Judicial Review for Government Actions: (HB 3027)
An Alternative View Report

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I support the concept of a unified system for judicial review of government decisions. The question is whether LC 1564 does an adequate job of melding the system for judicial review of local government decisions with the system for judicial review of state government decisions. From the perspective of citizens seeking judicial review, LC 1564 does not. It needs further revision. My concerns fall into four categories.

1. **APA Principles**

   The first category relates to how the principles in the Administrative Procedures Act (APA) are treated in LC 1564. If the APA is included in LC 1564, its principles should not be sacrificed at the expense of those seeking judicial review. As pointed out in the attached materials, LC 1564 raises the bar for citizens seeking appellate review. LC 1564 diverges from APA standards to the detriment of the person seeking judicial review in many areas, including: pleading requirements, interlocutory review, preservation of error, stays, exhaustion of administrative remedies, review of inconsistent agency action, judicial deference, hearings not covered by contested case procedures, withdrawal of agency orders, and attorney fees.

2. **Increased Procedures**

   The second category relates to the increase in procedures and costs to Oregonians who are seeking judicial review of their government’s actions. LC 1564 creates new procedures and allows government multiple opportunities to get it right--at the expense in time and money of the person seeking judicial review.

3. **Exclusion of Some State Agencies**

   The third category relates to the adherence of LC 1564 to the concept of a unified system. The bill excludes many state agencies from its provisions. All state agency decisions should be included under the new unified system, not just some. The APA presents a simple, unified system for reviewing state government’s orders, rules, rulings and failures to act. The judicial comments and law review articles referred to in one of the reports are not applicable to the APA or were not even directed at the APA’s provisions. The APA does not suffer from arcane procedures and treacherous intricacies. HB 3119, which passed last session, resolved any lingering concern over how to choose the correct forum for judicial review under the APA. The APA is a recognized body of “well-established procedures and standards tailored to the kind of government action involved.” If APA proceedings can benefit from inclusion in LC 1564, then there is no reason to exclude other state agencies’ proceedings.
4. Overall Clarity

The fourth category relates to the bill’s clarity. How easy is the bill to use by the uninitiated and unwary? The Work Group spent more time trying to decipher what the bill meant, than in determining what the bill should mean. That, of course, was caused by the material the Work Group inherited for the project, and not the excellent drafting skills that David Heynderickx brought to the project. After a yearlong effort to make sense of the bill, I must admit that the bill’s text still needs clarification. Practitioners and judges need a clear bill, not one that requires months of colloquy with other practitioners to understand. I have pointed out some of the areas still needing clarification in the attached material. However, that does not make the bill, on the whole, easy to read, understand, or apply.

Commentary

The bill also needs more specific commentary. The commentary needs to explain where and how this proposal changes the way the current system works. Those reviewing the bill to determine its merits, and those later applying it, need to know what the bill really does to the current system. For instance, wherever LC 1564 departs from standards and practices currently in place in the APA, the report should forthrightly explain that there is a departure and how it is different. Likewise, LC 1564 would now cut off access to judicial review of certain local government decisions after 60 days, and this change, and others like it, should be identified in the comments. That way, those considering adoption of the proposal can judge whether the bill on balance provides fair and appropriate changes from the status quo. Those applying the bill will understand how the new system is intended to work and not have false expectations regarding the bill’s impact on the status quo. Unless one has expertise in every aspect of judicial review covered by this comprehensive bill, the changes must be highlighted and explained, if the bill is to be properly evaluated.

I worked diligently on this project. The other members of the Work Group certainly have, too. I would like to see a unified system that is fair and that improves the efficiency and effectiveness of the judicial review system. As it stands now, however, LC 1564 is not at that point. It needs to be revised to ensure that the purpose of the bill—to protect governments from new legal challenges or new procedures, as Section 1 of LC 1564 provides—also includes a bigger commitment to protect Oregon’s citizens from costly new procedural requirements and reduced access to judicial review.

I would like to thank the Work Group’s chair, Attorney General Hardy Myers, for his dedication to this project. I hope the following section-by-section analysis of LC 1564 and the recommendations it contains, will be helpful.
Section-by-Section Analysis of LC 1564

SECTION 2

(1). This subsection does not refer to ripeness criteria in Section 8, which is an exception to “finality” as defined in this section.

