ADMINISTRATIVE PROCESS ACT

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REPORT OF THE

VIRGINIA CODE COMMISSION

To

THE GOVERNOR

And

THE GENERAL ASSEMBLY OF VIRGINIA

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ADMINISTRATIVE PROCESS ACT

Report of the

Virginia Code Commission

Richmond, Virginia

January 1, 1975

To: Honorable Mills E. Godwin, Jr., Governor of Virginia

and

The General Assembly of Virginia

The Commission, charged with examining the General Administrative Agencies Act, submits the following report respecting the administrative process in the State:

In 1944 the General Assembly adopted the first statutes designed to regulate administrative processes (Chapter 160 of the 1944 Acts of Assembly). It was soon followed by the substitution of a more comprehensive law in 1952 (Chapter 703 of the 1952 Acts of Assembly) which, with slight amendments, is the present General Administrative Agencies Act. Reference to the annotated Code of Virginia shows that, in the 20 years which have followed, there has been but one reported decision referring to it—but only in passing as the issues in that case were in no way dependent upon the act. It is also an open secret that the act in its present form is largely unused and unusable. If that were the only matter for consideration, the Code could be cleared by a simple repeal of the act. But that is not all that is involved because, among other things, subsequent laws relating to administrative powers often refer to and thereby assume to adopt it by reference; and hence something more is needed than its repeal. There are, of course, also many other reasons why there should be a general administrative process act—to do generally that which the General Assembly cannot be expected to do specially each time it confers administrative powers, to guide agencies, to inform the public, and to lessen the chances for miscarriage of administrative justice by agencies in the first instance or by courts when they review administrative action.

For such purposes there are several reasons why the present General Administrative Agencies Act is inoperable, if not indeed substantially meaningless. In the first place, even assuming that it could be workable, it is so riddled with general exceptions of agencies and subjects that there is very little left for it to relate to. In view of the serious imperfections in the "model" from which the act was derived, mentioned below, it is not surprising that the lawmakers in 1952 could not risk applying it to important fields of administrative law in Virginia.

Secondly, the act is technically defective in a basic way because of its failure to distinguish the processes to be used in making regulations as contrasted with those necessary in deciding cases. It may be that this defect was one of the considerations which led to the wholesale exemptions mentioned above. In any event, it was fashionable in the late 1940's and early 1950's for states to adopt such acts, mainly because of the coming of the federal act in 1946 and the promulgation of the very different so-called Model Act suggested by the Commissioners on Uniform State Laws in the same year. Virginia followed the so-called Model State Act in this respect as did a total of about ten states in one degree or another. The acts thus adapted and adopted by other states have fared no better than the Virginia version, there being but three case citations thereto mentioned in the annotations collected in Uniform State Laws—and those are trifling references from the supreme court of only one state. The Model Act has since been somewhat revised by the Commissioners, but without correcting the basic difficulty.

Thirdly, and perhaps more immediately important, the Model Act and the derivative Virginia act are overly simplistic in conception. They are gravely deficient in the failure to make essential distinctions, and provide separate procedures, not only for making regulations or deciding cases but also for either of those operations (a) with formal trial-type procedure in some cases and (b) without it in others. The basic laws of Virginia, which govern notwithstanding the General Administrative Agencies Act, sometimes provide for one type of procedure, sometimes the other, in making regulations or deciding cases. But the General Administrative Agencies Act assumes that all administrative powers are the same in kind and method—which means that it fits some agency operations and ignores others where it does not hinder them. Thus, for example, it speaks mainly to the administrative process for the making of regulations and all but ignores that process for the administrative fact finding and decision of cases. Save for rate making, where constitutional requirements are already extensive, the making of administrative regulations in Virginia is a minor part of the total operation of the agencies. Administrative adjudication, on the other hand, may and does proceed without the making of regulations and is thus virtually unaided and unguided by the General Administrative Agencies Act. The present act also assumes in the main that all procedures in either case are of the formal trial-of-fact variety whereas most of them are not.

A cure for these critical deficiencies would require a rewriting of the present act from end to end, that is, from its definitions to its conclusory provisions respecting court controls. To remedy the situation in the form of amendments would result in a bill in which it would be difficult to find traces of the language of the present act save for some phrases or details such as those relating to subpoenas or depositions. It has seemed to the Commission, therefore, that the clearer course of procedure would be to draft a completely new act at least as an illustration of what needs doing and of language suitable therefor. In doing so the Commission has also been impressed with the need for clarity, for recognizing the needs of the administrative process, and for an act which can aid and expedite administration and inform the public as to its nature as well as

supply rudimentary protections to those individuals and organizations who are subject to control by it.

Accordingly, the attached bill contains much that is ignored by the present act, and some things which are left unsaid in any similar acts in other jurisdictions, but very little that is at all novel in practice anywhere. Mainly it distinguishes between agency processes for making regulations and those for making case-fact decisions. In the making of regulations it further distinguishes between (a) informational proceedings, which may be of several types, and (b) evidential proceedings which are rarely called for and have some similarity to trials of fact. The same is done for case decision procedures which primarily involve fact finding and again are separately stated for the nonhearing and trial-of-fact types of administrative adjudication process. These distinctions, moreover, are already made in existing Virginia statutes conferring administrative powers; and thus the suggested provisions match and supplement the related statutes in the Code of Virginia rather than repeal or radically modify them.

A final word may be helpful to explain the length of the attached bill. Since the subject is the whole of the administrative process, it is necessary to state all the salient points of and differentials in that process lest it be thought that some part of it is being changed or ignored.

THE NATURE OF THE ATTACHED BILL

There are a number of reasons why a general administrative "process" act is desirable. Acts of this kind are usually called "procedure" acts—but they are not codes of procedure, or "codes" of anything else for that matter. Instead, they are outlines of general methods agencies may use in carrying out the regulatory tasks of governance otherwise specifically entrusted to them. Under acts of this kind agencies must still formulate their own more or less detailed rules of procedure and practice just as courts have always done and are coming more and more to do in their spheres. However, legislatures and courts have inherited and confirmed their general methods during centuries of experience whereas the administrative agencies, which now share some of the responsibilities of these arms of government, are in the main offshoots of the 20th century. Hence it is the function of a general administrative law act to supply a pattern of operation not to curb them but to enable them to function understandably, efficiently, and effectively.

It is manifestly impossible for the General Assembly to draft or even consider such a document for each agency as it is created, for each administrative power as it is conferred, or for each amendment thereof as it is made thereafter. About all a legislature has time to do—once it has selected a subject and goal of regulation—is to determine by law what agencies there shall be and whether they may proceed by either or both making regulations (which are laws) or deciding cases (which are judgments formerly rendered only by

courts). When a legislature confers either such function upon an agency, it may also indicate how the agency is to determine fact issues (usually in terms of a "hearing"). In other words, and despite their occasional bulk, the important provisions in statutes dealing with individual administrative agencies are those briefly authorizing the making of regulations or the decision of cases with or without further succinct indication as to the nature of the investigational or fact finding processes the agency is to employ.

Such rudimentary laws (called "basic laws" in the attached bill) often furnish agencies with no more information than that they may adopt "regulations" or issue "orders" on some subject or other. They are thus left to guess at the several important differentiations of regulations—which may be substantive, procedural, organizational, routine, technical, and so on. Case decisions (adjudications) presuppose some form of fact finding of course—but there are a number of perfectly acceptable forms of fact finding other than full-scale trials. To be sure, the word "hearing" is also often found in such laws—but it necessarily means different things in different settings, particularly when used in connection with the making of regulations as compared with the determination of facts necessary to agency decisions. Agencies need to know the nature of the statutory "hearings" in the different sectors of administrative law. Justice will be served to the extent that these things can be made intelligible. Here oversimplification is worse than no law at all—because it is misleading, gives rise to uncertainty at the administrative level, produces difficult interpretative questions for courts, and may result in needless litigation. A reasonably complete agency process act would be educational at the very least.

