REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

Judicial Work Group

Model Act		Virginia Code
§ 401	**CONTESTED CASE.** This [article] applies to an adjudication made by an agency in a contested case.	**Case Decisions**

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§ 402	**PRESIDING OFFICER.** (a) A presiding officer must be an administrative law judge assigned in accordance with Section 604(2), the individual who is the agency head, a member of a multi-member body of individuals that is the agency head, or, unless prohibited by law of this state other than this [act], an individual designated by the agency head. (b) An individual who has served as investigator, prosecutor, or advocate at any stage in a contested case or who is subject to the authority, direction, or discretion of an individual who has served as investigator, prosecutor, or advocate at any stage in a contested case may not serve as a presiding officer in the same case. An agency head that has participated in a determination of probable cause or other preliminary determination in an adjudication may serve as the presiding officer of final decision maker in the adjudication unless a party demonstrates grounds for disqualification under subsection (c). (c) A presiding officer or agency head acting as a final decision maker is subject to disqualification for bias, prejudice, financial interest, ex parte communications as provided in Section 408, or any other factor that would cause a reasonable person to question the impartiality of the presiding officer or agency head. A presiding officer or agency head, after making a reasonable inquiry, shall disclose to the parties any known facts related to grounds for disqualification which are material to the impartiality of the presiding officer or agency head in the proceeding. (d) A party may petition for the disqualification of a presiding officer or agency head promptly after notice that the person will preside or, if later, promptly on discovering facts establishing a ground for disqualification. The petition must state with particularity the ground	**2.2-4024**	Hearing officers. A. In all formal hearings conducted in accordance with § 2.2-4020, the hearing shall be presided over by a hearing officer selected from a list prepared by the Executive Secretary of the Supreme Court and maintained in the Office of the Executive Secretary of the Supreme Court. Parties to informal fact-finding proceedings conducted pursuant to § 2.2-4019 may agree at the outset of the proceeding to have a hearing officer preside at the proceeding, such agreement to be revoked only by mutual consent. The Executive Secretary may promulgate rules necessary for the administration of the hearing officer system and shall have the authority to establish the number of hearing officers necessary to preside over administrative hearings in the Commonwealth. Prior to being included on the list, all hearing officers shall meet the following minimum standards: 1. Active membership in good standing in the Virginia State Bar; 2. Active practice of law for at least five years; and 3. Completion of a course of training approved by the Executive Secretary of the Supreme Court. In order to comply with the demonstrated requirements of the agency requesting a hearing officer, the Executive Secretary may require additional training before a hearing officer shall be assigned to a proceeding before that agency. B. On request from the head of an agency, the Executive Secretary shall name a hearing officer from the list, selected on a rotation system administered by the Executive Secretary. Lists reflecting geographic preference and specialized training or knowledge shall be maintained by the Executive Secretary if an agency demonstrates the need.

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	on which it is claimed that a fair and impartial hearing cannot be accorded or the applicable rule or canon of practice or ethics that requires disqualification. The petition may be denied if the party fails to exercise due diligence in requesting disqualification after discovering a ground for disqualification. (e) A presiding officer or agency head whose disqualification is requested shall decide whether to grant the petition and state in a record facts and reasons for the decision. The decision to deny disqualification is not subject to interlocutory review. (f) If a substitute presiding officer is required, the substitute must be appointed [as required by law, or if no law governs,] by: (1) the Governor, if the original presiding officer is an elected official; or (2) the appointing authority, if the original presiding officer is an appointed official. (g) If participation of the agency head is necessary to enable the agency to take action, the agency head may continue to participate notwithstanding a ground for disqualification or exclusion.		C. A hearing officer shall voluntarily disqualify himself and withdraw from any case in which he cannot accord a fair and impartial hearing or considerations, or when required by the applicable rules governing the practice of law in the Commonwealth. Any party may request the disqualification of a hearing officer by filing an affidavit, prior to the taking of evidence at a hearing; stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded, or the applicable rule of practice requiring disqualification. The issue shall be determined not less than ten days prior to the hearing by the Executive Secretary of the Supreme Court. D. Any hearing officer empowered by the agency to provide a recommendation or conclusion in a case decision matter shall render that recommendation or conclusion within ninety days from the date of the case decision proceeding or from a later date agreed to by the named party and the agency. If the hearing officer does not render a decision within ninety days, then the named party to the case decision may provide written notice to the hearing officer and the Executive Secretary of the Supreme Court that a decision is due. If no decision is made within thirty days from the receipt by the hearing officer of the notice, then the Executive Secretary of the Supreme Court shall remove the hearing officer from the hearing officer list and report the hearing officer to the Virginia State Bar for possible disciplinary action, unless good cause is shown for the delay. E. The Executive Secretary shall remove hearing officers from the list, upon a showing of cause after written notice and an opportunity for a hearing. When there is a failure by a hearing officer to render a decision as required by subsection D, the burden shall be on the hearing officer to show good cause for the delay. Decisions to remove a hearing officer may be reviewed by a request to the Executive Secretary for reconsideration, followed by judicial review in accordance with this chapter. F. This section shall not apply to hearings conducted by (i) any commission or board where all of the members, or a quorum, are present; (ii) the Alcoholic Beverage Control Board, the Virginia Workers' Compensation Commission, the State

