, an order granting defendant's motion under *CCP § 437c*, for summary judgment to the extent of precluding plaintiffs' recovery of general and exemplary damages was not appealable, was one for which plaintiffs had no plain, speedy and adequate remedy in the ordinary course of law, and was thus one subject to vacation by writ of mandate where the order was based on an improper application of *CC § 48a*, providing that only special damages are recoverable for libel by newspaper or slander by radio broadcast unless a correction is first demanded and refused. *Field Research Corp. v Superior Court of San Francisco (1969) 71 Cal 2d 110, 77 Cal Rptr 243, 453 P2d 747.*

Where a board of trustees of a school district, having suspended a tenured teacher for incompetency due to a mental disability, brings an action to dismiss her on that ground, and the trial court denies the board's request for a court-appointed psychiatrist to make a current examination and report under *CCP § 2032*, subd. (a), a petition for mandate in the appellate court is a proper remedy to test the order denying such discovery. *Board of Trustees v Superior Court of El Dorado County (1969, 3rd Dist) 274 Cal App 2d 377, 79 Cal Rptr 58.*

On the denial, by a superior court, of a school district's request under *CCP § 2032*, subd. (a), for a court-appointed psychiatrist to make a current examination and report on a tenured school teacher in its action under former Ed C § § 13412 et seq. (see now *Ed C § § 44932* et seq.), to have her dismissed for incompetency due to a mental disability, mandamus lay to direct the court to order such examination, where at one level or another proceedings against her had been pending for nearly four years, and where her most recent psychiatric examination had been made on her suspension from teaching over a year before the trial; and during such examination she was not entitled to have her counsel or a court reporter present. *Board of Trustees v Superior Court of El Dorado County (1969, 3rd Dist) 274 Cal App 2d 377, 79 Cal Rptr 58.*

With regard to the propriety of the issuance of a writ of mandamus in adoption or guardianship proceedings, the question of clean hands is largely subordinated to the court's primary concern, which is to determine what is in the best interest of the child. *San Diego County Dep't of Public Welfare v Superior Court of San Diego County (1972) 7 Cal 3d 1, 101 Cal Rptr 541, 496 P2d 453.*

Local Agency Formation Commissions (LAFCOs) are administrative bodies created pursuant to the Cortese-Knox Local Government Reorganization Act of 1985 (*Gov C § § 56000* et seq.) to control the process of municipality expansion. The purposes of the act are to encourage planned, well-ordered, efficient urban development patterns with appropriate consideration of preserving open-space lands within those patterns, and to discourage urban sprawl and encourage the orderly formation and development of local agencies based on local conditions and circumstances. A LAFCO annexation determination is quasi-legislative; judicial review thus arises under the ordinary mandamus provisions of *CCP § 1085*, rather than the administrative mandamus provisions of *CCP § 1094.5*. *Sierra Club v San Joaquin Local Agency Formation Com. (1999) 21 Cal 4th 489, 495, 87 Cal Rptr 2d 702, 981 P2d 543.*

Writ of mandate was the proper mechanism for the private high school and the student to use to get the Department of Motor Vehicles to accept the certificates of completion from the high school and the student for the high school's correspondence driver education course. *Jackson v Gourley (2003, 1st Dist) 105 Cal App 4th 966, 130 Cal Rptr 2d 72.*

95. Arbitration Proceedings

Mandamus will lie to correct nonappealable order compelling arbitration and staying proceedings. *Cook v Superior Court of Los Angeles County (1966, 5th Dist) 240 Cal App 2d 880, 50 Cal Rptr 81.*

A writ of mandate will issue directing the trial court to set aside its order vacating an arbitration award and to deny an insured's petition to vacate said award where the trial court acted in excess of its jurisdiction in granting the petition to vacate and where the result of the lower court's order was to require both parties to go through another arbitration hearing and then, in the event of an award contrary to the original award, another proceeding in superior court to vacate such second award, followed by an appeal in the event the superior court, contrary to law, should rule that the first award was not binding upon the parties. *National Union Fire Ins. Co. v Superior Court of San Francisco (1967, 1st Dist) 252 Cal App 2d 568, 60 Cal Rptr 535.*

96. Contempt Proceedings

Where a proceeding for an alleged contempt in violating an injunction is dismissed by the superior court on the ground that the party proceeded against is not guilty, a writ of mandate will not lie to review the order of dismissal, and to command the court to punish the party for the alleged contempt. *Heilbron v Superior Court of Tulare County (1887) 72 Cal 96, 13 P 160.*

Mandate is the proper remedy where the superior court refuses to hear and decide contempt proceedings brought for disobedience to its orders. *United Railroads of San Francisco v Superior Court of San Francisco (1916) 172 Cal 80, 155 P 463.*

In a proceeding in mandamus to compel a court to cite certain persons for contempt in relation to orders contained in its judgment, where the court is of the opinion that the acts of the persons involved did not amount to contempt, the writ of mandate is properly denied. *McAlvay v Superior Court of Los Angeles County (1931) 115 Cal App 391, 2 P2d 829.*

Although where it is the only method by which the right of a party may be protected, mandamus may be used to compel contempt proceedings, the dismissal of such proceeding is final and conclusive and beyond review by any other tribunal; manadamus will not lie to review it. *State Bar of California v Superior Court of Los Angeles County (1935) 4 Cal 2d 86, 47 P2d 697.*

Mandamus will not lie to compel a court to hear and determine an order to show cause why a party should not be punished for contempt where it appears that the court heard such order but refused to adjudge the party guilty of contempt. *Thomas v Superior Court of Butte County (1935) 4 Cal App 2d 356, 41 P2d 220* (disapproved by *Robinson v Superior Court of Los Angeles County, 35 Cal 2d 379, 218 P2d 10).*

Where the record shows that the trial court, on an order to show cause why defendant should not be held in contempt for failure to comply with the terms of an interlocutory decree of divorce, assumed jurisdiction and disposed of all the relevant and material issues raised by the citation and order to show cause, and held defendant had complied with the only enforceable provision of said decree, which approved a property settlement agreement made by the parties, and the matter was disposed of on the merits, mandamus is not available as a means of inquiring into the correctness of the trial court's decision. *Glazer v Superior Court of Los Angeles County (1936) 14 Cal App 2d 596, 58 P2d 664.*

Where the defendant purported to make a special appearance on the hearing of an order to show cause why he should not be punished for contempt, but in fact made a general appearance and the trial court erroneously held that it was without jurisdiction because of defective service and, while the order quashing service was not final and did not leave petitioner without a remedy, defendant avoided service of a second order to show cause, thereby rendering the remedy merely nominal, petitioner was entitled to a writ of mandate to compel the trial court to proceed with the hearing of said order to show cause. *MacPherson v Superior Court of Los Angeles County (1937) 22 Cal App 2d 425, 71 P2d 91.*

97. Criminal Proceedings

Mandamus lies to compel a justice of the peace to proceed with the preliminary examination of one regularly charged with having committed a public offense, and arrested and brought before him, as enjoined by *Pen C § § 858, 859, 860. People ex rel. Hamilton v Barnes (1885) 66 Cal 594, 6 P 698.*

Where, in a proceeding in mandamus to compel the dismissal of a criminal prosecution, it is shown that there was in fact good cause for the delay in the trial of the case, it is immaterial whether or not such a cause was satisfactorily shown to the trial court, for the appellate court will not direct the dismissal of a case where it is shown to its satisfaction that the delay in the trial was for good cause. *Chrisman v Superior Court (1923) 63 Cal App 477, 219 P 85.*

A defendant who is represented by counsel in a criminal case is not entitled as a matter of right to be present when the case is set for trial, and although any error in this connection is reviewable on appeal it is not a ground for the issuance of a writ of mandate to compel his appearance in court. *Mooney v Superior Court of San Francisco (1933) 130 Cal App 521, 20 P2d 106.*

Since no legal duty is imposed upon a police court to expunge a void judgment from its records, mandamus will not issue to compel it to expunge judgments and orders in a prosecution of the petitioner, though it be assumed the court acted without jurisdiction. *Andrews v Police Court of Stockton (1943) 21 Cal 2d 479, 133 P2d 398.*

Defendant in criminal case is not entitled to writ of mandamus to compel superior court to direct filing of notice of appeal and preparation of clerk's and reporter's transcripts, where in view of counteraffidavit showing that, among other things, custodial officer to whom notice of appeal was allegedly given was "off duty" on date in question, it appears that defendant has not sustained burden of establishing that he was denied right to file his notice by reason of any act or omission on part of jail official. *Brown v Superior Court of Los Angeles County (1955, 2nd Dist) 136 Cal App 2d 28, 288 P2d 144.*

Order denying motion for order in nature of writ of mandamus to compel county clerk to deliver petitioner certified clerk's transcript and reporter's transcript in robbery trial was correct where record showed that same issues raised on this appeal were same as those raised in prior pending appeal in which same motion had been denied by appellate court. *People v Adriano (1958, 4th Dist) 162 Cal App 2d 798, 328 P2d 827.*

Where petitioner is entitled to have record of his conviction based on void judgment expunged, such relief may not be granted in district court of appeal on his petition for writ of habeas corpus; mandamus is proper remedy. *In re Schillaci (1961, 2nd Dist) 196 Cal App 2d 591, 16 Cal Rptr 757.*

Where court in criminal case acts in excess of jurisdiction and without authority of law in entering order or judgment, and there is no remedy by appeal, writ of mandate will issue on petition of People to set aside order or judgment and to compel court to pronounce judgment in manner provided by law. *People v Superior Court of Solano County (1962, 1st Dist) 202 Cal App 2d 850, 21 Cal Rptr 178.*

Mandamus lies on state's petition to compel court to arraign defendant for judgment and proceed as required by law in prosecution in which court, after plea of guilty, acted in excess of jurisdiction in dismissing "the case." *People v Superior Court of Solano County (1962, 1st Dist) 202 Cal App 2d 850, 21 Cal Rptr 178.*

Appellate court will not exercise its discretion in favor of issuing writ of mandamus to compel dismissal of pending criminal proceeding on showing that accused, though incarcerated in federal prison, could be made available for trial of felony, with which he was charged, that warrant issued for his arrest remained unserved, that he had formally requested court to set matter for speedy trial or to dismiss complaint, that no action had been taken and that he alleged that his right to fair trial was being denied by delay; appellate court's function was being served and rights of accused were protected by proceedings which, if district attorney did not elect to exercise his discretion of dismissal, required him to show cause why he should not take steps to bring case on for early trial. *Partain v Municipal Court for Los Angeles Judicial Dist. (1963, 2nd Dist) 215 Cal App 2d 407, 30 Cal Rptr 300.*

Although a clear case of a mistrial in a criminal prosecution because of lack of a unanimous jury is a typical situation in which jeopardy has no application, even if jeopardy were to attach, it would be improper to grant mandate in a situation otherwise improper solely to avoid the bar of jeopardy. *People v Superior Court of Orange County (1967) 67 Cal 2d 929, 64 Cal Rptr 327, 434 P2d 623.*

Ordinarily, the granting of relief in mandamus lies in the discretion of the court, but mandate is not generally permissible to review determinations from which the People may not appeal, such as from a dismissal of a criminal action in the interests of judtice under *Pen Code, § 1385,* and even in exceptional cases, assuming the matter to be of such importance that review by mandate would otherwise be available to the people, such review is still prohibited if there is a danger of further trial or retrial. *People v Superior Court of Marin County (1968) 69 Cal 2d 491, 72 Cal Rptr 330, 446 P2d 138.*

Mandate did not lie to compel a trial judge to vacate his order, entered after the jury had returned a verdict finding defendant guilty of first degree robbery, dismissing the action in the interests of justice under *Pen Code, § 1385*, where the judge stated insufficiency of the evidence as the ground of his decision and conscientiously supported this by his reasons for discounting the identification evidence, on which alone defendant had been connected with the crime, where, also, it appeared most unlikely that further evidence was available to the prosecution, and where, moreover, even supposing the merits of the decision could properly be reviewed in denying the writ, the record showed no abuse of discretion. *People v Superior Court of Marin County (1968) 69 Cal 2d 491, 72 Cal Rptr 330, 446 P2d 138.*

A criminal defendant's proper recourse for the protection of his right to a speedy trial is to petition for a writ of mandate or of prohibition prior to the commencement of trial. *People v Davis (1968, 2nd Dist) 265 Cal App 2d 341, 71 Cal Rptr 242.*

Mandamus was available to the People to set aside the trial court's order vacating defendant's plea of guilty in a criminal prosecution, where the order was an abuse of discretion, where the case was one of importance to the entire

judicial scheme, and where issuance of mandate would not require further trial not retrial as to the count of the information to which the plea was entered and would not violate any known policy consideration or provide harassment to defendant. *People v Thompson (1970, 2nd Dist) 10 Cal App 3d 129, 88 Cal Rptr 753.*

Where a trial court refuses to correct an illegal sentence, the People may obtain relief in the appellate court by writ of mandate. *People v Massengale (1970, 2nd Dist) 10 Cal App 3d 689, 89 Cal Rptr 237.*

Mandamus is an appropriate remedy to review orders concerning the designation or substitution of appointed counsel. *Drumgo v Superior Court of Marin County (1973) 8 Cal 3d 930, 106 Cal Rptr 631, 506 P2d 1007.*

One who had been charged with battery and other offenses, subsequently dismissed for lack of prosecution, was not entitled to a writ of mandate to compel the presiding judge of the municipal court, the city police chief, and the records custodian to expunge or return to him the record of his arrest, where he failed to point out any statute or ordinance imposing on any defendant, as required by *CCP § 1085*, providing for the writ of mandate, "a duty resulting from [his] office" to comply with such a demand. Moreover, an arrest record is a document within the scope of *Gov. Code, § 6200*, which imposes criminal sanctions on an officer having custody of such a record for "wilfully... removing... the whole or any part" of it. *Loder v Municipal Court for San Diego Judicial Dist. (1976) 17 Cal 3d 859, 132 Cal Rptr 464, 553 P2d 624.*

The practice of securing additional appellate review of a criminal conviction in municipal court that has been affirmed by the appellate department of the superior court, by applying in superior court for a writ of mandate directed against the municipal court and then appealing, to the Court of Appeal, the superior court judgment denying the writ, circumvents the established channels of judicial review which preclude review of municipal court judgments as of right in the Court of Appeal, and is highly disfavored, so that sanctions may be imposed for unwarranted use of the procedure. The availability of an adequate appellate remedy is normally a bar to prerogative writ relief, and where that remedy is not only available but also used, any further writ review should be limited to the question whether the municipal court judgment was voidable or void. *Mendieta v Municipal Court for North County Judical Dist. (1980, 4th Dist) 109 Cal App 3d 290, 168 Cal Rptr 1.*

Motion to return a portion of seized marijuana was properly denied because the amount of marijuana seized confirmed that the petitioner was not in lawful possession. The court therefore denied a petition for writ of mandate that challenged the trial court's decision. *Chavez v Superior Court (2004, 4th Dist) 123 Cal App 4th 104.*

Where the death penalty was being sought against an accused claiming to be mentally retarded, while the trial court properly ordered the accused to submit to an examination on the issue of mental retardation by the People's expert and properly determined that the accused was not entitled to unqualified judicial immunity for information obtained from that interview, writ of mandate sought by the accused was granted, and the trial court was ordered to hold a hearing to determine what tests desired by the People's expert addressed the determination of mental retardation and to order only those tests to be performed. *Centeno v Superior Court (2004, Cal App 2nd Dist) 2004 Cal App LEXIS 381, 2004 CDOS 2602.*

98. -Indictments and Information

Mandamus may be invoked to compel the dismissal of indictments pending against the defendant for a series of years, and which were continued for trial from time to time for more than sixty days after the filing of the indictment without good cause, and over the protest of the petitioner. *Ford v Superior Court of California (1911) 17 Cal App 1, 118 P 96.*

Where on the trial of a criminal prosecution the trial court erroneously sustained an objection to the sufficiency of the information and discharged the jury from further consideration of the case, mandamus was a proper remedy to compel it to vacate its order and to proceed with the trial to verdict and judgment. *People v Superior Court of California (1918) 39 Cal App 324, 178 P 730.*

Where the superior court, without good cause, has postponed the trial of a defendant, without his consent, beyond the sixty days within which statute requires that he must be tried or the indictment against him dismissed, he is entitled to relief by a proceeding in mandamus, on a proper showing, to compel a dismissal of the indictment. In re Application of Spagnoli on behalf of *Murphy (1921) 53 Cal App 523, 200 P 836.*

The People were entitled to be heard in a mandamus proceeding seeking to set aside an order dismissing a criminal action, where the dismissal followed a motion to quash the indictment by one of the three accused based on the alleged

unconstitutionality of the grand jury in question and of the state grand jury system in general, but where the dismissal, made without any evidentiary hearing or a ruling on the merits, was applied equally to the actions against the other two accuseds and was accompanied by the judge's express intention to take similar action with respect to other pending cases, thus denying the People an adequate remedy at law by forcing the district attorney to abandon, pending the delay incident to any appeal, the use of indictments for criminal investigations. *People v Superior Court of San Luis Obispo County (1970, 2nd Dist) 13 Cal App 3d 672, 91 Cal Rptr 651.*

99. -Evidence

Pretrial inspection of written statement made by accused to police may be compelled by him by mandamus where he has forgotten what he said and alleges that documents he seeks "may be necessary... to refresh his recollection." *Powell v Superior Court of Los Angeles County (1957) 48 Cal 2d 704, 312 P2d 698.*

Where an application for pre-trial discovery is made in a criminal case, the trial court has a broad discretion, and only on an abuse of such discretion can error be predicated thereon so that mandate will lie. *Walker v Superior Court of Mendocino County (1957, 3rd Dist) 155 Cal App 2d 134, 317 P2d 130.*

One who is indicted for crime is entitled to writ of mandate to require prosecution to permit him to hear recordings of his conversation with police officers and conversation between purported victim and police officers which were played to him at time he was examined, where he has forgotten what he said at time he was examined and alleges that recordings are necessary to refresh his recollection. *Vance v Superior Court of San Diego County (1958) 51 Cal 2d 92, 330 P2d 773.*

Writ of mandamus properly issued to compel inspection of statements made by accused to law enforcement officers, where petitioner alleged in his affidavit that he could not recall contents of statements and needed them to refresh his recollection, and where officer's counteraffidavits did not deny such allegations. *Cordry v Superior Court of Santa Clara County (1958, 1st Dist) 161 Cal App 2d 267, 326 P2d 222.*

Writ of mandamus may issue to compel inspection of certain statement made by petitioner to police officers immediately after his arrest, though there is no showing that statement was reduced to writing or signed by him and he does not aver that statement is essential to his defense, where he alleges without contradiction that he is unable to recall what he said in statement, and where, to deny such inspection, would be to lose sight of objective of ascertainment of facts. *McCarthy v Superior Court of Contra Costa County (1958, 1st Dist) 162 Cal App 2d 755, 328 P2d 819.*

Issuance of peremptory writ of prohibition to restrain court from proceeding to trial after preliminary examination in criminal case does not render moot petitioner's request for writ of mandate to compel superior court to order production and inspection of certain statement made by petitioner to police officers immediately after his arrest, where prosecution has indicated its intention of recharging petitioner. *McCarthy v Superior Court of Contra Costa County (1958, 1st Dist) 162 Cal App 2d 755, 328 P2d 819.*

Mandamus is proper remedy to correct situation where trial court in murder case abused its discretion in refusing to permit defendant's attorney to conduct hypnotic examination for purpose of recalling defendant's memory, lost through intoxication, shock or otherwise, of his whereabouts and activities during critical time involved, and writ may issue requiring court to issue order to sheriff permitting attorney to examine accused with aid of hypnotist and to provide that such examination be conducted in private unless accused waives that right. *Cornell v Superior Court of San Diego County (1959) 52 Cal 2d 99, 338 P2d 447.*

The trial court properly denied mandamus to compel a municipal court clerk to file, as the first paper in a criminal case, a document presented by the public defender seeking the return of personal property allegedly owned by his client and unlawfully seized by police officers, and an order that such property be suppressed as evidence in any criminal proceeding, where no criminal proceeding had been taken against the client and no threat or attempt to use the property as evidence in any such proceeding had ever been made, where no Fourth Amendment issue was posed, and it was not contended that the client was in fact entitled to the return of his property or to its suppression as evidence, where there appeared to be no legislative authorization for the municipal court to entertain such strange procedure, and where the client had a plain legal remedy by way of replevin or claim and delivery. *Ligda v Edmunds (1971, 1st Dist) 16 Cal App 3d 715, 94 Cal Rptr 234.*

The superior court properly dismissed the People's petition for a writ of mandate or prohibition directing the municipal court to vacate its order, made on defendant's motion in prosecutions for driving while under the influence of intoxicating liquor, declaring that on the People's failure to produce breathalyzer test ampoules and their contents, all

evidence with respect to the tests should be excluded, where, in view of the People's stipulation that the items sought had been destroyed, defendant's motion had raised merely a question of admissibility of evidence such as is not reviewable by mandamus or prohibition. *People v Municipal Court for Cent. Judicial Dist. (1974) 12 Cal 3d 658, 117 Cal Rptr 20, 527 P2d 372.*