GeneralStructure. The core of the attached bill is to be found in three of its articles. They deal separately with the making of regulations (Article 2), case decisions (Article 3), and court control thereof (Article 4). It also includes, apart from its short title provision, the general exemption from the act of a number of subjects—those having to do with money claims against the State, State contracting, grants of State or federal funds or property, chartering of corporations, defense or police functions, public officer or employee selection and tenure, the conduct of elections and eligibility to vote, student relations and academic affairs in State schools, and prison inmates and other persons in the custody of State institutions.

Definitions. The first article of the bill, after a brief statement of policy to clarify and supplement the basic laws under which Virginia agencies operate, defines "agency", "regulation", and "case decision." To these elementary terms is added a definition of "hearing" to differentiate it in the several respects mentioned above and covered in the later provisions of the proposed bill. Also, to eliminate repetitions in the further provisions, special meanings are attributed to certain words and phrases such as "agency action" (i.e. the making of regulations or decisions), "basic laws" (i.e. those authorizing regulations or case decisions or stating procedural requirements therefor), "subordinate" (i.e. personnel other than the agency head or board), and "substantive" (i.e. provisions of laws or regulations limiting freedom of conduct).

A BILL to amend the Code of Virginia by adding in Title 9 a chapter numbered 1.1:1, consisting of sections numbered 9-6.14:1 through 9-6.14:20, entitled the Administrative Process Act; and to repeal Chapter 1.1 of Title 9, the General Administrative Agencies Act, consisting of sections numbered 9-6.1 through 9-6.14, as severally amended.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 9 a chapter numbered 1.1:1, consisting of sections numbered 9-6.14:1 through 9-6.14:20, as follows:

Article 1.

General Provisions.

§ 9-6.14:1. Short Title.—This chapter may be cited as the "Administrative Process Act."

§ 9-6.14:2. Effect of repeal of the General Administrative Agencies Act and enactment of this chapter.—The repeal of Chapter 1.1 of Title 9, which is entitled the General Administrative Agencies Act but which will be hereinafter referred to as Chapter 1.1, shall not affect any proceedings that may have been commenced under the provisions of Chapter 1.1 prior to the effective date of this chapter including those proceedings prerequisite to the adoption of a regulation, and those proceedings, and any appeals therefrom, for determination of the validity of a regulation and for determination of whether or not a regulation has been violated. Provided, however, that any regulation adopted pursuant to the provisions of Chapter 1.1 but subsequent to the effective date of this chapter shall be subject to all the provisions of this chapter except those relating to the proceedings prerequisite to the adoption of a regulation. Provided, further, that the repeal of Chapter 1.1 shall in no way affect the validity of any regulation that has been adopted and promulgated under Chapter 1.1 prior to the effective date of this chapter.

§ 9-6.14:3. References to former sections, articles and chapters of the General Administrative Agencies Act.—Whenever any reference is made in this Code to the General Administrative Agencies Act, the applicable provisions of this chapter are substituted therefor.

§ 9-6.14:4. Policy.—The purpose of this chapter is to supplement present and future basic laws conferring authority on agencies to either make regulations or decide cases as well as to standardize court review thereof save as laws hereafter enacted may otherwise expressly provide; [1] but this chapter does not supersede or repeal additional procedural requirements in such basic laws. [2]

§ 9-6.14:5. Definitions.—As used in this chapter:

A. "Agency" means any authority, instrumentality, officer, board or other unit of the State government empowered by the basic laws to make regulations or decide cases but excluding (i) the General Assembly, (ii) courts, and any agency which by the Constitution is expressly granted any of the powers of a court of record, and (iii) municipal corporations, counties, and other local or regional governmental authorities including sanitary or other districts, and joint State-federal, interstate, or intermunicipal authorities. [3]

B. "Agency action" means either an agency's regulation or case decision or both, any violation, compliance, or noncompliance with which could be a basis for the imposition of injunctive orders, penal or civil sanctions of any kind, or the grant or denial of relief or of a license, right, or benefit by any agency or court. [4]

C. "Basic law" or "basic laws" means provisions of the Constitution and statutes of the Commonwealth of Virginia authorizing an agency to make regulations or decide cases or containing procedural requirements therefor. [5]

D. "Case" or "case decision" means any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit. [6]

E. "Hearing" means agency processes other than those informational or factual inquiries of an informal nature provided in §§ 9-6.14:7 and 9-6.14:11 of this chapter and includes only (i) opportunity for private parties to submit factual proofs in formal proceedings as provided in § 9-6.14:8 of this chapter in connection with the making of regulations or (ii) a similar right of private parties or requirement of public agencies as provided in § 9-6.14:12 hereof in connection with case decisions. [7]

F. "Regulation" means any statement of law, policy, right, requirement, or prohibition formulated and promulgated by an agency as a rule, standard, or guide for public or private observance or for the decision of cases thereafter by the agency or by any other agency, authority, or court. [8] But such statements do not include traffic signs, markers, or control devices. [9] So far as not shown in its other regulations or in the basic laws under which it operates, each agency shall include in its regulations statements of the general course and method by which its authority to decide cases or issue regulations is channeled and determined sufficient to inform persons affected or interested of their opportunities to participate. [10]

G. "Subordinate" means (i) one or more but less than a quorum of the members of a board constituting an agency, (ii) one or more of its staff members or employees, or (iii) any other person or persons designated by the agency to act in its behalf. [11]

Regulations. The second article of the bill, after exempting some kinds of regulations such as those of a routine or procedural nature in § 9-6.14:6, differentiates the process of making administrative regulations as between those proceedings of an "informational" nature and those which are properly "evidential." The idea underlying the whole article is that it is unnecessary and undesirable to compel formal trial-like proceedings, or to force agencies to become triers of fact, unless the regulation in contemplation is substantive in nature, there are fact issues bearing on the validity of the proposal, and the General Assembly has by its basic law given some indication that such proofs should be so received.

Casedecisions. The third article of the bill, after exempting from its provisions the assessment of taxes, the grant or denial of workmen's compensation or public assistance, or issuance of authorized temporary restraining orders in § 9-6.14:10, differentiates between trial and nontrial fact finding incident to decision making. The rudimentary requirements for informal fact finding are stated in § 9-6.14:11. But where the basic laws expressly provide for decisions upon hearing, elemental incidents of notice, presenting relevant proof, and submittal of argument are summarized in § 9-6.14:12. Added in these provisions is authority for subordinates, in the discretion of the agency, to render real assistance to the agencies they serve by presiding at hearings and recommending findings and decisions. Supplemental powers—to issue subpoenas and take depositions—are provided in § 9-6.14:13.

Courtcontrols. Article 4 could be called a codification of the existing system, State and national, respecting the relation of agencies and courts. It is necessary to do so here for a number of reasons—to restate existing court-agency relations lest it be assumed that the act disturbs them, to relate the prior provisions of the act to that existing system, and to make the whole as plain as possible. Accordingly, § 9-6.14:15 makes some obvious exemptions such as those required by the Constitution or statutes, matters of internal management or routine of agencies, decisions resting on authorized inspections or tests, and acts done for or under the supervision of a court or subject to trial de novo in court. Section 9-6.14:16 limits complaints to those of unlawfulness, preserves special forms of court review provided in basic laws as well as traditional forms where special ones are lacking, and so on. It also contemplates that new Rules of the Supreme Court will be developed specifying the procedural steps in such court action. This is explained in the annotated copy of the bill appended to this report. Section 9-6.14:17 is merely a tight catalogue or listing of the various kinds of claims of unlawfulness which are to be decided upon proper actions for judicial review. In that connection the concluding sentences differentiate the function of courts where fact issues are to be determined upon the evidential record made by the agency as compared with those which, in the absence of such agency record, are to be decided upon a record made in the court. Section 9-6.14:18 states the general situation respecting the availability and scope of intermediate relief pending final court judgment; and § 9-6.14:19 does the same as to final court judgments in review cases.