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			Corporation Commission, the Virginia Employment Commission, the Department of Motor Vehicles under Title 46.2 (§ 46.2-100 et seq.), § 58.1-2409, or Chapter 27 (§ 58.1-2700 et seq.) of title 58.1, or the Motor Vehicle Dealer Board under Chapter 15 (§ 46.2-1500 et seq.) of Title 46.2; or (iii) any panel of a health regulatory board convened pursuant to § 54.1-2400, including any panel having members of a relevant advisory board to the Board of Medicine. All employees hired after July 1, 1986, pursuant to §§ 65.2-201 and 65.2-203 by the Virginia Workers' Compensation Commission to conduct hearings pursuant to its basic laws shall meet the minimum qualifications set forth in subsection A. Agency employees who are not licensed to practice law in the Commonwealth, and are presiding as hearing officers in proceedings pursuant to clause (ii) shall participate in periodic training courses. G. Notwithstanding the exemptions of subsection A of § 2.2-4002, this article shall apply to hearing officers conducting hearings of the kind described in § 2.2-4020 for the Department of Game and Inland Fisheries, the Virginia Housing Development Authority, the Milk Commission and the Virginia Resources Authority pursuant to their basic laws.

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§ 403	**CONTESTED CASE PROCEDURE.** (a) This section does not apply to an emergency adjudication under Section 407. (b) An agency shall give notice of the agency decision to a person when the agency takes an action as to which the person has a right to a contested case hearing. The notice must be in writing, set forth the agency action, inform the person of the right, procedure, and time limit to file a contested-case petition, and provide a copy of the agency procedures governing the contested case. (c) In a contested case, the presiding officer shall give all parties a timely opportunity to file pleadings, motions, and objections. The presiding officer may give all parties the opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed recommended, initial, or final orders. The presiding officer, with the consent of all parties, may refer the parties in a contested case to mediation or other dispute resolution procedure. (d) In a contested case, to the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall give all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence. (e) Except as otherwise provided by law other than this [act], the presiding officer may conduct all or part of an evidentiary hearing or a prehearing conference by telephone, television, video conference, or other electronic means. The hearing may be conducted by telephone or other method by which the witness may not be seen only if all parties consent [or the presiding officer finds that this method will not impair reliable determination of the credibility of testimony]. Each party must be given an opportunity to attend, hear, and be heard at the proceeding as it occurs. This subsection does not prevent an agency from providing by rule for electronic hearings. (f) Except as otherwise provided in subsection (g), a hearing in a contested case must be open to the public. A hearing conducted by telephone, television, video conference, or other	**2.2-4020**	Formal hearings; 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 § 2.2-4019 have not been had or have failed to dispose of a case by consent. B. Parties to formal proceedings shall be given reasonable notice of the (i) time, place, and nature thereof, (ii) basic law under which the agency contemplates its possible exercise of authority, and (iii) matters of fact and law asserted or questioned by the agency. 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 § 2.2-4019. 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 presiding officers at the proceedings may (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 a 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 a hearing officer presides, or where a subordinate designated for that purpose presides in hearings specified in subsection F or § 2.2-4024, he 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 the presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on its own motion. The agency shall give deference to findings by the presiding officer explicitly based on the demeanor of witnesses.

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	electronic means is open to the public if members of the public have an opportunity to attend the hearing at the place where the presiding officer is located or to hear or see the proceeding as it occurs. (g) A presiding officer may close a hearing to the public on a ground on which a court of this state may close a judicial proceeding to the public or pursuant to law of this state other than this [act]. (h) Unless prohibited by law of this state other than this [act], a party, at the party's expense, may be represented by counsel or may be advised, accompanied, or represented by another individual. (i) A presiding officer shall ensure that a hearing record is created that complies with Section 406. (j) The decision in a contested case must be based on the hearing record and contain a statement of the factual and legal bases of the decision. If a finding of fact is set forth in language of a statute of this state other than this [act], it must be accompanied by a concise and explicit statement of the underlying facts		D. Prior to the recommendations or decisions of subordinates, 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 therefore. In all cases, on request, opportunity shall be afforded for oral argument (i) to hearing officers or subordinate presiding officers, as the case may be, in all cases in which they make 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 hearing officers or subordinate presiding officers, as the case may be, make recommendations or decisions, the agency shall receive and act on exceptions thereto. 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 therefore 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.

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	supporting the finding of fact. The decision must be prepared electronically and, on request, made available in writing. (k) Subject to Section 205, the rules by which an agency conducts a contested case may include provisions more protective than the requirements of this section of the rights of parties other than the agency. (l) Unless prohibited by law of this state other than this [act], an agency may dispose of a contested case without a hearing by stipulation, agreed settlement, consent order, or default.	2.2-4023	Final orders. The terms of any final agency case decision, as signed by it, shall be served upon the named 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 for public inspection or copying except (i) so far as the agency may 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 conditions of such individuals or (ii) for trade secrets or, so far as protected by other laws, other commercial or industrial information imparted in confidence.