100. -Probation

A superior court has power to hear and determine an application for probation, notwithstanding the appellant was convicted by plea of guilty, but whether any proceedings to that end shall be entertained is a question resting entirely in its discretion and cannot be controlled or reviewed by mandamus. *Svoboda v Purkitt (1925) 75 Cal App 148, 242 P 81.*

Although the grant or denial of probation in a criminal case after judgment is within the discretion of the court, the defendant has a right to make such application, and its refusal to permit such application is an abuse of its discretion subject to correction by writ of mandate. *People v Payne (1930) 106 Cal App 609, 289 P 909.*

Reciprocal discovery provisions set forth in the criminal discovery chapter of Cal. Proposition 115, enacted at *Pen C § 1054* et seq., did not apply to a probationer's revocation hearing because the revocation proceeding was not a criminal trial within the meaning of *Pen C § 1054.3*, which governed the scope of the discovery obligations of the defense, and neither the criminal discovery chapter, the Constitution of the United States, nor other statutory authority provided for such discovery; hence, the probationer's request for a writ of mandate was granted and the trial court was directed to vacate its order, which found that the probationer had violated the reciprocal discovery requirement under *Pen C § 1054* et seq. by failing to provide to the State the name of a defense witness who had identified to a defense investigator the person with whom the probationer had allegedly engaged in a fight. *Jones v Superior Court (2004, Cal App 4th Dist) 2004 Cal App LEXIS 78.*

100.5. Dependency Proceedings

Where a trial court had sua sponte appointed a guardian ad litem for a mother in dependency proceedings regarding the mother's child, procedural rules established thereafter could not be retroactively applied as a basis for relief from the jurisdictional findings entered by the trial court after the guardian ad litem appointment; hence, the county children and family services bureau's request for a petition for a writ of mandate setting aside the trial court's order setting aside the jurisdictional findings was granted. Contra *Costa County Children & Family Services Bureau v Superior Court (2004, Cal App 1st Dist) 2004 Cal App LEXIS 388, 2004 CDOS 2599.*

101. Dissolution Proceedings

Where an action for annulment of marriage has come on for hearing and testimony has been taken, the court may not, because the plaintiff has previously obtained an interlocutory decree of divorce, continue the case beyond the expiration of one year after the date on which the interlocutory decree was granted, and if it directs such continuance, mandamus lies to have the case restored to its place on the calendar. *Mason v Superior Court of Los Angeles County (1914) 24 Cal App 386, 143 P 554.*

Mandate is an appropriate remedy to compel the entry of a final decree of divorce where the court's duty is plain and unmixed with the exercise of discretionary powers. *Olson v Superior Court of County of Merced (1917) 175 Cal 250, 165 P 706.*

Where there is a legal right to relief under certain facts and the existence of such facts is not questioned, a court having jurisdiction has no discretion to refuse the relief; but where it appears that an interlocutory decree of divorce, which is the foundation for the relief sought, has been set aside by a judgment not shown to be invalid, and the trial court, in a proceeding in which it had jurisdiction, has from evidence before it made findings supporting on additional grounds its judgment denying relief, such judgment cannot be reviewed on an application for a writ of mandate. *O'Connell v Superior Court of San Francisco (1925) 74 Cal App 350, 240 P 294.*

In a proceeding in mandamus to compel the superior court to hear motions modifying an interlocutory decree of divorce, the appellate court is entitled to take into consideration all the facts surrounding the making of an order dealing with the motions and is not bound by the phraseology of the order as written; when the petitioner offered to present his motions, if no legal objection existed, it became the duty of the trial court to exercise its jurisdiction, which is the power to hear and determine, and the trial court having refused to act on the motion for the petitioner, it did not hear; the fact that the order refusing to hear petitioner's motions was an appealable order and that petitioner had a remedy by appeal

therefrom did not deprive petitioner of the right to maintain such mandamus proceeding. *Carstens v Western Pipe & Steel Co. (1927) 252 P 939.*

Mandamus will not lie to require a court to proceed with a divorce action upon the merits where the court determined that a foreign judgment was res judicata of all the matters pleaded in the complaint in such action, as the decision of the court was mere error, and a right of appeal existed under former CCP § 963 subd 1 (see now *CCP § 904.1*). *Short v Superior Court of Los Angeles County (1928) 94 Cal App 664, 271 P 783.*

After notice of appeal by a husband from an interlocutory judgment in a divorce action, the trial court cannot refuse to settle the reporter's transcript on appeal on the ground that appellant is guilty of contempt in refusing to comply with an order directing him to pay plaintiff a specified sum of money to enable her to defend as against such appeal, and mandamus will lie to require the settlement of the transcript. *Jansen v Superior Court of Los Angeles County (1929) 99 Cal App 718, 279 P 227.*

Where an interlocutory decree of divorce had been granted, and on the application for a final decree no intervening facts appear to show a change in the status or relation of the parties, the entry of the final decree becomes something in the nature of a ministerial act on the part of the court, and mandamus may be invoked to compel it to perform its duty; but where, after the rendition of the interlocutory decree, events occur to change the status or relation of the parties, such as condonation and a resumption of the marital relation by the parties, the entry of the final decree ceases to be a ministerial act only, and becomes a judicial act in the performance of which the trial court may use its discretion, and mandamus will not lie. *Lane v Superior Court of Fresno County (1930) 104 Cal App 340, 285 P 860.*

Where an interlocutory decree of divorce in favor of the husband on the ground of the wife's extreme cruelty orders the husband to pay a specified sum in full of all alimony, maintenance and support of every kind and a further sum in full of counsel fees, and his uncontradicted affidavit for a final decree is in all respects in the usual form except that it does not show full compliance with the order for the payment of said sums, but in view thereof he shows that he has paid a specified sum and he sets forth in full the reasons for his failure to pay the balance and his inability to comply with the order further than to pay a stated sum monthly, which sum he has been paying, and he has not been adjudged in contempt for failure to pay specified sums, the trial court should grant his final decree, and where it refuses to do so mandamus is a proper remedy. *Isakson v Superior Court of San Francisco (1933) 130 Cal App 180, 19 P2d 840.*

In a mandamus proceeding to compel a superior court to order a money judgment against petitioner's former husband for accrued alimony, and directing the clerk to issue execution thereon, where petitioner had applied to said court for such relief, and whether any judgment was to be entered and, if so, the amount thereof were in issue, and the determination of those issues involved the issue as to whether any indebtedness existed in favor of petitioner, and the superior court received evidence and determined that no indebtedness existed in petitioner's favor, the matter before the superior court necessarily involved an exercise of discretion and a weighing of the evidence presented, and its action could not be controlled by mandamus. *Parker v Superior Court of San Diego County (1936) 16 Cal App 2d 580, 60 P2d 1021.*

A wife who brought an action for divorce on the ground of adultery, but did not comply with former CCP § 1019 requiring service of the pleading on the husband's associates in the alleged adulteries, was not entitled to a writ of mandamus to compel the husband on a deposition to answer questions concerning the whereabouts of the women. *Monroe v Superior Court of Los Angeles County (1950) 97 Cal App 2d 470, 218 P2d 136.*

Mandamus lies to compel entry of final decree of divorce on moving party's compliance with requirements of former CC § 132 (see now *Fam C § 2339*). *Haldeman v Superior Court of Sutter County (1962, 3rd Dist) 206 Cal App 2d 307, 23 Cal Rptr 895.*

Application for writ of mandate to vacate interlocutory decree of divorce was properly denied where divorce action was heard by commissioner, sitting as judge pro tempore of superior court pursuant to stipulation executed by counsel for plaintiff, default of defendant, who did not appear, having first been duly entered in cause. *Barfield v Superior Court of Los Angeles County (1963, 2nd Dist) 216 Cal App 2d 476, 31 Cal Rptr 30.*

Mandamus was proper procedure to test first husband's right to discovery, with respect to financial standing attained by his former wife by reason of her second marriage, in proceeding to determine liability of respective parties to make support payments for their daughter, and writ should be granted where, in preparing for determination of whether first husband or his former wife must pay additional sums, or whether he should be excused from paying anything, for support of their daughter, it was proper to inquire concerning former wife's separate and community property which arose from her second marriage. *Chapin v Superior Court of Kern County (1966, 5th Dist) 239 Cal App 2d 851, 49 Cal Rptr 199.*

Mandamus was a proper remedy and lay to compel a court to hear petitioner former husband's motion to modify an interlocutory and final divorce decree insofar as it related to the support and maintenance of his former wife, where such motion had been improperly denied on the erroneous theory that the court lacked jurisdiction in that the support payment provision had been a part of an integrated property settlement agreement which the court had no power to modify. *Sprenger v Superior Court of Sacramento County (1969, 3rd Dist) 268 Cal App 2d 857, 74 Cal Rptr 638.*

A husband's tenant under a sublease was entitled to relief by way of prohibition and mandamus, to an order prohibiting a trial court from enforcing an erroneous order made in supplemental divorce proceedings directing the tenant to pay rental payments to accrue to the husband under the sublease, to his judgment creditor wife, and to an order directing the court to recall and quash a writ of execution issued thereon which had been levied on the tenant's bank account, where it appeared from the record that so long as the order stood unmodified as interpreted by the trial court, the tenant was subject to the threat of contempt proceedings, and that if he failed to pay the basic rent to the prime lessor (of the husband) he might be evicted by title paramount. *Hustead v Superior Court of Contra Costa County (1969, 1st Dist) 2 Cal App 3d 780, 83 Cal Rptr 26.*

102. Injunctions

In a proceeding in mandamus to require a superior court to assume jurisdiction of a motion for injunction to restrain a judgment debtor from disposing of his property for the purpose of defeating execution of a judgment in a certain case, where the superior court denied the motion on the sole ground that it was without jurisdiction because that case was then pending on appeal, but a remittitur was issued in that case and there was no further obstacle to the assumption of jurisdiction over said motion, and the trial court could hear the motion on its merits, a peremptory writ was granted as prayed. *Passow v Superior Court of San Francisco (1938) 28 Cal App 2d 382, 82 P2d 615.*

Superior court may be compelled to assume jurisdiction over petitioner's application for preliminary injunction and appointment of receiver, unless appeal from order denying application constitutes plain, speedy and adequate remedy. *Atkinson v Superior Court of Los Angeles County (1957) 49 Cal 2d 338, 316 P2d 960.*

Where trial court has jurisdiction to consider and pass on petitioner's motion to dissolve injunction and to determine whether there has been change in controlling factors on which injunction rested or whether ends of justice would be served by modification of order, and court merely sustains objection on jurisdictional grounds and leaves proceedings pending, petitioners are entitled to writ of mandate to compel hearing and determination on merits of petitioner's motion. *Branker v Superior Court of Riverside County (1958, 4th Dist) 165 Cal App 2d 816, 332 P2d 711.*

The lack of a final judgment after a peremptory writ and injunctive relief have been granted by a lower court might, under appropriate facts, justify a higher court in exercising its discretion to deny an alternative or peremptory writ seeking to annul the lower court's writ and injunction, but does not per se prevent the higher court from issuing the annulling writ when the facts otherwise call for it. *City Council of Beverly Hills v Superior Court of Los Angeles County (1969, 2nd Dist) 272 Cal App 2d 876, 77 Cal Rptr 850.*

A trial court's minute order granting a petitioner a peremptory writ and injunctive relief annulling the award of a public contract for a city reservoir project was beyond the jurisdiction of that court, where the order was based on mere conclusions of the petitioner that the action of the city council in making its award was null and void as being capricious, unreasonable, and contrary to the requirements of the law, and where the only operative factual allegations on which the order was based, namely, those purporting to establish the city's abuse of discretion, amounted to no more than allegations that the council, in interpreting its invitation to bid, acted honestly but in a fashion different from what a court might have done if the court had been letting the contract. *City Council of Beverly Hills v Superior Court of Los Angeles County (1969, 2nd Dist) 272 Cal App 2d 876, 77 Cal Rptr 850.*

102.5. Inverse Condemnation Proceedings

Where a condemnee failed to pursue its available remedy under *CCP § 1263.240(c)* in an eminent domain action and erected a building on the property after summons was served, the condemnee was not entitled to damages for the value of the building in the condemnee's subsequently filed inverse condemnation action; hence, on the condemnor's petition a writ of mandate issued, ordering the trial court to grant summary judgment to the condemnor in the inverse condemnation proceedings. *Mt. San Jacinto Community College Dist. v Superior Court (2004, Cal App 4th Dist) 2004 Cal App LEXIS 387, 2004 CDOS 2606.*

103. Personal Injury and Wrongful Death

A petition for a writ of mandate to compel the superior court to grant leave to petitioner to proceed in forma pauperis, in an action for death, filed a year and a half after the denial of the application to sue in forma pauperis, is not seasonably made and fails to show the due diligence that the law requires. *Jenkins v Superior Court of Santa Clara County (1929) 98 Cal App 729, 277 P 757.*

Mandamus lies to compel dismissal pursuant to former CCP § 583 (see now *CCP § § 583.110* et seq.) of passengers' action against bus company for injuries not brought to trial within five years after action was filed where, notwithstanding plaintiffs' affidavit avers inability to serve bus driver or take his deposition, case could have been tried without driver under doctrine of res ipsa loquitur, his address was contained in highway patrol report, and defendants did nothing to estop them to seek dismissal under former CCP § 583 (see now *CCP § § 583.110* et seq.). *Continental Pacific Lines v Superior Court of Solano County (1956, 3rd Dist) 142 Cal App 2d 744, 299 P2d 417.*

Defendants, in action for injury due to loss of hair allegedly resulting from use of hair straightener sold to plaintiff, were entitled to writ of mandate directing superior court to set aside its order sustaining plaintiff's refusal to answer questions propounded to her during pretrial deposition, as to name of her family doctor and of all physicians who had treated her for five years preceding accident. *Barnes v Superior Court of Los Angeles County (1958, 2nd Dist) 163 Cal App 2d 277, 328 P2d 985.*

Petition for writ of mandate to compel superior court to change its ruling sustaining defendant's objections in personal injury action to interrogatories with regard to existence, identity and limits of liability of any public liability insurance owned by defendants should be dismissed where, at time matter was called for argument, defendants served and filed supplementary return to petition in which they set forth name of insurer and limits of liability of their insurance policy, since as result of this action plaintiff had information he sought and question became moot. *Fisher v Superior Court of Los Angeles County (1959, 2nd Dist) 176 Cal App 2d 785, 1 Cal Rptr 807.*

Writ of mandate should not issue to compel dismissal of wrongful death action brought by real party in interest against petitioners (hospital and doctor) for allegedly negligent diagnosis and treatment where trial court, in denying motion to dismiss on defendant's affidavit that case was not brought to trial within five years and plaintiff's counteraffidavit that it would have been impractical and futile gesture for plaintiff to have attempted to bring cause on for trial during doctor's absence in military service, must be presumed not to have been of opinion that defendant's ability to conduct their defense was not materially affected by reason of doctor's military service and to have concluded that doctor's presence was necessary and that it would have been impossible and futile gesture to continue to prosecute case during his military absence. *Kaiser Foundation Hospitals v Superior Court of Solano County (1960, 3rd Dist) 185 Cal App 2d 177, 8 Cal Rptr 181.*

Although mandamus may be used to compel court to allow amendment of pleading in some cases, motion to amend complaint in personal injury action for sole purpose of adding allegation of damages for mental suffering rests largely in discretion of court; where plaintiff had made no showing of abuse of discretion, mandamus will not lie. *Coy v Superior Court of Contra Costa County (1962) 58 Cal 2d 210, 23 Cal Rptr 393, 373 P2d 457.*

Mandamus is proper to compel trial court to allow amendment to property owner's answer, alleging affirmative defense of contributory negligence of independent contractor, in action against property owner for personal injuries sustained by independent contractor's employee while in course of employment on owner's premises, where property owner's motion for amendment is timely. *Vegetable Oil Products Co. v Superior Court of Los Angeles County (1963, 2nd Dist) 213 Cal App 2d 252, 28 Cal Rptr 555.*

Where personal injury action against county and individual residing in another county was brought in county of individual's residence, court erred in ordering action transferred to defendant-county, and writ of mandamus should issue directing superior court of county of individual's residence to proceed with trial. *Channell v Superior Court of Sacramento County (1964, 3rd Dist) 226 Cal App 2d 246, 38 Cal Rptr 13.*

In an action based on negligent maintenance of a skating rink, the trial court abused its discretion in denying defendant's motion for summary judgment and defendant was entitled to a peremptory writ of mandate commanding the trial court to set aside its order and to order summary judgment, where defendant supported its motion with a declaration that it did not at any time own, possess, or control the rink, where plaintiff's declaration in opposition to the motion, containing conclusions of law that plaintiff had a good cause of action against defendant on the merits, without reference to any deed, title, lease or other evidence contradicting defendant's disclaimer, raised no triable issue, and where plaintiff produced no evidence, by declaration or otherwise, on which to predicate defendant's liability. *Whitney's at the Beach v Superior Court of San Francisco (1970, 1st Dist) 3 Cal App 3d 258, 83 Cal Rptr 237.*

104. Probate and Settlement of Estates

A writ of mandate will issue to compel the superior court to hear and determine on its merits an application made under § 473 to amend a claim against the estate of a deceased person. *Davis v Superior Court of County of San Joaquin (1917) 35 Cal App 473, 170 P 437.*

Mandamus does not lie to compel a probate court to remove executors where the judge of such court at no time refused to perform any act which the law specially enjoined upon him. *Bauer v Superior Court of Los Angeles County (1929) 208 Cal 193, 281 P 61.*

An heir may maintain a proceeding for a writ of mandamus to require the superior court sitting in probate to proceed to hear and pass on a petition for the distribution of an estate, as that is a duty imposed on the court by law. *Johnson v Superior Court of San Diego County (1929) 102 Cal App 178, 283 P 331.*

Where an action is brought against the executors of an estate on a rejected claim based on a promissory note alleged to have been executed by decedent to plaintiff and which was found by the executors in decedent's safe deposit box, and prior to the date set for trial of said action the plaintiff filed the second action against the executors to quiet title to and secure the possession of said promissory note, the postponement of the trial of the first action until the trial of the second action is within the administrative discretion of the trial court in the conduct of its business and, in the absence of a showing of an abuse of discretion or that there will be undue delay in the trial of said second action, mandamus will not lie to compel said court to proceed with the trial of the first action. *Hector v Superior Court of Placer County (1936) 15 Cal App 2d 552, 59 P2d 591.*

Although *Prob C § 1240* authorizes an appeal from an "order refusing to make an order distributing property", a writ of mandate may issue to compel the probate court to pass on a matter properly before it for decision, where in declining to act the court neither granted nor denied the petition, but failed to exercise jurisdiction. *Lissner v Superior Court of Los Angeles County (1944) 23 Cal 2d 711, 146 P2d 232.*

Failure of a probate court to act on a matter properly before it, e.g., a failure to pass on the receiver's petition for ratable distribution, establishes a proper factual base, jurisdictionally, for the intervention of mandamus. *Lissner v Superior Court of Los Angeles County (1944) 23 Cal 2d 711, 146 P2d 232.*

A devisee who had filed an answer to a contest of probate in which he requested that the will be admitted to probate is not entitled to a writ of mandate to compel the court to proceed with the trial of the contest following its voluntary dismissal, where the will had been admitted to probate. *Hatfield v Superior Court of Los Angeles County (1947) 29 Cal 2d 847, 179 P2d 569.*

An error of a probate court in refusing to instruct a guardian affords no occasion for a writ of mandamus, since such order is appealable. *Stratton v Superior Court of Los Angeles County (1948) 87 Cal App 2d 809, 197 P2d 821.*

Since jurisdiction is the power to act either correctly or erroneously, the district court of appeals cannot, by writ of mandate, interfere with the probate court in either granting a partial distribution or in denying distribution of any kind. *Dockweiler v Superior Court of Los Angeles County (1951) 106 Cal App 2d 744, 236 P2d 20.*

The extraordinary remedy of mandamus may not be resorted to to compel the the probate court to proceed with the hearing and determination of a petition for ratable distribution where the court has not refused to exercise its jurisdiction, and where any decision that might be rendered could be appealed. *Dockweiler v Superior Court of Los Angeles County (1951) 106 Cal App 2d 744, 236 P2d 20.*

Mandamus will not lie to compel the probate court to proceed with the hearing and determination of a petition for ratable distribution although the judge stated that he was convinced that the petition was not properly one for ratable distribution and displayed an unfriendliness toward the idea of making such a distribution to all three heirs on a petition which sought a distribution to only two of them, since such expressions do not constitute a denial of jurisdiction nor indicate that he will not act on the petition. *Dockweiler v Superior Court of Los Angeles County (1951) 106 Cal App 2d 744, 236 P2d 20.*

If a trial court acts on and denies a petition for ratable distribution, mandamus will not lie; but if it refuses to act where the matter is properly before it, a writ of mandate will issue to compel action. *Dockweiler v Superior Court of Los Angeles County (1951) 106 Cal App 2d 744, 236 P2d 20.*

Though an order of the superior court in probate denying a petition by the beneficiaries of a testamentary trust for instructions to the trustee on the ground of lack of jurisdiction was not appealable, a proceeding in mandamus instituted simultaneously with the appeal was a proper remedy to compel the court to act in a matter properly brought before it. *Estate of Bullock (1968, 2nd Dist) 264 Cal App 2d 197, 70 Cal Rptr 239.*