COMMENTS OF AGENCIES CONSIDERED

The Commission's draft of the proposed act, of June 21, 1973, was submitted to Virginia's administrative agencies for comment. A dozen or so of them responded. The Attorney General's office answered for a number of them. Some indicated no objection, others voiced fears, and a few made detailed suggestions or objections. The Commission considered all the suggestions that were received and as a result thereof a number of clarifications and changes were made.

RECOMMENDATIONS OF THE COMMISSION

The Commission recommends the adoption of the attached Administrative Process Act by the General Assembly. Included as a part of its report are explanatory notes keyed to the provisions of the proposed Act.

Respectfully submitted,

A. L. Philpott, Chairman

J. Harry Michael, Jr., Vice Chairman

John A. Banks, Jr.

Frederick T. Gray

John Wingo Knowles

*Andrew P. Miller

Theodore V. Morrison, Jr.

*Comment by Andrew P. Miller: The words "temporary restraining", which appear in proposed § 9-6.14:10 of the Act, should be replaced by the words "temporary injunctive." "There is no provision in the Virginia law for a 'temporary restraining order'."

H. "Substantive" or "substantive in nature" means, when used in connection with regulations, those allowing, requiring, or forbidding conduct in which persons are otherwise free or prohibited to engage or which state requirements, other than procedural, for obtaining or retaining a license or other right or benefit. [12]

Article 2.

Regulations.

§ 9-6.14:6. Exclusions.—Agency orders or regulations fixing rates or prices are excluded from the operation of the provisions of this article but not from the other provisions of this chapter. [13] In addition agencies may dispense, in whole or part, with the public procedures prescribed by this article with respect to regulations which (i) are prescriptions of agency organization or internal procedure or practice including delegations of authority to subordinates, (ii) consist only of changes in style or form, corrections of technical errors, amendments to the extent required to conform to changes in basic laws where no agency discretion is involved, declarations as to how the agency interprets the language of such laws under which it exercises authority to decide cases, codifications of existing principles of decision derived from its prior experience and rulings in the disposition of cases, or broad statements of policy subject to unspecified exceptions in the case of unforeseen or special circumstances or (iii) apply in any situation in which the agency finds, and by preamble states with the reasons and precise factual basis therefor, that an emergency situation exists, in which case it shall fist secure the approval of the Governor and, accordingly, limit the duration of its regulation in time. [14] When such a regulation is issued without any of the public procedures otherwise required or authorized by this article, the agency shall state as part of the regulation that it will receive, consider, and respond to petitions by any interested person at any time for the reconsideration or revision thereof. [15]

§ 9-6.14:7. Informational proceedings.—In formulating any regulation the agency (i) may afford interested persons an opportunity to submit data, views, and argument orally and in writing to the agency or its specially designated subordinate, (ii) shall always do so where the contemplated regulation is of a substantive nature or the basic law under which the agency is acting specifically authorizes the making of regulations only upon or after a hearing, and (iii) where no such oral proceeding is so required or held, the agency may proceed by affording similar opportunity for written submittals only. [16]

In the case of substantive regulations or those for which the basic law requires a hearing, general notice of opportunity for such oral or written submittals shall be published in a newspaper of general circulation published at the State Capital and in addition, as the agency may determine, it may be similarly published in newspapers in localities particularly affected as well as publicized through press releases and such other media as will best serve the

purpose and subject involved. Such newspaper publication shall be made at least fourteen days in advance of the date prescribed for such submittals. In addition to the time, place, and nature of the proceedings, such notices shall include a brief statement as to the subject, substance, issues, basis, and purpose or possible terms of the regulation under consideration as well as a reference to the legal authority of the agency to act and the place at which any tentative draft thereof may be examined. [17] All notices, written submittals, at least summaries or notations of oral presentations, and any agency action thereon shall be matters of public record in the custody of the agency. [18]

After such public procedural opportunities the agency, if it concludes to promulgate the regulation under consideration, shall accompany it with a separate and concise statement as to the basis and purpose thereof together with its summary description or resume and comment upon the nature of the oral and written data, views, or arguments presented during the public proceedings. [19]

§ 9-6.14:8. Evidential hearings.—Where an agency proposes to consider the exercise of authority to promulgate a substantive regulation, it may conduct or give interested persons an opportunity to participate in a public evidential proceeding; and the agency shall always do so where the basic law requires a hearing. [20] Such evidential hearings may be limited to the trial of factual issues directly relevant to the legal validity of the regulation (if it should be later adopted) in any of the relevant respects outlined in § 9-6.14:17 of this chapter. [21]

General notice of such proceedings shall be published as prescribed in § 9-6.14:7. [22] In addition, where the possible regulation is to be addressed to named persons, the latter shall also be given the same notice individually by mail or otherwise if acknowledged in writing. [23] The proceedings may be conducted separately from, and in any event the record thereof shall be separate from, any other or additional proceedings the agency may choose or be required to conduct for the reception of general data, views, and argument pursuant to § 9-6.14:7 or otherwise. [24] Any probative evidence may be received except that the agency shall as a matter of efficiency exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross examination. [25] Testimony may be admitted in written form provided those who have prepared it are made available for examination in person. [26] There shall preside at the taking of such evidence the agency or one or more of its subordinates specially designated for the purpose, who may administer oaths and affirmations. [27] The proceedings shall be recorded verbatim and the record thereof shall be made available to interested persons for transcription at their expense or, if transcribed by or for the agency, for inspection or purchase at cost. [28]

Where subordinates preside at the reception of the evidence, they shall make a report with recommendations and proposed findings and conclusions which shall be made available upon request to the participants in the taking of evidence as well as other interested persons and serve as a basis for exceptions, briefs, or oral

argument to the agency itself. [29] Whether or not subordinates take the evidence, after opportunity for the submittal of briefs on request and such oral argument as may be scheduled in its discretion, the agency may settle the terms of the regulation and shall promulgate it only upon (i) its findings of fact based upon the record of evidence made pursuant to this section and facts of which judicial notice may be taken, (ii) statements of basis and purpose as well as comment upon data received in any informational proceedings held under § 9-6.14:7 and (iii) the conclusion or conclusions required by the terms of the basic law under which the agency is operating. [30]

§ 9-6.14:9. Adoption, dating, availability.—All regulations, including those as to which agencies pursuant to § 9-6.14:6 may elect to dispense with the public procedures provided by §§ 9-6.14:7 and 9-6.14:8, may be formally and finally adopted by the signed order of the agency so stating. [31] But no regulation shall be operative in less than thirty days after such adoption and the filing thereof in accordance with the Virginia Register Act except that in the case of an emergency under § 9-6.14:6(iii) hereof the regulation shall become operative upon its adoption and filing unless a later date is specified. [32] The originals shall remain in the custody of the agency as public records subject to judicial notice by all courts and agencies. [33] They, or facsimiles thereof, shall be made available by the agency for public inspection or copying. [34] Full and true copies shall also be additionally filed, registered, published, or otherwise made publicly available as may be required by other laws. [35]

Article 3.