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<tr><td>§ 404</td><td>EVIDENCE IN CONTESTED CASE. The following rules apply in a contested case:

(1) Except as otherwise provided in paragraph (2), all relevant evidence is admissible including hearsay evidence, if it is of a type commonly relied on by a reasonably prudent individual in the conduct of the affairs of the individual.

(2) The presiding officer may exclude evidence in the absence of an objection if the evidence is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of an evidentiary privilege recognized in the courts of this state. The presiding officer shall exclude the evidence if objection is made at the time the evidence is offered.

(3) If the presiding officer excludes evidence with or without objection, the offering party may make an offer of proof before further evidence is presented or at a later time determined by the presiding officer.

(4) Evidence may be received in a record if doing so will expedite the hearing without substantial prejudice to a party. Documentary evidence may be received in the form of a copy if the original is not readily available or by incorporation by reference. On request, parties must be given an opportunity to compare the copy with the original.

(5) Testimony must be made under oath or affirmation.

(6) Evidence must be made part of the hearing record of the case. Information or evidence may not be considered in determining</td><td>2.2-4020

2.2-4022</td><td>Formal hearings; litigated issues.

. . .

C. . . . The presiding officers at the proceedings may (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 a 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 . . . .

Subpoenas, depositions and requests for admissions.

The agency or its designated subordinates may, 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 procure by petition a decision on the validity thereof in the circuit court as provided in § 2.2-4003; 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 therefore may be challenged or enforced in the same manner as subpoenas. Nothing in this section shall be taken to authorize discovery proceedings.</td></tr>
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	the case unless it is part of the hearing record. If the hearing record contains information that is confidential, the presiding officer may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record. (7) The presiding officer may take official notice of all facts of which judicial notice may be taken and of scientific, technical, or other facts within the specialized knowledge of the agency. A party must be notified at the earliest practicable time of the facts proposed to be noticed and their source, including any staff memoranda or data. The party must be afforded an opportunity to contest any officially noticed fact before the decision becomes final. (8) The experience, technical competence, and specialized knowledge of the presiding officer or members of an agency head that is a multi-member body that is hearing the case may be used in evaluating the evidence in the hearing record.		

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§ 405	**NOTICE IN CONTESTED CASE.** (a) Except as otherwise provided in an emergency adjudication under Section 407, an agency shall give notice in a contested case that complies with this section. (b) In a contested case initiated by a person other than an agency, not later than [five] days after filing, the agency shall give notice to all parties that the case has been commenced. The notice must contain: (1) the official file or other reference number, the name of the proceeding, and a general description of the subject matter; (2) contact information for communicating with the agency, including the agency mailing address [, electronic mail address,] [,] [facsimile number,] and telephone number; (3) a statement of the date, time, place, and nature of the prehearing conference or hearing, if any; (4) the name, official title, mailing address, [electronic mail address,] [facsimile number,] and telephone number of any attorney or employee who has been designated to represent the agency; and (5) the names and last known addresses of all parties and other persons to which notice is being given by the agency. (c) In a contested case initiated by an agency, the agency shall give notice to the party against which the action is brought. The notice must contain: (1) a statement that a case that may result in an order has been commenced against the party; (2) a short and plain statement of the matters asserted, including the issues involved; (3) a statement of the legal authority under which the hearing will be held citing the statutes and any rules involved; (4) the official file or other reference number and the name of the proceeding; (5) the name, official title, mailing address,	**2.2-4020**	Formal hearings; litigated issues. B. Parties to formal proceedings shall be given reasonable notice of the (i) time, place, and nature thereof, (ii) basic law under which the agency contemplates its possible exercise of authority, and (iii) matters of fact and law asserted or questioned by the agency. 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 § 2.2-4019.

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	[and] [electronic mail address,] [and] [facsimile number,] [and] [telephone number] of the presiding officer and the name, official title, mailing address, [electronic mail address,] [facsimile number,] and telephone number of the agency's representative; (6) a statement that a party that fails to attend or participate in any subsequent proceeding in the case may be held in default; (7) a statement that the party served may request a hearing and includes instructions in plain English about how to request a hearing; and (8) the names and last known addresses of all parties and other persons to which notice is being given by the agency. (d) When a hearing or a prehearing conference is scheduled, the agency shall give parties notice that contains the information required by subsection (c) at least [30] days before the hearing or prehearing conference. (e) A notice under this section may include other matters that the presiding officer considers desirable to expedite the proceedings.		

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§ 406	**HEARING RECORD IN CONTESTED CASE.** (a) An agency shall maintain the hearing record created under Section 403(i) in each contested case. (b) The hearing record must contain: (1) a recording of each proceeding; (2) notice of each proceeding; (3) any prehearing order; (4) any motion, pleading, brief, petition, request, and intermediate ruling; 67 (5) evidence admitted; (6) a statement of any matter officially noticed; (7) any proffer of proof and objection and ruling thereon; (8) any proposed finding, requested order, and exception; (9) any transcript of the proceeding prepared at the direction of the agency; (10) any recommended order, final order, or order on reconsideration; and (11) any matter placed on the record after an ex parte communication under Section 408(f). (c) The hearing record constitutes the exclusive basis for agency action in a contested case.	**2.2-4020**	Formal hearings; litigated issues. 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 presiding officers at the proceedings may (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 a 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 a hearing officer presides, or where a subordinate designated for that purpose presides in hearings specified in subsection F or § 2.2-4024, he 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 the presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on its own motion. The agency shall give deference to findings by the presiding officer explicitly based on the demeanor of witnesses. D. Prior to the recommendations or decisions of subordinates, 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 therefore. In all cases, on request, opportunity shall be afforded for oral argument (i) to hearing officers or subordinate presiding officers, as the case may be, in all cases in which they make 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 hearing officers or subordinate presiding officers, as the case may be, make recommendations or decisions, the agency shall receive and act on exceptions thereto. E. All decisions or recommended decisions

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			shall be served upon the parties, become a part of the record, and briefly state or recommend the findings, conclusions, reasons, or basis therefore 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.