105. Unlawful Detainer

Where a judgment as first entered in an action of forcible entry and detainer fails, as the result of a clerical misprision, to name the defendants against whom it was rendered, it is the duty of the trial court to amend it in conformity with the facts, so that it will properly designate such defendants; the amendment may be made either before or after an appeal from a judgment has been finally determined, and if the trial court refuses to make the correction, mandamus will lie to enforce it. *Boust v Superior Court of County of Kern (1912) 162 Cal 343, 122 P 956.*

A petitioner, who had conveyed his apartment house and furnishings to others under a conditional exchange agreement, was not entitled to a writ of mandamus to compel the trial court to proceed to judgment in his claim and delivery and unlawful detainer actions, notwithstanding his appeal from a judgment in a third action against him for rescission of the exchange contract, in view of the involved and interdependent questions presented by the three cases. *Green v Superior Court of Los Angeles County (1929) 98 Cal App 665, 277 P 349.*

A proceeding in mandamus to compel the superior court to quash a writ of possession, is sued on rendition of a judgment for plaintiff in an unlawful detainer action, was dismissed as moot where, following reversal of such judgment on the ground that the justice court had jurisdiction of the controversy, the superior court transferred the case to the justice court; where the justice court tried the case, rendered a judgment in favor of plaintiff and issued a writ of restitution; and where the judgment had become final and, not being void on its face, could not be collaterally attacked in the mandamus proceeding. *Coyne v Superior Court of Santa Clara County (1947) 80 Cal App 2d 898, 183 P2d 36.*

Writ of mandate will issue to compel superior court to vacate its order continuing trial of unlawful detainer action to await final decision in district court of appeal of declaratory relief action by defendants in unlawful detainer action affecting trustee's sale through which plaintiff obtained title to property in question where, if mandamus were not granted, trial court could continue unlawful detainer action from time to time awaiting supreme court decision in declaratory relief action, and where there was important issue in unlawful detainer action that was not common to both cases. *Kartheiser v Superior Court of Los Angeles County (1959, 2nd Dist) 174 Cal App 2d 617, 345 P2d 135.*

On petition of the plaintiff in an action of unlawful detainer, a peremptory writ of mandate will issue commanding the trial court to give that action precedence on the pretrial calendar to expedite setting it for trial (*CCP § 1179a*), where the issue of possession remains, and the record shows that that issue can be resolved only by a determination of the disputed question of title to the property that remains in the premises. *Cohen v Superior Court of San Francisco (1967, 1st Dist) 248 Cal App 2d 551, 56 Cal Rptr 813.*

On inmate's petition for a writ of mandate/prohibition, seeking to enjoin the California Supreme Court from ruling against the inmate on a petition for writ of mandate to compel that court to reconsider its denial of the inmate's petition for review of a State Bar complaint about the inmate's attorney's performance, the federal court lacked subject matter jurisdiction to compel a particular result by the *California Supreme Court. Shaheen v Cal. Supreme Court (2002, ND Cal) 2002 US Dist LEXIS 24969.*

105.5. Peer Review Proceedings

In a review of a decision by a peer review hearing officer to terminate proceedings based on the doctor's disruptive behavior, whether the hearing officer had the authority for the sanction was reviewed de novo under *CCP § 1085*. The question of whether the sanction was properly imposed on the particular doctor was subject to abuse of discretion review as a quasi-judicial administrative decision under *CCP § 1094.5*. *Mileikowsky v Tenet Healthsystem (2005, 2nd Dist) 128 Cal App 4th 531.*

F. PRACTICE AND PROCEDURE

(1) GENERALLY

106. In General; Venue

A proceeding in mandamus is subject to the same right to a change of place of trial as any other civil action. *Bloom v Oroville-Wyandotte Irrigation Dist. (1939) 34 Cal App 2d 102, 93 P2d 164.*

In a case in which a doctor alleged that state employees violated the doctor's due process rights by improperly sanctioning him for fraud, the doctor's failure to raise damage claims while seeking a writ of mandamus in state court did not bar the federal action under the doctrine of claim preclusion. *Maynard v Bonta (2002, CD Cal) 2002 US Dist LEXIS 26728.*

A writ of mandate was issued on a challenge to a decision by a trial court on a motion by an insurance company for the trial court to determine which state's substantive law was applicable to a class action by policyholders against the insurance company for the company's failure to issue dividend distributions. Because a decision regarding dividends was an internal business decision of the company, the law of the state where the company was incorporated, and not California's laws, was the proper substantive law to apply; the trial court was ordered, by mandate, to vacate its decision that California law applied. *State Farm Mutual Automobile Ins. Co. v Superior Court (2003, Cal App 2nd Dist) 2003 Cal App LEXIS 1863.*

Foreign telemarketer and its parent company were subject to personal jurisdiction in California, even though they lacked offices or personnel in the state, where the litigation arose from an upsell the telemarketer initiated during inbound call from a California caller; hence, the telemarketer and parent company's petition for a writ of mandate directing the trial court to grant a motion to quash a service of summons was denied. *West Corp. v Superior Court (2004, Cal App 4th Dist) 2004 Cal App LEXIS 342.*

107. Prematurity of Action

Proceedings on motion for a new trial, based solely on minute entry of a decision, which did not purport to be a judgment, and was not signed, it appearing that no findings or judgment had been filed or entered, were premature and invalid; and where findings were filed and judgment entered after denial of the premature motion, new proceedings for a new trial, thereafter instituted in due form, were the only valid proceedings, and it is no defense to mandamus to compel settlement of a statement on such new proceedings, where a statement had been settled and set aside on the premature proceedings. *Fountain Water Co. v Dougherty (1901) 134 Cal 376, 66 P 316.*

In a proceeding in mandamus to compel the superior court to enter judgment on a stipulation, where it appeared that the stipulation was entered into after the case was partially tried, but thereafter petitioners moved for entry of judgment on the stipulation, but the defendants opposed the motion on the grounds that untrue evidence had been given and at the same time they moved for a new trial, and the court denied petitioner's motion and granted defendant's motion for a new trial, the latter motion was premature, and the order granting the same could not be sustained where no decision had theretofore been announced by the court. *Brown v Superior Court of Sierra County (1935) 10 Cal App 2d 365, 52 P2d 256.*

An application for a writ of mandate to require a city civil service board to reinstate and put into effect an eligible list for promotion and to certify that the petitioner is eligible for promotion is premature where it appears that the board is merely holding action in abeyance, and where under the charter the remedy is by appeal to the council when a threatened abuse of power matures into action. *Lewis v Civil Service Board (1941) 45 Cal App 2d 666, 114 P2d 634.*

Mandamus proceeding to compel setting aside of resolution passed by city counsel and of ordinance approving tentative plan for redevelopment of certain area is premature where it is filed only about fifteen days after tentative plan was adopted, since no final redevelopment plan could have been adopted until after public hearing thereon and since no action could be brought prior to adoption of final redevelopment plan. *Andrews v San Bernardino (1959, 4th Dist) 175 Cal App 2d 459, 346 P2d 457.*

107.5. Exhaustion of Administrative Remedies

Given an ordinance's language, the relevant city administrative agencies would not have had discretion to waive the replacement housing requirement for a permit to convert to issue, let alone determine whether these sections of the ordinance were preempted by the Ellis Act, *Gov C § § 7060* et seq., and thus a trustee was not obligated to pursue administrative remedies before seeking a writ ordering the city to expunge recorded notices to comply with certain ordinances. *Reidy v City and County of San Francisco (2004, 1st Dist) 123 Cal App 4th 580.*

108. Laches

Where a police officer sought reinstatement by mandamus, and his petition showed delays nearly five years on his part in moving the police department to have his resignation set aside, his remedy was barred by laches. *Auener v Norman (1919) 39 Cal App 425, 179 P 219.*

The question of laches in a mandamus proceeding is addressed to the sound discretion of the chancellor, whose decision will not be abused unless so clearly wrong as to amount to an abuse of discretion. *La Shells v Hench (1929) 98 Cal App 6, 276 P 377.*

A petitioner for a writ of mandate to compel his reinstatement to a civil service position must act promptly, and can be precluded by laches from enforcing such demand. *Brown v State Personnel Board (1941) 43 Cal App 2d 70, 110 P2d 497.*

One seeking reinstatement in public employment must act promptly in the prosecution of his claim. *Varela v Board of Police Comm'rs (1951) 107 Cal App 2d 816, 238 P2d 62.*

Plaintiffs seeking reinstatement in a union from which they were expelled are guilty of laches where their original petition for writ of mandate was not filed until two years and seven months after the alleged wrongful acts of defendants, the fourth amended petition was not filed until more than four years after such alleged acts, nothing is alleged in the pleading to show any excuse for such long delay, and defendants' rights are prejudiced because plaintiffs are seeking large sums of money by way of damages, which amount would be very much greater than if the action had been promptly instituted and tried. *Griffin v International Longshoremen's & Warehousemen's Union (1952) 109 Cal App 2d 823, 241 P2d 552.*

In a mandamus proceeding relief may be denied on the ground of laches. *Hopson v National Union of Marine Cooks & Stewards (1953) 116 Cal App 2d 320, 253 P2d 733.*

Mandamus is an extraordinary remedy which will not be allowed in cases of doubtful right, and it is generally regarded as not embraced within statute of limitation applicable to ordinary actions, but as subject to the equitable doctrine of laches. *Corcoran v Los Angeles (1955, 2nd Dist) 136 Cal App 2d 839, 289 P2d 556* (disapproved on other grounds by *Conti v Board of Civil Service Comm'rs, 1 Cal 3d 351, 82 Cal Rptr 337, 461 P2d 617).*

Action to compel city officials to reinstate discharged municipal civil service employee is barred by laches in absence of any allegations which would excuse or explain the delay, where employee waited 19 months from the date on which his discharge was sustained and approximately 16 months from the date on which his demand for reinstatement was denied. *Corcoran v Los Angeles (1955, 2nd Dist) 136 Cal App 2d 839, 289 P2d 556* (disapproved on other grounds by *Conti v Board of Civil Service Comm'rs, 1 Cal 3d 351, 82 Cal Rptr 337, 461 P2d 617).*

A writ of mandate is used only in the court's discretion; hence, a petitioner's laches is often an important element in determining the disposition of the cause. *Lewis v Superior Court of Los Angeles County (1968, 2nd Dist) 261 Cal App 2d 736, 68 Cal Rptr 631.*

A writ of mandate to direct a superior court to set an action for trial without requiring petitioner to join specified persons as indispensable parties must be denied, on the ground of laches, and a demurrer to the petition of the real parties in interest must be sustained, where, whether or not the court abused its discretion or exceeded its powers in originally imposing such requirement in its order of October 10, 1966, it properly, in view of petitioner's noncompliance with the condition and his lack of explanation therefor, denied petitioner's motion to set the case for early trial filed on November 2, 1967, long after the original order had become final, where, moreover, he had already shown lack of candor in noticing a similar motion without informing the court of his noncompliance, where, also, no explanation was offered for his delay in filing his present collateral attack on the order, and where prejudice to the other parties would probably result if the writ were granted. *Lewis v Superior Court of Los Angeles County (1968, 2nd Dist) 261 Cal App 2d 736, 68 Cal Rptr 631.*

Unreasonable delay, without more, is no defense to a mandamus action; laches may be raised by demurrer, but only if the complaint shows on its face unreasonable delay plus prejudice or acquiescence, and petitioner need not plead excuse or explanation. *Monroe v Board of Trustees (1971) 18 CA3d 112, 95 Cal Rptr 704.*

In a mandamus proceeding in which a licensed physician and surgeon sought to compel a private, nonprofit hospital corporation to grant him staff membership and hospital privileges, the trial court's finding that the defense of laches was applicable was not supported by substantial evidence. Though plaintiff delayed for over a year after receiving notice of

defendant's decision before filing his petition, the record contained nothing indicating acquiescence on his part to the decision or any prejudice to defendant from the delay. *Miller v Eisenhower Medical Center (1980) 27 Cal 3d 614, 166 Cal Rptr 826, 614 P2d 258.*

109. Statutes of Limitation

An application for a writ of mandamus is a special proceeding of a civil nature for the purposes of the statute of limitations, and may also be barred in a proper case by laches. *Jones v Board of Police Comm'rs (1903) 141 Cal 96, 74 P 696.*

A proceeding in mandamus to compel the reinstatement of the petitioner as a police officer after his dismissal for disobedience, is barred by the statute of limitations and laches, where said petitioner applied for reinstatement almost three years after his dismissal, and such proceeding was brought almost one year after the denial of the application for reinstatement or almost four years after his dismissal, and the vacancy caused by his dismissal was shortly after such dismissal filled. *Curtin v Board of Police Comm'rs (1925) 74 Cal App 77, 239 P 355.*

The statute of limitations may be set up in a special proceeding for a writ of mandate. *Hermanson v Board of Pension Comm'rs (1933) 219 Cal 622, 28 P2d 21.*

In a proceeding in mandamus to compel the restoration of petitioner as a police officer, where it appeared from the petition that petitioner was first suspended from duty by the chief of police and then removed from office, but he was never served with notice thereof as provided by the city charter in either instance, neither the attempted suspension nor the discharge was legal and his right of action accrued immediately on failure of his superiors to permit him to engage in his regular duties and on their failure to certify his name on the monthly or semi-monthly payroll; and where his petition was not filed until more than three years thereafter, defendant's demurrer should have been sustained because of the bar of the statute of limitations. *Mayer v Board of Police Comm'rs (1934) 136 Cal App 534, 29 P2d 458.*

An application for writ of mandamus is a special proceeding of a civil nature, within the rules which govern the statute of limitations. *Raymond v Christian (1937) 24 Cal App 2d 92, 74 P2d 536.*

A mandamus proceeding to compel restoration to a civil service position on the ground that petitioner's dismissal was fraudulent is governed by *CCP § 338* and is barred if not brought within three years after discovery of the fraud; if it is based on a statute it is governed by *CCP § 338. Pacheco v Clark (1941) 44 Cal App 2d 147, 112 P2d 67* (disapproved on other grounds by *Conti v Board of Civil Service Comm'rs, 1 Cal 3d 351, 82 Cal Rptr 337, 461 P2d 617).*

A party having an option to seek a declaratory judgment or to apply for a writ of mandate, or to seek both forms of relief concurrently, cannot avoid the effect of the statute of limitation relevant to mandamus proceedings by seeking declaratory relief only. *Leahey v Department of Water & Power (1946) 76 Cal App 2d 281, 173 P2d 69.*

A petition for writ of mandate to review the order of an administrative board was filed within the time allowed by *Gov C § 11523*, although it was filed more than thirty days after the effective date of the board's decision, where on that date petitioner requested the shorthand reporter of the board to prepare the record of the proceedings held therein, this being tantamount to a request of "the agency" within the code section, and where the petition was filed within five days after delivery of the record to petitioner. *Moran v Board of Medical Examiners (1948) 32 Cal 2d 301, 196 P2d 20.*

A mandamus proceeding is barred where not commenced within the period prescribed by the limitation statutes; and the statute begins to run when the right first accrues. *Barlow v City Council of Inglewood (1948) 32 Cal 2d 688, 197 P2d 721.*

Claimant cannot postpone running of statute of limitations by deferring his demands and this rule applies to mandamus proceedings. *Union Paving Co. v City Council of San Bruno (1961, 1st Dist) 189 Cal App 2d 440, 11 Cal Rptr 351.*

Rules of law relating to limitations of actions are applicable to mandamus proceedings. *Ginns v Savage (1964) 61 Cal 2d 520, 39 Cal Rptr 377, 393 P2d 689.*

Rules of law applicable to estoppel to assert statutory periods of limitation apply to mandamus proceedings. *Bostick v Martin (1966, 4th Dist) 247 Cal App 2d 179, 55 Cal Rptr 322.*

Mandamus does not lie when a respondent no longer has the legal authority to discharge his alleged duty, the statutory time for doing so having expired, and thus, in granting a new trial on the ground of "errors in law," although the

court's specification of reasons required by the 1965 amendments to *CCP § 657*, would appear to be within the scope of mandamus, being "an act which the law specially enjoins as a duty resulting from an office" (*CCP § 1085*), mandamus was not available to compel the entry of such specification, nunc pro tunc or otherwise, after the expiry of the 10-day statutory period of limitation. *Treber v Superior Court of San Francisco (1968) 68 Cal 2d 128, 65 Cal Rptr 330, 436 P2d 330.*

A mandamus proceeding is barred if not commenced within the period prescribed by the limitation statutes; that limitation begins to run when the right first accrues. *Monroe v Board of Trustees (1971) 18 CA3d 112, 95 Cal Rptr 704.*

Where there was no dispute in state court action as to citizenship of plaintiff and insurer, amount in controversy exceeded $ 75,000, and California Commissioner of Department of Insurance had been named in the complaint as a sham defendant in order to defeat diversity, removal to federal court was proper. *Borsuk v Mass. Mut. Life Ins. Co. (2003, ND Cal) 2003 US Dist LEXIS 25259.*

Gov C § 65009 applied to a neighbor's judicial challenge of a building permit issued in conjunction with a zoning variance, even though the permit decision was not made by an entity listed in *Gov C § 65903* because the gravamen of the petition was the variance, which was approved by the zoning administrator, a listed entity. The neighbor had filed her petition for writ of administrative mandate pursuant to *CCP § 1085*. *Honig v San Francisco Planning Dept. (2005, Cal App 1st Dist) 2005 Cal App LEXIS 348.*

110. Original Proceedings in Appellate Courts

The circuit courts of the United States have no jurisdiction to award a mandamus, except as ancillary to some other proceeding establishing a demand, and reducing it to judgment, the mandamus being in the nature of process for executing the judgment; an original proceeding for a mandamus is not a suit of a civil nature within the meaning of the Removal Act of 1875, and is not removable. *Rosenbaum v Bauer (1887) 120 US 450, 30 L Ed 743, 7 S Ct 633.*

The district court of appeal and the superior court have co-ordinate or concurrent jurisdiction to grant an original application for writ of mandate; and the pendency of a prior proceeding in mandamus in the superior court constitutes a good defense by way of a plea in abatement, and, when the judgment of the superior court becomes final, it may be pleaded in bar of a similar proceeding between the same parties in the district court of appeal. *Cohn v Isensee (1920) 45 Cal App 509, 188 P 278.*

Mandamus is appropriate to require superior court, in exercise of its general powers, to assume jurisdiction over and to hear and determine an original proceeding initiated by petition for writ of review of municipal court order allowing amendment of a complaint which increased amount of demand beyond jurisdictional amount of that court. *Thomasian v Superior Court of San Francisco (1953) 122 Cal App 2d 322, 265 P2d 165.*

It is not the policy of appellate court to encourage institution of original proceedings in appellate court when such proceedings could as well have been instituted in superior court of county where controversy arose. *County of Sacramento v Hastings (1955, 3rd Dist) 132 Cal App 2d 419, 282 P2d 100.*

Before seeking mandate in appellate court to compel action by trial court, party should first request lower court to act, and if such request has not been made, the writ ordinarily will not issue unless it appears that demand would have been futile. *Tromanhauser v Fraga (1956, 1st Dist) 144 Cal App 2d 272, 300 P2d 874.*

Rule that appellate court will not ordinarily entertain original proceeding in mandamus to determine validity of wage claims has no application where public interest requires speedy determination of controversy. *Acton v Henderson (1957, 1st Dist) 150 Cal App 2d 1, 309 P2d 481.*

Orderly judicial administration demands that petitions for writs of mandate be presented in first instance to courts of original jurisdiction. *County of Los Angeles v Nesvig (1965, 2nd Dist) 231 Cal App 2d 600, 41 Cal Rptr 916.*

Though mandamus is a proper remedy to require public officer, such as clerk of board of supervisors, to perform ministerial act, it is not policy of district court of appeal to entertain original mandamus proceedings when they could as well be instituted in superior court. *County of Los Angeles v Nesvig (1965, 2nd Dist) 231 Cal App 2d 600, 41 Cal Rptr 916.*

In seeking writ of mandate to compel secretary of board of airport commissioners to publish resolution of board authorizing issuance of bonds, circumstances were sufficiently exceptional to justify original application for writ to district court of appeal where revenue from bonds was to be used to develop jet runway important to efficient operation of air-

port and to expand parking facilities, for which there was immediate need, as well as to finance long-range program of other improvements. *Los Angeles v Dannenbrink (1965, 2nd Dist) 234 Cal App 2d 642, 44 Cal Rptr 624.*

The general proposition that there is no hard-and-fast rule as to the lapse of time which will justify the application of the doctrine of laches, and that each case must rest on its own facts, leaving a wide scope for the exercise of the court's discretion, applies equally to original proceedings for mandate in the appellate court. *Lewis v Superior Court of Los Angeles County (1968, 2nd Dist) 261 Cal App 2d 736, 68 Cal Rptr 631.*

For the sake of orderly judicial administration, original proceedings in mandamus should be brought in the appellate courts only if exceptional circumstances are present, and should otherwise be instituted in the superior court of the county where the controversy arose. *Cohen v Superior Court of Kern County (1968, 5th Dist) 267 Cal App 2d 268, 72 Cal Rptr 814.*

