

# **JUDICIAL REVIEW PROCEDURES ACT**

## **REPORT (HB 3027)**

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# **CLARIFYING JUDICIAL REVIEW: AN EXPLANATION OF THE JUDICIAL REVIEW PROCEDURES ACT \***

## I. WHAT IS "JUDICIAL REVIEW"?

The general label "judicial review" applies to those proceedings in which a court is asked to determine the legality of a governmental action or its application under specific circumstances. The phrase does not include litigation of ordinary civil claims involving government, such as disputes about contracts, ownership of property, or damage claims for injuries to persons or property. American law prides itself on allowing anyone to seek protection from allegedly unlawful governmental acts. What Americans mean by "the rule of law" takes the form of judicial review of acts of governmental power in independent courts.

The goal of judicial review is to leave policy judgments to governmental policymakers rather than judges, while ensuring that officials stay within their legal authority, follow prescribed procedures, and have a factual basis for their decisions when that is legally required. Most government acts are not challenged and consequently never reviewed, although they would readily survive a legal challenge if one were raised. That is as should be expected of state and local governments conscious of their legal accountability. But this is an argument for an efficient system, not for attempts to place some actions beyond judicial review altogether.

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\* This report accompanies LC 1564 a proposed bill intended to clarify the law of judicial review of government action. The proposed bill provides a uniform set of procedures and standards of review for challenges to state and local government action. The proposed bill is the result of a project of the Oregon Law Commission. The Commission appointed a Work Group on Judicial Review of Government Action including members and former members of the Oregon Legislature and the judiciary, attorneys representing state and local government, and attorneys representing private parties. The members of the Work Group are: Hardy Myers, Chair; Hon. David Brewer; Paul Elsner; Janice Krem; Hans Linde; Scott Parker; Meg Reeves; Steve Schell; Philip Schradle; Rep. Lane Shetterly; and Martha Walters. Senior Deputy Legislative Counsel David Heynderickx provided substantial drafting help to the Work Group in preparing the proposed bill. The Work Group also received particular help from interested participants, including Lorey Freeman, Christy Monson, Paul Snider, and Ruth Spetter. Finally, the tireless efforts of David Kenagy, Wendy Johnson, and Rosalie Schele of the Oregon Law Commission staff have been indispensable in getting the project to this point. The members of the Work Group and the other interested participants have devoted a great deal of time and effort to develop this proposed bill. This project generated vigorous discussions on a number of topics and the resulting proposal has been improved substantially by the diligent efforts on the part of all who have participated. This report was prepared for the Commission by Hardy Myers, Attorney General, and Philip Schradle, Special Counsel to the Attorney General, and we in particular wish to thank all those who have participated for their contributions to this project.

## II. THE LAW OF JUDICIAL REVIEW

While the principle of judicial review is clearly established, the rules under which courts in Oregon exercise judicial review comprise a patchwork of old writs, inconsistent statutes, and case-by-case judicial improvisations. This is confusing to judges, as well as lawyers, and to the parties on either side of judicial review, at needless cost in time and money to all involved.

Articulating clearly by statute the process for judicial review of governmental acts, including the courts' scope of authority in conducting that review, has at least three major benefits. First, the procedures for obtaining review can be clarified. Second, the predictability and uniformity of judicial decisions can be enhanced. Third, setting out the standards by which courts review governmental decisions limits occasions for judges to extend their authority to change or reverse governmental decisions that they deem unjustified on their merits. See Brodie and Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 Ariz. St. L. J. 537.

### A. The current patchwork system creates a need for reform.

In 1985, Professor Barbara Safriet described Oregon's system for judicial review of government actions as a "hodgepodge of common law, equitable, extraordinary, and legislatively created provisions." Safriet, *Judicial Review of Government Action: Procedural Quandaries and a Plea for Legislative Reform*, 15 Env. L. J. 217, 218 (1985). She noted that the problem with Oregon's seemingly "ad hoc," "hit-or-miss approach" to judicial review is "not merely academic" but is one the courts themselves have noted on several occasions:

In the most recent and perhaps the most stinging opinion, Chief Justice Peterson, concurring in *Forman v. Clatsop County*, [297 Or 129, 133, 681 P2d 786, 788 (1984)] remarked: "If a person intended to create an inefficient, unpredictable, ineffective, expensive, unresponsive system for review of governmental acts, he or she would use the system we have in Oregon as a perfect model. Ours is senseless and cries for revision."

*Id.*

Professor Safriet summarized the key issues and the problems that occur under Oregon's system:

The myriad difficulties identified by Chief Justice Peterson and others most frequently manifest themselves to the appellate courts in the form of a few key issues. Primary among them are the proper choice of remedy from among the remedies potentially available and the proper choice of forum for review. This is so because, in any challenge to governmental action, one of the plaintiff's most difficult tasks is determining which form of relief to pursue in which court. This determination most often depends on the nature of the challenged action, thus forcing the potential plaintiff to exhibit extraordinary prescience, because the "legal characterization of the governmental action involved, for instance as 'legislative,' 'ministerial,' 'discretionary,' or 'judicial or quasi-judicial,' decides not only the merits of the

challenge but at the same time the propriety of the petitioner's choice of a remedy and procedure." More specifically, challenges to local action tend to involve choice of remedy problems, while challenges to state action more often involve choice of forum problems.

In addition to these crucial issues, other problems plague the potential plaintiff. They include identifying the appropriate evidentiary standards for, and ascertaining who has standing to pursue, judicial review. Furthermore, two added problems not reflected in the case law are sometimes encountered in the courtroom. First, circuit court judges tend to allow a full trial of every aspect of the challenged action, even when only judicial review of the pre-existing record is called for. Second, the same judges, having found error, often usurp governmental authority by mandating the "correct" action instead of allowing the governmental unit to exercise its remaining discretion.

Id. at 218-219 (footnotes omitted).

Professor Safriet's comments describe not only the plight of a citizen seeking judicial review of government actions, they also reflect the time-consuming, resource-expensive nature of the process, including the delay and costs of appeals, for the governmental bodies that must defend their actions and for the courts that must attempt to disentangle procedural snarls unrelated to the legal merits of these actions. Much expensive briefing and argument is devoted to procedural and jurisdictional issues rather than addressing – and disposing of – the merits of challenges to governmental actions.

#### **B. The goal of reform – a uniform way to initiate a challenge to government action.**

The concerns noted above have led the collective Oregon Judicial Conference as well as individual Oregon Supreme Court Justices to call for a comprehensive and coherent general law of judicial review. Concrete proposals have been thoroughly studied by interim legislative committees for several sessions and now by the Oregon Law Commission. Former Oregon Supreme Court staff attorney Roy Pulvers, now in private practice, worked on development of the 1995 proposal of the Judicial Review Act (JRA) sponsored by the Judicial Conference. He described that proposal in the following terms:

The JRA does not change the range of reviewable governmental actions; it does not subject any additional governmental actions to judicial review. The JRA also does not apply to claims for monetary damages, including tort claims, contract claims, certain statutory discrimination claims, and condemnation actions. Such claims are expressly exempted from the statute, as are claims presently routed through such adjudicative bodies as the ERB [Employment Relations Board], EAB [Employment Appeals Board], LUBA [Land Use Board of Appeals], and the Workers' Compensation Board.