(3). This subsection should refer to the requirement that if no written notice, the court has discretion to extend the time for filing an appeal in Section 5. See discussion in Section 5, below.

SECTION 3

(1). Because LC 1564 provides the exclusive remedy for all government actions not specifically excluded from its provisions, any confusion about what actions are covered by LC 1564 may result in the loss of any opportunity to challenge a wrongful act or enactment. If a party brings an action in contract for how an agency is implementing a lottery contract (actions on contracts are excluded from provisions of LC 1564), when the remedy should have been a request to review a government action pursuant to LC 1564 (lottery final order implementing the lottery contract), there will be no remedy available to the party by the time this is clarified by the courts. The appellant has only sixty days to appeal the lottery final order but has six years to bring an action in contract.

Considering that there are 30 exclusions, many of which are subject to a great deal of interpretation, this needs to be addressed. Courts must have discretion to allow late filings and to allow amendments because of the uncertainty about what this subsection means. Otherwise, this section will be a procedural trap.

Any confusion in the definitions in the Administrative Procedures Act (APA) concerning whether the agency action was a rule, an order in a contested case, or another kind of order was fixed by HB 3119 last session. Consequently, relief for a mistaken choice of forum under the APA was eliminated by HB 3119. Because of the uncertainty created in Section 3 of LC 1563, there is now, however, a need for relief for a mistaken choice of remedy. The transfer provisions in Section 12 do not address a mistaken choice of remedy. LC 1564 needs to be amended to allow courts to deal efficiently with not just a mistaken choice of forum, but also with a mistaken choice of remedy.

(5). Exclusions of some state agencies’ actions from LC 1564 belies the avowed intent to have a comprehensive bill. This bill should apply to all state agency acts and enactments. Although not all state agencies have the same appeal processes (review by boards) for their decisions, the scope of judicial review (review by courts) is not substantially different from the standards for judicial review under the APA. Judicial review of a LUBA decision is no more clear and distinctive than judicial review is pursuant to the APA. LUBA is excluded, the APA is not. The PUC is included in the
Judicial review provisions of LC 1564, (PUC orders are subject to *de novo* circuit court review), while support orders are excluded. The Workers’ Compensation Board is excluded, although judicial review of Board orders is substantially the same as APA judicial review.

The APA is a unified system that has well-established procedures and practices. If LC 1564 is to create a unified and comprehensive judicial review system, all agency acts and enactments should be included in the judicial review bill without artificial distinctions being drawn that include the APA and exclude other agencies’ judicial review procedures.

SECTION 4

(2). The need to provide a statement of errors in the notice of appeal is an unfair requirement. The majority of citizens participating in APA proceedings are unrepresented at the agency level and must find attorneys to represent them on appeal. Without a record to review or previous representation at the agency level, an attorney for the injured party or aggrieved person would be forced to allege errors in the notice of appeal without adequate information and then be subject to a time-consuming and expensive motion practice. This procedural change is detrimental to the appellant and should be deleted. The current APA requirements for a petition for judicial review are fair and should be retained.

(7). This subsection should provide that the court *may* dismiss the appeal if not timely filed, but is not required to do so. This reflects the extenuating circumstances that are expressed in LC 1564 and allows the court discretion to accept a well-founded appeal without elevating filing dates to jurisdictional requirements.

SECTION 5

(1). This subsection is meant to cover appeals filed pursuant to OR 183.400 (1). It appears over broad because it could affect procedural errors in rulemaking outside this direct review context. This subsection should be clarified so that the 2-year limitation does not prevent an appellant from asserting failure to follow rulemaking procedures when challenging an action based on an invalid rule more than 2 years after the agency failed to properly engage in rulemaking.

(4) (b). This subsection should be changed so that failure to give notice *may* be grounds for dismissal. This section should be amended to include a provision that the court has discretion to extend the filing deadline if no notice regarding the filing deadline was provided to the appellant by the government unit.
SECTION 6

This section creates more procedures, causes more delay, and makes appeals more costly. This section should be deleted.