An appellate court may consider a petition for an extraordinary writ at any time, but has discretion to deny a petition filed after the 60-day period applicable to appeals, and should do so absent extraordinary circumstances justifying the delay. A denial on the basis of untimeliness is appropriate even though the opposing party would not be prejudiced by consideration of the petition on the merits. *Popelka, Allard, McCowan & Jones v Superior Court of Santa Clara County (1980, 1st Dist) 107 Cal App 3d 496, 165 Cal Rptr 748.*

111. -Supreme Court

Inasmuch as the superior court of the county has concurrent jurisdiction, the supreme court will not take the time to entertain an original application in mandamus to compel the board of directors of an irrigation district to call an election where the question involved requires the hearing of evidence and decision as to the genuineness of about seven hundred signatures to the election petition; such an application will be dismissed without prejudice to an application in any other court of concurrent jurisdiction. *Imperial Land Co. v Imperial Irrigation Dist. (1913) 166 Cal 491, 137 P 234.*

In a proceeding in mandamus to compel a former officer to deliver the books and records of the corporation to new officers, which was brought on for hearing by a notice of motion without affording the Supreme Court an opportunity of declining to assume jurisdiction, where the only reason given for not first making application to the superior court was that only by a judgment of the Supreme Court can the newly elected officers enter on their duties within the time for which they were elected, the application should first have been made to the superior court and was denied by the Supreme Court without prejudice. *Roma Macaroni Factory v Giambastiani (1933) 219 Cal 435, 27 P2d 371.*

A proceeding in mandamus to compel the governor to exercise his discretion with reference to the appointment of notaries in a political subdivision may be commenced in the supreme court. *Hollman v Warren (1948) 32 Cal 2d 351, 196 P2d 562.*

While the Supreme Court ordinarily will not entertain an original application for a writ of mandate where the proceeding could have been prosecuted in the superior court, it will act where the circumstances justify such action. *May v Board of Directors (1949) 34 Cal 2d 125, 208 P2d 661.*

Where there is pending another mandamus proceeding in superior court seeking the same result, involving same parties and same issues, Supreme Court will generally not assume jurisdiction. *People v County of Tulare (1955) 45 Cal 2d 317, 289 P2d 11.*

The Supreme Court's original jurisdiction in mandamus was available to petitioners to determine their right, denied by the San Francisco registrar of voters, to submit a proposed initiative to the electorate, where the superior court denied such a writ only three weeks before the date by which the sufficiency of the signatures had to be decided and where an appeal from such order would thus have been an inadequate remedy. *Farley v Healey (1967) 67 Cal 2d 325, 62 Cal Rptr 26, 431 P2d 650.*

The Supreme Court exercises its original jurisdiction in mandamus only in cases in which the issues presented are of great public importance and must be resolved promptly. *Mooney v Pickett (1971) 4 Cal 3d 669, 94 Cal Rptr 279, 483 P2d 1231.*

In election cases in which the issues are of great public importance and must be resolved promptly, the Supreme Court will exercise its original jurisdiction in mandamus proceedings. *Burrey v Embarcadero Municipal Improv. Dist. (1971) 5 Cal 3d 671, 97 Cal Rptr 203, 488 P2d 395.*

(2) PARTIES

112. In General; Plaintiffs or Petitioners

Where the final decree in partition has awarded to the plaintiff a portion of the lands allotted to one of the defendants by an interlocutory decree, and has been affirmed on appeal, and the bill of exceptions prepared by such defendant on appeal from the final decree was served only on the attorney for the plaintiff, and the judge of the court refused to settle the bill because not served on all the parties to the action in partition, a writ of mandate will lie commanding him to settle the bill, and the court will not inquire on the application for the writ whether any other one of the parties to action would be an adverse party, upon whom the proposed bill of exceptions should be served. *Gutierrez v Hebberd (1895) 106 Cal 167, 39 P 529, 39 P 935.*

In mandamus proceedings by persons who have associated together to organize a domestic corporation to compel the secretary of state to file the articles of incorporation, no other person or corporation is a necessary or proper party. *Rixford v Jordan (1931) 214 Cal 547, 6 P2d 959.*

A person whose complaint against an on-sale liquor licensee has been rejected by the state board of equalization has a sufficient interest to institute proceedings for a writ of mandate to compel the board to revoke the license. *Covert v State Bd. of Equalization (1946) 29 Cal 2d 125, 173 P2d 545.*

A class suit by way of mandamus in the court of appeal was a proper remedy for inmates of a vocational institution for young males confined under the custody of the Director of Corrections and the Youth Authority, where the basis of the inmates' petition was that the superior court's procedure for processing extraordinary writs was unconstitutional in that hearings and determinations thereon were in effect decentralized on to the district attorney's office, and where, since the request for relief extended to all future filings of such writs, the community of interest shared by the class was that the superior court henceforth act upon all petitions received from class members in a constitutional manner. *Reaves v Superior Court of San Joaquin County (1971, 3rd Dist) 22 Cal App 3d 587, 99 Cal Rptr 156.*

113. -Proceeding in Name of People

Where it appears that the purported relator is without capacity to commence a proceeding in mandamus on behalf of the people, without the consent of the attorney general, the proceeding will fail for want of a proper party plaintiff. *People ex rel. O'Gara v Superior Court of San Francisco (1933) 218 Cal 178, 22 P2d 226.*

The Attorney General, on behalf of the People, was not entitled to a writ of mandate to secure a determination from the Supreme Court that the provisions of *CCP § 537* (see now *CCP § § 484.010* et seq.), which specify the actions in which prejudgment attachment may issue, are void; though California's prejudgment wage garnishment procedures violate procedural due process requirements, the rendering of advisory opinions falls within neither the functions nor the jurisdiction of the *Supreme Court. People ex rel. Lynch v Superior Court of Los Angeles County (1970) 1 Cal 3d 910, 83 Cal Rptr 670, 464 P2d 126.*

114. -Enforcement of Public Right or Duty

A writ of mandate will not issue at the instance of a city taxpayer to compel an alleged de jure city assessor to perform the duties of such office, where the same are being performed by a county assessor under claim and color of right under the acquiescence of the city council and the city assessor de jure, as the question of the right to the office is one for litigation in a direct proceeding between the parties directly interested. *Hamilton v Mallard (1917) 33 Cal App 470, 165 P 725.*

A holder of public bonds payable from a particular fund may by mandamus proceedings compel the proper officials of the governmental agency to levy and collect a tax or assessment, and to do other things required by the statute under which the bonds were issued, in order to obtain the funds necessary to pay the bonds. *Irvine v Bossen (1944) 25 Cal 2d 652, 155 P2d 9.*

A mandamus proceeding to compel the governor to exercise his discretion with reference to the appointment of notaries in a political subdivision may be maintained by a taxpayer and resident, who is an applicant for appointment as a notary. *Hollman v Warren (1948) 32 Cal 2d 351, 196 P2d 562.*

Generally private individual may apply for mandamus only when he has some private or particular interest to be served, or some particular right to be preserved or protected, independent of that which he holds with public at large;

however, where enforcement of action is to procure enforcement of public duty, this rule has been modified to permit property owners and others to sue in mandamus, since they have an interest as such in seeing that public duties are enforced. *Kappadahl v Alcan Pacific Co. (1963, 1st Dist) 222 Cal App 2d 626, 35 Cal Rptr 354* (disapproved on other grounds by *Topanga Asso. for Scenic Community v County of Los Angeles, 11 Cal 3d 506, 113 Cal Rptr 836, 522 P2d 12).*

Mandamus proceeding to require defendant county building inspectors to revoke permit to build bridge, allegedly issued in violation of zoning ordinance, could be maintained by property owners along cul-de-sac within zoned area on behalf of themselves and others so situated, even though petitioners did not allege how and in what respect they or other property owners were damaged, where it was clear that injury with which they were concerned was devaluation of their property and greatly increased traffic, that there was a community of interest among owners of lots fronting on the cul-de-sac, and that class was therefore definite and ascertainable. *Kappadahl v Alcan Pacific Co. (1963, 1st Dist) 222 Cal App 2d 626, 35 Cal Rptr 354* (disapproved on other grounds by *Topanga Asso. for Scenic Community v County of Los Angeles, 11 Cal 3d 506, 113 Cal Rptr 836, 522 P2d 12).*

Hotel owner required by city ordinance to collect from transients tax of designated per cent of compensation paid by them for lodging rentals is proper party to maintain proceeding in mandamus against city and its officials to submit ordinance compelling tax to referendum. *Atlas Hotels, Inc. v Acker (1964, 4th Dist) 230 Cal App 2d 658, 41 Cal Rptr 231.*

The trial court correctly determined that petitioners had standing to bring mandamus in a taxpayers' suit since their status as taxpayers made them beneficially interested parties who could maintain the action, where its object was to compel the performance of public duties which the law specially enjoined; further, in bringing the action in a representative capacity, thereby making it a class action, the trial court correctly determined that they sued on behalf of all other citizen-resident taxpayers of the county as well as on their own behalf. *Knoff v San Francisco (1969, 1st Dist) 1 Cal App 3d 184, 81 Cal Rptr 683.*

A petitioner for a writ of mandamus, to enforce compliance with a charitable trust, need not show any legal or special interest other than that of a citizen to have the laws of the state executed and the duty in question enforced. *In re Veterans' Industries, Inc. (1970, 2nd Dist) 8 Cal App 3d 902, 88 Cal Rptr 303.*

Petitioner, in a mandamus proceeding to compel a historical monuments commission to implement its resolution to restore and relocate a certain building, had a legal right to maintain the action, where he had a personal economic interest through his donations to the commission's restoration fund. *Harbach v El Pueblo de Los Angeles State Historical Monument Com. (1971, 2nd Dist) 14 Cal App 3d 828, 92 Cal Rptr 757.*

115. Defendants or Respondents

The teacher of a public school is the only necessary defendant in a proceeding to compel the admission thereto of a child unlawfully excluded. *Tape v Hurley (1885) 66 Cal 473, 6 P 129.*

Conceding that the right to an office may be tried by mandamus, the writ will not issue unless the person, if any, in possession of the office is made a party to the proceeding. *Kelly v Edwards (1886) 69 Cal 460, 11 P 1.*

Mandamus to keep highways clear of obstructions and in a condition for public travel does not lie against a board of supervisors alone, but the road overseer must be made a party to such proceedings. *Peck v Board of Supervisors (1891) 90 Cal 384, 27 P 301.*

The better practice in proceeding against a board of officials is to implead it as a board and name the individuals composing the board, though the names are not indispensable. *Taylor v Burks (1907) 6 Cal App 225, 91 P 814.*

The appellate court will not issue a writ of mandate to compel the clerk of the superior court to enter in his judgment book the judgment as pronounced by the court and entered in its minutes, where that officer is not a party to the proceeding. *Brown v Superior Court of Los Angeles County (1925) 70 Cal App 732, 234 P 409.*

In a suit for a writ of mandate to compel the sheriff to release of record an attachment, to which proceeding the plaintiff in the attachment suit is not a party, the court is without power to dissolve or discharge the attachment. *Johnston v Jones (1926) 78 Cal App 84, 248 P 286.*

In a proceeding in mandamus to compel a county auditor to levy a special tax for high school purposes, the court is without authority to order the board of supervisors of the county to include within the tax rate to be levied for the pre-

sent year a sufficient increase in rate to cover a deficit caused by the improper exercise of its legal duties in making the tax levy for the preceding year, where such board was not made a party to the proceeding. *McDonald v Richards (1926) 79 Cal App 1, 248 P 1049.*

Without the presence of parties whose interests are substantially affected, a writ of mandate to recall execution on a judgment will not lie and the relief prayed for will not be granted, and where petitioner sought to recall execution on a judgment, praying that the judgment creditor and his agents be enjoined from proceeding with the execution, and it appeared that the petitioner sought to have that judgment set off against the amount alleged to be due on a promissory note, that the judgment creditor was not a party to the proceeding, the latter was entitled to his day in court and the petitioner was not entitled to the relief requested. *California Cotton Credit Corp. v Superior Court of Madera County (1932) 122 Cal App 404, 10 P2d 176.*

Mandamus will not issue if the petition is directed against an individual who is neither authorized nor specially enjoined to do the act for which the writ is sought, although he may be an executive officer or member of a board against which the writ would lie, unless the board is made a party. *Albori v Smith (1937) 18 Cal App 2d 615, 65 P2d 81.*

If action by two or more boards is made by law a prerequisite to action by a third party, the boards are necessary parties in a proceeding to compel action by the third party so that they may defend any action taken by them on the claim, or be ordered to conform to the law if they have not acted in accordance with it. *Valley Motor Lines, Inc. v Riley (1937) 22 Cal App 2d 233, 70 P2d 672.*

The fact that the respondent in a proceeding for mandamus to compel a board to publish a call for bids and to receive sealed proposals, is the secretary of the board, serving at its pleasure, does not deprive petitioner of the right to prosecute the proceeding. *San Francisco v Linares (1940) 16 Cal 2d 441, 106 P2d 369.*

In an application for writ of mandate directed to a court relative to a judicial act, the judge is not a party respondent. *Gresham v Superior Court of Los Angeles County (1941) 44 Cal App 2d 664, 112 P2d 965.*

Judge of court is not proper party respondent in mandamus proceeding to compel court to set aside order and demurrer of judge made party to such proceeding must be sustained. *Pettie v Superior Court of Los Angeles County (1960, 2nd Dist) 178 Cal App 2d 680, 3 Cal Rptr 267.*

Where mandamus is sought to control affairs of public entity, proceeding is brought against board or officer whose duty it is to act and where it appears that officer named as respondent is not one whose duty is involved, relief is denied. *Wenzler v Municipal Court for Pasadena Judicial Dist. (1965, 2nd Dist) 235 Cal App 2d 128, 45 Cal Rptr 54.*

That approval of the State Director of Finance was necessary to acceptance of a gift by a state historical monuments commission (*Gov Code, § 11005*), did not make the director a necessary party to a mandamus proceeding brought by contributors to the commission, and the trial court's issuance of the writ was not improper, where the writ did not command the director to approve a gift but commanded the commission to take necessary steps to further implement its resolution to restore an relocate a building, for which purpose the contributions had been made. *Harbach v El Pueblo de Los Angeles State Historical Monument Com. (1971, 2nd Dist) 14 Cal App 3d 828, 92 Cal Rptr 757.*

A mandamus proceeding challenging the method of administering the general welfare assistance program in five counties properly named the directors of the county departments of public welfare as defendants and it was not necessary that the county boards of supervisors be joined. *Welf. & Inst. Code, § § 10800-10803*, which impose on the supervisors the duty of providing aid to county indigents, also require each board to establish a county department of social services, and to appoint a director for such department, who shall be subject to the general direction of the board, and who shall, for and in its behalf, have full charge of the county department and the responsibility of administering and enforcing the code provisions pertaining to public social services. Moreover, in carrying out statutory and related social service obligations imposed on the boards of supervisors, the county directors act in a ministerial capacity, and thus any improper action or failure to act may be attacked by mandamus. *Rogers v Detrich (1976, 3rd Dist) 58 Cal App 3d 90, 128 Cal Rptr 261.*

116. -Joinder

A school district may be properly joined as a defendant in a proceeding in mandamus against its officials to compel the performance of a duty owed the relator. *Barber v Mulford (1897) 117 Cal 356, 49 P 206.*

The real party to be affected by the writ may be joined as a defendant in a proceeding to enforce performance of a duty owed to the plaintiff or relator, and though seldom a necessary defendant, is not an improper one. *Barber v Mulford (1897) 117 Cal 356, 49 P 206.*

In an insured's suit regarding disability benefits, the insured did not fraudulently join the Commissioner of the California Department of Insurance, and remand was appropriate, because the insured's claim for writ of mandamus, challenging the Commissioner's approval of the policy language, raised a possible cause of action. *Brazina v Paul Revere Life Ins. Co. (2003, ND Cal) 2003 US Dist LEXIS 12382.*

(3) PLEADING

117. In General

A shareholder of a corporation in petitioning for a writ of mandate to compel it to permit an inspection of its books is not required to anticipate and plead the affirmative defenses of the corporation, and to show that the application is not a "fishing expedition." *Private Investors, Inc. v Homestake Mining Co. (1936) 11 Cal App 2d 488, 54 P2d 535.*

The sufficiency of defendant's counterclaim, plaintiff's demurrer to which, based on the parol evidence rule, had been overruled, was not properly before the Supreme Court, reviewing in a mandate proceeding the trial court's denial of defendant's motion for discovery of documents related to that counterclaim, where, although plaintiff's opposition to the discovery motion was again based on the parol evidence rule, the trial court's denial of discovery was not so based, and it had not reconsidered its ruling on demurrer. *Associated Brewers Distributing Co. v Superior Court of Los Angeles County (1967) 65 Cal 2d 583, 55 Cal Rptr 772, 422 P2d 332.*

Against a general demurrer, the only requirement is that on a consideration of all the facts stated, it must appear that the plaintiff is entitled to some relief, notwithstanding that the facts may be inartfully stated or intermingled with a statement of other facts irrelevant to the cause of action, or that the plaintiff demands relief to which he is not entitled under the facts alleged. *Selby Realty Co. v San Buenaventura (1973) 10 Cal 3d 110, 109 Cal Rptr 799, 514 P2d 111.*

Mandate may issue despite the form of the petition or its prayer for prohibition. The rationale behind the rule, that a plaintiff's cause of action will not be defeated by an error in specifying the appropriate form of mandamus, applies equally to a mistaken request for *CCP § 1094.5*, mandamus, when *CCP § 1085* is appropriate. *Lowry v Obledo (1980, 3rd Dist) 111 Cal App 3d 14, 169 Cal Rptr 732.*

118. Petition or Other Application

In an original proceeding in mandamus, the truth of all material allegations of the petition follows as a legal conclusion from failure to traverse them, even where respondent neither admits nor denies such averments. *George v Beaty (1927) 85 Cal App 525, 260 P 386.*

In a proceeding in mandamus to compel the board of supervisors and other county officers to order and consent to the cancellation of the assessments on petitioner's properties for general county purposes levied for a particular year, the question whether they state facts entitling them to any release must be determined on the facts existing at the time the petitions for the writs were filed as disclosed by the allegations thereof. *Rittersbacher v Board of Supervisors (1934) 220 Cal 535, 32 P2d 135.*

In petitioning to compel a corporation to permit an inspection of its books a shareholder is not required to plead that the purposes why he desired to inspect the books are "reasonably related to his interests as a shareholder," it being sufficient if the purposes pleaded show this fact. *Private Investors, Inc. v Homestake Mining Co. (1936) 11 Cal App 2d 488, 54 P2d 535.*

In passing on the sufficiency of a petition for mandamus to state a cause of action, an attached transcript of the evidence cannot be considered for the purpose of supplying any deficiency in its allegations. *Dierssen v Civil Service Com. (1941) 43 Cal App 2d 53, 110 P2d 513.*

Where petition for vacation of order for inspection of writings is meritorious even though prohibition is asked for, it can be treated as a petition for mandate. *Proctor & Gamble Mfg. Co. v Superior Court of Marin County (1954) 124 Cal App 2d 157, 268 P2d 199.*

An application for submission of a controversy without action pursuant to § § 1138-1140 is treated as an application for writ of mandate where the facts actually set forth would suffice therefor. *Northridge Park County Water Dist. v McDonell (1958, 3rd Dist) 158 Cal App 2d 123, 322 P2d 25.*

In determining whether petition filed in superior court shows requisites for mandamus, and therefore, whether that court's intended action is within its jurisdiction, appellate court may consider pleadings of opposite party and exhibits attached to pleadings; any defect in petition for writ may be aided or cured by averments in pleadings of opposite party. *Baldwin-Lima-Hamilton Corp. v Superior Court of San Francisco (1962, 1st Dist) 208 Cal App 2d 803, 25 Cal Rptr 798.*

In ruling on sufficiency of petition for mandate against demurrer, court will assume truth of all material and issuable facts properly pleaded, disregard conclusions of law and allegations contrary to facts subject to judicial notice, and consider judicially noticed facts as pleaded. *Stanton v Dumke (1966) 64 Cal 2d 199, 49 Cal Rptr 380, 411 P2d 108.*

In ruling on the sufficiency of a petition for mandate as against demurrer, the court will assume to be true all material and issuable facts properly pleaded. *Rosenfield v Malcolm (1967) 65 Cal 2d 559, 55 Cal Rptr 505, 421 P2d 697.*

A petition for a writ of prohibition was treatable as one for mandate where, although in seeking prohibition petitioners mistook their remedy, they nevertheless made out a case entitling them to mandate to enforce discovery in a criminal prosecution. *Honore v Superior Court of Alameda County (1969) 70 Cal 2d 162, 74 Cal Rptr 233, 449 P2d 169.*

In a taxpayer's mandamus proceeding to test the activities of the Estero Municipal Improvement District, its directors, and certain landowner developers of the district, in which petitioner filed a cross-complaint couched in 10 causes of action to a complaint in intervention filed in behalf of 2,000 residents of the district, designating as defendants the district, its directors, the landowners developers, the residents, and others, the trial court properly denied plaintiff petitioner's motion to amend his second amended mandamus petition so as to substitute the cross-complaint therefor, where the latter appeared to be plaintiff's seventh attempt to state a cause of action on substantially similar grounds. *Cooper v Estero Municipal Improv. Dist. (1969) 70 Cal 2d 645, 75 Cal Rptr 777, 451 P2d 417.*