Case Decisions.

§ 9-6.14:10. Exclusions.—This article shall not apply to case decisions respecting (i) the assessment of taxes or penalties under the tax laws, (ii) the award or denial of claims for workmen's compensation, (iii) the grant or denial of public assistance, or (iv) temporary restraining or like orders authorized by law to be issued summarily. [36]

§ 9-6.14:11. Informal fact finding.—Save to the extent that case decisions are made as provided by § 9-6.14:12, agencies shall, unless the parties consent, ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings. [37] Such conference-consultation procedures include rights of parties to the case (i) to have reasonable notice thereof, (ii) to appear in person or by counsel or other qualified representative before the agency or its subordinates for the informal presentation of factual data, argument, or proof in connection with any case, (iii) to have notice of any contrary fact basis or information in the possession of the agency upon which it may rely in any way in making an adverse decision, (iv) to receive a prompt decision of any application for a license, benefit, or renewal thereof, and (v) to be informed, briefly and generally in writing, of the factual or procedural basis for an

adverse decision in any case. [38]

§ 9-6.14:12. Litigated issues.—A. The agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing and may do so in any case to the extent that informal procedures under § 9-6.14:11 have not been had or have failed to dispose of a case by consent. [39]

B. Parties to such formal proceedings shall be given reasonable notice of (i) the time, place, and nature thereof, (ii) the basic law or laws under which the agency contemplates its possible exercise of authority, and (iii) the matters of fact and law asserted or questioned by the agency. [40] Applicants for licenses, rights, benefits, or renewals thereof have the burden of approaching the agency concerned without such prior notice but they shall be similarly informed thereafter in the further course of the proceedings whether pursuant to this section or to § 9-6.14:11. [41]

C. In all such formal proceedings the parties shall be entitled to be accompanied by and represented by counsel, to submit oral and documentary evidence and rebuttal proofs, to conduct such cross examination as may elicit a full and fair disclosure of the facts, and to have the proceedings completed and a decision made with dispatch. The burden of proof shall be upon the proponent or applicant. The agency, or one or more subordinates designated for the purpose, shall preside at the taking of evidence. The presiding officers at such proceedings are empowered to (i) administer oaths and affirmations, (ii) receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross examination, rule upon offers of proof, and oversee an accurate verbatim recording of the evidence, (iii) hold conferences for the settlement or simplification of issues by consent, (iv) dispose of procedural requests, and (v) regulate and expedite the course of the hearing. Where subordinates preside, they shall recommend findings and a decision unless the agency shall by its procedural regulations provide for the making of findings and an initial decision by such presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on its own motion. [42]

D. Prior to the recommendations or decisions of subodinates, the parties concerned shall be given opportunity, on request, to submit in writing for the record (i) proposed findings and conclusions and (ii) statements of reasons therefor. In all cases, on request, opportunity shall be afforded for oral argument (i) to subordinate presiding officers in all cases in which they make such recommendations or decisions or (ii) to the agency in cases in which it makes the original decision without such prior recommendation and otherwise as it may permit in its discretion or provide by general rule. Where subordinates make recommendations or decisions, the agency shall receive and act on exceptions thereto. [43]

E. All decisions or recommended decisions shall be served upon the parties, become a part of the record, and briefly state or recommend the findings, conclusions, reasons, or basis therefor upon the

evidence presented by the record and relevant to the basic law under which the agency is operating together with the appropriate order, license, grant of benefits, sanction, relief, or denial thereof. [44]

§ 9-6.14:13. Subpoenas, depositions, and requests for admissions.—The agency or its designated subordinates shall have power to, and on request of any party to a case shall, issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence. Any person so subpoenaed who objects may, if the agency does not quash or modify the subpoena at his timely request as illegally or improvidently granted, immediately thereupon procure by petition a decision on the validity thereof in the circuit court of the county or city where such evidence is to be produced; and otherwise in any case of refusal or neglect to comply with an agency subpoena, unless the basic law under which the agency is operating provides some other recourse, enforcement, or penalty, the agency may procure an order of enforcement from such court. Depositions de bene esse and requests for admissions may be directed, issued, and taken on order of the agency for good cause shown; and orders or authorizations therefor may be challenged or enforced in the same manner as subpoenas. Nothing in this section shall be taken to authorize discovery proceedings. [45]

§ 9-6.14:14. Final orders.—The terms of any final agency case decision, as signed by it, shall be served upon the private parties by mail unless service otherwise made is duly acknowledged by them in writing. The signed originals shall remain in the custody of the agency as public records subject to judicial notice by all courts and agencies; and they, or facsimiles thereof, together with the full record or file in every case shall be made available by the agency for public inspection or copying except (i) so far as the agency may, in the exercise of sound discretion, withhold the same in whole or part for the purpose of protecting individuals mentioned from personal embarrassment, obloquy, or disclosures of a private nature including statements respecting the physical, mental, moral, or financial condition of such individuals or (ii) for trade secrets or, so far as protected by other laws, other commercial or industrial information imparted in confidence. [46]

Article 4.

Court Review.

§ 9-6.14:15. Exclusions.—This article does not apply to any agency action which (i) is placed beyond the control of the courts by constitutional or statutory provisions expressly precluding court review, (ii) involves solely the internal management or routine of an agency, (iii) is a decision resting entirely upon an inspection, test, or election save as to want of authority therefor or claim of arbitrariness or fraud therein, (iv) is a case in which the agency is acting as an agent for a court, or (v) encompasses matters subject by law to a trial de novo in any court. [47]

§ 9-6.14:16. Right, forms, venue.—Any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision, as the same are defined in § 9-6.14:5 of this chapter and whether or not excluded from the procedural requirements of Article 2 or 3 hereof, shall have a right to the direct review thereof either (i) by proceeding pursuant to express provisions therefor in the basic law under which the agency acted or (ii), in the absence, inapplicability, or inadequacy of such special statutory form of court review proceeding, by an appropriate and timely court action against the agency as such or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia. [48] Such proceedings include those for declaratory judgments, mandamus, or equitable relief by way of prohibitory or mandatory injunctions; but relief pursuant thereto shall await final judgments or decrees in such actions save as provided in § 9-6.14:18. [49] Such actions may be instituted in any court of competent jurisdiction as otherwise provided by law; and the judgments of such courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. [50] In addition, when any such regulation or case decision is the subject of an enforcement action in court, the same shall also be reviewable by the court as a defense to the action; and the judgment or decree therein shall be appealable as in other cases. [51]

§ 9-6.14:17. Issues on review.—The burden shall be upon the party complaining of agency action to designate and demonstrate an error of law subject to review by the court. [52] Such issues of law include: (1) accordance with constitutional right, power, privilege, or immunity, (2) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlement in connection with case decisions, (3) observance of required procedure where any failure therein is not mere harmless error, and (4) the substantiality of the evidential support for findings of fact. [53] The determination of such fact issue is to be made upon the whole evidential record provided by the agency if its proceeding was required to be conducted as provided in § 9-6.14:8 or 9-6.14:12 of this chapter or, as to subjects exempted from those sections, pursuant to constitutional requirement or statutory provisions for opportunity for an agency record of and decision upon the evidence therein. [54] When the decision on review is so to be made on such agency record, the duty of the court with respect to issues of fact is limited to ascertaining whether there was substantial evidence in the agency record upon which the agency as the trier of the facts could reasonably find them to be as it did. [55] Where there is no such agency record so required and made, any necessary facts in controversy shall be determined by the court upon the basis of the agency file, minutes, and records of its proceedings under § 9-6.14:7 or 9-6.14:11 as augmented, if need be, by the agency pursuant to order of the court or supplemented by any allowable and necessary proofs adduced in court except that the function of the court shall be to determine only whether the result reached by the agency could reasonably be said, on all such proofs, to be within the scope of the legal authority of the agency. [56] Whether such fact issues are

reviewed on the agency record or one made in the review action, the court shall take due account of the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted. [57]