(2),(4). Without a record, the bases for dismissal should be restricted to jurisdiction and timeliness, and only those issues that are apparent from the notice. Once the court has to rely on a record, the whole purpose of a “preliminary” procedure to avoid filing a record is obviated.

(3). This subsection preserves the agency’s ability to file a motion to dismiss and restart the motion practice pursuant to ORCP 21 when the petition for review is filed. Having ORCP 21 motion practice before and after the petition for review is filed is excessive.

SECTION 8

(1). This subsection needs to provide that once there is a request for the government unit to provide a statement regarding finality, the time for filing the appeal may be tolled until the statement is issued. Otherwise, the appellant could miss the filing deadline waiting for a response from the government unit.

This subsection should also include a provision that the appellant may pursue relief available in Section 17 (5), (failure to act at all) as well as in this section, if the government unit’s action is not final.

(2). This subsection raises the bar for appellants seeking interlocutory relief. This subsection should allow relief if either (2) (a) standards OR (2) (b) standards are met. Otherwise, even if there is no basis in law or fact for the agency action, the injured person is unable to seek injunctive or other relief from a court. This section is a substantial change from APA practice and is unfair to appellants.

SECTION 9

This section needs to have a provision clarifying that Section 9 does not apply to cases that are subject to Section 8 (2).

Futility is not included as a basis for exemption from the requirement that appellants exhaust administrative remedies, although it currently is recognized by the courts. Futility is different from inadequacy of the “available” remedy from the agency. The remedy may be “available” (possible remedy) but it would be futile to pursue it before the agency.

The courts have previously determined that an appellant need not exhaust its administrative remedies by presenting issues to the agency before seeking judicial review of claims regarding: jurisdiction; unconstitutionality or invalidity of a rule; statutory
interpretations when correct administration of the statute concerns public interests beyond those of the parties; and issues having substantial public importance. This section should be amended to ensure courts have discretion to review these issues, as they do now. Furthermore, these issues should not have to be raised pursuant to Section 10.

SECTION 10

This section needs to clarify that the appellant does not need to raise an issue before the agency, if the court exercises its discretion in Section 9, above.

(1)(b) There is no requirement in the APA that an issue must be “raised” as if the proceedings were typical judicial proceedings. That is not surprising because administrative hearings are informal proceedings. The APA puts burdens on the agency and the hearing officer to create a full and fair record, unlike a typical adversarial proceeding. A party’s ability to “raise” issues is frequently dependant on the actions of the hearing officer, because parties are usually unrepresented. Consequently, the APA requires the agency and hearing officer to help a party recognize and assert issues under ORS 183.415 (7) and (10). Section 10 does not reflect this APA distinction and imposes a “raise it or waive it” standard that conflicts with the APA.

The current provision regarding hearing officer responsibilities in this section is not sufficient to address this APA distinction. Hearing officers are not required to “raise” issues, but are required to assist parties in identifying applicable issues and pursuing them at the hearing. ORS 183.415 (7) and (10). Consequently, as currently drafted, this section is nonsensical and would be ineffectual in protecting APA principles.

SECTION 16

(6). This section needs to be clarified to ensure that the court, as well as the agency, is required to issue a stay, or temporary stay, if imposing conditions would alleviate substantial harm to the public or other party should the stay be granted. The requirement should be added to Subsection 6

Stay provisions outside of the judicial review bill need to be repealed. For instance, stay provisions for certain OLCC matters and for medical professionals are not in conformance with this section.

SECTION 17

(3) (a). This subsection is unfair to the appellant. It allows an agency action, which is invalid because of a lack of required fact-finding by the agency, to remain in effect while the matter goes back to the agency for required fact-finding. The invalid act by the government unit should be reversed by the court at this stage, so that the invalid order is not in effect. Instead of a remand, the reviewing court should find facts based on the record, without prolonging the proceeding by further proceedings before the agency.
Instead of giving the agency yet another chance to fix an invalid order, the need for efficiency should prevail.