In a mandamus proceeding to compel a county welfare department and its director to advise all applicants for aid of their right to make written application therefor (*Welf & Inst Code, § 10500*), and of their right to a fair hearing in case of dissatisfaction (*Welf & Inst Code, § 10950*), the trial court erred in dismissing the petition on the ground that plaintiffs had failed to exhaust their administrative remedies, where the petition was framed as a class action alleging that defendants failed to so advise plaintiffs, that they failed to so advise others, and that they would continue such nonaction in the future, where, although it was obvious that by the time the petition was filed, plaintiffs were aware of their rights, the performance by defendants of their duty to advise welfare applicants was a matter of public right (*Welf & Inst Code, § § 10000, 10600*), where the relief sought was unavailable on administrative appeal under *Welf & Inst Code, § § 10950-10965*, and where remedies provided by *Welf & Inst Code, § 10605*, for failure of a county to comply with code provisions or regulations, were available only to the *Department of Social Welfare. Diaz v Quitoriano (1969, 3rd Dist) 268 Cal App 2d 807, 74 Cal Rptr 358.*

Under *CCP § 1109*, the ordinary rules of pleading are applied in determining whether or not a petition which seeks the remedy of administrative mandamus states a cause of action. *Turner v Hatch (1971, 2nd Dist) 14 Cal App 3d 759, 92 Cal Rptr 643.*

Because the only question before the court was one of timeliness, and as a writ of administrative mandate under *CCP § 1094.5*, like a challenge under *Gov C § 65009(c)(1)(E)*, had to be brought within 90 days of the final administrative decision under *CCP § 1094.6(b)*, the court did not need to address the effect, if any, of property owners having failed to label their petition as one for administrative mandate as well as one for ordinary mandate under *CCP § 1085*. *Travis v County of Santa Cruz (2004, Cal) 2004 Cal LEXIS 6834.*

119. -Requisites

A petition for mandamus to compel the settlement of a bill of exceptions to an appealable order, which the trial judge has refused to settle or allow, if presented after the time for appeal when the order has expired, is demurrable if it does not allege that an appeal was taken from the order within sixty days from its date. *Flagg v Puterbaugh (1893) 98 Cal 134, 32 P 863.*

A petition in the Supreme Court for a writ of mandate to compel the trial court to settle a bill of exceptions should allege in substance that the proposed bill contained everything the petitioner honestly believed it should contain in order to make it a fair and proper draft of a bill such as the statute requires him to prepare. *Walkerley v Greene (1894) 104 Cal 208, 37 P 890.*

A petition for a mandamus to compel the furnishing of a public utility which does not allege compliance by the petitioner with the rules and regulations of the state railroad commission is demurrable. *Hartigan v Pacific Gas & Electric Co. (1918) 38 Cal App 763, 177 P 484.*

In a proceeding for a writ of mandamus to compel the payment of a judgment against a city and county after the collection of the money by a tax levy under Stats 1901 p 794, it was essential that the petition allege a demand on the auditor for the issuance of a warrant and a refusal thereof, although a demand for the taking of the steps necessary to collect the money had been timely made. *Metropolitan Life Ins. Co. v Rolph (1920) 184 Cal 557, 194 P 1005.*

Before mandamus can properly issue to compel an irrigation district to deliver to a landowner the quantity of water apportioned to him under the irrigation laws relating to the district, it must be made to appear that the petitioner is prepared to use the same, that demand has been made therefor, that the water is available, and that compliance with such demand or request has been refused. *Nelson v Anderson-Cottonwood Irrigation Dist. (1921) 51 Cal App 92, 196 P 292.*

To justify the issuance by the appellate court of a writ of mandate to compel the settlement by the trial judge of a bill of exceptions it must appear that it was clearly the duty of the trial judge to settle the bill, and the appellate court cannot so determine without knowing what evidence was submitted to him on the hearing. *Derr v Busick (1923) 63 Cal App 134, 218 P 280.*

Where an applicant is a petitioner in mandamus to compel the performance of a public board of a purely ministerial function, he must prove the legality of his claim in all respects; if the board is left in any doubt as to what to do, it may await the determination of the courts. *Serv-U-Garbage Co. v Board of Health (1930) 107 Cal App 386, 290 P 519.*

In a proceeding for writ of mandate to compel the motor vehicle department to issue an operator's license to petitioner, to furnish any basis for the relief sought petition must show the officers of the department to have been under some duty to do what the petition asked that they be required to do. *Morales v Ingels (1938) 30 Cal App 2d 182, 85 P2d 907.*

A petition for writ of mandamus must show that the respondent is under some duty to do what the petitioner asks that he be required to do; the writ may not issue to compel action in a particular way except in the performance of ministerial duties, and never to control the exercise of discretion unless it has been abused. *Mosesian v Parker (1941) 44 Cal App 2d 544, 112 P2d 705.*

It is incumbent upon a petitioner to allege and prove that the act complained of was an excess of jurisdiction, arbitrary, capricious, fraudulent, or an abuse of discretion, or that it was a breach of duty or one taken without due regard to the petitioner's rights. *King v Board of Medical Examiners (1944) 65 Cal App 2d 644, 151 P2d 282.*

A writ of mandate to compel restoration of municipal employees to positions from which they were discharged will not issue where the petition contains no allegation of a prior demand for the performance of the act to which petitioner is entitled, nor an excuse for failure to file a demand. *Palmer v Wolff (1948) 88 Cal App 2d 979, 200 P2d 167.*

To state a cause of action a petition for writ of mandate must set forth facts, not conclusions, showing that plaintiff is entitled to the relief he seeks. *Perry v Chatters (1953) 121 Cal App 2d 813, 264 P2d 228.*

In proceeding in mandamus to compel public official to draw a warrant, allegation and proof of an available fund are essential elements of petitioner's case where officer's duty to issue warrant is dependent on there being money in fund applicable to payment of warrant. *Tevis v San Francisco (1954) 43 Cal 2d 190, 272 P2d 757.*

A petitioner is not entitled as matter of right to issuance of writ of mandate; if his petition fails to state prima facie case entitling him to issuance of writ, it is within court's power to deny it "out of hand." *Black v State Personnel Board (1955, 2nd Dist) 136 Cal App 2d 904, 289 P2d 863.*

In order to state a cause of action, a petition for a writ of mandate must set forth facts showing that plaintiff is entitled to the relief he seeks. *Ward v County of Riverside (1969, 4th Dist) 273 Cal App 2d 353, 78 Cal Rptr 46.*

In a mandamus proceeding seeking an order directing a county clerk to make a certified copy of the proceedings in a criminal case and to forward the same to a petitioning prisoner to assist him in preparing a meaningful petition for a

writ of habeas corpus, the pivotal issue is the clerk's duty; substantively, therefore, the petition and its supporting authorities would have to establish a clear and present ministerial duty by the clerk to comply with petitioner's request for reporters' transcripts. *Miller v Hamm (1970, 2nd Dist) 9 Cal App 3d 860, 88 Cal Rptr 538.*

120. -Sufficiency

In a suit for a writ of mandamus to compel the supervisors of a city and county to approve and allow a claim for the payment of a judgment for recovery of taxes illegally collected by it, where the complaint set forth with great circumstantiality the history and nature of the claim, and after doing so averred plaintiff "presented his claim and demand to said board," the statement sufficiently shows that it was the detailed claim and demand of plaintiff which was brought before the board for its approval, and the complaint was sufficient as against either a general demurrer or a special demurrer for uncertain. *Burr v Board of Supervisors (1916) 30 Cal App 755, 159 P 458.*

On appeal from a judgment in favor of the plaintiff in a mandamus proceeding to compel a county engineer to make a true and correct final estimate of excavations made by the plaintiff under a contract for the construction of a county highway, the complaint will not be held insufficient because of the failure to allege that prior to the commencement of the action a demand was made on the defendant to make the required estimate, where the complaint alleges that the defendant refused to include in the estimate the work on which the action is based and the answer denies that the plaintiff was entitled to have such work so included and the appeal is founded on the same contention. *McGillivray Constr. Co. v Hoskins (1921) 54 Cal App 636, 202 P 677.*

In a proceeding in mandamus to compel the issue by a tax collector of a receipt for taxes tendered, the plaintiff who in his complaint alleges such a tender on the stated allegations that the taxes which had been omitted from the tender were illegal and void, or in other words that he had tendered and did tender an offer to pay all amounts legally due and collectible, is entitled to the writ of mandate to compel the tax collector to issue to him the receipt showing payment in full of taxes. *Spring Valley Water Co. v Planer (1927) 88 Cal App 170, 263 P 323.*

A petition for a writ of mandate to compel the issuance of a commission for the taking out of testimony of witnesses on letters rogatory issued out of a court of a foreign country is not insufficient because it fails to allege a specific demand on the respondent court to issue a subpoena, where it appears that the demand would be futile, the petition alleging that the respondent court refuses to take any steps whatever to compel the witnesses to attend the taking of the deposition and the answer admitting this allegation. *Christ v Superior Court of San Francisco (1931) 211 Cal 593, 296 P 612.*

In a proceeding to compel payment of the same salary for petitioner's services as a teacher as that which is paid to a male teacher in the same school for like services, an objection that the petition was insufficient in that it contained no specific allegation that the petitioner held a county certificate authorizing her to teach such subject was untenable where it alleged the petitioner to be "duly qualified to teach the subject... and holds valid, unrevoked credentials permitting her to teach the subject in any of the public schools of the state of California" and further alleged that she was employed in the school in question and that she successfully taught the subject in that school for more than three successive years. *Chambers v Davis (1933) 131 Cal App 500, 22 P2d 27.*

In a proceeding in mandamus to compel the issuance of an order for the former husband of petitioner to show cause why he should not be adjudged in contempt for failure to pay alimony, the petition contained sufficient allegations that the said former husband was in default of the payment of alimony which he was duly ordered to pay by the terms of the final judgment of the trial court, and that he was financially able to pay, where the amount ordered was $50 a month and the petitioner alleged that he was earning $225 a month and that he had wilfully failed to pay the alimony with the purpose of harassing and annoying the petitioner. *Thomas v Superior Court of Butte County (1935) 9 Cal App 2d 383, 49 P2d 898.*

A petition by Negroes, predicated on *CC § 51,* to compel city officials to admit them to the privileges and facilities of a municipal bath house and swimming pool, stated a cause of action where it was alleged that they were citizens, residents, and qualified electors of the city, that the respondents had denied them equal accommodations and equal protection of the law in the use and enjoyment of the bath house and pool, and that their use thereof would not be detrimental to the health, welfare, and safety of others. *Stone v Board of Directors (1941) 47 Cal App 2d 749, 118 P2d 866.*

In proceeding in mandamus to compel municipality and its officers to pay former municipal employees vacation pay, though petition is defective in failing to allege existence of a fund from which payment of such claims could be made, there is no error in judgment for petitioners insofar as it directs city officials to certify and approve payrolls

showing that petitioners are entitled to receive vacation pay for periods enumerated; and, with those legal demands established, it may be presumed that city officials will pay claims if funds are available and, if unavailable, that proper steps will be taken to appropriate amount required to meet them. *Tevis v San Francisco (1954) 43 Cal 2d 190, 272 P2d 757.*

Though allegation in petition for writ of mandamus, that awarding of contract would be abuse of discretion, was conclusion, where all of essential facts as to abuse of discretion were established by other pleadings and exhibits attached thereto, question was properly raised. *Baldwin-Lima-Hamilton Corp. v Superior Court of San Francisco (1962, 1st Dist) 208 Cal App 2d 803, 25 Cal Rptr 798.*

City employee's petition for writ of mandamus to compel city and city council to increase petitioner's rate of compensation was sufficient against general demurrer, where such petition alleged that city council had adopted fixed plan providing that employees "shall be paid on a 'five step' basis," with each higher step "available" after certain period of time on job in particular class, and for highest pay level, certification by department head that employee merited increase; that petitioner was in fourth class and that she thereafter became otherwise qualified for increase in compensation thereby putting her into fifth class; that petitioner received from head of department in which she worked certification that merited increase in compensation, but that city council refused to increase petitioner's compensation to fifth, and highest, level. *Ivens v Simon (1963, 4th Dist) 212 Cal App 2d 177, 27 Cal Rptr 801.*

The trial court erred in sustaining a general demurrer to a third cause of action set forth in a mandamus petition, based on an asserted violation of the Estero Act, § 193 (Stats 1963, Ch 995), providing that if the district board appoint a depositary for its funds it shall appoint a finance officer who must be bonded for at least $250,000, and the allegations of the cause of action appeared sufficient against general demurrer, where the petition alleged that the district had appointed a depositary, that it had an appropriate bond until a certain time, but that plaintiff was informed and believed the district no longer carried a fiduciary bond in compliance with the section, and that the district had refused to inform plaintiff of the terms of any bond it might have, and where, the district in its return replied that a bond existed insuring "all offices and departments" of the district, so that it appeared on the face of the pleadings that the district did not have an individual bond for its finance officer as required by the section but that all of its employees were insured for the required sum in the aggregate. *Cooper v Estero Municipal Improv. Dist. (1969) 70 Cal 2d 645, 75 Cal Rptr 777, 451 P2d 417.*

To sustain a petition for writ of mandate against a general demurrer, the allegation "that petitioner has exhaused his administrative remedies" is a sufficient allegation. *Wong v Regents of University of Cal. (1971, 1st Dist) 15 Cal App 3d 823, 93 Cal Rptr 502.*

Plaintiffs in an action seeking a declaration of rights and accounting under a partnership agreement were entitled to a writ of mandate directing the trial court to vacate its order overruling their demurrer to a cross-complaint by defendant alleging that plaintiffs' petition for a receiver to take possession of the partnership assets was an abuse of process, and to sustain the demurrer without leave to amend, where, though defendant alleged that the motion for a receiver was wrongful, malicious, and for the purpose of compelling him to admit the existence of a partnership, no showing was made that the receivership, though denied, was not proper in the regular conduct of the proceedings, and where defendant failed to allege a wrongful act of plaintiffs in the invocation and prosecution of their undoubted legal right to move for appointment of a receiver. Defendant's cause of action was in fact one for malicious prosecution, which could not be sustained without alleging and proving that plaintiffs' action for a declaration of rights and accounting was filed without probable cause and with malice, which proof could not be made unless the action were finally decided in defendant's favor. *Spira v Superior Court of Los Angeles County (1974, 2nd Dist) 41 Cal App 3d 536, 116 Cal Rptr 93.*

Although an inmate who sought compensation for loss of personal property did not request a writ of mandamus, his petition sufficiently alleged facts that would support its consideration as a petition for writ of mandamus; the label given a pleading is not determinative, as provided in *CCP § 425.10(a). Escamilla v. California Dep't of Corrections & Rehabilitation (2006, 4th Dist) 2006 Cal App LEXIS 1092.*

121. -Insufficiency

A complaint by a county in mandamus against the State Board of Examiners to compel an allowance for the maintenance by the county of children is insufficient in respect of claims the amount of which is not stated in the complaint, and in respect to which the complaint does not allege that the county supported any such children for the time to which the claim must have referred, and does not contain any facts which would justify the board of examiners in allowing such claims, or require it to allow them. *County of San Luis Obispo v Gage (1903) 139 Cal 398, 73 P 174.*

A complaint which fails to allege an existing duty and a failure to perform it on demand cannot support a mandamus, which only lies to compel the performance of an act which the law especially enjoins as duty resulting from an office, trust or station. *Meyer v San Francisco (1907) 150 Cal 131, 88 P 722.*

In a proceeding to compel a county auditor to allow and indorse and to draw a warrant for a claim which had been allowed by the county superintendent of schools, where the petitioner's complaint did not show what service or other consideration was the foundation of his claim, and did not allege any facts from which an abuse of discretion could be inferred the trial court did not err in sustaining a demurrer to the petition without leave to amend. *Cook v Reid (1919) 39 Cal App 453, 183 P 820.*

Where in a proceeding for a writ of mandate to compel a superior court to enforce contempt proceedings against the secretary of a corporation for refusal to permit the petitioners to inspect the books of the corporation in order that they might ascertain the names of the stockholders for the purpose of naming them as defendants in an action brought by the petitioners on their stockholders' liability, it is not made to appear what particular matters were before the court on the hearing of the order to show cause, the petition merely showing that the matter came on for hearing and that the order was dismissed, the writ will be withheld. *Favorite v Superior Court of San Bernardino County (1921) 52 Cal App 316, 198 P 1004.*

In a proceeding to require the state surveyor general to issue a permit to prospect for oil and gas on certain lands, the petitioner has failed to allege any facts showing an abuse of discretion on the part of the respondent where, aside from an allegation as to the opinion of the oil and gas supervisor that the lands in question are not within the geologic structure of the oil fields, he merely alleges as a conclusion of law that the order of the respondent was "incorrect and arbitrary." *Kelley v Kingsbury (1930) 210 Cal 37, 290 P 885.*

In a proceeding in mandamus to compel the grant of a pension to the widow of a policeman, even assuming that the board of police commissioners had rendered the decision adverse to the plaintiff, her petition was wholly insufficient where it did not allege facts showing that there was a clear abuse of discretion, such as that the board had acted arbitrarily, capriciously or fraudulently or that the proceedings were conducted without due regard for the rights of petitioner. *McColgan v Board of Police Comm'rs (1933) 130 Cal App 66, 19 P2d 815.*

In a mandamus proceeding to require the pension board to award petitioner a pension as the widow of a police officer, where the petition merely alleged that the officer died as the result of an injury incurred while in the performance of his duties, but that said board, after hearing her application, refused to award her a pension, and there was no allegation that the board acted arbitrarily, capriciously or fraudulently, or without due regard for petitioner's rights, and said board was a fact finding body with power to grant or deny applications for pensions, the judgment of the board could not be compelled by mandamus, and a demurrer to the petition was properly sustained. *Hogan v Retirement Board, San Francisco City Employees' Retirement System (1936) 13 Cal App 2d 676, 57 P2d 520.*

In a proceeding in mandamus to compel the levy of taxation or the appropriation of available funds as required by a city charter, where it did not appear from the pleadings that either the mayor or the city controller had ever failed or refused to perform his official duty in the premises, the relief prayed for could not be granted even though respondents desired the court to render a decision wherein the civil duties of the different city officials would be clearly defined and each ordered to perform such duties. *McAlpine v Baumgartner (1937) 10 Cal 2d 409, 74 P2d 753.*

Failure to plead and prove that the board acted arbitrarily, capriciously, fraudulently, or illegally in denying his application for reinstatement was fatal to a petition for a writ of mandate to compel the board to reinstate the petitioner. *Wallace v Board of Education (1944) 63 Cal App 2d 611, 147 P2d 8.*

General allegations by petitioner that he has "no other plain, speedy, or adequate remedy" and that unless a writ of mandate is issued he "will suffer great and irreparable harm and injury" are, without reference to any fact, insufficient to sustain his burden of showing that the remedy of appeal would be inadequate. *Phelan v Superior Court of San Francisco (1950) 35 Cal 2d 363, 217 P2d 951.*

Speculative conclusions and allegations of remote possibilities of injury which might result from a proposed annexation by a municipality of territory are insufficient to justify a mandamus to restrain the enactment of an annexing ordinance. *Potter v City Council of Port Hueneme (1951) 102 Cal App 2d 141, 227 P2d 25.*

Mere delay for 40 days in passing on petition for writ of error coram nobis without request to do so is not proof that judge refuses to pass on it, and petition of writ of mandate to compel judge to "activate ineffectiveness" the petition for

writ of error coram nobis, fails to state cause of action where it does not allege request and refusal. *Tromanhauser v Fraga (1956, 1st Dist) 144 Cal App 2d 272, 300 P2d 874.*

Municipal court has duty to make order releasing exhibits used as evidence in criminal proceeding to one who petitions for them if exhibits are still in custody of court and petitioner is owner or otherwise entitled to possession of exhibits, but where petition for mandamus for return of exhibits contained no allegation that any of exhibits remained in custody of court at time motion for release was made and where, although petition alleges ownership, it did not allege that ownership was proved when motion was heard, petition for mandamus fell short of alleging facts essential to establish existence of duty to release exhibits. *Wenzler v Municipal Court for Pasadena Judicial Dist. (1965, 2nd Dist) 235 Cal App 2d 128, 45 Cal Rptr 54.*

No cause of action was stated in mandamus proceeding to compel reemployment of academic employee of state college where such employee was accorded administrative hearing, record of which demonstrated that charges of impropriety in refusing reemployment where illusory, and no opportunity should be given to amend to attempt to state cause of action. *Stanton v Dumke (1966) 64 Cal 2d 199, 49 Cal Rptr 380, 411 P2d 108.*

A petition for a writ of mandate to annul certain conditions to a use permit did not state a cause of action, and defendants' general demurrer should have been sustained, where there was no allegation that it was the ministerial duty of any city officer or agency to issue a use permit free of the objected-to conditions, nor any factual allegations tending to show excess of jurisdiction, or lack of a fair trial, or an abuse of discretion. *Gong v Fremont (1967, 1st Dist) 250 Cal App 2d 568, 58 Cal Rptr 664.*