Under existing law, it is essential for the parties and the court to determine, at the outset, whether a challenged governmental action (such as a decision to vacate a street or to implement an ordinance in a particular fashion) is legislative, judicial, quasi-judicial, administrative, ministerial, discretionary, etc. That labeling presently may control and vary such essential (and sometimes dispositive) aspects of the

judicial challenge as the time for filing, the correct form of writ or action, the appropriate forum or procedure for the challenge, and the relief available. Parties respond to the existing uncertainty by filing multiple claims for relief within a single action or by filing multiple actions, sometimes in multiple forums, to challenge a single government action (*e.g.*, writ of review, mandamus, writ of prohibition, declaratory judgment, injunction, petitions for judicial review, petitions for reconsideration before the government body).

The JRA responds to this problem by providing for one all-purpose form of proceeding and by standardizing, across the range of cases seeking review of government actions, the rules regarding time for filing, standing, ripeness, exhaustion of remedies, preservation of claims, standards of judicial review, the record on review, and the circumstances and procedures for judicial factual and legal determinations.

That description applies equally to the goal of the current proposed Judicial Review Procedures Act (Act). This proposal, too, is addressed only to setting out a comprehensive and coherent system for general judicial review. This judicial review law would only govern what judges do once a case is filed in court. This proposed Act does not prescribe how state or local government should conduct their business.

### **C. The elements of judicial review.**

Any system of judicial review consists of a number of elements. It must answer basic questions of "who, where, when, what, how, how much, and with what effect." These questions are of procedural importance mainly to litigants and judges. Here they are discussed in order of their importance rather than in procedural sequence.

1. Coverage: What actions are reviewable? Any government action may be brought before a court, as may a failure to act when some action is legally required, although the court may dismiss or deny a claim for a number of different reasons. This is true now, and this Act does not change that fact. It applies to elected policy makers and to state or local government units. The Legislative Assembly, for instance, could not insulate its own statutes from constitutional challenges.

The Oregon Law Commission nonetheless heard and considered expressions of concern about the definition of "government action" (Section 2(4)) and the definition of "administrative act" (Section 2(1)). But upon closer scrutiny no legal analysis supports those concerns.

Definition sections have no legal force of their own, but only define the meaning of words that are used in the operational sections of a law. Section 2(4) defines the term "government action" simply as a collective term for "administrative acts" and "enactments" (statutes, ordinances, rules, and other official written statements (Section 2(2))). Since the subject of the bill is judicial review of government actions, the question is whether the definitions of "enactments" and "administrative acts" bring anything into potential review that presently cannot be legally challenged under any circumstances. The answer is that they do not.

Some members of the Commission's Work Group representing local governments have contended that the definitions are too sweeping by suggesting hypothetical cases in which judicial review would appear unwarranted. Most of the hypothetical examples – discretionary choices in the conduct of schools, parks, or other local affairs – in fact would not survive the preliminary motion to dismiss the appeal process set out in Section 6 of the proposed bill. But that is because they are discretionary, not because they are not government actions.

The appropriate legal boundary for determining whether an act is reviewable under this Act is the dividing line between private acts and acts taken on behalf of a public entity. For example, members of a part-time board may buy dinner and a gift for a retiring employee, but if they pay with public funds it is a government action. Similarly, the choice of paint for schoolrooms may seem discretionary, but perhaps not if the paint contains lead. The crux of the matter is that if any particular act is governed by a legal rule or standard – which often is the disputed question on judicial review – the act should not be beyond judicial review because it is outside a narrow definition of government action.

Of course, courts will dismiss any attempted challenge when there is no plausible basis for it. The Act seeks to accomplish this as expeditiously as is compatible with fairness to the citizen seeking review. But dismissal should not result from falling into one of the numerous procedural traps now scattered throughout the present haphazard collection of separate remedies.

Efforts to place one or another kind of government action beyond judicial review by excluding it from a judicial review reform bill are misguided, because they only compel judges to revert to the pre-reform methods of review. The Act does preserve existing statutory review procedures for those specialized fields in which special procedures have been thought necessary, including parole decisions, government contracts, taxation, employment relations, workers' compensation, and land use - areas that include specialized tribunals for the first stage of review. See Section 3(5).

2. Types of government actions. Broadly speaking, government actions fall into two categories. The categories divide between general and specific actions instead of between actions by state and by local officials. The two categories call for different standards of judicial review, regardless of who takes the action.

One category includes policies officially adopted to govern more than one instance. These may range from statutes and ordinances through state agency rules to the lowest levels of official rule-making or standard-setting, as long as these standards are adopted to apply "generally," *i.e.*, in more than one instance. The Act defines such a government action as an "enactment." See Section 2(2).

The second category is the application of an existing rule, or an exercise of delegated discretion, in a particular instance. It includes official actions directed to one or more named persons, now commonly called "orders," as well as actions taken in pursuit of some governmental program that are not issued as "orders" or addressed to or directed against anyone. These are the mass of official actions that do not lay down a rule. The Act describes them as "administrative acts." See Section 2(1).

The distinction between these two categories largely corresponds to the current distinction between “rules” and “orders” under Oregon’s Administrative Procedures Act (APA). This should permit substantial reliance on existing case precedents for reviewing actions of state agencies. The broader terms “enactments” and “administrative acts” are needed, however, because the Act includes review of local ordinances and resolutions, as well as statutes, and because the Act covers managerial or operational acts that do not fit into the APA term “order.” The significant gain here is that a challenger need not wade through a morass of possible types of legal actions to determine how to challenge the particular type of government action at issue. The challenger instead can initiate a challenge to any type of government action through one, uniform method – *i.e.*, by filing a notice of appeal under this Act.

3. State or local actions. Local officials, by virtue of their elective office, may intuitively feel that their actions have a distinctive character and should be viewed differently from similar acts of state officials. But in legal analysis and court procedures, there is no reason to distinguish between state and local actions in a judicial review bill. Their legal characteristics are the same for purposes of judicial review and require the same analysis, though the analysis may lead to different results. Government actions are either enactments or administrative acts, and reviewable as such. This is why the Act applies to any "government unit," as provided in Section 2(5).

Instead, the important question for policymakers and for citizens is how courts analyze and dispose of the issues on review. In fact, a coherent system is more urgent for courts reviewing local actions because judicial review of state agencies already is mostly statutory, even if incomplete and inconsistent, while much judicial review of local government action is governed by outdated writs and improvised judicial opinions. The consistent approach provided in the Act actually helps local governments because it should cause courts to refrain from substituting their own judgment for the choices of local officials just as the Act does for state officials.