§ 9-6.14:18. Intermediate relief.—When judicial review is instituted or is about to be, the agency concerned may, on request of any party or its own motion, postpone the effective date of the regulation or decision involved where it deems that justice so requires. Otherwise the court may, on proper application and with or without bond, deposits in court, or other safeguards or assurances as may be suitable, issue all necessary and appropriate process to postpone such effective dates or preserve existing status or rights pending conclusion of the review proceedings if the court finds the same to be required to prevent immediate, unavoidable, and irreparable injury and that the issues of law or fact presented are not only substantial but that there is probable cause for it to anticipate a likelihood of reversible error in accordance with § 9-6.14:17. Such action by the court may include (i) the stay of operation of agency decisions of an injunctive nature or those requiring the payment of money or suspending or revoking a license or other benefit and (ii) continuation of previous licenses in effect until timely applications for renewal are duly determined by the agency. [58]

§ 9-6.14:19. Court judgments.—Unless an error of law as defined in § 9-6.14:17 appears, the court shall dismiss the review action or affirm the agency regulation or decision. Otherwise, it may compel agency action unlawfully and arbitrarily withheld or unreasonably delayed except that the court shall not itself undertake to supply agency action committed by the basic law to the agency. Where a regulation or case decision is found by the court to be not in accordance with law under § 9-6.14:17,the court shall suspend or set it aside and remand the matter to the agency for such further proceedings, if any, as the court may permit or direct in accordance with law. [59]

Article 5.

Subject Exemptions.

§ 9-6.14:20. Subject exemptions.—There shall be exempted from the operation of this chapter any agency action relating to the following subjects: (i) money or damage claims against the State or agencies thereof as well as the award or denial of State contracts including decisions with respect thereto as to compliance therewith or the location, design, specifications, or construction of public buildings and other facilities; (ii) grants of State or federal funds or property; (iii) the chartering of corporations; (iv) customary military, naval, or police functions; (v) the selection, tenure, dismissal, direction, or control of an officer or employee of an agency or the State; (vi) the conduct of elections or eligibility to vote; (vii) any action taken with respect to the admission, exclusion,

discharge, or discipline of students in State or local public schools, colleges, and universities as well as the academic affairs and requirements thereof; (viii) inmates as such of prisons or other such facilities or parolees therefrom; and (ix) the custody of persons in, or sought to be placed in, mental, penal, or other State institutions as well as the treatment, superintendence, or discharge of such persons. [60]

2. That Chapter 1.1 of Title 9, consisting of sections numbered 9-6.1 through 9-6.14, as severally amended, is repealed.

[1] The general backgound and purpose are more fully stated in the report submitting the draft. The first clause is a thumbnail summarization of the general import of the chapter and hence subject to the more specific provisions which follow, particularly Articles 2, 3, and 4 as modified by the definitions in § 9-6.14:5 and general exemptions in Article 5.

[2] Additional procedural requirements unaffected would include those respecting notices, which may be found in basic statutes authorizing the agency to make decisions or issue regulations. Since the chapter is designed as a supplement to existing laws in the respects stated, it would not of course diminish the authority of agencies, as stated in those laws, to make investigations, require reports, allow interventions, and so on.

[3] An agency "which by the Constitution is expressly granted any of the powers of a court of record" is presently only the State Corporation Commission. Since the Commission is a court of record when it functions in deciding cases, the rules applicable to courts apply. See, for example, § 12.1-30, providing for the observance and administration of the "rules of evidence as observed and administered by the courts of the Commonwealth." In the case of judicial review, the Constitution itself provides for the sole method of review, appeal to the Supreme Court (Article IX, Section 4). Thus the provisions of this chapter relating to those matters should not be applicable to the Commission. With respect to rulemaking by the Commission, the existing § 12.1-28 of the Code makes adequate provision.

[4] The term "agency action" is included in the definitions for use in simplifying the language of Article 4, relating to court review, when it is desired to refer to *either* or *both* "case decisions" and "regulations" in that article. In other words, the meaning of this phrase depends on the definitions of "case decisions" and "regulations" which are dealt with in their alphabetical order later in this section.

[5] "Basic law" or laws is one of the three fundamental and related terms around which the chapter is drawn, the others being "case decisions" and "regulations." The term is used throughout the chapter to refer to the express constitutional or statutory authority of administrative agencies to exercise regulatory powers in the form of decisions or regulations as the latter two terms are defined later in this section. In addition to authorizing those forms of agency action, such basic laws also importantly prescribe the nature of the

administrative process to be followed in exercising those powers, chiefly the requirement or lack of it for hearings which becomes critical for the purposes of §§ 9-6.14:8, 9-6.14:12 and 9-6.14:17 respecting agency procedure in making case decisions and regulations as well as court review thereof.

[6] "Case" or "case decision" is the term used to refer to administrative applications of law to a named party or parties on the basis of facts found by the agency. The heart of such a proceeding is a fact determination respecting compliance with law, which may take the form of an inquiry under a law or regulation into the facts of a case to decide whether there has been either (i) a violation or (ii) a showing of entitlement to a license or benefit. Article 3 of this chapter is devoted entirely to agency process in such cases. These adjudications are sometimes referred to as "judicial" or "quasi-judicial" administrative operations. They are to be distinguished from the issuance of "regulations" as later defined in this section, that is, from the very different "legislative" or "quasi-legislative" function which may be delegated to administrative agencies by basic laws, procedure for which is the subject of Article 2 of this chapter.

"Case decisions" would include, among others, those (i) of a declaratory nature issued in advance of contemplated private activities, (ii) awarding or denying money, or (iii) forbidding named parties from acting or refraining from acting or threatening to act in some way required or forbidden by the basic laws, the regulations, or other applicable law under which the agency is operating.

[7] No new formal hearings are required by this chapter alone. Instead it either limits or builds upon hearing requirements previously written into basic laws with reference to case decisions or the issuance of regulations under §§ 9-6.14:8 and 9-6.14:12. For that purpose this definition might have been omitted since those sections speak for themselves in that regard, but it is included to help emphasize that trial-like hearing requirements are not created in the first instance by this chapter.

[8] Regulations such as these are sometimes referred to as "legislative" in nature because, rather than pronounce upon past violations or present entitlement, they prescribe for future conduct or entitlement. They are thus also sometimes said to be of a "substantive"nature, for which see also the definition in the last paragraph of this section. Regulations of this kind are also sometimes called "rules of conduct" or "rules of decision" when found in legislation under which courts or agencies are called upon to decide cases.

However, the term "regulations" would not include (i) an agency's explanation of or reasons for its decision of a case, (ii) any statement of the nature of or basis for regulations issued, (iii) advisory rulings given upon a hypothetical or stated fact situation, (iv) the terms of an injunctive order, or (v) the conditions stated in a license.

[9] Traffic signs, markers, and control devices are excluded for practical reasons.

[10] This sentence is not only definitive but it is also a positive requirement that agencies shall include in their regulations sufficient information to apprise the public of procedural opportunities.

[11] "Subordinate" is defined here in order to simplify the language of, and avoid repetitions in, § 9-6.14:8 with reference to the evidential hearings in connection with the issuance of regulations and §§ 9-6.14:12 and 9-6.14:13 with reference to litigated issues in connection with case decisions. Such subordinates would include hearing officers duly authorized to be appointed from outside the agency as for example the "hearing officers" provided for the Department of Professional and Occupational Regulation pursuant to Chapter 318 of the Laws of 1974.