Mandamus, being available only to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station (*CCP § 1085*), was not a proper vehicle for redress of asserted taxpayer grievances arising from transactions between the Estero Municipal Improvement District and its developer landowners, and seeking an accounting for benefits received by the latter from the district, where petitioner plaintiff alleged nothing to indicate that the developer landowners had a duty to account to him nor that the district was enjoined by law to cause an investigation to be made of its disbursements to the developer landowners as prayed for alternatively in the petition, and where plaintiff petitioner did not allege that he was suing in behalf of the district or that he made demands upon the district to request an accounting from the developer landowners which was refused. *Cooper v Estero Municipal Improv. Dist. (1969) 70 Cal 2d 645, 75 Cal Rptr 777, 451 P2d 417.*

The remedy of mandate was inappropriate as to a second cause of action set forth in a mandamus petition challenging a certain transaction between the Estero Municipal Improvement District and a dredging company and praying that the district obtain an accounting in connection therewith, where the district had no duty to conduct the proposed investigation and there was no allegation of wrongdoing and no grounds alleged upon which a court might order an accounting. *Cooper v Estero Municipal Improv. Dist. (1969) 70 Cal 2d 645, 75 Cal Rptr 777, 451 P2d 417.*

In a mandamus proceeding challenging activities of the Estero Municipal Improvement District and its directors, the allegations of a fourth cause of action contained in the petition seeking replacement of moneys transferred from the park fund of the district appeared incomprehensible, and the trial court acted properly in sustaining a demurrer thereto, where it was alleged that certain money was transferred from the park fund to a reclamation fund, that the money in the reclamation fund would be used to make interest payments on reclamation bonds, that future interest payments would exceed the reclamation fund so that additional moneys would be removed from other bond funds or transferred to the reclamation fund, and where the broad general allegation that all such activities were in violation of law was merely a conclusion and no facts were alleged justifying the granting of any relief. *Cooper v Estero Municipal Improv. Dist. (1969) 70 Cal 2d 645, 75 Cal Rptr 777, 451 P2d 417.*

In a mandamus proceeding challenging activities of the Estero Municipal Improvement District and its directors, the allegations of a purported fifth cause of action contained in the petition failed to state a cause of action seeking judgment that none of bond sale proceeds be used for payment of interest on prior bonds, where it did not appear that the payment of such interest from bond proceeds was illegal or that the law required that a bond election specifically authorize the use of proceeds for payment of interest, where, according to the Estero Act, § § 106 and 107 (Stats 1960, 1st Ex Sess, Ch 82), the board may call a bond election by a resolution which may submit to the voters the question of issuing bonds to make all outlays or so many of them as may be selected, and where the cause of action alleged that the board in its resolution stated that a certain amount of current bond sales would be used to pay interests on bonds, and there was no allegation that the provisions of the section were not complied with as to other bond sales mentioned in the cause of action. *Cooper v Estero Municipal Improv. Dist. (1969) 70 Cal 2d 645, 75 Cal Rptr 777, 451 P2d 417.*

In a mandamus proceeding challenging activities of the Estero Municipal Improvement District, its directors, and certain landowner developers thereof, plaintiff was entitled to no remedy under the nebulous allegations of a purported sixth cause of action seeking to compel the district to obtain a welter of financial details and other information from the landowner developers before expenditure of further funds for their benefit, where plaintiff alleged nothing to indicate any duty on defendants' part resulting from an office, trust, or station, or any act, performance of which by defendants was specially enjoinable by law. *Cooper v Estero Municipal Improv. Dist. (1969) 70 Cal 2d 645, 75 Cal Rptr 777, 451 P2d 417.*

A petition for a writ of mandate directing school board trustees to prepare a schedule of salaries for teachers to conform to the principle of uniformity, with the real purpose of compelling the school district, despite the contrary vote of a majority of employees covered by a health insurance plan to select a plan that did not provide benefits for family members, did not state a cause of action to compel the manner in which the school board exercised its discretion. *Sheehan v Eldredge (1970, 1st Dist) 5 Cal App 3d 77, 84 Cal Rptr 894.*

Before seeking mandate to compel action by a trial court, a party should first request the lower court to act. If such a request has not been made, the writ ordinarily will not issue unless it appears that the demand would have been futile. Hence, in a mandamus proceeding in a superior court against a justice court to compel it to vacate a judgment suspending petitioner's driver's license after conviction for drunk driving, the superior court properly denied the writ, where the petition contained no allegation that relief from the judgment had first been sought in the justice court, and where no basis existed for finding that it would have been futile to seek such relief. *Fitch v Justice Court for Anderson Valley Judicial Dist. (1972, 1st Dist) 24 Cal App 3d 492, 101 Cal Rptr 227.*

122. Response or Return

The denial in an answer to a petition for a writ of mandate to compel the trial judge to certify the reporter's transcript on an appeal from a judgment taken pursuant to former CCP § 953a, that said reporter's transcript was a full or true transcript of the proceedings for the reason that the respondents' amendments to said records were not incorporated therein, did not constitute sufficient justification for refusal to certify the transcript, since it was within the power of the trial court to require said amendments to be incorporated in the transcript. *Wrynn v Superior Court of San Francisco (1925) 197 Cal 591, 241 P 849.*

In a proceeding in mandamus to require respondents to refrain from conducting a recall election on the date set for the general primary election, the writ was denied where, under the showing made by the return, which was not challenged, it did not clearly appear that there would be a violation of the act relating to consolidation of elections, and the petition for the writ was filed at the eleventh hour, and the election proclamation appeared to have been given due notice. *Vela v Huberty (1934) 1 Cal 2d 466, 35 P2d 531.*

When a petition for writ of mandate and the court's answer are submitted without taking evidence, allegations in the answer that court has not refused to proceed with the trial of the action before it, and is willing to proceed therewith in a certain way must be deemed true. *Friedland v Superior Court of Sacramento County (1945) 67 Cal App 2d 619, 155 P2d 90.*

In a mandamus proceeding by a sanitary district to compel the superior court to fix the amount of deposit necessary to secure to the owner of land payment of just compensation for condemnation of easements or rights of way over her property, allegations in the owner's answer that there were no unsanitary conditions requiring abatement were irrelevant, as such questions would be determined by the trial court in a condemnation action. *Central Contra Costa Sanitary Dist. v Superior Court of Contra Costa County (1950) 34 Cal 2d 845, 215 P2d 462.*

Answer in mandamus proceedings is accepted as true unless controverted by plaintiff. *Steiger v Board of Supervisors (1956, 2nd Dist) 143 Cal App 2d 352, 300 P2d 210.*

When question of fact is raised by defendant's answer, applicant may countervail it by proof, either in direct denial or by way of avoidance; but if only question of law is raised, court may hear matter on papers filed and argument. *Lassen v Alameda (1957, 1st Dist) 150 Cal App 2d 44, 309 P2d 520.*

Where complaint in intervention which is filed simultaneously with demurrer to petition for writ of mandate, is in legal effect answer, any defect in petition may be aided or cured by averments of that answer. *Baldwin-Lima-Hamilton Corp. v Superior Court of San Francisco (1962, 1st Dist) 208 Cal App 2d 803, 25 Cal Rptr 798.*

In mandamus proceeding brought to compel vacation of order abating action during pendency of another action, court takes complaint in abated action as it stands, and denial by real party in interest of allegations of complaint in her "Return, Demurrer and Answer" to petition has no place in mandamus proceeding. *Diowchi v Superior Court of Los Angeles County (1963, 2nd Dist) 216 Cal App 2d 525, 31 Cal Rptr 214.*

Petitioner's motion to strike allegations contained in answer of real parties in interest raising issues relating to propriety of previous acts of county board of supervisors should be granted where petition for writ of mandate was directed solely against initiative measure sought to be brought to vote, which measure in no way questioned previous acts of board of supervisors, and proceeding was not one to enjoin or prohibit board of supervisors from going forward with planned course of action. *Mueller v Brown (1963, 5th Dist) 221 Cal App 2d 319, 34 Cal Rptr 474.*

In a mandamus proceeding against the superior court, a denial, in the return filed by the real party in interest, of any information or belief sufficient to answer the allegation in the mandamus petition, that a copy of the superior court file has been attached, is sham and will be disregarded. *Fred Howland Co. v Superior Court of Los Angeles County (1966, 2nd Dist) 244 Cal App 2d 605, 53 Cal Rptr 341.*

Matters alleged in the return to an alternative writ of mandate which, if true, sufficiently show cause to deny the peremptory writ, are accepted as true unless controverted by the petitioner. *Most v First Nat'l Bank (1966, 4th Dist) 246 Cal App 2d 425, 54 Cal Rptr 669.*

Allegations that one acted in "bad faith" and that one's purposes are not legitimate, or are illegitimate, are conclusions of law and are not sufficient to constitute a defense. *Most v First Nat'l Bank (1966, 4th Dist) 246 Cal App 2d 425, 54 Cal Rptr 669.*

A request to amend an answer to raise the bar of limitations is addressed to the discretion of the trial court, which considers whether or not its allowance will further justice, and, while mandate is available to compel allowance after leave to amend is denied, the party seeking it must show abuse of discretion in order to secure relief. *Vedder v Superior Court of Lassen County (1967, 3rd Dist) 254 Cal App 2d 627, 62 Cal Rptr 222.*

In a mandamus proceeding by a city employee to compel a city to pay the employee's back wages without setoff of an amount allegedly owed by the employee to the retirement fund, the pleading by the city of the setoff in its answer rather than in a separate pleading, either by cross-complaint or counterclaim, was proper, where, all the facts surrounding the setoff being fully and clearly set forth, the employee was fully informed, where, though he demurred generally to the answer, he made no reference to the claimed defect in the answer, and where, the matter being fully heard under the pleadings presented, whatever objection might have been urged against the pleading vanished at the close of the evidence. *McDaniel v San Francisco (1968, 1st Dist) 259 Cal App 2d 356, 66 Cal Rptr 384.*

In a mandamus proceeding, allegations in the answer which are not countervailed by pleading or proof are to be taken as true. *San Francisco Chamber of Commerce v San Francisco (1969, 1st Dist) 275 Cal App 2d 499, 79 Cal Rptr 915.*

123. Demurrer

A demurrer to a petition for writ of mandate is recognized as the proper pleading in superior courts and in original proceedings in the supreme court and district courts of appeal. *Lagiss v Kraintz (1951) 104 Cal App 2d 793, 232 P2d 541.*

Where a general demurrer is interposed to a petition for a writ of mandate and the matter is argued on questions of law and submitted to the court, the allegations of the petition must be accepted as true. *Handler v Board of Supervisors (1952) 39 Cal 2d 282, 246 P2d 671.*

To sustain without leave to amend demurrer to mandamus petition is generally abuse of discretion unless petition shows on its face that it is incapable of amendment. *Tringham v State Board of Education (1955, 4th Dist) 137 Cal App 2d 733, 290 P2d 890.*

Although the statutes make no express provision for a demurrer in a mandamus proceeding, the sufficiency of the petition can be tested either by demurrer or by raising questions of law as well as of fact in the answer, and except as otherwise provided in *CCP § § 1067-1110b*, a mandamus proceeding is subject to the general rules of pleading applicable to civil actions (*CCP § 1109*). *Gong v Fremont (1967, 1st Dist) 250 Cal App 2d 568, 58 Cal Rptr 664.*

The sufficiency of a petition in a mandamus proceeding can be tested by demurrer. *Hilton v Board of Supervisors (1970, 2nd Dist) 7 Cal App 3d 708, 86 Cal Rptr 754.*

(4) TRIAL, DECISION, AND RELIEF

124. In General

When, on issue of law or fact joined, a superior court has adjudicated the merits of an application for mandamus, such adjudication is as conclusive (except on appeal) on Supreme Court as it is on another superior court. *Santa Cruz Gap Turnpike Joint Stock Co. v Board of Supervisors (1882) 62 Cal 40.*

A superior court judge hearing a party's petition for a writ of mandamus or prohibition was not acting in an appellate capacity and was not exempt from disqualification under *CCP § 170.6*, providing for disqualification of a judge for prejudice by affidavit of a party. A writ proceeding is a matter within the original jurisdiction of the superior court, and is within the express terms of § 170.6. *Solberg v Superior Court of San Francisco (1977) 19 Cal 3d 182, 137 Cal Rptr 460, 561 P2d 1148.*

Where it appears that some of the charges on which an administrative body has based the imposition of a penalty or other disciplinary action are not sustained by the evidence, the matter will be returned to the administrative body for redetermination in all cases in which there is a real doubt as to whether the same action would have been taken on a proper assessment of the evidence. *Miller v Eisenhower Medical Center (1980) 27 Cal 3d 614, 166 Cal Rptr 826, 614 P2d 258.*

Employee association's petition for writ of mandamus seeking to compel a superior court and county to disclose certain records relating to court employee travel and reimbursement under the California Public Records Act, *Gov C § 6250* et seq., and *Cal. R. Ct. 6.702* was not moot; the court noted that (1) whether the superior court fully complied with the request made under *Cal. R. Ct. 6.702* was at the heart of the controversy, and the resolution of the issue of what party was required to pay for the cost of locating records, copying them, and redacting information affected not only the association, but future petitioners under the Rule, and (2) even though the association no longer needed the records for a salary increase negotiation because the increase had been reinstated, the association still had a right to request the disclosure, as *Gov C § 6250* stated that access to information was a fundamental right, and *Cal. R. Ct. 6.702* was to be interpreted consistently with the Act. *Orange County Employees Assn., Inc. v Superior Court (2004, Cal App 4th Dist) 2004 Cal App LEXIS 1036.*

125. Issues, Proof, and Variance

In mandamus proceedings to compel reinstatement to an office in accordance with a decision of a civil service board, the only question involved is whether the board's order as a matter of law commands obedience on the respondent's part. *Petersen v Morse (1920) 48 Cal App 428, 192 P 51.*

In mandamus proceedings to compel the president and secretary of an irrigation district to sign and attest bonds of the district, the court is not concerned with the necessity or propriety of authorizing or issuing such bonds, but whether the defendants refused, without legal justification, to do that which the law specifically requires them to do, as duties resulting from their respective offices. *La Mesa Lemon Grove & Spring Valley Irrig. La Mesa Lemon Grove & Spring Valley Irrigation Dist. v Halley (1925) 195 Cal 739, 235 P 999.*

In a proceeding for a writ of prohibition to restrain the superior court from reviewing in a mandamus proceeding the evidence and proceedings before the state personnel board which led to a decision of that board reinstating petitioner as a referee of the industrial accident commission, where it appeared that petitioner not only sought by his mandamus proceeding to enforce his reinstatement but also payment of back salary, and the answer in the mandamus proceeding alleged that there was no money in the state treasury available to pay the back salary, a valid issue was raised on which the court was entitled to receive evidence to determine whether the writ of mandamus should issue. *Cullinan v Superior Court (1938) 24 CA2d 468, 75 P2d 518, 77 P2d 471.*

Any matter of policy involved in the adoption by an unincorporated association of bylaws, a code of ethics, and the resolution in conformity therewith is a question for the membership itself and is not debatable in a mandamus proceeding to compel the reinstatement of an expelled member, so long as it is not shown that such policy is in violation of law; a member who has agreed to be bound by the laws adopted by the membership is precluded from relief in such proceed-

ing where the expulsory proceedings were regularly conducted in good faith, in accordance with the laws of the society and of the land. *Smith v Kern County Medical Asso. (1942) 19 Cal 2d 263, 120 P2d 874.*

It is not the function of a court, on considering a petition for mandate, to anticipate the outcome of other actions and to determine questions which arise only if the results of such actions are adverse to petitioners, and the question of whether certain judgment is res judicata as to some future judgment which might never be entered against petitioners is within the realm of conjecture and is not entitled to consideration in a proceeding in mandamus. *Lindquist v Superior Court of Los Angeles County (1949) 90 Cal App 2d 191, 202 P2d 620.*

In mandamus proceedings to review action of local board, the chief issues are whether person affected has been accorded a hearing and, if so whether there is any evidence to support order of such board. *Livingston Rock & Gravel Co. v County of Los Angeles (1954) 43 Cal 2d 121, 272 P2d 4.*

In proceeding by former city employee for writ of mandate directing city to reinstate him in his former position, it is for trial court to pass on merits of petitioner's contention that he was kept out of his office and denied access to his files between time of first and second mayor's hearings investigating charges made by him against certain of his associates. *Chenoweth v Office of City Clerk (1955, 2nd Dist) 131 Cal App 2d 498, 280 P2d 858.*

The duty of determining questions of fact in proceedings in mandate heard below is for the trial court. *Cosgrove v County of Sacramento (1967, 5th Dist) 252 Cal App 2d 45, 59 Cal Rptr 919.*

In a mandamus proceeding to compel a city to pay a reinstated employee's back wages, as ordered by the Civil Service Commission, without setoff of an amount allegedly owed by the employee to the retirement system, the setoff was not a collateral matter, unrelated to the employee's right to have the city comply with the order of the commission, and the claim was properly asserted by the city and considered by the trial court in arriving at its judgment denying the writ, since a defendant's answer to a petition for the writ of mandate should set up any matter of defense relied upon as justification for the circumstances which gave rise to the petition for the writ. *McDaniel v San Francisco (1968, 1st Dist) 259 Cal App 2d 356, 66 Cal Rptr 384.*

The "quasi-legislative," that is, the "rule-making" or "policy-making," proceedings and determinations of a nonprofit hospital corporation are reviewable by traditional mandamus (*CCP § 1085*), rather than by administrative mandamus (*CCP § 1094.5*). The trial court in such a proceeding, therefore, is not to exercise its independent judgment on the evidence, but is to limit its inquiry to an examination of the proceedings so as to determine whether the action taken was arbitrary, capricious, or entirely lacking in evidentiary support, or whether the hospital failed to follow the procedure and give the notices required by law, or whether the action taken was otherwise unlawful or contrary to established public policy. *Lewin v St. Joseph Hospital (1978, 4th Dist) 82 Cal App 3d 368, 146 Cal Rptr 892.*

126. Evidence

In proceeding by former city employee for writ of mandate directing city to reinstate him, it is not error to exclude portions of petitioner's letters to mayor in hearing before board to admit transcript of mayor's hearing, or to refuse to subpoena and admit in evidence before board testimony and documents which it is claimed would support his charges against certain office associates, where he was discharged for refusing to be sworn and support his charges when he was called on to do so by mayor and city clerk. *Chenoweth v Office of City Clerk (1955, 2nd Dist) 131 Cal App 2d 498, 280 P2d 858.*

In proceeding for writ of mandate to compel labor union to restore plaintiff to membership and to recover damages for alleged wrongful expulsion, line of questioning relating to plaintiff's membership in Communist Party was material on theory of plaintiff's alleged damages as well as on his plea for reinstatement in union when Communist Party membership would make him ineligible therefor. *Allen v Los Angeles County Dist. Council of Carpenters (1959) 51 Cal 2d 805, 337 P2d 457.*

In mandamus proceeding to compel Board of Medical Examiners to set aside its order revoking license of physician and surgeon for unprofessional conduct in permitting unlicensed persons to administer anesthetics, affidavit by 55 doctors stating that "it is common practice in the State of California for persons not licensed to practice medicine and surgery to administer anesthetic and to give hypodermic injections" was of no value where it did not specify what persons other than licensed physicians commonly administer anesthetics and it could not reasonably be understood to mean that this function was regularly left to all persons regardless of qualifications, even to those without any knowledge or training which would fit them for task, and averred common practice might have existed only with respect to persons author-

ized by Business and Professions Code to perform medical acts, such as registered nurses and interns. *Magit v Board of Medical Examiners (1961) 57 Cal 2d 74, 17 Cal Rptr 488, 366 P2d 816.*

In proceeding in mandamus to compel municipal board of pension commissioners to issue disability pension to former police officer, board's action in denying pension was supported by substantial evidence where, though medical testimony indicated disagreement as to degree of police officer's claimed disability from injury sustained in line of duty, there was showing that he had fully and actively performed duties of regular police officer from his return to active duty after accident until he was relieved therefrom for other reasons more than year later. *Petersen v Los Angeles (1962, 2nd Dist) 207 Cal App 2d 785, 24 Cal Rptr 809.*

In mandamus action to compel city to conform to provisions of *Lab C § § 1960-1963*, authorizing fire fighters to organize and join labor organizations, evidence was not insufficient to support writ of mandate, though there was no evidence that city had in past, or would in future, disregard statutory provisions, where plaintiffs' original petition contained, as exhibits, correspondence between plaintiffs' attorney and city manager whereby latter advised former that defendants intended to act according to advice of city attorney who held that law did not apply to charter cities and was therefore not binding on defendant city, where no point was made at trial of authenticity of such exhibits, and where defendants' own pleading incorporated exhibits affirmatively showing that for many years rules and regulations of city fire department prohibited members thereof from organizing or joining any labor union, that although such rule was rescinded, fire chief still believed supervisory personnel should not be affiliated with any employee organization, and advised one captain to resign his membership in plaintiff union, and that defendant city council adopted a policy of refusing to recognize plaintiff union. *International Asso. of Fire Fighters v Palo Alto (1963) 60 Cal 2d 295, 32 Cal Rptr 842, 384 P2d 170.*

In mandamus proceeding against city officials, police patrolmen did not show that they were working as inspectors outside their classification, as claimed, where, following second finding by city civil service board that they were working out of classification, change in their duties was not merely physical separation of officers. nor mere change in name of division, section or detail, but they were required to turn over results of their inspection duties to investigative officers and following this substantial change and until mandamus was sought there was no finding by board that they were still working out of classification. *Mullins v Toothman (1965, 1st Dist) 231 Cal App 2d 756, 42 Cal Rptr 254.*