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§ 407	**EMERGENCY ADJUDICATION PROCEDURE.** (a) Unless prohibited by law of this state other than this [act], an agency may conduct an emergency adjudication in a contested case under this section. (b) An agency may take action and issue an order under this section only to deal with an imminent peril to the public health, safety, or welfare. (c) Before issuing an order under this section, an agency, if practicable, shall give notice and an opportunity to be heard to the person to which the agency action is directed. The notice 68 of the hearing and the hearing may be oral or written and may be by telephone, facsimile, or other electronic means. (d) An order issued under this section must briefly explain the factual and legal reasons for using emergency adjudication procedures. (e) To the extent practicable, an agency shall give notice to the person to which the agency action is directed that an order has been issued. The order is effective when signed by the agency head or the designee of the agency head. (f) After issuing an order pursuant to this section, an agency shall proceed as soon as practicable to provide notice and an opportunity for a hearing following the procedure under Section 403 to determine the issues underlying the order. (g) An order issued under this section may be effective for not longer than [180] days or until the effective date of any order issued under subsection (f), whichever is shorter.		The VAPA does not provide for this.

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§ 408	**EX PARTE COMMUNICATIONS.** (a) In this section, "final decision maker" means the person with the power to issue a final order in a contested case. (b) Except as otherwise provided in subsection (c), (d), (e), or (h), while a contested case is pending, the presiding officer and the final decision maker may not make to or receive from any person any communication concerning the case without notice and opportunity for all parties to participate in the communication. For the purpose of this section, a contested case is pending from the issuance of the agency's pleading or from an application for an agency decision, whichever is earlier. (c) A presiding officer or final decision maker may communicate about a pending contested case with any person if the communication is required for the disposition of ex parte matters authorized by statute or concerns an uncontested procedural issue. (d) A presiding officer or final decision maker may communicate about a pending contested case with an individual authorized by law to provide legal advice to the presiding officer or final decision maker and may communicate on ministerial matters with an individual who serves on the [administrative] [personal] staff of the presiding officer or final decision maker if the individual providing legal advice or ministerial information has not served as investigator, prosecutor, or advocate at any stage of the case, and if the communication does not augment, diminish, or modify the evidence in the record. (e) An agency head that is the presiding officer or final decision maker in a pending contested case may communicate about that case with an employee or representative of the agency if: (1) the employee or representative: (A) has not served as investigator, prosecutor, or advocate at any stage of the case; (B) has not otherwise had a communication with any person about the case other than a communication a presiding officer or final decision maker is		The VAPA does not provide for this.

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	permitted to make or receive under subsection (c) or (d) or a communication permitted by paragraph (2); and (2) the communication does not augment, diminish, or modify the evidence in the agency hearing record and is: (A) an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence in the agency hearing record; (B) an explanation of the precedent, policies, or procedures of the agency; or (C) any other communication that does not address the quality or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses. (f) If a presiding officer or final decision maker makes or receives a communication in violation of this section, the presiding officer or final decision maker: (1) if the communication is in a record, shall make the record of the communication a part of the hearing record and prepare and make part of the hearing record a memorandum that contains the response of the presiding officer or final decision maker to the communication and the identity of the person that communicated; or (2) if the communication is oral, shall prepare a memorandum that contains the substance of the verbal communication, the response of the presiding officer or final decision maker to the communication, and the identity of the person that communicated. (g) If a communication prohibited by this section is made, the presiding officer or final decision maker shall notify all parties of the prohibited communication and permit parties to respond in a record not later than 15 days after the notice is given. For good cause, the presiding officer or final decision maker may permit additional testimony in response to the prohibited communication. (h) If a presiding officer is a member of a multi-member body of individuals that is the agency head, the presiding officer may		

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	communicate with the other members of the body when sitting as the presiding officer and final decision maker. Otherwise, while a contested case is pending, no communication, direct or indirect, regarding any issue in the case may be made between the presiding officer and the final decision maker. Notwithstanding any provision of [state open meetings law], a communication permitted by this subsection is not a meeting. (i) If necessary to eliminate the effect of a communication received in violation of this section, a presiding officer or final decision maker may be disqualified under Section 402(d) and (e), the parts of the record pertaining to the communication may be sealed by protective order, or other appropriate relief may be granted, including an adverse ruling on the merits of the case or dismissal of the application.		