Some members of the Commission’s Work Group representing local governments expressed concern that Section 17(7) might invite legal claims based upon inconsistent actions that the turnover in volunteer elected officials and the absence of long-term staff and records make inevitable. While this concern is understandable, it is addressed by changes made in this subsection after the original draft. Section 17(7) does not open the door to every claim alleging inconsistent action. As now written, this subsection applies only when the enactment at issue, the enactment’s interpretation in practice by the government unit, or some other law (not this Act) requires that the government unit make consistent decisions in applying an enactment to its citizens. Furthermore, this subsection requires only that the government unit be able to explain the reason for any difference in treatment. And most important, the subsection expressly does not prevent a government unit from changing any policy whenever newly elected or appointed officials choose to do so by establishing a new policy through an enactment.

#### 4. What courts decide: The scope of judicial review.

The scope of review is central to the law of judicial review. It is set out in Section 17 of the Act. A government action may be disputed on different grounds. Some claims concern only an issue of law, for instance the interpretation of a statute or other enactment.

Some challenges dispute whether the government followed prescribed procedures. More often there is no disagreement about the law but a dispute about its application to the particular facts in the case. Often, the nature and scope of judicial review hinges on the initial question of whether facts matter to the legality of the government action at all. Some cases involve both legal and factual issues. Section 17 sets out an analytic framework for the courts to use in conducting review of government actions.

(a) *Issues of law.* The Act assigns to the courts the familiar judicial task of interpreting legal texts like statutes, regulations, ordinances, and constitutional provisions, including interpretation of the range and limits of discretion that a law delegates to officials. See Sections 17(2)-(6), (8)-(9). Courts are directed, however, to respect the government unit's special knowledge of technical terms or terms used in its own enactment, unless the agency's interpretation cannot be reconciled with the text, context and legislative history of the enactment. See Section 17(6).

(b) *Issues of fact.* When facts are in dispute, a judicial review law must direct the reviewing court's role in that dispute. If a government unit, following proper procedures, has determined the facts on which it acts, courts do not simply determine the facts for themselves, as they might in a private dispute. That is, courts are not to substitute their own view of the facts for those of responsible public entities.

Judicial review of a factual disagreement, however, depends on the manner in which those facts were found, whether the opposing party had an opportunity to dispute the evidence, and how that evidence is available to the reviewing court. If the government action rests entirely on evidence in a factfinding record, the court ordinarily reviews only that record. (Examples are revocation of an occupational license or denial of unemployment benefits.) Because such factfinding procedures are not required to enact most laws, rules, ordinances, or for discretionary actions, the court's role in reviewing any legally essential facts in those situations is different from its role in reviewing the facts on which an administrative action is based. These rules are set out in Section 17(3).

#### **D. Remedies.**

1. *The present confusion.* Appeals from government actions or inaction sometime seek that specified action be taken or stopped, a rule be invalidated, an order be reversed and a license or benefit be reinstated, or money be paid or property restored. The current procedures for asserting these claims include injunctions, mandatory injunctions, writs of mandamus, writs of review, writs of prohibition, actions for "inverse condemnation," petitions for declaratory judgment, and special statutory procedures. In the absence of a comprehensive law, such claims may require separate kinds of writs, perhaps in different courts and under different time schedules, wasting time and money in litigating and appealing procedural issues instead of the merits of the claim. Forty years ago, a famous treatise by Professor Kenneth Culp Davis said of the writs:

An imaginary system cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation would copy the major features of the extraordinary remedies. For the purpose of creating treacherous procedural snares and preventing or delaying the decision of cases on the merits, such a scheme would insist upon a plurality of remedies.



See 3 K. Davis, *Administrative Law Treatise* §§ 24.01, at 388 (1958). The cure, Professor Davis wrote, was to establish a single, simple form of petition for judicial review. This Act moves far toward that goal. The Act consolidates all available forms of relief in Section 20, allowing judges to award the proper relief without the filing of another suit.

2. *Who, where, when?* Clear and consistent answers to these procedural questions are essential to persons seeking judicial review, to government units, and to the courts. The Act specifies who is eligible to seek review (Section 7), when review may be sought (Sections 8, 9 and 10), and the proper court in which to seek review (Sections 11 and 13). If an appeal needs to be considered in a different court or tribunal from the one in which it is first filed, an important part of the Act allows the case to be transferred easily (Section 12).

In the great majority of cases, judicial review is sought by individuals, businesses, or other entities whose financial or personal interests are adversely affected by the government action at issue. But some government actions (or inaction, where action is legally required) deal with communal rather than individual interests. Examples include environmental interests such as protection of non-human species or protection of public amenities such as parks, monuments, or historic buildings, as well as government actions that may constitute an unlawful establishment of religion. There are also some disputes about the legality of a practice that need review before any identifiable person is injured. Such issues could range from establishing the validity of a bond measure to alleged practices of racial profiling. On the other hand, some prerequisites are needed so that government action is not unduly delayed or subjected to costly litigation on the unwarranted petition of any individual who chooses to file an appeal and to assure that persons purporting to represent a public interest are capable of doing so. The Act's provision on "standing" appears in Section 7.

In 2001, the Oregon Law Commission approved an earlier version of this proposal and submitted it for enactment by the Legislative Assembly. That proposal became HB 2246. HB 2246 was not enacted into law, but the Commission authorized continuation of the Judicial Review Procedures Act Work Group to attempt to address concerns that were raised about the proposal. During the last two years, the Work Group convened on numerous occasions and received input from a broad range of practitioners. The participants in the Work Group included persons with experience representing state and local governments, private practitioners with experience representing persons challenging state and local government actions, current and former members of the judiciary, and current and former members of the Legislative Assembly. The basic framework of the proposal has remained the same, but there have been many changes incorporated in particular sections to address specific issues that were raised in the Work Group discussions. The Summary that follows explains specific sections of the Act in more detail. It is essential, however, to keep in mind that the Act seeks only to clarify and systematize procedures in courts. It does not govern the powers or procedures of governmental bodies.

### III. SECTION-BY-SECTION EXPLANATION

#### **Overview**

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#### **Section 1. Purpose and Scope**

This section emphasizes that the Act is intended to be procedural and not substantive. It states that the Act addresses judicial review procedures only. It further states that the Act does not increase the range of government actions that are judicially reviewable beyond those currently reviewable through some form of legal action and that the Act does not require any government unit to change its own procedures or policies.

#### **Section 2. Definitions**

This section defines the important recurring terms used in the Act. A "government unit" (subsection 5) includes all state and local government entities. These units perform

"government action" (subsection 4) which includes both a government unit's acts and a government unit's failures to act when action is legally required. All government action is either an "enactment" (subsection 2), which is an official written statement of general effect such as a statute, rule, ordinance or other policy statement, or an "administrative act" (subsection 1), which includes final judicial or quasi-judicial decisions of a government unit and other government actions that are not enactments. A "final government action" (subsection 3) is the actual performance of an act or the issuance of a decision or statement for which no further procedures are required as a condition of the action becoming effective, and it is reviewed in a "judicial review proceeding" (subsection 6) which is commenced by filing a notice of appeal as prescribed in Section 4. The "person" (subsection 8) who files the notice could include an organization or other entity, including a government unit.