In an original proceeding in mandamus in the appellate court to compel the trial court in a will contest to vacate an order denying a certain motion, the appellate court will not consider declarations, in the return filed by the real party in interest or in petitioners' traverse to the return, which were not before the trial court. *Morris Stulsaft Foundation v Superior Court of San Francisco (1966, 1st Dist) 245 Cal App 2d 409, 54 Cal Rptr 12.*

In a proceeding seeking a writ of mandate to compel a school district to reinstate plaintiff as a tenured teacher an affidavit by the school district superintendent must be construed as an answer to plaintiff's petition for a writ of mandate and as evidentiary matter relating to the issues raised by the petition where, though the affidavit did not conform to standard practice regarding answers to such petitions, plaintiff failed to object to the affidavit at the time of the hearing. *Adelt v Richmond School Dist. (1967, 1st Dist) 250 Cal App 2d 149, 58 Cal Rptr 151.*

Where a local tribunal exercises quasi-judicial powers its action may be reviewed by either mandamus or certiorari; in such a review the chief issues are whether the person affected has been accorded a hearing, and if so, whether there is any evidence to support the determination; and the court should confine itself to the showing made before the tribunal with regard to the sufficiency of the evidence. *De Lucia v County of Merced (1968, 5th Dist) 257 Cal App 2d 620, 65 Cal Rptr 177.*

In a mandamus action seeking to compel a city to recreate the position of manager of harbor real estate and to reinstate petitioner thereto, the trial court properly admitted and considered extraneous evidence in reaching a judgment in his favor, where the evidence was overwhelming that the board of harbor commissioners' motives for abolishing the position had been not, as stated in its adopted resolution, for reasons of "economy and efficiency," but to get rid of petitioner, despite his permanent tenure subject to civil service regulations, and to replace him by his assistant, without bringing or contemplating any charges against petitioner, and where it was undisputed that he had been an honest, able and loyal employee. *Trujillo v Los Angeles (1969, 2nd Dist) 276 Cal App 2d 333, 81 Cal Rptr 146.*

In a mandamus action seeking to compel a city to recreate the position of manager of harbor real estate and reinstate petitioner thereto, the trial court properly admitted and considered parol evidence relating to petitioner's written letter of resignation, and such evidence was sufficient to indicate an intent, not to waive his employment rights regarding his old position, but to resign only his newly created position as assistant manager, where, although he had also

withdrawn his paid-in contributions from the city's retirement fund, he had nevertheless continued his lawsuit for reinstatement to his old position, and where the new position was shown to have been one in which his talents and experience had not been used and his working conditions had been intolerable. *Trujillo v Los Angeles (1969, 2nd Dist) 276 Cal App 2d 333, 81 Cal Rptr 146.*

In a mandamus proceeding to compel a county clerk to certify that a referendum petition had attached to it the requisite number of signatures of registered, qualified electors of the county, the court did not err in refusing to permit the petitioners to produce evidence that 94 signatures rejected by the clerk were in fact genuine, where they requested permission to call in all persons whose signatures had been rejected by the county clerk. *Wheelright v County of Marin (1970) 2 Cal 3d 448, 85 Cal Rptr 809, 467 P2d 537.*

In a mandamus proceeding, brought pursuant to *CCP § 1085*, to compel the governing board of a county unified school district to reinstate a tenured teacher who inadvertently failed to make a timely return, contrary to the provisions of former Ed. Code, § 13260 [44842], of his contract with the district for the subsequent school year, the trial court did not err in applying the substantial evidence test, rather than the independent judgment test, to determine whether the board had abused its discretion in refusing to reemploy the teacher. Though the teacher's proper remedy may have been administrative mandamus pursuant to *CCP § 1094.5*, which would have involved the independent judgment test, such a procedural defect could not be raised for the first time on appeal by the board, and, in any event, application of the independent judgment test would not have produced a different result in the trial court. *California Teachers Asso. v Governing Board of Mariposa County Unified School Dist. (1977, 5th Dist) 70 Cal App 3d 833, 139 Cal Rptr 155.*

The record of hearings before the judicial review committee and the appellate review committee of a private nonprofit hospital, both of which upheld a denial of a physician's application for staff privileges, did not sufficiently show that the applicant's ability to work with others in the hospital setting, as required by a bylaw of the hospital on which the denial was based, was limited in a manner which would pose a realistic and specific threat to the quality of medical care to be afforded patients at the institution. Though the medical executive committee, in its efforts to establish that the applicant, through the more controversial or flamboyant aspects of his personality, had succeeded in alienating a substantial segment of the local medical community, placed emphasis on certain business dealings which he had had with other doctors, the history of his association in practice with other doctors, his alleged propensity for litigation, and his readiness to express his views on the treatment practices of other doctors and on hospital administrative matters, no effort was made to establish any direct link between those considerations and their potential effect on patient care. *Miller v Eisenhower Medical Center (1980) 27 Cal 3d 614, 166 Cal Rptr 826, 614 P2d 258.*

In a mandamus proceeding under *CCP § 1085*, by a school administrator who had been reassigned from his position as principal of an intermediate school to the lesser administrative position of supervisor of special projects seeking reinstatement to his former position, the trial court did not err in determining the matter without taking any testimony, where the district's answer admitted all of the material allegations of the petition which ultimately formed the basis of the court's findings of fact, and the only affirmative defense concerned the adequacy of the administrator's legal remedy, where the district's memorandum of points and authorities in opposition to the writ of mandate was directed solely to issues of law, and where the district did not object to the trial court's procedures although given ample opportunity to do so. If the defendant in a mandate proceeding answers, but raises only questions of law, the answer is in substance a demurrer, the hearing is only an argument, and the decision may be rendered on the pleadings without the introduction of any evidence. *Ellerbroek v Saddleback Valley Unified School Dist. (1981, 4th Dist) 125 Cal App 3d 348, 177 Cal Rptr 910.*

Because state agencies' actions under *Cal. Health & Safety Code § 41865(m)*, (n) of the Connelly-Areias-Chandler Rice Straw Burning Reduction Act of 1991, *Cal. Health & Safety Code § 41865* et seq., were neither informal nor ministerial, the rule applied that extra-record evidence was inadmissible in a traditional mandamus proceeding under Cal. *Code Civ. Proc. § 1085* that challenged the quasi-legislative acts of the agencies, and thus the court's review was properly confined to the administrative record. *Carrancho v California Air Resources Bd. (2003, Cal App 3rd Dist) 2003 Cal App LEXIS 1405.*

127. -Presumptions and Burden of Proof

Burden of proving that the petitioner complied with the law, and took all necessary steps required to make it the duty of the respondent to do the act sought to be compelled, is on the petitioner, and if findings of such compliance are not sustained by the evidence, a judgment in his favor granting a writ of mandate must be reversed on appeal. *Hippen v Ford (1900) 129 Cal 315, 61 P 929.*

On a petition by a corporation and its alleged secretary to compel the delivery up of its seal and records and the like, where the official character of the alleged secretary is put in issue by the answer of the alleged ex-secretary, the burden of proof is cast on the alleged secretary petitioner to establish his official relation to the corporation, that he is the legally appointed secretary and entitled to the custody of the books, and the like, for the corporation petitioner. *Potomac Oil Co. v Dye (1910) 14 Cal App 674, 113 P 126.*

Mandamus proceedings must be predicated upon the existence of a duty on the defendant's part to perform an act concerning which he has no right to refuse, and the burden is upon the plaintiff to prove the existence of such right rather than upon the defendant to disprove it. *MacLeod v Long (1930) 110 Cal App 334, 294 P 54.*

The fact that an alternative writ of mandate is in the usual language to the effect that the defendant either perform the act required or show cause why he has not done so, does not shift the burden of proof from the plaintiff to the defendant. *MacLeod v Long (1930) 110 Cal App 334, 294 P 54.*

Before the issuance of a writ of mandate to compel an irrigation district to furnish drainage to lands within the district would be justified, it must be established by the landowner by satisfactory and sufficient evidence that his lands are in need of drainage made necessary by the irrigation operations of the district, and whether the district is acting under the power conferred by Stats 1907 p 569, and is not doing all within its power to perform the duty enjoined upon it by the statute. *Sutro Heights Land Co. v Merced Irrigation Dist. (1931) 211 Cal 670, 296 P 1088.*

In a proceeding in mandamus to compel the civil service commission to certify petitioner as eligible for appointment as a police officer and to compel the board of police commissioners to make the appointment, where petitioner's name had been stricken from the list of eligibles on the ground that he did not possess the requisite moral character, the burden of proving that he possessed good moral character rests on the petitioner. *Klevesahl v Byington (1934) 1 Cal App 2d 671, 37 P2d 179.*

In a mandamus proceeding to compel the holding a promotional, instead of an open nonpromotional examination, when the petitioners by their petition and the admissions in the answer establish a prima facie case of abuse of discretion on the part of the civil service commission, the burden of bringing forth any explanation of its action by way of defense rests on it. *Allen v McKinley (1941) 18 Cal 2d 697, 117 P2d 342.*

In an action by a school district superintendent to compel the district to reinstate him to his position under a four-year contract, there was no burden on him to prove that he had properly performed the contract up to the time of prevention of further performance; the district's prevention of performance relieved him of that necessity. *Titus v Lawndale School Dist. (1958, 2nd Dist) 157 Cal App 2d 822, 322 P2d 56* (disapproved on other grounds by *Barthuli v Board of Trustees, 19 Cal 3d 717, 139 Cal Rptr 627, 566 P2d 261).*

Where Supreme Court issued alternative writ of mandamus to review order of superior court denying plaintiff's several motions to require defendants to answer certain interrogatories, court necessarily indicated that plaintiff had made prima facie showing of abuse of discretion, or possible abuse of discretion; it was defendants' burden to rebut this prima facie showing by filing written return to writ, and where in their return they claimed that interrogatories were interposed for improper purpose, but did not include record of single fact to substantiate that claim other than that some of interrogatories were answered in previous depositions, this was not sufficient showing to sustain order. *Coy v Superior Court of Contra Costa County (1962) 58 Cal 2d 210, 23 Cal Rptr 393, 373 P2d 457.*

On an application for a writ of mandamus, for an order directing the county clerk to make a certified copy of the proceedings in a criminal case and to forward the same to a petitioning prisoner to assist him in preparing a meaningful petition for a writ of habeas corpus, the prisoner's failure to appeal from the criminal conviction gave rise to a presumption that he was validly convicted. *Miller v Hamm (1970, 2nd Dist) 9 Cal App 3d 860, 88 Cal Rptr 538.*

128. Findings

The rule that findings of fact are required, unless waived, on the trial of a question of fact in a civil action is applicable to a mandamus proceeding. *Delany v Toomey (1952) 111 Cal App 2d 570, 245 P2d 26.*

Although findings of fact may not be necessary to support denial of petition for writ of mandamus, entry of judgment is necessary to make it a final decision effectual for any purpose. *People v Berger (1955) 44 Cal 2d 459, 282 P2d 509.*

In mandamus proceeding to compel Board of Medical Examiners to set aside its order revoking license of physician for unprofessional conduct in permitting unlicensed persons to administer anesthetics, finding of court that unlicensed persons never, with defendant's knowledge, administered anesthetics in absence of supervision and control of licensed physician was not relevant to question of defendant's guilt because administration of anesthetics by unlicensed person is illegal even if performed under such supervision. *Magit v Board of Medical Examiners (1961) 57 Cal 2d 74, 17 Cal Rptr 488, 366 P2d 816.*

Code requirement for findings of fact unless waived applies to mandamus proceeding. *Healy v Stationers Corp. (1964, 2nd Dist) 228 Cal App 2d 601, 39 Cal Rptr 679.*

A finding of the trial court that a city housing authority exercised its "discretionary power" in determining that a certain contract entered into by it did not involve "public works" within *Lab Code, § 1720*, and thus that mandamus could not be used to compel the housing authority to transmit to the State Treasurer certain funds withheld by it from the contractor was erroneous; interpretation or construction of a statute is a matter of law, not the exercise of discretionary authority. *Priest v Housing Authority of Oxnard (1969, 2nd Dist) 275 Cal App 2d 751, 80 Cal Rptr 145.*

In an action by a county board of supervisors seeking a writ of mandate directing the Highway Commission to rescind certain decisions relating to highway construction projects, such decisions could not be held null and void for failure of the commission to make findings of fact thereon, where, although administrative findings of fact are required for purposes of administrative mandamus (*CCP § 1094.5*), the decisions in question were quasi-legislative and therefore subject to judicial review, if at all, under ordinary mandamus procedure (*CCP § 1085*), for which administrative findings of fact are not required. *Board of Supervisors v California Highway Com. (1976, 3rd Dist) 57 Cal App 3d 952, 129 Cal Rptr 504.*

Unlike *CCP § 1094.5*, providing for judicial review under administrative mandamus of adjudicatory determinations by an administrative agency, *CCP § 1085*, providing for ordinary mandamus, requires no written findings of fact in relation to administrative decisions reviewable under that statute. *Santa Cruz v Local Agency Formation Com. (1978, 1st Dist) 76 Cal App 3d 381, 142 Cal Rptr 873.*

In a mandamus proceeding against a school district under *CCP § 1085*, by a school principal who had been re assigned to a lesser administrative position seeking reinstatement to his former position, the trial court properly refused to make a finding of fact that plaintiff was reassigned "for cause" (by which finding the district sought to avoid the notice provision of *Ed. Code, § 44951*). Though the declaration of the district superintendent indicated that after he had become aware during the month of June of certain derogatory facts concerning plaintiff, he advised him that he would no longer be school principal as of the end of that month, there was no indication that he advised plaintiff that he was being transfered or reassigned "for cause." Furthermore, there was no evidence that the district board ratified the reassignment "for cause." A subsequent letter from the district's counsel to plaintiff's counsel purporting to set forth reasons for the reassignment was a self-serving statement without legal effect. *Ellerbroek v Saddleback Valley Unified School Dist. (1981, 4th Dist) 125 Cal App 3d 348, 177 Cal Rptr 910.*

(5) REHEARING AND APPEAL

129. In General

On appeal from judgment granting peremptory writ of mandate directing Board of Medical Examiners to set aside its order revoking license of physician and surgeon for unprofessional conduct in permitting unlicensed persons to administer anesthetics, Supreme Court was not required to take into consideration asserted custom in California of permitting persons other than licensed physicians and surgeons to administer anesthetics where, though there was evidence from which it might be inferred that it was common practice to permit general anesthetics to be administered by registered nurses, there was no substantial evidence of common practice to permit anesthetics to be given by persons who had no authority to perform medical acts. *Magit v Board of Medical Examiners (1961) 57 Cal 2d 74, 17 Cal Rptr 488, 366 P2d 816.*

On appeal from judgment granting peremptroy writ of mandate directing Board of Medical Examiners to set aside its order revoking license of physician and surgeon for unprofessional conduct in permitting unlicensed persons to administer anesthetics, Supreme Court was not required to consider a statement in medical book, which apparently was not before board or court, that it is open question in most states who may legally administer anesthetic and that in nearly all states custom has developed to have "almost anyone" administer the anesthetic, where book did not give any author-

ity for statement and did not mention California in this connection and hence was not authority for proposition that such custom exists here. *Magit v Board of Medical Examiners (1961) 57 Cal 2d 74, 17 Cal Rptr 488, 366 P2d 816.*

On appeal from judgment granting writ of mandate directing State Board of Education to reinstate plaintiff's credentials as teacher, but not awarding damages, plaintiff, not having appealed, was in no position to raise point that case should be remanded in order to try issue of damages. *Di Genova v State Bd. of Education (1962) 57 Cal 2d 167, 18 Cal Rptr 369, 367 P2d 865.*

Although generally petitioner's right to mandamus is determined by facts as they exist at time petition was filed, that rule is not controlling where there is change, not in facts, but in law, subsequent to determination of issues in court and before notice of appeal from decision; in such case, where relief sought relates to future conduct, appellate court, in order to prevent circuity of action which would result from compelling petitioner to reassert his rights in court by new proceeding in light of new law, should remand case to court with directions to adopt such further proceedings as may be proper in light of new law. *Renken v Compton City School Dist. (1962, 2nd Dist) 207 Cal App 2d 106, 24 Cal Rptr 347.*

Whether the superior court had jurisdiction, following its denial of petition to adopt a child placed with petitioners by his mother, to order the child's custody turned over to the county adoption bureau was a question to be determined on appeal from the order denying the adoption petition; the question was not properly before the Supreme Court in a mandamus proceeding to vacate a writ of supersedeas issued by the District Court of Appeal with respect to the child's custody pending determination of the appeal. *Superior Court of Los Angeles County v District Court of Appeal (1966) 65 Cal 2d 293, 54 Cal Rptr 119, 419 P2d 183.*

A city tax collector's regulation, approved by the trial court, denying the right of public inspection of his records for the first and last 30 minutes of office hours was not so substantial a denial of the rights of a realtor seeking, in mandamus, to have the records available at all times during office hours (former Gov C, § 1227, see now *Gov C § § 6250* et seq.), as to render denial of the writ an abuse of discretion. *Bruce v Gregory (1967) 65 Cal 2d 666, 56 Cal Rptr 265, 423 P2d 193.*

On appeal from an order of the trial court determining that the respondents had complied with a writ of mandate issued by that court, little, if any, leeway is left to the appellate court to control the action of the trial court, where the trial court had before it substantial evidence on which to act. *Cosgrove v County of Sacramento (1967, 5th Dist) 252 Cal App 2d 45, 59 Cal Rptr 919.*

On appeal in a proceeding in mandamus, findings of the lower court will not be disturbed by the appellate court if they are based on substantial evidence, though the evidence is conflicting; and the appellate court will not attempt to weigh the evidence. *Cosgrove v County of Sacramento (1967, 5th Dist) 252 Cal App 2d 45, 59 Cal Rptr 919.*

The Supreme Court would accept the decision of the Court of Appeal that the remedy by appeal was inadequate when it issued an alternative writ of mandate, where no purpose but delay would be served in reviewing the decision. *Miller v Superior Court of Los Angeles County (1968) 69 Cal 2d 14, 69 Cal Rptr 583, 442 P2d 663.*

On appeal from judgments, rendered in three consolidated injunctive relief and mandamus cases, directing a county and county board of supervisors to remove a condition placed on plaintiffs' respective card club licenses precluding the game "panguinge" from being played for stakes of value, and, in the third case, declaring the invalidity and enjoining the enforcement of an urgent interim amendatory ordinance specifically prohibiting such play, all judgments required reversal with directions to dismiss the action as moot, where, during the pendency of the appeal, two more amendatory ordinances were enacted deleting the specific prohibition as to "panguinge," and prohibiting, instead (where not already prohibited under state preemptive legislation), the playing of all card games for stakes of value unless positively permitted by state law, and where neither of the latest two amendatory ordinances reenacted those parts of the prior ordinances that had been determinative of the trial court's decisions in the three cases. *Callie v Board of Supervisors (1969, 2nd Dist) 1 Cal App 3d 13, 81 Cal Rptr 440.*

On appeals from judgments granting or denying injunctions, the law to be applied is that which is current at the time of judgment in the appellate court, and the same equitable considerations may be applied in the case of mandamus proceedings. *Callie v Board of Supervisors (1969, 2nd Dist) 1 Cal App 3d 13, 81 Cal Rptr 440.*

In a mandamus proceeding by taxpayers to remedy the effects of allegedly wrongful property assessments made by an assessor, a judgment awarding attorneys' fees to petitioners on a contingent percentage basis payable directly to the attorneys was proper, where the action was a class action to which equitable principles applied, and the award of the attorneys' fees was a proper exercise of the trial court's broad equitable powers, not limited by statute, to which the exis-

tence of an actual fund of money for payment was not a condition precedent. *Knoff v San Francisco (1969, 1st Dist) 1 Cal App 3d 184, 81 Cal Rptr 683.*

An abuse of discretion in refusing leave to amend is not shown where an appellant does not indicate either in the trial court or in the appellate court the manner in which the complaint is proposed to be amended; and property owners who sought mandamus (*CCP § 1085*) to compel supervisors to rescind a rezoning amendment to a county zoning ordinance failed to show an abuse of the trial court's discretion in sustaining demurrers without leave to amend, where the property owners sought to escape the impact of the above rule by stating in their briefs that additional factual matters could have been set forth in an amended pleading which would further substantiate the cause of action pleaded, but where the additional factual matters were simply cumulative of similar points made before the supervisors and the planning commission, and where the additional matters were not pertinent to the question on appeal as to whether the amended ordinance sought to be rescinded was a valid legislative enactment. *Hilton v Board of Supervisors (1970, 2nd Dist) 7 Cal App 3d 708, 86 Cal Rptr 754.*

On appeal from an adverse ruling in a mandamus proceeding involving judicial inquiry into grounds supportive of a warrant under which an allegedly obscene motion picture film was seized, petitioner could not properly raise the issue of the People's failure to introduce evidence on limits of candor, prurient appeal, and social unimportance at the probable cause hearing before the magistrate, where petitioner chose to submit comparison films at the hearing which bore on the issues, and where the record was inadequate to disclose whether the issue was put to the superior court. *Monica Theater v Municipal Court for Beverly Hills Judicial Dist. (1970, 2nd Dist) 9 Cal App 3d 1, 88 Cal Rptr 71.*