[12] "Substantive" is defined in order to simplify the language of, and avoid repetitions in, Article 2 with respect to agency procedure in the making of regulations. Its purpose there is to distinguish, for purposes of the agency process, between regulations which state rules of conduct as compared with those which are merely procedural or organizational in nature. "Persons" as used in this definition includes of course private organizations of any kind. See § 1-13.19 of the Virginia Code.

[13] Rate making, though legislative in nature, is excluded from the requirements of Article 2 because due process rulings, statutory requirements, and long standing agency practices have so fully occupied this historically much litigated field that the interposition of a further general process statute seems to be entirely unnecessary at least for the present. Price fixing is also excluded because it is of the same nature.

[14] Permissions for agencies to avoid the requirements of Article 2 are self-explanatory. Since § 9-6.14:7 of the chapter imposes a mandatory public procedure requirement on all agencies contemplating making substantive regulations, it is particularly necessary that they have authority to omit such procedures in formal, trivial, technical, and other situations in which the public is little concerned. To force public procedure in such cases would make agencies and legal processes appear supernumerary if not ridiculous. It may also impede agencies in keeping their regulations up to date as the Virginia Register Act contemplates (Virginia Code, § 9-6.15 et seq.). Otherwise, in true emergencies an escape mechanism is necessary to avoid exacerbating compelling situations but, in view of the other categories of exceptions, these should be few.

[15] Of course anyone may at any time petition an agency to reconsider and revise, or adopt, amend, or repeal any regulation. This provision adds, for the purposes of emergencies and other situations in which procedures under this article are avoided, that on receipt of such petitions the agency will actually respond in some suitable fashion or other. It does not mean, however, that the

regulations will meanwhile be rendered inoperative merely because such petitions have been received.

[16] This section must be read together with § 9-6.14:8. Combined, they make several differentiations in agency process for making regulations. They also afford agencies considerable flexibility and accommodate the public as well as make it possible to avoid unnecessary proceedings.

Section 9-6.14:7(i) permits agencies, in their discretion, to make available public procedures in the formulation of *any* type of regulation. But it is limited to the public submission of "data, views, and argument" as distinguished from proof of facts which is the subject of § 9-6.14:8 hereinafter. Such submittals are to be allowed both *orally* and in writing, that is, interested parties may make their presentations orally, in writing, or both at their option. But under the second numbered part of the sentence, agencies are always to do so where either the regulation is substantive or the basic law requires a hearing. The third numbered part of the sentence invites agencies, where they are not required to hold oral proceedings and do not choose to do so, nevertheless in their discretion to afford public opportunity to make *written* submittals. It should be noted that, under any of these provisions, the agency is to afford only the *opportunity* to the public to make submittals; the notices therefor may require interested parties to signify that they wish and plan to do so; and if no one wishes to take advantage of the opportunity so provided, the agency need not further proceed publicly. In any case, however, the agency should of course take care that its file reflects the factual basis for any substantive regulation issued (see note 56 to § 9-6.14:17 hereinafter).

Note again, however, that this section deals with the submission of "data, views, or argument" which does not necessarily include the formal submission of evidence or proofs of some specific fact or other. For the latter purpose § 9-6.14:8 provides for "evidential hearings"—which may be combined with or in addition to the "informational hearings" referred to in this section as explained in the next comments.

[17] Requirement of such notices is limited to situations in which contemplated regulations are substantive in nature or the basic law requires a hearing in order to allow agencies flexibility and discretion in other situations in which, for example, the subject is one of interest to limited groups which may be given notice by other means. In any case, of course, agencies may choose to publish general notice of proposed rule making. Also, in any case whether required or not, such notices may be short and simple. Such proceedings are exploratory in nature and hence the agency is by no means required to detail what it might ultimately do as a result of such public inquiry.

[18] See also § 9-6.14:9 with respect to the adoption, dating, and availability of all regulations.

[19] The statements contemplated by this paragraph need not

be elaborate but, for the information of any court called upon to review pursuant to Article 4, they should include identification of the legal and factual basis under and upon which the agency has acted.

[20] This section provides for the reception of evidence as distinguished from general views, data, or argument which is the subject of § 9-6.14:7. If the proposed regulation is substantive in nature, the agency may in its discretion in any case hold evidentiary proceedings whether or not the basic law provides for hearings—but the agency must provide opportunity for the submission of evidence where the basic law under which it is proposing to act expressly requires a hearing.

> The reason for the distinction between informational proceedings under § 9-6.14:7 and evidential hearings under this section is that, in the usual case, the submittals respecting proposed regulations are argumentative rather than evidential so that there is no need for the safeguards and expense attendant upon fact finding proceedings. So far as there is need to receive no more than views, data, and argument from interested persons, procedure under § 9-6.14:7 should suffice. But even where an evidential proceeding is required, note that the agency need not always hold one but may give interested persons an "opportunity" to request one and, if there is no demand therefor, need not undertake such a trial-like proceeding.
>
> Evidential hearings may be comparatively infrequent. In any case they will depend upon the presentation of fact issues bearing upon the validity of the proposed regulation should it be adopted (as is more fully explained in the next note). While two kinds of public proceedings are envisioned, one under § 9-6.14:7 and the other under this section, they do not require a double procedure. See the third sentence of the second paragraph of this section. In the normal case it should be possible for the agency to discover in the course of an informational proceeding under § 9-6.14:7 whether or not the requisite fact issues are presented for trial under this section and, if so and it is requested, then to conduct the evidential hearing forthwith or later as may be deemed preferable.
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> Note also that some provision such as this section is necessary to avoid court trials and simplify court proceedings respecting fact issues bearing upon the validity of regulations. That relationship is further explained in note 56 to § 9-6.14:17 of this chapter hereinafter.

[21] The first paragraph of this section is important if agencies are to have authority to avoid unnecessary formalities. Thus the second sentence of this section provides that, where evidential hearings are held, the agency may not only limit them to the demonstration of "factual" issues but also limit such issues to those "directly relevant to the legal validity" of the proposed regulation. Such proceedings are allowably limited to fact issues because that is all that any evidential proceeding is designed to handle.

"other laws." Note, in that connection, that presently something of that nature is only partially required by the General Administrative Agencies Act (Code of Virginia, Ch. 1.1, § 9-6.1 et seq.). Presumably the subject will be more fully dealt with if and when the present Virginia Register Act (Code, § 9-6.15 et seq.) is implemented by the General Assembly in 1975 or thereafter.

[36] Unlike the "legislative" functions hereinbefore dealt with in Article 2, Article 3 is concerned with the "judicial" operations of agencies, that is, the case by case application of law by agencies. The first three exceptions in § 9-6.14:10 are made primarily because basic laws on those subjects are of such nature that there is little, if any, occasion or need for the applicability of a chapter of this kind. That is generally true of tax administration and procedures and workmen's compensation. Public assistance at the state level is intertwined with federal laws and regulations. The last exemption, relating to authorized preliminary orders of a summary nature, is necessary for the simple reason that they cannot be summary if also subject to the adjudicatory process provided in § 9-6.14:11 or 9-6.14:12.