### **Section 3. Judicial review of government actions; exclusivity; exceptions**

Section 3 defines the coverage of the Act. It states that the Act is the exclusive means of seeking judicial review of all government action unless otherwise specified elsewhere in the section (subsection 1). The exceptions include: procedures or standards required by federal law (subsection 3); actions that, under other statutes, receive mandatory direct review in the Supreme Court of Oregon (subsection 4); a civil action commenced in circuit court seeking compensation for a taking of property (subsection 6); judicial review of government action that occurs as an incidental part of a judicial proceeding initiated by government or between two individuals (subsection 7); and 30 specific exceptions (subsection 5).

The list of exceptions embodies the general policy that the legal validity of government actions should be reviewed under the procedures and standards of this Act unless there are already in place well-established procedures and standards more suitably tailored to the particular type of government action involved. Examples of these kinds of exceptions include matters currently subject to review by the Workers Compensation Board, the Land Use Board of Appeals, the Employment Relations Board, and the Employment Appeals Board; decisions of the State Board of Parole and Post-Prison Supervision; and actions within the jurisdiction of the Oregon Tax Court.

The exceptions also recognize there are types of claims that are not addressed to the question of whether the government action is valid when measured against applicable law, but instead seek redress for actions already taken. Examples of these kinds of exceptions include actions based on contracts, tort actions, claims for habeas corpus relief and condemnation claims.

### **Section 4. Notice of appeal**

Under this section, the notice of appeal should contain the filer's name and address, the name and address of the government unit that made the challenged government action, the action being challenged, the date of that action, a brief statement of the nature of the alleged errors, and the names and addresses of other parties, if there are any (subsection 2). A copy of the notice should be served on the Attorney General if the appeal challenges the validity of a statute (subsection 5) or on the appropriate city attorney or county counsel if the appeal challenges the validity of an ordinance or charter provision (subsection 6). Timely filing of the notice of appeal is the only real jurisdictional requirement, however. Failure to comply with any of the other requirements in Section 4 generally is not a ground for

dismissal unless the failure causes substantial prejudice to another party (subsection 7). A notice of appeal generally may be amended at any time before the appealing party files the next required document – the petition for review in circuit court or the petitioner’s brief in the appellate court (subsection 8). The State Court Administrator is required to develop a standard form for notices of appeal to assist *pro se* litigants in completing this step of the process (subsection 9).

## **Section 5. Time limitations on filing notice of appeal**

Different types of appeal have different time limitations. The time limit for appealing an enactment generally is two years (subsection 1). But a challenge to an enactment that appropriates money must be brought within 90 days after the date of the enactment (subsection 2). The different timeframes are an acknowledgment that government units must be able to plan and act expeditiously and with certainty regarding budgetary and financial matters.

The Act also provides specific timelines for challenging administrative acts. If an administrative act is in writing, the limit is 60 days from when the action becomes effective. If the action is a decision taken at a public meeting, the limit is 60 days from the date of the meeting. If the action, including a previously authorized action, is not in writing and not taken at a public meeting, the limit is 60 days from when the person found out about the action, or should have found out (subsection 3). If the challenged government action is an alleged failure to take action within a legally prescribed time, then the challenger must give the government unit notice of intent to require compliance, and the challenger then can file the notice of appeal 35 days later if the government unit has not acted (subsection 4). But in no case can such a challenge be filed more than two years after the time provided by law (subsection 4).

Finally, the Act also permits, but does not require, a government unit to provide for rehearing or reconsideration of administrative acts, and the Act provides a process for a person to request that the government unit consider additional evidence regarding the government action. If rehearing or reconsideration is available, a timely request for rehearing or reconsideration tolls the time for filing a notice of appeal. If a request for reconsideration or rehearing, or a request for consideration of additional evidence, is timely filed with the government unit, the time for filing a notice of appeal is tolled during consideration of the request, and the notice of appeal must be filed within 60 days after the date the government unit has given notice of its final action on the request (subsection 5). These timelines, however, apply only to petitions seeking affirmative relief. A person may still challenge the validity of a law in defending against a government action taken against that person whenever that may occur.

## **Section 6. Preliminary motion to dismiss**

In judicial review proceedings filed in circuit court, the Act provides that a preliminary motion to dismiss may be filed within 21 days after the notice of appeal is filed and served. The grounds for such a motion to dismiss generally are limited to the grounds provided for motions to dismiss trial court proceedings under ORCP 21 – *i.e.*, matters of law. The early timing of this motion to dismiss is intended to allow dispositive legal issues to be addressed before costs associated with preparation and filing of the record are incurred.

The Act strikes a balance between two legitimate concerns. For government units, defending against unfounded lawsuits and filing the required record are significant expenses distinct from the governmental interest in the eventual outcome. Government units, therefore, justifiably seek dismissals on the quickest available grounds. Many citizens, on the other hand, are unable to file appeals meeting the requirements of Section 4 or to obtain legal counsel within the allotted time for the filing of a notice of appeal. The requirements for the notice of appeal, therefore, cannot be made too technically demanding. Yet there is a need to have the grounds for appeal set out in a manner sufficiently informative to permit a judge to decide whether an appeal is entirely frivolous or baseless without waiting for submission of the government's record. Section 6 addresses the procedure and the standards for this determination. Section 6 also has a built-in safeguard which provides that, when the reviewing court determines review of the record would assist it in ruling on a preliminary motion to dismiss, the court can require the government unit to file the record before the court will rule on the motion (subsection 4).

### **Section 7. Qualified petitioners**

This section provides that the following persons may file a notice of appeal: a party to a judicial or quasi-judicial proceeding; a person to whom a government action is specifically directed; a governmental entity if the challenged action will affect its ability to carry out its policies; a person who has suffered injury to a financial, voting or other legally recognized interest; and an association or organization if the action will injure the interest represented by the association. Further, an association or organization has "standing" to appeal on behalf of one of its members if the member is adversely affected by the challenged government action (subsection 9).

This section explicitly recognizes representational and organizational standing for purposes of judicial review under the Act. This broadened standard for "standing" serves two important objectives: It allows citizen organizations to challenge unauthorized or unlawful government acts that injure public values but do not injure specific persons (*e.g.*, protection of biological species or esthetic values or violations of the ban against public establishment of religion), and it ensures that state law "standing" requirements comply with federal law requirements applicable to federally funded programs. The organization seeking review to protect a public interest need not exist for any particular length of time, but it must have 25 or more members and represent an identifiable interest. For example, 25 neighbors or community members may associate to protect the particular public interest they assert is unlawfully threatened by government action. The number 25 is proposed only as one reasonable balance between the need to allow people jointly to challenge the legality of government action and the need to ensure that the asserted interest is truly a public interest and is seriously presented before imposing the costs of litigation on a government unit.