This section promotes the mistaken approach in LC 1564 that government units have a stake in controlling what the facts are in a particular case. The facts are the facts. The government unit is in no better position than the courts are in when determining what the cold record shows are the facts. The policy-making prerogatives of a government unit do not include fact-finding. An agency’s policies cannot and should not determine what factually occurred. The government unit determines policies in accordance with its legal authority. It then applies these policies to the facts. The government unit is not in the business of massaging the facts to prescribe an outcome, any more than the courts are. Once the record is made, judicial economy requires that the court review the record to determine what facts are established in the record. If the agency failed to find necessary facts, the court should do so and not remand the matter so that the agency can review the same cold record that the court is currently reviewing.

(7) As drafted, this subsection is ineffectual for ensuring that an agency issue consistent orders. LC 1564 specifies that the requirement for consistency in government orders must be found outside the provisions of LC 1564. Therefore, LC 1564 requires that any claim for inconsistent action by an agency include a reference to some law that says that agencies must act consistently. The APA currently provides that requirement in ORS 183.482 and ORS 183.484, which are being repealed by this bill.

The requirement for consistency in agency actions must continue to be a requirement that is reviewable by the courts. The Work Group was unable to cite any statutes that specify that consistency in agency orders is required; the report also does not give examples of statutes that require agency actions to be consistent. In effect, this subsection makes that requirement impossible to raise on appeal, without resorting to constitutional requirements. Relying on constitutional claims to require consistent agency actions is a significant departure from APA practice and is detrimental to appellants and the quality of Oregon’s administrative law system.

SECTION 18

Under the APA, the appellant has a right to a contested case hearing before the agency issues its final order or a hearing before the circuit court when no hearing was required before issuance of the final order. In either case, the person injured by the agency decision has a right to a contested case hearing or its equivalent. This provision reduces the minimum level of hearing that injured persons, which includes adversely affected citizen groups, can count on under the APA. Contrary to the APA, this section does not require record development before an impartial judge or hearing officer.

The requirements for adding information to the record when the agency had no formal proceeding or some limited method for gathering information on which to base its order must be revised. Otherwise, the process will not be fair to appellants or citizen
groups seeking judicial review. LC 1564 must specify that, unless the agency already provided a proceeding that meets the following requirements, the agency must afford an adversely affected or aggrieved person who requests to augment the record the right to:

1) obtain discovery of all the information presented to the agency, as well as information relied upon by the agency; 2) object to the evidence relied upon by the agency; 3) present documents, witnesses or other evidence; 4) cross-examine anyone providing information, opinions or reports relied upon by the agency; and 5) present issues and arguments for consideration by the agency. The injured person may not exercise all of these rights when requesting to augment the record, but this basic procedure should be available in order to ensure a fair opportunity to be heard.

This proceeding must be conducted by a hearing officer who is not employed by the agency. The factual basis for the order should be established in a record created before an impartial hearing officer. Again, the agency should not have a stake in determining what the facts are. Its role is to apply policy to the facts established by an impartially developed record.

The agency then may reconsider its order, based on a full and fair record, and issue an order for review by the courts. On the other hand, if the agency is not interested in conducting the proceeding after receiving the request, the circuit court may conduct the proceeding, reviewing the matter de novo.

SECTION 19

(1). This section allows the agency to withdraw its order after the appellant has already filed its brief based on the agency’s final order. The majority of the costs of an appeal for an appellant are incurred in producing a brief. To allow the agency to produce a new order requiring a new brief by the appellant is wasteful of an appellant’s resources and prolongs appeals. To encourage the agency to engage in settlement as early as possible, before the appellant has expended its resources on a brief, the agency should have an incentive to fix its erroneous orders before requiring an expensive brief from the appellant. Accordingly, if the agency withdraws its order after the appellant’s brief is filed, the appellant should be entitled to its costs.

SECTION 20

The section eliminates the discretionary award of attorney fees to the appellant in ORS 183.497. ORS 183.497 should be retained. Also, Section 20 would now allow the government unit to be awarded attorney fees. In a typical judicial proceeding, reciprocal fees make sense. Both parties come into the process on an even-footing. However, LC 1564 does not treat government and appellants equally. LC 1564 requires the courts to give deference to the agency. LC 1564 allows the government unit to keep fixing its erroneous actions before it is accountable for the decision that caused the appeal. To allow the agency to then receive attorney fees as a prevailing party is unfair and a departure from current APA practice. Subsection 4 should be deleted.