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§ 409	**INTERVENTION.** (a) A presiding officer shall grant a timely petition for intervention in a contested case, with notice to all parties, if: (1) the petitioner has a statutory right under law of this state other than this [act] to initiate or to intervene in the case; or (2) the petitioner has an interest that may be adversely affected by the outcome of the case and that interest is not adequately represented by existing parties. (b) A presiding officer may grant a timely petition for intervention in a contested case, with notice to all parties, if the petitioner has a permissive statutory right to intervene under law of this state other than this [act] or if the petitioner's claim or defense is based on the same transaction or occurrence as the case. (c) A presiding officer may impose conditions at any time on an intervener's participation in the contested case. (d) A presiding officer may permit intervention provisionally and, at any time later in the contested case or at the end of the case, may revoke the provisional intervention. (e) On request by the petitioners or a party or by action of the presiding officer, the presiding officer may hold a hearing on the intervention petition. (f) A presiding officer shall promptly give notice of an order granting, denying, or revoking intervention to the petitioner for intervention and to the parties. The notice must allow parties a reasonable time to prepare for the hearing on the merits.		Not provided for in VAPA.

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§ 410	**SUBPOENAS.** (a) On a request in a record by a party in a contested case, the presiding officer or any other officer to whom the power to issue a subpoena is delegated pursuant to law, on a showing of general relevance and reasonable scope of the evidence sought for use at the hearing, shall issue a subpoena for the attendance of a witness and the production of books, records, and other evidence. (b) Unless otherwise provided by law or agency rule, a subpoena issued under subsection (a) shall be served and, on application to the court by a party or the agency, enforced in the manner provided by law for the service and enforcement of a subpoena in a civil action. (c) Witness fees shall be paid by the party requesting a subpoena in the manner provided by law for witness fees in a civil action.	**2.2-4022**	**Subpoenas, depositions and requests for admissions.** The agency or its designated subordinates may, 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 procure by petition a decision on the validity thereof in the circuit court as provided in § 2.2-4003; 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.

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	Text	**Sec.**	**Text**
§ 411	**DISCOVERY.** (a) In this section, "statement" includes a record of a person's written statement signed by the person and a record that summarizes an oral statement made by the person. (b) Except in an emergency hearing under Section 407, a party, on written notice to another party at least [30] days before an evidentiary hearing, unless otherwise provided by agency rule under subsection (g), may: (1) obtain the names and addresses of witnesses the other party will present at the hearing to the extent known to the other party; and (2) inspect and copy any of the following material in the possession, custody, or control of the other party: (A) statements of parties and witnesses proposed to be called by the other party; (B) all records, including reports of mental, physical, and blood examinations, and other evidence the other party proposes to offer; (C) investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the adjudication; (D) statements of expert witnesses proposed to be called by the other party; (E) any exculpatory material in the possession of the agency; and (F) other materials for good cause. (c) Parties to a contested case have a duty to supplement responses provided under subsection (b) to include information thereafter acquired, to the extent that the information will be relied on in the hearing. (d) On petition, the presiding officer may issue a protective order for any material for which discovery is sought under this section which is exempt, privileged, or otherwise made confidential or protected from disclosure by law of this state other than this [act] and material the disclosure of which would result in annoyance, embarrassment, oppression, or undue burden or	**2.2-4022**	Not authorized under VAPA. See last sentence of 2.2-4022 which reads: Nothing in this section shall be taken to authorize discovery proceedings.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
	expense to any person. (e) On petition, the presiding officer shall issue an order compelling discovery for refusal to comply with a discovery request unless good cause exists for refusal. Failure to comply with the order may be enforced according to the rules of civil procedure. (f) On petition and for good cause, the presiding officer shall issue an order authorizing discovery in accordance with the rules of civil procedure. (g) An agency may provide by rule that some or all discovery procedures under this section do not apply to a specified program or category of cases if it finds that: (1) the availability of discovery would unduly complicate or interfere with the hearing process in the program or cases, because of the volume of the applicable caseload and the need for expedition and informality in that process; and (2) alternative procedures for the sharing of relevant information are sufficient to ensure the fundamental fairness of the proceedings.		