### **Section 8. Ripeness**

Generally, only final administrative acts of a government unit are subject to judicial review, unless the claim asserted is that a government unit has failed to act when required to do so by law (subsection 1). This requirement serves the dual functions of ensuring that governmental entities have the opportunity to make the program and policy decisions with which they are charged and that disputes over those decisions are resolved in an orderly and

expedient manner, with resort to judicial intervention only when the government unit has made its final determination. There should be an exception, however, when the challenger can establish a reasonable likelihood of prevailing on review of the challenged administrative act and the challenger or the public will suffer substantial and irreparable harm if relief is not granted immediately. This subsection in its entirety is intended to allow for immediate review only when the challenging party can make some showing the government unit is proceeding incorrectly and the challenging party will suffer irreparable injury. The availability of immediate review should be limited so that government entities have the opportunity to carry out the programs for which they are responsible.

The balance struck in this section requires that the challenging party be able to show that the party is likely to prevail *and* that the party will suffer irreparable harm if the government unit is allowed to proceed. Under the currently existing provisions of the APA, a party challenging a state action must only show that the agency is proceeding without probable cause *or* that the party will suffer substantial and irreparable harm if interlocutory relief is not granted. There is no logical underpinning, however, for the idea that a party should be able to forestall an agency proceeding simply based upon a claim of irreparable injury without some showing that the agency action is also incorrect. For example, a licensee should not be able to stop a license suspension proceeding from occurring merely by showing that the suspension of the license will cause the licensee irreparable injury. There may well be ample (or even compelling) justification for the license suspension regardless of the irreparable injury that would accompany the suspension of the license. Consequently, the balance struck in this section would require a showing that the challenging party is likely to prevail in its challenge and that the challenging party will suffer irreparable harm if the government unit is allowed to proceed. This would permit interlocutory review in those limited circumstances where it is appropriate. Finally, subsection 3 of this section makes clear that when a person challenges a government action before it is final, the court may dismiss the judicial review proceeding without prejudice to the challenger's ability to challenge the action later, or the court may stay the judicial review proceeding until the government action becomes final.

## **Section 9. Exhaustion of remedies**

Section 9 involves the timing of a notice of appeal. It requires a person generally to pursue all remedies available from the government unit before seeking judicial review (subsection 1). This requirement is necessary to ensure that disputes are resolved at the lowest level possible in order to save all the parties to the dispute, as well as the court system, from needless judicial involvement and the costs associated with litigation. This section does not itself impose any new requirements, but instead requires challengers to pursue all remedies that are required by other law. There are, in addition, exceptions built into this section for situations where the remedy available from the government unit is inadequate, the person was misled by the government unit about the need to pursue such a remedy, or when pursuing that remedy prior to judicial review would cause irreparable harm (subsection 2). Finally, this section makes clear that when a person has filed a notice of appeal before pursuing all available remedies available from the government unit, the court may dismiss the judicial review proceeding or stay the proceeding until the person has exhausted the available remedies and the government action has become final (subsection 3).

## **Section 10. Reviewable issues**

This section states the general rule that a person must, if possible, raise an issue before the government unit in order to raise that issue on appeal (subsection 1). But this section also makes clear that if the issue was raised by any person before the government unit the issue may be raised by a challenger on appeal (subsection 3). This requirement applies only to judicial review of administrative acts. Like Section 9, it serves the salutary function of encouraging issues to be presented to, and resolved by, the government unit before the expense of judicial processes is imposed on all the participants involved in the dispute. It also ensures that judicial review does not usurp the authority of governmental decision-makers, which is likely if governmental decisions are reviewed based upon claims never presented to the governmental unit. The section, however, also provides an appropriate escape valve that allows a new issue to be raised on judicial review when the person seeking review did not have a reasonable opportunity to raise the issue before the governmental unit (subsection 1(a)). This would apply to circumstances where no proceeding was conducted before the governmental unit or where the party seeking judicial review had a justifiable reason for not presenting the issue to the governmental unit for decision. Furthermore, this section also provides in subsection 1(b) that an issue can be raised for the first time on appeal from a state agency proceeding if the issue is one that the agency or a hearing officer had a duty to raise under ORS 183.415(10). This provision is intended to ensure that the duty imposed under ORS 183.415(10) is not inadvertently affected by the provisions of this Act. This section further provides that, if the court believes that to render its decision it may need to address legal issues the parties on appeal have not addressed, the court should allow the parties on appeal an opportunity to address those issues (subsection 4). Finally, this section carries forward the existing limitation that a person cannot bring a separate, facial challenge to an enactment if that person is a party to a judicial or quasi-judicial proceeding in which the validity of the enactment can be challenged (subsection 5).

## **Section 11. Authority of the courts.**

Generally, the Oregon Court of Appeals has original jurisdiction in appeals of contested cases, challenges to state agency rules, or appeals of declaratory orders issued by state agencies under the state APA (subsection 1). In all other appeals, the circuit court has jurisdiction (subsection 2). In some circumstances, the parties may stipulate to Court of Appeals original jurisdiction (subsections 3 and 4) or the circuit court may seek transfer of original jurisdiction to the Court of Appeals (subsection 5). This framework continues the current allocation of appeals to the circuit courts and to the Court of Appeals.

## **Section 12. Transfer**

If the notice of appeal is filed in the wrong court, the court has authority under Section 12 to transfer the case to the proper court or other tribunal (subsection 1). If there is a dispute as to which court is proper, the Oregon Court of Appeals decides (subsection 2). Regardless of where the notice of appeal was originally filed, the case may not be dismissed as untimely filed if it was originally filed within the time limitation of the court to which it is ultimately transferred (subsection 3). Furthermore, an appeal may not be dismissed even if it is not filed within the time limitation of the court to which it is ultimately transferred if the appeal is filed in the transferring court based upon a good faith, reasonable interpretation of

the law and it was timely filed under that interpretation, unless the delay caused substantial prejudice to an adverse party or to the public interest.

This section mirrors the transfer provisions that were enacted in the 2001 regular legislative session as HB 3119 (currently codified as ORS 14.165 and ORS 34.740). But the Act as a whole goes further than those transfer provisions. By doing away with the various forms of writs (*e.g.* writs of review, writs of mandamus, and writs of prohibition) and providing for a unitary form of notice of appeal for challenging government action, the transfer provisions in this section allow transfer of a notice of appeal to the appropriate court with no need for amendment or refile to cure any defect caused by using the wrong form of writ. Consequently, this section constitutes a substantial reform. It provides significant relief to parties seeking to challenge governmental actions where the appropriate tribunal is uncertain. This safe-harbor provision, coupled with the single, uniform form of notice of appeal required to trigger judicial review of state or local government action, will eliminate one of the most vexing problems facing potential challengers: how to get their claim in the right form before the right court or tribunal. This change should facilitate having claims against government actions resolved on their merits instead of expending resources on procedural technicalities.