[37] This section, as contrasted with § 9-6.14:12 which follows, deals with adjudications agencies are authorized to make without any of the formalities of trial-like procedure. They account for by far the greater bulk of administrative operations of a regulatory nature. To exclude them would be to ignore the larger part of the subject. To prevent or seem to prevent them would radically alter, if not disastrously impair, an important tool of today's governance. But on the other hand, and for those very reasons, these so-called "informal" agency methods of adjudication should be defined and given substance. Hence this section states the main form such process usually takes, that is, conferences or consultations. To the extent that basic laws permit, agencies may also proceed on the basis of inspections, tests, or elections, followed by such conference-consultation procedure as the case issues may require. Initial licensing, for example, is a vital part of state administration and proceeds on the basis of tests or the informal submittal of data designed to show that the applicant meets requirements.

> But, while this section is designed as the primary provision respecting case decisions where basic laws do not require an agency hearing, it may also serve, in the discretion of agencies concerned and upon consent of the private parties, as a preliminary or pre-trial method of settling or simplifying cases in which there is a statutory right to a trial-like agency hearing. The latter type of process is governed by § 9-6.14:12 hereinafter, in which detailed evidential and decisional procedure is stated.

[38] The first sentence having defined the subject, this second sentence completes the section by stating requirements for this form of adjudicatory process. Notice of proceedings is obviously necessary; but a distinction should be made in connection with applications for a license, in which case the applicant has the burden of approaching the agency in the first instance as provided in the second paragraph of § 9-6.14:12 hereinafter. Right to appear in person or to have counsel or representation is equally obvious.

Prompt decision is particularly desirable in the case of licensing since delay in agency action upon applications amounts to a denial thereof pro tem. However, the heart of the matter relates to the presentation and determination of facts. Where the conference-consultation process is utilized, that means rights to present "factual data, argument, or proof" to the agency or a subordinate designated by the agency to act in its behalf for the purpose; to have notice of any contrary fact basis or information upon which the agency proposes to rely; and to be informed of the factual basis for an adverse decision made by the agency. Such rights of notice or information are, of course, particularly necessary in the case of adverse decisions. Note also that, whether or not private parties appear and submit proofs in such cases, agencies should take care to record in some suitable fashion the factual basis for their adverse decisions which are not subject to further administrative process under § 9-6.14:12—because, in case of court review of such otherwise final informal decisions, agencies may be called upon to demonstrate the factual basis upon which they have relied (as explained in note 56 with reference to § 9-6.14:17 hereinafter).

[39] As distinguished from the prior section, this one deals with fact issues determined by agencies through a trial-like process—but such procedures are required only "where the basic laws provide expressly for decisions upon or after hearing." Note that, when used in a basic law, the word "hearing" in such cases does not have the different meanings met with in Article 2 relating to regulations. Here the word signals only one type of formal fact finding. However, where this form of process is required, the agency may, and often should, first attempt to resolve controversies by consent through the informal methods described in § 9-6.14:11. Conversely, where agencies are not required to use formal trial-like procedures pursuant to this section, they may nevertheless choose to do so for purposes of the record.

[40] Here, unlike the general publication of notice usual in connection with the making of regulations under Article 2, notices must be brought to the attention of parties to an adjudication personally.

[41] This provision, in its reference to applicants for licenses, modifies the last sentence of § 9-6.14:11 as mentioned in the note thereto.

[42] Subsection C. of this section is a simplified statement of the usual incidents of formal administrative adjudicatory process. It is similar to the listing in the federal Administrative Procedure Act. But one feature may add something to some state practice, that is, the use of subordinates. In addition to presiding at hearings, they may, but only subject to appeal to or review by the agency itself, also either make or recommend findings and a decision as the agency may direct—an obvious necessity if some agencies are to cope with growing case loads and if private parties are to be allowed meaningful contact with personnel upon whom much of the burden rests in any event. See § 9-6.14:5 and note 11 thereto.

[43] Subsection D. of this section deals with the so-called post-

Argumentative matter may be better, and less elaborately and less expensively, received through the more flexible procedure provided in § 9-6.14:7. Evidential proceedings under this section are further allowably limited, in the discretion of the agency, to fact issues going to the "legal validity" of the possible regulation because those are the significant fact issues [see also § 9-6.14:17] . Such fact issues are somewhat rare in the making of regulations. They normally arise, if at all, in one of two situations: The fact issue may be whether the persons or activity to be affected by the proposed regulation are within the *subject* stated in the basic law. Thus, for example, the issue may be whether a class of truckers are "common carriers" or whether some types of workers are "employees." Decision of such issues depends not only on the basic statute but also on the facts of the class or type which might be covered by the proposed regulation. Where the basic laws provide that the agency is to hold a hearing in making such regulations, the agency is of course entitled to assume the function of the initial trier of the relevant facts in those situations. This section not only protects that function of such agencies but also permits it in all cases where substantive regulations are proposed.

> The other situation in which fact issues may be important, and agency jurisdiction thereof should be served, arises when basic laws not only state the subject but provide further as to the *objective* for which regulations are authorized. Thus, a basic law relating to foodstuffs may authorize regulations to prevent the use of additives *injurious to health*, or a statute may provide for regulations respecting air pollutants *harmful to humans*, and the critical issue of fact is whether such additives or emissions are actually harmful to health or humans. In such cases the primary function of the agency is to determine the issue of fact in the first instance.

[22] Since proposed regulations may potentially affect persons unknown, often in large numbers, notice by publication is the only practical method of apprising the public. But this does not mean that an agency may not, as it wishes, also give such additional notice as may be appropriate.

[23] Regulations addressed to named persons are the administrative counterpart of what are called "special" or "private" laws when in statutory form. They may in one way or another affect other persons than those named, for which reasons general publication of notice is also required under the previous sentence.

[24] The reasons for this sentence are set forth in note 20 to this section.

[25] This sentence embodies no more than the exclusions normal in any fact finding process.

[26] Submission of written evidence is authorized in the discretion of the agency only upon condition that those responsible for it are produced for cross examination. It confirms a practice already normal in administrative proceedings in the making of regulations.

[27] For the definition of "subordinates" see § 9-6.14:5 G.

[28] Note that it is only these evidential proceedings which require a verbatim record, not the informational proceedings under § 9-6.14:7. Another condition is the requirement of a report by such subordinates as mentioned in the next sentence.

[29] Only where subordinates preside at evidential hearings is a report required, the purpose of which is to serve as a basis for further proceedings before the agency itself.

[30] In all cases where evidential hearings are held it is contemplated that parties shall have the opportunity to submit briefs, but oral argument rests in the discretion of the agency. The agency itself must make the findings of fact on the basis of the record (and such judicial notice as is recognized) as well as state the basis and purpose required by the last paragraph of § 9-6.14:7 growing out of any separate informational proceedings. These must lead to the similarly stated ultimate conclusion or conclusions required by the language of the basic law under which the agency is acting. Such findings, statement, and conclusion may be short and simple unless the nature and number of the factual issues require elaboration of the findings.

[31] This assumes that all regulations will be in writing. The normal method of adoption would be a signed order stating that the attached (or "foregoing") regulation is "hereby adopted." The signing may be by the official or officials authorized to act, or by some duly designated subordinate such as the secretary or chief clerk of the agency who is by agency minute or otherwise authorized to sign "for" the agency.

[32] Note that, with the exception stated, the normal 30-day deferred effective date period begins to run upon and after the filing of regulations under the Virginia Register Act. Such filing is required only to the extent provided in that Act, amendments thereof, and any instructions or regulations issued thereunder respecting such filing.

[33] Every agency should provide for suitable custody of such public records as well as their availability under the remainder of this section.

[34] Where copies are made available, there would of course be no reason for public inspection or copying of originals unless some controversy should develop as to the existence, terms, dating, or otherwise of the originals.