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 412	**DEFAULT.** (a) Unless otherwise provided by law of this state other than this [act], if a party without good cause fails to attend or participate in a prehearing conference or hearing in a contested case, the presiding officer may issue a default order. (b) If a default order is issued, the presiding officer may conduct any further proceedings necessary to complete the adjudication without the defaulting party and shall determine all issues in the adjudication, including those affecting the defaulting party. (c) A recommended, initial, or final order issued against a defaulting party may be based on the defaulting party's admissions or other evidence that may be used without notice to the defaulting party. If the burden of proof is on the defaulting party to establish that the party is entitled to the agency action sought, the presiding officer may issue a recommended, initial, or final order without taking evidence. (d) Not later than [15] days after notice to a party subject to a default order that a recommended, initial, or final order has been rendered against the party, the party may petition the presiding officer to vacate the recommended, initial, or final order. If good cause is shown for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If good cause is not shown for the party's failure to appear, the presiding officer shall deny the motion to vacate.		Not provided for in VAPA.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 413	**ORDERS: RECOMMENDED, INITIAL, OR FINAL.** (a) If the presiding officer is the agency head, the presiding officer shall issue a final order. (b) Except as otherwise provided by law of this state other than this [act], if the presiding officer is not the agency head and has not been delegated final decisional authority, the presiding officer shall issue a recommended order. If the presiding officer is not the agency head and has been delegated final decisional authority, the presiding officer shall issue an initial order that becomes a final order [30] days after issuance, unless reviewed by the agency head on its own initiative or on petition of a party. (c) A recommended, initial, or final order must be served in a record on each party and the agency head not later than [90] days after the hearing ends, the record closes, or memoranda, briefs, or proposed findings are submitted, whichever is latest. The presiding officer may extend the time by stipulation, waiver, or for good cause.	**2.2-4021**	Timetable for decision; exemptions. A. In cases where a board or commission meets to render (i) an informal fact-finding decision or (ii) a decision on a litigated issue, and information from a prior proceeding is being considered, persons who participated in the prior proceeding shall be provided an opportunity to respond at the board or commission meeting to any summaries of the prior proceeding prepared by or for the board or commission. B. In any informal fact-finding, formal proceeding, or summary case decision proceeding in which a hearing officer is not used or is not empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within 90 days from the date of the informal fact-finding, formal proceeding, or completion of a summary case decision proceeding, or from a later date agreed to by the named party and the agency. If the agency does not render a decision within 90 days, the named party to the case decision may provide written notice to the agency that a decision is due. If no decision is made within 30 days from agency receipt of the notice, the decision shall be deemed to be in favor of the named party. The preceding sentence shall not apply to case decisions before (i) the State Water Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Water Act, (ii) the State Air Pollution Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Air Act, or (iii) the Virginia Soil and Water Conservation Board or the Department of Conservation and Recreation to the extent necessary to comply with the federal Clean Water Act. An agency shall provide notification to the named party of its decision within five days of the decision. C. In any informal fact-finding, formal proceeding, or summary case decision proceeding in which a hearing officer is empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within 30 days from the date that the agency receives the hearing officer's recommendation. If the agency does not render a decision within 30 days, the named party

Model Act		Virginia Code	
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			to the case decision may provide written notice to the agency that a decision is due. If no decision is made within 30 days from agency receipt of the notice, the decision is deemed to be in favor of the named party. The preceding sentence shall not apply to case decisions before (i) the State Water Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Water Act, (ii) the State Air Pollution Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Air Act, or (iii) the Virginia Soil and Water Conservation Board or the Department of Conservation and Recreation to the extent necessary to comply with the federal Clean Water Act. An agency shall provide notice to the named party of its decision within five days of the decision. D. The provisions of subsection B notwithstanding, if the board members or agency personnel who conducted the informal fact-finding, formal proceeding, or summary case decision proceeding are unable to attend to official duties due to sickness, disability, or termination of their official capacity with the agency, then the timeframe provisions of subsection B shall be reset and commence from the date that either new board members or agency personnel are assigned to the matter or a new proceeding is conducted if needed, whichever is later. An agency shall provide notice within five days to the named party of any incapacity of the board members or agency personnel that necessitates a replacement or a new proceeding.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 413	**ORDERS: RECOMMENDED, INITIAL, OR FINAL.** (d) A recommended, initial, or final order must separately state findings of fact and conclusions of law on all material issues of fact, law, or discretion, the remedy prescribed, and, if applicable, the action taken on a petition for a stay. The presiding officer may permit a party to submit proposed findings of fact and conclusions of law. The order must state the available procedures and time limits for seeking reconsideration or other administrative relief and must state the time limits for seeking judicial review of the agency order. A recommended or initial order must state any circumstances under which the order, without further notice, may become a final order.	**2.2-4020**	Formal hearings; litigated issues.. D. Prior to the recommendations or decisions of subordinates, 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 hearing officers or subordinate presiding officers, as the case may be, 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 hearing officers or subordinate presiding officers, as the case may be, make recommendations or decisions, the agency shall receive and act on exceptions thereto. 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.
		Rule of Court 2A:2(c)	Any final agency case decision as described in § 2.2-4023 shall advise the party of the time for filing a notice of appeal under this Rule.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 413	(e) Findings of fact must be based exclusively on the evidence and matters officially noticed in the hearing record in the contested case. **Alternative A** (f) Hearsay evidence may be used to supplement or explain other evidence, but on timely objection, is not sufficient by itself to support a finding of fact unless it would be admissible over objection in a civil action. **Alternative B** (f) Hearsay evidence is sufficient to support a finding of fact if it constitutes reliable, probative, and substantial evidence.	**2.2-4020**	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 presiding officers at the proceedings may (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 a 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 a hearing officer presides, or where a subordinate designated for that purpose presides in hearings specified in subsection F of § 2.2-4024, he 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 the presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on its own motion. The agency shall give deference to findings by the presiding officer explicitly based on the demeanor of witnesses.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 413	**End of Alternatives**	**2.2-4023**	**Final orders.**
	(g) An order is issued under this section when it is signed by the agency head, presiding officer, or an individual authorized by law of this state other than this [act] to sign the order.		The terms of any final agency case decision, as signed by it, shall be served upon the named 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 for public inspection or copying except (i) so far as the agency may 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.
	(h) A final order is effective [30] days after all parties are notified of the order unless reconsideration is granted under Section 416 or a stay is granted under Section 417.	**Rule 2A:2(a)**	Any party appealing from a regulation or case decision shall file with the agency secretary, within 30 days after adoption of the regulation or service of the final order in the case decision, a notice of appeal signed by the appealing party or that party's counsel. In the event that a case decision is required by § 2.2-4023 or by any other provision of law to be served by mail upon a party, 3 days shall be added to the 30-day period for that party. Service under this Rule shall be sufficient of sent by registered or certified mail to the party's last address known to the agency.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 414	**AGENCY REVIEW OF INITIAL ORDER.** (a) An agency head may review an initial order on its own initiative. (b) A party may petition an agency head to review an initial order. On petition by a party, the agency head may review an initial order. (c) A petition for review of an initial order must be filed with the agency head or with any person designated for this purpose by agency rule not later than [15] days after notice to the parties of the order. If the agency head decides to review an initial order on its own initiative, the agency head shall give notice in a record to the parties that it intends to review the order. The notice must be given not later than [15] days after the parties are notified of the order. If a petition for review is not filed or the agency head does not elect to review the initial order within the prescribed time limit, the initial order becomes a final order. (d) The period in subsection (c) for a party to file a petition or for the agency head to notify the parties of its intention to review an initial order is tolled by the submission of a timely petition under Section 416 for reconsideration of the order. A new [15]-day period begins on disposition of the petition for reconsideration. If an order is subject both to a timely petition for reconsideration and a petition for review by the agency head, the petition for reconsideration must be disposed of first, unless the agency head determines that action on the petition for reconsideration has been unreasonably delayed. (e) When reviewing an initial order, the agency head shall exercise the decision-making power that the agency head would have had if the agency head had conducted the hearing that produced the order, except to the extent that the issues subject to review are limited by law of this state other than this [act] or by order of the agency head on notice to the parties. In reviewing findings of fact in an initial order, the agency head shall consider the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The agency head shall consider the hearing record or parts of the record designated by the parties.		No comparable VAPA provision.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
	(f) If an agency head reviews an initial order, the agency head shall issue a final order disposing of the proceeding not later than 120 days after the decision to review the initial order or remand the matter for further proceedings with instructions to the presiding officer who issued the initial order. On remanding a matter, the agency head may order such temporary relief as is authorized and appropriate. (g) A final order or an order remanding the matter for further proceedings must identify any difference between the order and the initial order and must state the facts of record that support any difference in findings of fact, the law that supports any difference in legal conclusions, and the policy reasons that support any difference in the exercise of discretion. Findings of fact must be based exclusively on the evidence and matters officially noticed in the hearing record in the contested case. A final order under this section must include, or incorporate by express reference to the initial order, the matters required by Section 413(d). The agency head shall deliver the order to the presiding officer and notify the parties of the order.		