### **Section 13. Venue**

A case brought to challenge state government action that is properly reviewable by the circuit court may be filed in Marion County, the county where the challenged government action took place or has effect, or the county where the challenger lives or has a principal business office. A case brought to challenge local government action must be filed in the circuit court for the county where the government action was taken.

### **Section 14. Record**

Within 28 days after service of the notice of appeal, the government unit whose action is being reviewed must provide the court and the challenger with the record on which the unit based its action (subsection 1). There are special provisions addressed to large documents that are difficult to duplicate and transmit (subsections 2 and 3). If the challenge is to an enactment other than a state agency administrative rule, the record includes only the enactment, copies of all documents necessary to demonstrate procedural compliance (if that is raised as an issue), and the information on which the government unit made factual determinations if the validity of an enactment depends on facts (subsection 5). (Note: There are specific provisions addressed to challenges to state agency administrative rules set out in Section 59 that require the record to contain copies of all documents necessary to demonstrate procedural compliance whether or not that is raised as an issue by the challenger. Section 59 continues existing practice for challenges to state agency administrative rules.) There are additional provisions that allow the record to be corrected, shortened, summarized or reorganized to facilitate processing of the judicial review proceeding (subsection 4). The challenger normally will not be required to pay the cost of preparing the record, unless the challenger unreasonably refuses to limit the record (subsection 6).



## **Section 15. Petition for review**

If the appeal is in circuit court, the petitioner must file a petition for review with the circuit court and serve a copy on all parties within 21 days of the filing of the record. The petition must contain facts establishing the petitioner's qualification to pursue the appeal under Section 7; ripeness for appeal under Section 8; and exhaustion of available remedies under Section 9 (2)(a). The petition must also contain a statement of the specific grounds for review; state whether additional factfinding must occur; and specify the relief requested (subsection 2(b), (c) and (d)). If the notice of appeal is filed in the Oregon Court of Appeals or the Oregon Supreme Court, no petition for review is filed and the requirements for the type of information that would otherwise be required to be set out in the petition will be established by the rules of the appellate courts for briefs filed in those courts (subsection 3).

## **Section 16. Stays**

The stay provisions contained in the Act merge the disparate stay provisions of the Oregon Rules of Civil Procedure (ORCP) for temporary restraining orders and preliminary injunctions, the general stay provisions contained in ORS 19.330 – 19.360, and the stay provisions under the APA set out in ORS 183.482 (3). Such a merger is required as part of providing a unitary process for review of all government action covered by the Act. Because of the need to craft such a new provision, this section generated substantial discussion within the Work Group. Ultimately, the Work Group established stay provisions that use new terminology and establish new procedures, but the operative effect of these provisions should closely mirror current law.

Any person with standing to file a notice of appeal from a government unit's action has standing to file a motion for a stay in the judicial review proceeding (subsection 1). The person seeking the stay must serve that request on the government unit and the court must defer ruling on the motion for a stay for a period of 14 days to allow the government unit to determine whether to grant or deny the stay request (subsection 4). The government unit has discretion to grant or deny the request for a stay, but it must consider whether the moving party has established a colorable claim of error and it must consider the nature of the harm that will result from granting or denying the stay request to the person requesting the stay, the other parties, and the public (subsection 6). This section requires that the government unit's action on the stay request be in writing (subsection 4). The government unit's action on the stay request is reviewed *de novo* – *i.e.*, while the court will consider the government unit's decision on the stay request, the court will make its own findings and draw its own conclusions about whether a stay should be granted based upon the same criteria set forth above.

In addition, this section allows a person filing a notice of appeal to seek an immediate stay (subsection 3). The immediate stay is the functional equivalent of a temporary restraining order currently available under the ORCP. An immediate stay may be granted where the court determines that the person seeking such a stay will suffer immediate and irreparable injury unless the stay is granted, but such an immediate stay will remain in effect only until there is a final resolution reached under the motion for stay process described above. This provision allows for immediate action to maintain the *status quo* in

circumstances where it is warranted until an orderly decision can be reached on whether the government action should be stayed until the pending appeal is resolved.

As noted above, this section generated substantial Work Group discussion with competing concerns about whether the provisions made stays overly difficult to obtain or overly easy to obtain. It should be noted that the stay provisions ultimately incorporated into this section are very analogous to the provisions currently set out in ORS 19.350(3) (the trial court shall consider the “likelihood of the appellant prevailing on appeal” and the “nature of the harm to the appellant, to other parties, and to the public that will likely result from the grant or denial of a stay”) and are very analogous to the temporary restraining order provisions of ORCP 79 (the trial court may grant a temporary restraining order for a period not to exceed 10 days upon determining that “immediate and irreparable injury, loss or damage will result to the applicant”). The majority of the Work Group concluded that the provisions of this section strike the right balance and that they articulate the appropriate set of factors for the government unit and the court to consider in determining whether a stay of the government action is warranted.

## **Section 17. Grounds for review**

Section 17 is the heart of the Act. It addresses the essential separation between the role of judges and the role of those responsible for deciding and implementing governmental policy. This section attempts to set out a clear roadmap for courts to follow in addressing the types of claims asserted in challenges to governmental actions. Section 17 provides the standards for judicial review that a court must use to determine whether a person has a valid challenge to a government action.

Subsection 1 sets out in a summary list the grounds for review that are available under the Act. The subsections of Section 17 then provide in detail how the reviewing court is to approach analysis of the various types of claims that may be asserted and set out the standards of review that apply to each type of claim.

Subsection 2 deals with assertions that the government unit failed to follow a procedure required by law. Procedural challenges to enactments can result in a declaration that the enactment is invalid and may also result in such other relief as the court determines to be appropriate. Procedural challenges to administrative acts taken by government units can succeed only if the fairness of the proceeding or the correctness of the action may have been impaired by the error.

Subsection 3 deals with fact-based challenges. The court will consider such challenges on their merits only if some source of law dictates that the validity of the government action depends on the existence of one or more required facts. If not, the court need not consider disputes about facts and should dismiss the claim of error.

When the validity of the challenged action does depend on the existence of one or more facts, the government unit may or may not have made any determinations of the existence of those facts. Subsection 3(a) provides that if the government unit has not determined whether one or more of the required facts exist, the court must afford the government unit the opportunity to determine whether the required facts exist based on the record before the government unit. If the government unit makes that determination, the

court will review that determination under the remaining provisions of Section 17(3)(b) and (c). If the government unit does not make that determination, the court will make its own factual determination and decide the validity of the government action based on that determination.