[35] As stated in note 32 above, filing under the Virginia Register Act is required only to the extent provided therein or by any amendments of that act or any regulations or instructions issued thereunder respecting such filing. Other laws occasionally require the filing of regulations for other purposes, but those are neither made additional filing requirements under this chapter nor does this chapter repeal or modify them. Note that this chapter makes no provision for publishing regulations, which is left to

hearing procedure of administrative agencies. It is designed to bridge the gap between the hearing by a subordinate and the exercise of final decision by the agency, for which purpose provisions such as these are common and borrow heavily from the practice of courts when they delegate fact finding to masters in chancery.

[44] The core of any agency adjudication following upon formal procedure is the finding of facts, upon which court review largely depends as indicated in § 9-6.14:17 hereinafter.

[45] The settled practice with respect to administrative subpoenas, depositions *de bene esse* and requests for admissions is reflected in this section. Disavowal of discovery proceedings has been added as a precaution.

[46] Section 9-6.14:14 simply summarizes what is deemed to be either requisite or good practice with respect to the final adjudicatory orders of agencies. Note that there is no problem, or thought, of publication here, in contrast with the problem of availability of regulations mentioned in § 9-6.14:9. There is of course no reason why agencies should not selectively publish some of their case decisions as federal agencies often do.

[47] The first of the exclusions in § 9-6.14:15 is a necessary recognition that the makers of constitutions and statutes may, if they wish, exclude courts from any participation in administrative justice in the rare instances in which they elect to do so. The second makes a similarly necessary exception of internal management and routine decisions of agencies. The third is a recognition that there is no ascertainable role for courts to play in connection with some types of administrative process—inspections, test, and elections save where there are claims of gross wilfulness or fraud. The last two—where an agency is the agent of a court or its actions are subject to a complete redoing by courts—are obvious instances in which mere court "review" is inapposite and redundant.

[48] As the first part of the first sentence of this section indicates, the right of court review, so far as provided by this article, is limited to regulations and case decisions as those terms are defined in § 9-6.14:5. Otherwise the purpose of the sentence is to recognize that the *form* of court actions therefor may be either that specified in the basic law involved or, for lack thereof, any traditional type of court proceeding as further indicated by the following sentence of the section. Note, however, that what may be said to be a third form of court review is recognized by the last sentence of the section, that is, by way of defense to any action in which enforcement of the agency action is sought. While the form of a court review proceeding is important as a matter of court procedure, more important is the nature of issues which may be reviewed whatever the form—which is the subject of § 9-6.14:17.

> The procedural steps for obtaining court review of agency action under this chapter have been left to the Rules of the Supreme Court, and a specific rule should be developed for this purpose. The Committee adopted this approach after

considering (a) the incorporation by reference of the Rules of Court governing appeals from the State Corporation Commission and (b) spelling out the procedural steps in the chapter itself, as was done in the General Administrative Agencies Act. The first of these was rejected because the provisions of Rule 5:18 were not a perfect fit for appeals to courts other than the Virginia Supreme Court, and this raised numerous unnecessary questions. The latter approach was rejected because the Code Commission presently has under review the provisions of Title 8 and the Committee did not want to recommend procedural steps that might be inconsistent with recommendations of that study. Accordingly, the Committee has recommended that this point be covered by Rules of Court in a manner consistent with the results of the Code Commission's study.

[49] Section 9-6.14:18, to which reference is made, deals with the authority of reviewing courts to grant temporary relief in appropriate cases.

[50] As with respect to the form of review actions, this sentence is simply a recognition that the appropriate courts for review or appeals therefrom are those designated by the basic law under which the agency has acted or, for lack thereof, any courts of competent jurisdiction under other laws of the Commonwealth.

[51] Where review of agency action is sought as a defense to the enforcement thereof, the proper court is that which has enforcement jurisdiction and in which such enforcement action is brought; and the judgment or decree therein is appealable as in other cases.

[52] "Error of law" is a phrase often used to summarize the sort of reviewable questions more fully explained in the next sentence of this section.

[53] This listing has come to be customary in drafting provisions defining issues on judicial review, particularly since the adoption of the federal Administrative Procedure Act in 1946. Thereunder, more particularly, when such issues are presented and a determination thereof is required for decision, reviewing courts must of course (a) interpret constitutional and statutory provisions as well as determine the meaning or applicability of the terms of the regulation or case decision involved, (b) inquire into the relevance, sufficiency, and factual support of the supporting agency findings, conclusions, grounds, or reasons and (c) decide upon the validity of the regulation or case decision upon its face, in view of the stated agency findings or reasons, the proofs therefor, or the procedural opportunities afforded as the issue may be.

[54] This sentence confines the court to the agency record as to the facts where constitutional or statutory provisions in effect make the agency the trier of fact (except of course to the extent that basic laws expressly provide otherwise). In those cases, moreover, the court is further limited by the next sentence and the last sentence of this section.

[55] Where the agency is the trier of the facts, this sentence merely puts in statutory form the "substantial evidence" rule long adhered to by courts in reviewing administrative action.

[56] This sentence articulates, in statutory form, the function of courts respecting the necessary facts where agencies are not by constitutions or statutes the constituted triers of fact through the medium of formal hearings. It does not authorize courts to try out the facts in such cases de novo; where trials de novo are authorized by law, this article, as stated in § 9-6.14:15 hereof, does not apply. Although a court may sometimes order an agency to augment its informal record or in rare instances supplement the same by evidence adduced in court, it would defeat justice to allow agencies to make fact decisions in the first instance without the necessary factual basis therefor in reliance on a later opportunity to do so in court or to contest in court any contrary showing. For this reason agencies should see to their fact records even in non-hearing cases as mentioned in notes 16 to § 9-6.14:7 and 38 to § 9-6.14:11. This is not to say, however, that courts may not permit "any allowable and necessary proofs" in situations otherwise unavoidable as, for example, where bad faith is charged in substance or procedure—or as courts sometimes say, where administrative action is in point of fact alleged to be arbitrary, capricious, or otherwise contrary to law.

[57] This last sentence, applicable whether the agency is the trier of fact or not, directs reviewing courts to take account of the role for which agencies are created and the public policy evidenced by the basic laws under which they operate.

[58] This section summarizes the recognized authority of reviewing courts to grant temporary relief from contested agency action but adds language to prevent improvident exercise of such authority.

[59] One point of this section is to emphasize that, while the court may dismiss the review action or affirm the agency regulation or decision, it is not to suspend or set them aside without a remand to the agency if further proceedings by the agency would be lawful. Another is that, while the court may compel agencies to act where they have unlawfully or arbitrarily refused to do so or have unreasonably delayed, the court itself is not to undertake to supply the lacking agency action but should remand the matter to the agency for appropriate action by it if any.

[60] Article 5 makes obvious self-explanatory exemptions from the whole chapter. Note, however, that there are other kinds of exceptions. Thus §§ 9-6.14:6 and 9-6.14:10 make certain exclusions from the prescribed agency process for the making of regulations or case decisions respectively; and § 9-6.14:15 does the same respecting court review. Other exceptions are written into the important definitions in § 9-6.14:5 of agency, case or case decision, and regulation. Section 9-6.14:6 permits agencies to dispense with public procedures in the making of certain types of regulations, or of any regulation in emergencies; and the first paragraphs of §§ 9-6.14:7 and 9-6.14:8 further limit the requirement of public procedures in the making of regulations. Sections 9-6.14:16 through

9-6.14:19 also restrict the power of courts in reviewing agency actions. All make necessary exclusions or differentiations because of the nature of the subject, to avoid interpretative controversy, to preserve the flexibility and integrity of the administrative process, and to achieve a practical as well as educational statement of the law of administrative due process in Virginia.