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 415	**AGENCY REVIEW OF RECOMMENDED ORDER.** (a) An agency head shall review a recommended order pursuant to this section. (b) When reviewing a recommended order, the agency head shall exercise the decision-making power that the agency head would have had if the agency head had conducted the hearing that produced the order, except to the extent that the issues subject to review are limited by law of this state other than this [act] or by order of the agency head on notice to the parties. In reviewing findings of fact in a recommended order, the agency head shall consider the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The agency head shall consider the hearing record or parts that are designated by the parties. (c) An agency head may render a final order disposing of the proceeding or remand the matter for further proceedings with instructions to the presiding officer who rendered the recommended order. On remanding a matter, the agency head may order such temporary relief as is authorized and appropriate. (d) A final order or an order remanding the matter for further proceedings must identify any difference between the order and the recommended order and must state the facts of record that support any difference in findings of fact, the law that supports any difference in legal conclusions, and the policy reasons that support any difference in the exercise of discretion. Findings of fact must be based exclusively on the evidence and matters officially noticed in the hearing record in the contested case. A final order under this section must include, or incorporate by express reference to the recommended order, the matters required by Section 413(d). The agency head shall deliver the order to the presiding officer and notify the parties of the order.		No comparable VAPA provision

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 416	**RECONSIDERATION**. (a) A party, not later than [15] days after notice to the parties that a final order has been issued, may file a petition for reconsideration that states the specific grounds on which relief is requested. The place of filing and other procedures, if any, must be specified by agency rule and must be stated in the final order. (b) If a petition for reconsideration is timely filed, and if the petitioner has complied with the agency's procedural rules for reconsideration, if any, the time for filing a petition for judicial review does not begin until the agency disposes of the petition for reconsideration as provided in Section 503(d). (c) Not later than [20] days after a petition is filed under subsection (a), the decision maker shall issue a written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further proceedings. If the decision maker fails to respond to the petition not later than [30] days after filing, or a longer period agreed to by the parties, the petition is deemed denied. The petition may be granted only if the decision maker states findings of facts, conclusions of law, and the reasons for granting the petition.		CURRENT APA PROVISIONS None