Subsections 3(b) and (c) apply when the validity of a challenged government action depends on the existence of facts and the government unit has made factual determinations about those facts. Subsection 3(b) applies to review of administrative acts that depend on the existence of facts. In some cases, the government unit may have determined the relevant facts on a record of evidence taken in a formal evidentiary proceeding, such as a contested case under the APA. If it did, the court applies the familiar standard of determining whether the government unit's factual determination is supported by substantial evidence in the record viewed as a whole. The standard for reviewing required determinations of fact that are not based on a formal evidentiary proceeding is the same, but the court may need to take additional evidence or remand the matter to the government unit for additional evidence to be taken under Section 18(6). This provision is intended to incorporate the substantial evidence standard that has developed in judicial review proceedings conducted under the provisions of ORS 183.482(8)(c) and ORS 183.484(5)(c).

Subsection 3(c) applies to review of enactments that depend on the existence of facts. Most enactments are policy choices whose validity does not depend on a factual showing. When a law does require a factual basis for an enactment, but does not require the government to find these facts on a formal evidentiary record, Section 17(3)(c) proposes another standard of review: whether the government unit's determinations of required facts are supported by information of the type that a reasonable person would rely on in making the challenged decision. This provision is an attempt to strike an appropriate balance between the competing interests of not wanting to transform legislative actions of governmental units into quasi-judicial, adjudicatory actions while providing meaningful review when some law requires that an enactment be based upon a factual determination. The standard set out in this provision focuses only upon the information in the record that supports the determination of fact and it is intended to establish a lower standard than the "substantial evidence in the record viewed as a whole" standard applicable to review of administrative acts. This is a recognition that government units are engaged in legislative-type action when they adopt enactments and that government units should have greater policy-making freedom when they are adopting enactments that by definition will have general application beyond an individualized set of circumstances.

Finally, it should be noted that both subsections 3(b) and (c) merely establish the default standards when no other law requires a different standard for judicial review of facts. This subsection recognizes that there may be particular circumstances or reasons that might justify having a different standard apply and it incorporates that different standard when it is provided for by law.

Subsection 4 covers assertions that a government unit exceeded its legal authority. This subsection is straightforward. If the government unit exceeded its legal authority, the court will either set aside the action or remand it for disposition within lawful limits, as appropriate in the given case.

Subsection 5 covers assertions that a government unit unlawfully failed to act or unreasonably delayed taking action. The first inquiry for the court is to determine whether there is a legal duty to act. If there is such a duty, the court will address whether the government unit unlawfully failed to act within the time allowed by law or unreasonably delayed taking action. In determining whether the government unit unreasonably delayed taking action, the court must consider the circumstances involved, including obstacles to taking the action and the consequences of delay. If the government unit unlawfully failed to act or unreasonably delayed taking action, the court may order the government unit to act within a specified time.

Subsection 6 deals with challenges to a government unit's interpretations of enactments. In general, the court is charged with interpreting the terms of enactments. But the court must respect a government unit's interpretation of technical terms of which the government unit has special knowledge, terms in the government unit's own enactment, and terms which the government unit has been delegated authority to complete. In these circumstances, the court must accept the government unit's interpretation of such terms unless that interpretation is implausible or directly conflicts with the text, context or history of the enactment. It should be noted that this provision uses the phrase "enactment history" instead of "legislative history". This is intentional because the subsection applies to judicial review of all enactments (by definition the term "enactment" includes statutes, rules, charters, ordinances and resolutions), not just statutes. The majority of the Work Group was concerned that use of the phrase "legislative history" could be understood to limit application of the provision to statutes. The phrase "enactment history" is intended simply to apply the concept of "legislative history" to the broader category of enactments covered by the Act. Finally, it should also be noted that if the correct interpretation of an enactment compels a particular action, the court can modify the challenged action accordingly. But when the correct interpretation leaves the government unit with some discretion, the court must remand the action to the government unit.

Subsection 7 deals with challenges that assert a government action constitutes an inconsistent application of an enactment that must be consistently applied. The reviewing court must first determine whether the enactment itself or some other law requires consistent application of the enactment. If the enactment itself or some other law requires consistent application, and the government unit's action constitutes an inconsistent application, the court must remand the action to the government unit for modification. The court must also determine whether the government unit's prior practice under the enactment is established sufficiently to constitute the government unit's interpretation of the enactment. If the prior established practice is sufficient to constitute the government unit's consistent interpretation of the enactment, the reviewing court should affirm the action at issue if it is not inconsistent with the established practice or if the government unit provides sufficient reason for the departure; otherwise the court must remand the government action to the government unit. Such results follow from proper judicial respect for a government unit's interpretation of its own enactments (subsection 6) and from a government unit's general obligation to follow its own rules. It should be noted that nothing in this subsection is intended to alter the general requirement that state agencies must follow their own rules until those rules are properly amended or repealed through rulemaking procedures under the APA. The Act does not affect the definition of rules or the rulemaking provisions in the APA. Consequently, the general rule that state agencies must follow their own rules is not affected by the Act. Finally, this subsection also explicitly notes that the Act does not prevent a government unit from

changing any prior established practice by an enactment. That, too, is a continuation of current law.

Subsections 8 and 9 apply to claims that a government action violated the state or federal constitution or any other law. The court decides that claim as a matter of law and provides such relief as may be appropriate for any violation found.

Section 17, in sum, is intended to provide an analytic framework for the courts to use in conducting review of government actions. The overarching policy embedded in this section is that articulating that analytic framework in some detail will enhance the predictability and uniformity of judicial decisions throughout the judicial system, to the common benefit of citizens, government units, and the courts. Some members of the Work Group, however, have expressed concern that by setting out this roadmap the Act somehow will undercut claims that have their origins in statutes that are not affected by the Act. For example, some members of the Work Group have expressed the concern that the Act will eliminate some of the bases for claims currently available in judicial review proceedings under the APA – most notably the requirement that final orders issued by state agencies in contested case proceedings contain substantial reasoning exhibiting how the factual findings made are rationally connected to the conclusions reached and the requirement that state agencies not engage in standardless, *ad hoc* decision-making. Those requirements, however, are substantive legal rules derived from provisions of the APA. They are not currently part of any judicial review procedure statute, nor should they be. The Act does not affect the underlying provisions of the APA that form the basis for those requirements, nor is this Act intended to eliminate from review any claims based on alleged violations of any laws or legal requirements external to the Act. Instead, the purpose of the Act is to clarify and systematize judicial review procedures in court, not to govern the powers or procedures of governmental units, nor to affect the existing obligations and responsibilities of governmental units established by provisions of law outside the Act. To the extent that any existing types of claims that currently can be pursued are based upon the more general notion that there must be meaningful judicial review of state agency actions, the purpose of the Act is exactly that – this Act is intended to set out the framework for efficient and effective judicial review of governmental actions where there are legal requirements against which those actions must be measured.