On appeal from denial of a writ of mandamus to require a city and a county to issue press identification cards to reporters for plaintiff weekly newspaper, plaintiff could not successfully contend that standards for issuance of passes were arbitrarily and discriminatorily applied against plaintiff's interest because of its editorial policy, where such argument raised an issue of fact, and where there was sufficient evidence in the record to sustain the trial court's finding that passes were in fact issued on the basis of whether the applicant was a person who regularly covered police and fire news. *Los Angeles Free Press, Inc. v Los Angeles (1970, 2nd Dist) 9 Cal App 3d 448, 88 Cal Rptr 605.*

An appeal from a mandamus proceeding is a collateral but independent civil proceeding, even though it arises out of a criminal action. *Miller v Hamm (1970, 2nd Dist) 9 Cal App 3d 860, 88 Cal Rptr 538.*

In reviewing a summary judgment, the appellate court considers only the facts before the trial court, disregarding new allegations urged on appeal; and in a mandamus proceeding to compel issuance of a building permit for an apartment house project in a block that was rezoned after application for the permit, claims by defendant city, seeking affirmance of summary judgment in its favor, as to the lack of the applicant's license as a contractor at the time of the original application and the expiration of petitioners' FHA interest subsidy commitment pending appeal, could not be considered on appeal where such claims were not before the trial court on the summary judgment motion. *G & D Holland Constr. Co. v Marysville (1970, 3rd Dist) 12 Cal App 3d 989, 91 Cal Rptr 227.*

In civil cases that a constitutional question must be raised at the earliest opportunity or it will be waived, and constitutional issues raised on appeal by a corporation and a stockholder thereof, who sought a writ of mandate directing a county agency to set aside its decision revoking the corporation's license to conduct a card club, some of which were first urged in the trial court, properly should have all been presented at the administrative level and not on the piecemeal basis as adopted by the petitioners. *Savoy Club v Board of Supervisors (1970, 2nd Dist) 12 Cal App 3d 1034, 91 Cal Rptr 198.*

The scope of review of a Court of Appeal in a mandamus proceeding arising out of a trial court's denial of defendants' motion, based on jurisdictional grounds, to quash service of summons upon them, is limited to a determination of whether there is substantial evidence in the record before it to support the order of the trial court, resolving factual conflicts in favor of the prevailing party. *National Life of Florida Corp. v Superior Court of Orange County (1971, 4th Dist) 21 Cal App 3d 281, 98 Cal Rptr 435.*

On appeal from the trial court's denial of a writ of mandate to compel a justice court to set aside a conviction of misdemeanor drunk driving based on a plea of guilty, the People could not successfully argue that mandamus was not the proper remedy, where a motion to set aside or vacate the judgment had been made and denied in the justice court, and where the trial court's proposed findings of fact, signed by both parties, included a determination that the writ was the only plain, speedy, and adequate remedy available. *Cooper v Justice Court for El Centro Judicial Dist. (1972, 4th Dist) 28 Cal App 3d 286, 104 Cal Rptr 543.*

A judicial decision was appropriate on appeal from a judgment denying a petition for writ of mandate to compel issuance of nomination papers, refused on the ground petitioners failed to fulfill the city charter's demand for one-year residence where, althought the election was past, the one-year residence requirement of the city charter persists, and its constitutionality affects future elections in the city and other political entities having similar residence provisions. *Smith v Evans (1974, 3rd Dist) 42 Cal App 3d 154, 116 Cal Rptr 684.*

With respect to a traditional mandamus proceeding in which the trial court reviewed a "quasi-legislative" determination, and in which such review was limited to determining whether the determination was arbitrary, capricious, entirely lacking in evidentiary support, contrary to established public policy or unlawful or procedurally unfair, the conclusions of the trial court are not binding on appeal. Though there might be foundational matters of fact such that the trial court's findings would be conclusive on appeal if supported by substantial evidence, the ultimate questions are essentially questions of law with respect to which the trial and appellate courts perform essentially the same function. *Lewin v St. Joseph Hospital (1978, 4th Dist) 82 Cal App 3d 368, 146 Cal Rptr 892.*

In a mandamus proceeding to compel a private hospital to permit the petitioner, a physician, to use the hospital's chronic renal hemodialysis facility, exercise by the trial court of its independent judgment on the evidence was error if, in fact, the trial court exercised such an independent judgment, where the proper scope of review was that of the limited judicial review applicable in traditional mandamus proceedings (*CCP § 1085*). However, because, as to the ultimate questions in the case (that is, whether the hospital's decision to continue operation of such a facility on a "closed-staff" basis was arbitrary, capricious or entirely lacking in evidentiary support or contrary to established public policy or unlawful or procedurally unfair) an appellate court would exercise essentially the same function as the trial court, review by the Court of Appeal precluded any possibility of prejudice resulting from any mistake by the trial court as to the proper scope of review. *Lewin v St. Joseph Hospital (1978, 4th Dist) 82 Cal App 3d 368, 146 Cal Rptr 892.*

In a petition for mandamus relief from a trial court's denial of two separate motions to rescue the entire district attorney's office from two groups of consolidated felony prosecutions, the reviewing court was bound by the trial court's factual resolutions both as to the defendants' motion in which the factual issues had been resolved on the basis of competing declarations, and as to the other defendants' motion in which the factual issues had been resolved by competing declarations plus the testimony of the deputy district attorney who had once represented all the defendants. In a review on mandamus a reviewing court can overturn the trial court's determination only if the trial court acted in excess of its jurisdiction or there is no rational basis in the record supporting the manner in which the trial court exercised the power and discretion vested in it. *Chadwick v Superior Court of Santa Barbara County (1980, 2nd Dist) 106 Cal App 3d 108, 164 Cal Rptr 864.*

On appeal from the issuance of a supplemental writ of mandate (*CCP § 1085*) compelling compliance by the State Personnel Board with a 1976 writ of mandate which had ordered it to grant an association of government engineers a "trial-type" hearing regarding prevailing rates for comparable service in other public employment and in private business, the board was estopped from challenging the propriety of issuing a writ commanding the holding of an adjudicatory hearing, where the judgment granting the initial writ of mandate had already been affirmed on appeal. Professional Engineers in *California Government v State Personnel Board (1980, 2nd Dist) 114 Cal App 3d 101, 170 Cal Rptr 547.*

In an action by recipients of aid for dependent children benefits against the Department of Benefit Payments alleging that a welfare regulation (EAS 44-113.24) was invalid because it did not allow deduction of all expenses reasonably attributable to the earning of income as required by *42 USCS § 602*(a)(7) and that the department unlawfully denied plaintiffs transportation expenses under the regulation, the trial court erred in limiting the scope of its judgment to the portion of the regulation that provided an allowance for transportation expenses alone rather than ruling on the validity of the regulation in its entirety, where a fair reading of the complaint revealed that plaintiffs challenged the validity of the regulation as a whole. Moreover, while plaintiffs' evidence showed a dispute only with regard to the transportation-expense portion of the regulation, they had standing to seek a writ of mandate commanding defendants to cease enforcing the regulation in its entirety since the question was one of public right and the object of the action was to procure the enforcement of a public duty. Accordingly, plaintiffs were entitled to a new hearing on their cause of action for writ of mandate and to a determination of the validity of the remainder of the regulation. *Green v Obledo (1981) 29 Cal 3d 126, 172 Cal Rptr 206, 624 P2d 256.*

When there is review of an administrative decision pursuant to *CCP § 1085*, judicial review is limited to an examination of the proceedings before the agency to determine whether its action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether it has failed to follow the procedure and give the notices required by law. Where the case involves the interpretation of a statute, the appellate court engages in de novo review of the trial court's

determination to issue the writ of mandate. *Pomona Police Officers' Assn. v City of Pomona (1997, 2d Dist) 58 Cal App 4th 578, 68 Cal Rptr 2d 205.*

Appellate review of the award of a public contract is governed by certain well-established principles. Thus, in a mandamus action arising under *CCP § 1085*, review is limited to an examination of the proceedings before the agency to determine whether its findings and actions are supported by substantial evidence. The review is limited to an examination of the proceedings to determine whether the agency's actions are arbitrary, capricious, entirely lacking in evidentiary support or inconsistent with proper procedure. There is a presumption that the agency's actions are supported by substantial evidence, and the petitioner or plaintiff has the burden of proving otherwise. The appellate court may not reweigh the evidence and must view it in the light most favorable to the agency's actions, indulging all reasonable inferences in support of those actions. Mandamus is an appropriate remedy to compel the exercise of discretion by a government agency, but does not lie to control the exercise of discretion unless under the facts, discretion can only be exercised in one way. *MCM Construction, Inc. v City & County of San Francisco (1998, 1st Dist) 66 Cal App 4th 359, 78 Cal Rptr 2d 44.*

A traditional writ of mandate under *CCP § 1085* is the method for compelling a city to perform a legal, usually ministerial, duty. When the court reviews an administrative decision pursuant to § 1085, it merely asks whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, or whether the agency failed to follow the procedure and give the notices the law requires. In reviewing the trial court's judgment on a petition for writ of ordinary mandate, the appellate court applies the substantial evidence test to the trial court's factual findings, but it exercises its independent judgment on legal issues, such as interpretation of statutory retirement provisions. *Kreeft v City of Oakland (1998, 1st Dist) 68 Cal App 4th 46, 80 Cal Rptr 2d 137, 53.*

CCP § 1085 authorizes a trial court to issue a writ of mandate to compel an act that the law specifically requires. A petitioner seeking a writ of mandate under this section is required to show the existence of two elements: a clear, present and, usually, ministerial duty on the part of the respondent, and a clear, present, and beneficial right belonging to the petitioner in the performance of that duty. Where the duty asserted is one allegedly arising out of statute and/or constitutional guaranty, an appellate court must engage in de novo review of a trial court's refusal to issue the writ. *Bergeron v Department of Health Services (1999, 5th Dist) 71 Cal App 4th 17, 83 Cal Rptr 2d 481, 21.*

In reviewing the trial court's ruling on a writ of mandate, the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. However, the appellate court may make its own determination when the case involves resolution of questions of law where the facts are undisputed. *Caloca v County of San Diego (1999, 4th Dist) 72 Cal App 4th 1209, 1217, 85 Cal Rptr 2d 660.*

In reviewing the denial of a petition for writ of mandamus, whether under *CCP § 1085* or *CCP § 1094.5*, the appellate court reviews questions of law *de novo. Fry v Saenz (2002, 3rd Dist) 98 Cal App 4th 256, 120 Cal Rptr 2d 30.*

In reviewing a peremptory writ of mandate issued by a trial court requiring the state water resources department to make a determination of the justness and reasonableness of its revenue requirement and that the procedure for making such determination had to comply with the Administrative Procedure Act, the court reviewed factual findings for substantial evidence but reviewed legal determinations *de novo. Pacific Gas & Electric Co. v Department of Water Resources (2003, 3rd Dist) 112 Cal App 4th 477.*

Court's standard of review regarding a legislative determination that a street was unnecessary was governed by *CCP § 1085*; *CCP § 1094.5* did not apply because the action involved was legislative in nature. *Citizens for Improved Sorrento Access, Inc. v City of San Diego (2004, Cal App 4th Dist) 2004 Cal App LEXIS 741.*

130. Appealable Orders and Judgments

Attempted appeal from peremptory writ of mandate issued pursuant to judgment must be dismissed. *De Martini v Department of Alcoholic Beverage Control (1963, 1st Dist) 215 Cal App 2d 787, 30 Cal Rptr 668* (disapproved on other grounds by *Harris v Alcoholic Beverage Control Appeals Board, 62 Cal 2d 589, 43 Cal Rptr 633, 400 P2d 745).*

Order denying motion to amend petition for writ of mandamus is not separately appealable. *Sunseri v Board of Medical Examiners (1964, 1st Dist) 224 Cal App 2d 309, 36 Cal Rptr 553.*

In a mandamus proceeding by taxpayers to remedy the effects of allegedly wrongful property assessments made by an assessor, defendants could not appeal from an order setting a standard for compliance with the main judgment and peremptory writ of mandate issued pursuant thereto establishing that the board of supervisors, through independent ex-

perts, and the assessor and board of equalization were to examine the former assessor's assessments and adjust them to the extent necessary and legally possible, where, if the standard was wrong in the case of any affected taxpayer, only that taxpayer could complain. *Knoff v San Francisco (1969, 1st Dist) 1 Cal App 3d 184, 81 Cal Rptr 683.*

An order granting or denying relief in a mandamus proceeding is appealable, and the appeal lies even though no final judgment was entered. *Daggs v Personnel Com. of Modesto (1969, 5th Dist) 1 Cal App 3d 925, 82 Cal Rptr 157.*

An order denying defendant's motion to suppress evidence under *Pen Code, § 1538.5,* is reviewable by a pretrial petition for writ of mandate or prohibition, or by an appeal from the judgment of conviction (*Pen Code, § 1538.5,* subds (i) (m)). There is no appeal from the order itself. *People v Jasso (1969, 2nd Dist) 2 Cal App 3d 955, 82 Cal Rptr 229.*

A trial court's order overruling a demurrer to a wrongful death complaint containing allegations relating to punitive damages was not an appealable order (*CCP § 904.1*), and a writ of mandate (*CCP § 1085*) could thus be issued. *Georgie Boy Mfg., Inc. v Superior Court of Los Angeles County (1981, 2nd Dist) 115 Cal App 3d 217, 171 Cal Rptr 382.*

131. Presumptions

In a proceeding in mandamus to compel reinstatement of a municipal civil service employee and payment of back pay, on appeal from an order sustaining a demurrer to the petition, the allegations of the petition had to be deemed to be true. *Gantenbein v Long Beach (1935) 9 Cal App 2d 726, 51 P2d 124.*

In an action to compel an association to restore plaintiff to membership therein, where it was necessary for plaintiff to allege and prove that he had exhausted the lawful remedies prescribed by the constitution and bylaws of the association for reinstatement, and a finding was made that plaintiff failed to present or file with the association or its officers any application for reinstatement as provided by its bylaws, and the appeal was on the judgment roll alone, it was to be presumed that such finding was supported by the evidence, and it was conclusive on appeal. *Coffey v Los Angeles Firemen's Relief Asso. (1937) 22 Cal App 2d 510, 71 P2d 328.*

It must be assumed on appeal that petition for writ of mandamus was heard on merits where demurrers to petition were dropped from calendar and alternative writ ordered discharged and petition dismissed. *Lassen v Alameda (1957, 1st Dist) 150 Cal App 2d 44, 309 P2d 520.*

Where the petitioner in a mandamus proceeding for reinstatement of employment failed to assert in his petition that the job from which he had been discharged had not been filled by the school district and where the court, in sustaining the demurrer, granted leave to amend and appellant failed to amend, an appellate court will presume that the petitioner has pleaded his case as strongly as he can and that he cannot truthfully allege that the vacancy resulting from his discharge still existed. *Wisuri v Newark School Dist. (1966, 1st Dist) 247 Cal App 2d 239, 55 Cal Rptr 490* (disapproved on other grounds by *Conti v Board of Civil Service Comm'rs, 1 Cal 3d 351, 82 Cal Rptr 337, 461 P2d 617).*

On appeal from a proceeding in mandamus, the presumption that public officials have performed their duty as required by law is applicable. *Cosgrove v County of Sacramento (1967, 5th Dist) 252 Cal App 2d 45, 59 Cal Rptr 919.*

All presumptions usually made by an appellate court in considering appeals apply to a proceeding in mandamus. *Cosgrove v County of Sacramento (1967, 5th Dist) 252 Cal App 2d 45, 59 Cal Rptr 919.*

On appeal from a proceeding in mandamus, the judgment is presumed to be correct, and the burden is on appellant to show reversible error. *Cosgrove v County of Sacramento (1967, 5th Dist) 252 Cal App 2d 45, 59 Cal Rptr 919.*

All presumptions usually made by an appellate court in considering appeals apply to a proceeding in mandamus; the judgment is presumed to be correct, and the burden is on appellant to show reversible error. *California Federation of Teachers v Oxnard Elementary Schools (1969, 2nd Dist) 272 Cal App 2d 514, 77 Cal Rptr 497.*

132. Harmless and Reversible Error

In a mandamus proceeding to review the evidence of an administrative board, error in striking the record of oral evidence before the board was harmless where evidence introduced as in an unlimited trial de novo supported the findings and judgment, and this, despite the fact that the petitioner's testimony before the board was more detailed than in the trial court. *Russell v Miller (1943) 21 Cal 2d 817, 136 P2d 318.*

In mandamus proceedings to compel local administrative officers to issue licenses to petitioner to operate an amusement game, error in admitting evidence on the question of whether the game is one of skill or chance is prejudi-

cial where it is doubtful whether the evidence in the case sustains the court's finding that the officers had insufficient basis for their denial of the license, that the game is one of chance, and where the record demonstrates that the court's judgment granting the writ was based to a considerable extent on the inadmissible evidence. *Fascination, Inc. v Hoover (1952) 39 Cal 2d 260, 246 P2d 656.*

In proceeding in which court has entered judgment denying writ of mandate to compel city council to declare that initiative restricting ordinance which received majority, but not three-quarters vote required by its term for passage, had been adopted, it is not reversible error to refuse permission, asked after entry of judgment, to amend petition to seek declaratory relief where, in view of changed conditions, any redistricting proposition should be based on new proceeding signed by required number of voters. *Hass v Palm Springs (1956, 4th Dist) 139 Cal App 2d 73, 293 P2d 61.*

It was reversible error to grant People's petition for writ of mandate to compel justice court to set aside its ruling granting pretrial motion to suppress results of blood alcohol test and admit such results into evidence in criminal trial for drunk driving, such pretrial motion to suppress evidence being considered incidental to criminal case, not independent proceeding. *People v Justice Court of Oroville Judicial Dist. (1960, 3rd Dist) 185 Cal App 2d 256, 8 Cal Rptr 176.*

It was reversible error to sustain a demurrer to a petition for administrative mandamus without leave to amend, where, although petitioner did not actually plead sufficient facts to estop the respondent from asserting the statute of limitations or laches, the allegations suggested that it might have been able to do so. *Bostick v Martin (1966, 4th Dist) 247 Cal App 2d 179, 55 Cal Rptr 322.*

The seizure of an allegedly obscene motion picture film was invalid, and it was reversible error for the trial court to deny the petitions of the theatre owner and operator in mandamus to compel the film's return to them, such seizure amounting to a violation of *US Const, 1st Amend*, where, in the exercise of the discretion of two police officers, who believed the film constituted an exhibition of obscene matter in violation of *Pen Code, § 311.2*, the seizure was made as an incident to defendants' arrest on that charge, without the issue of a search warrant or other judicial determination of the obscene character of the film, despite its public showing for the previous two weeks. *Flack v Municipal Court for Anaheim-Fullerton Judicial Dist. (1967) 66 Cal 2d 981, 59 Cal Rptr 872, 429 P2d 192.*

On appeal from an adverse ruling in a mandamus proceeding involving judicial inquiry into grounds supportive of a warrant under which an allegedly obscene motion picture film was seized, error could not be predicated on the trial court's failure to make requested special findings as to whether the material in question was constitutionally protected and as to whether it appealed to prurient interests, exceeded customary limits of candor or was without redeeming social importance, where the requests were drawn in the context of an on-the-merits pretrial determination as to the obscene character of the material, whereas the question before the court was whether a person of ordinary intelligence and receptivity would conscientiously entertain a strong suspicion that the material had any of the listed characteristics, and where it could not be determined from the record presented whether there was a record before the trial court which would call for it to make the findings on the subjects listed. *Monica Theater v Municipal Court for Beverly Hills Judicial Dist. (1970, 2nd Dist) 9 Cal App 3d 1, 88 Cal Rptr 71.*

If a petition in mandamus sets forth a prima facie basis for relief, refusal to issue the alternative writ constitutes reversible error. *Turner v Hatch (1971, 2nd Dist) 14 Cal App 3d 759, 92 Cal Rptr 643.*

Denial by a private nonprofit hospital of a physician's application for staff privileges, which was not supported by a proper showing on the stated basis of the applicant's inability to work with others as required by a hospital bylaw, could not be upheld on the basis of other evidence in the record assertedly showing that the doctor's veracity was subject to question, where the form of notice given him concerning his initial rejection fell short of advising him of the full scope of the inquiry to be pursued at a subsequent judicial review committee hearing, and where the dominant focus of all of the hospital's administrative proceedings on the doctor's application was that of his ability to work with other hospital personnel in a manner which would not impair the quality of medical care offered. Thus, the record as a whole raised a significant and real doubt whether the deliberative bodies involved, had they been faced with only such other evidence, would have reached the result that they did. *Miller v Eisenhower Medical Center (1980) 27 Cal 3d 614, 166 Cal Rptr 826, 614 P2d 258.*

Where the facts were undisputed, the appellate court independently reviewed the trial court's finding that a charter school's facilities request was sufficient to document how many students were meaningfully interested in enrolling for the following year. *Environmental Charter High School v Centinela Valley Union High School Dist. (2004, Cal App 2nd Dist) 2004 Cal App LEXIS 1509.*