## **Section 18. Conduct of Proceeding**

This section sets out how judicial review proceedings are to be conducted. As is currently the case, judicial review proceedings do not use a jury, and review generally will be limited to the transmitted record with respect to disputed facts (subsections 1 and 2). In some limited circumstances, consideration of evidence other than that submitted in the record by the parties will be considered. These include situations in which a party alleges that procedural errors have occurred, a stay has been improperly granted, the proceeding is in the wrong court, or further evidence is relevant regarding the appropriate relief to be granted (subsection 3). In these circumstances, it is appropriate for the evidence to be presented and considered for the first time in court in the judicial review proceeding.

There also may be circumstances in which evidence is relevant to the challenged government action itself that was not considered by the government unit because that evidence was not presented to the government unit. For example, there may not have been

any proceeding before the government unit that afforded any opportunity to present evidence to the government unit before the government unit acted. That is the situation addressed in subsection 5. In such a circumstance, it is appropriate for the evidence to be considered in the first instance by the government unit. Subsection 5(a) provides that any person who could pursue an appeal of the government action may request that the government unit consider additional evidence relating to that action. If the government unit grants the request, then the government unit should conduct such supplemental proceedings as are necessary and appropriate to obtain the additional evidence and any evidence submitted in response. The government action then will be reviewed as provided by Section 17.

Additional evidence relevant to the government action also may come to light after a notice of appeal has been filed. In such circumstance, the evidence still should be considered if there were good and substantial reasons for the failure to present it to the government unit. Here, too, the fact that there were no proceedings before the government unit should satisfy this requirement. Subsections 6 and 7 provide that in such circumstances the court must authorize the government unit to conduct such supplemental evidentiary proceedings as the court determines necessary and appropriate to obtain the additional evidence and any evidence submitted in response. In this situation, the Act provides the government unit with the opportunity to develop any necessary additional evidence during the pendency of the court proceeding and, if it does so, any findings of fact made by the governmental unit that are challenged will be reviewed to determine whether they are supported by substantial evidence (subsections 6 - 8). If, however, the governmental unit does not conduct the supplemental evidentiary proceeding, or does not afford a reasonable opportunity to develop the appropriate record, the reviewing court will take the additional evidence and resolve any disputed facts (subsection 9).

This section is intended to bring uniformity to the manner in which courts handle those circumstances where additional evidence is necessary and appropriate for the court to consider in reviewing government action. Historically, courts have handled such situations inconsistently: some courts would take the additional evidence and resolve factual disputes without considering the findings made by the government unit; other courts would take the additional evidence and then attempt to determine whether the findings made by the government unit were supported by substantial evidence in light of all the evidence before the court. In the first circumstance, the courts were exceeding their review function and usurping the proper role of the government unit. In the second circumstance, the courts were engaging in a misguided task in attempting to review government action on the basis of information that was never before the government unit for its consideration.

While the second circumstance noted above was sanctioned by the Oregon Supreme Court in its recent decision in *Norden v. Water Resources Department*, 329 Or 641, 996 P2d 958 (2000), based upon the existing provisions of the APA, the framework set out in Section 18 and discussed above is a more logical approach to the problem. It provides for the reviewing court to review factual determinations made by government units for substantial evidence based upon evidence actually before the agency in most circumstances, but calls upon the court to resolve factual disputes itself in those circumstances when additional evidence is presented to the court beyond that considered by the government unit. This section also encourages development of records and resolution of disputes in proceedings before the government units charged with addressing such matters before invoking costly court proceedings to resolve disputes.

## **Section 19. Reconsideration**

Subsection 1 authorizes the government unit to withdraw its action for reconsideration at any time before the court decides the case. Subsection 2 provides that the court will retain jurisdiction during government reconsideration, with procedures for the maintenance or dismissal of the action after reconsideration is concluded. Subsection 3 provides that the government unit may vacate the government action at any time. These provisions are based upon current law and serve the salutary function of encouraging resolution of disputes at the earliest point possible. The government unit's authority to withdraw its action for reconsideration under this section is tempered by the fact that if the government unit reverses its action or substantially modifies its action, the challenging party may be awarded costs and prevailing party fees under Section 20 of the Act.

## **Section 20. Relief**

This section describes the various forms of relief available for valid claims under the Act. Under subsections 1 and 2, the court may order mandatory, prohibitory or declaratory relief in any judicial review proceeding. Subsection 3 authorizes the court to order interlocutory relief where necessary to protect the interests of parties or the public. In general, this section provides substantial discretion to the reviewing court to fashion appropriate relief, but it also requires that the court allow the parties to the appeal to be heard before the court can award relief different from that requested by the parties in the judicial review proceeding. Forms of relief may also be provided by other substantive law that may apply in a particular case. The Act does not itself provide for attorney fees, but it does allow attorney fees to be awarded when provided by other law or pursuant to the inherent power of a court of equity to award attorney fees (subsection 4). Finally, the section also authorizes the award of costs and prevailing party fees to a prevailing party in a judicial review proceeding (subsection 5).

## **Sections 21-23. Ancillary procedural matters; Disposition of action; Appeals**

These short, self-explanatory sections provide for various procedural housekeeping matters during the pendency of a case (section 21), at the point of disposition of a case (section 22), and finally on appeal (section 23).

## **Section 24. Writ of prohibition and common law procedures not available**

Consistent with Section 3(1) of the Act (describing the Act as the exclusive means of judicial review of government actions) and with one of the principal purposes of the Act, Section 23 provides that neither a writ of prohibition nor common law procedures are available for review of a government action subject to review under the Act.

## **Section 25. Review by Oregon Law Commission**

This section provides that the Oregon Law Commission must review the implementation of this Act within six years of its effective date and make any recommendations it considers appropriate at that time.

## **Section 26.**

This section provides for a phase-in of the procedures and standards of review contained in this Act where there currently are statutes that provide for procedures or standards of review that are materially different. The provisions of this Act will not govern in those cases until January 1, 2004.

## **Section 27.**

This section provides that nothing in this Act is intended to override the specific requirement that a reviewing court conduct a review *de novo* of agency modifications of findings of historical fact made by hearing officers of the Hearing Officer Panel created by Chapter 849, 1999 Oregon Laws.

## **Section 28 – 58.**

These sections are conforming amendments to make other statutes refer appropriately to the amendments made by the Act.

## **Section 59.**

This section preserves current law governing challenges to the validity of a state agency administrative rule. This section was considered necessary by the Work Group to leave intact two particular pieces of current administrative law practice. Currently, the APA provides that any person can file a facial challenge to a state agency administrative rule. This section retains that language to ensure that the general requirements imposed by Section 7 as to who may file a notice of appeal do not impose unintended restrictions for challenges to state agency administrative rules. The APA also currently requires that a state agency file, as part of the record in a rule challenge proceeding, copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures. This is now required whether or not any claims of procedural defects are raised in the judicial review proceeding. This section leaves that requirement in place to maintain the *status quo* and to allow challengers to evaluate for themselves whether the applicable procedural requirements have been satisfied.

## **Sections 60 – 275.**

These sections are conforming amendments to make other statutes refer appropriately to the amendments made by the Act.