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 417	**STAY.** Except as otherwise provided by law of this state other than this [act], a party, not later than [seven] days after the parties are notified of the order, may request the agency to stay a final order pending judicial review. The agency may grant the request for a stay pending judicial review if the agency finds that justice requires. The agency may grant or deny the request for stay of the order before, on, or after the effective date of the order.	**2.2-4028**	**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 the 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 § 2.2-4027. Actions 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.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 418	**SECTION 418. AVAILABILITY OF ORDERS; INDEX.** (a) Except as otherwise provided in subsections (b) and (c), an agency shall create an index of all final orders in contested cases and make the index and all final orders available for public inspection and copying, at cost, in its principal offices. (b) Except as otherwise provided in subsection (c), final orders that are exempt, privileged, or otherwise made confidential or protected from disclosure by [the public records law of this state] are not public records and may not be indexed. The final order may be excluded from an index and disclosed only by order of the presiding officer with a written statement of reasons attached to the order. (c) If the presiding officer determines it is possible to redact a final order that is exempt, privileged, or otherwise made confidential or protected from disclosure by law of this state other than this [act] so that it complies with the requirements of that law, the redacted order may be placed in the index and published. (d) An agency may not rely on a final order adverse to a party other than the agency as precedent in future adjudications unless the agency designates the order as a precedent, and the order has been published, placed in an index, and made available for public inspection.	**2.2-4023**	**Final orders**. The terms of any final agency case decision, as signed by it, shall be served upon the named 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 for public inspection or copying except (i) so far as the agency may 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. Final orders may be recorded, enforced, and satisfied as orders or decrees of a circuit court upon certification of such orders by the agency head or his designee. • *An index is not required under Virginia law, although the Virginia Department of Health Professions' website provides case decisions made in the last 90 days, with the ability to search case decisions by date.*

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 419	**SECTION 419. LICENSES.** (a) If a licensee has made timely and sufficient application for the renewal of a license or a new license for any activity of a continuing nature, the existing license does not expire until the agency takes final action on the application and, if the application is denied or the terms of the new license are limited, until the last day for seeking review of the agency order or a later date fixed by the reviewing court. (b) A revocation, suspension, annulment, or withdrawal of a license is not lawful unless, before the institution of agency proceedings, the agency notifies the licensee of facts or conduct that warrants the intended action, and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that imminent peril to public health, safety, or welfare requires emergency action and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings must be promptly instituted and concluded.	**2.2-4019**	Informal fact finding proceedings. A. Agencies shall ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings unless the named party and the agency consent to waive such a conference or proceeding to go directly to a formal hearing. Such conference-consultation procedures shall include rights of parties to the case to (i) have reasonable notice thereof, (ii) appear in person or by counsel or other qualified representative before the agency or its subordinates, or before a hearing officer for the informal presentation of factual data, argument, or proof in connection with any case, (iii) have notice of any contrary fact basis or information in the possession of the agency that can be relied upon in making an adverse decision, (iv) receive a prompt decision of any application for a license, benefit, or renewal thereof, and (v) be informed, briefly and generally in writing, of the factual or procedural basis for an adverse decision in any case. B. Agencies may, in their case decisions, rely upon public data, documents or information only when the agencies have provided all parties with advance notice of an intent to consider such public data, documents or information. This requirement shall not apply to an agency's reliance on case law and administrative precedent. • *Section 419(a) does not appear to be addressed in Virginia. Section 419(b) does not appear to be addressed directly by § 2.2-4019, but it contains some language that may be relevant. Virginia Code § 2.2-4020.1 references applications for licenses, but it addresses summary case decisions.*

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 501	**SECTION 501. RIGHT TO JUDICIAL REVIEW; FINAL AGENCY ACTION REVIEWABLE.** (a) In this [article], "final agency action" means an act of an agency which imposes an obligation, grants or denies a right, confers a benefit, or determines a legal relationship as a result of an administrative proceeding. The term does not include agency action that is a failure to act. (b) Except to the extent that a statute of this state other than this [act] limits or precludes judicial review, a person that meets the requirements of this [article] is entitled to judicial review of a final agency action. (c) A person entitled to judicial review under subsection (b) of a final agency action is entitled to judicial review of an agency action that is not final if postponement of judicial review would result in an inadequate remedy or irreparable harm that outweighs the public benefit derived from postponing judicial review.	**2.2-4026**	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 and whether exempted from the procedural requirements of Article 2 (§ 2.2-4006 et seq.) or 3 (§ 2.2-4018 et seq.) of this chapter, **shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia**. Actions may be instituted in any court of competent jurisdiction as provided in § 2.2-4003, and the judgments of the courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. In addition, when any regulation or case decision is the subject of an enforcement action in court, it 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. • Section 419(a) does not appear to be addressed in Virginia. Section 419(b) does not appear to be addressed directly by § 2.2-4019, but it contains some language that may be relevant. Virginia Code § 2.2-4020.1 references applications for licenses, but it addresses summary case decisions.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
501 (d)	(d) A court may compel an agency to take action that is unlawfully withheld or unreasonably delayed.	2.2-4029	Court judgments. **Unless an error of law as defined in § 2.2-4027 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 not to be in accordance with law under § 2.2-4027, the court shall suspend or set it aside and remand the matter to the agency for further proceedings, if any, as the court may permit or direct in accordance with law.** *There does not appear to be any provision for judicial review of an agency action that is not final if that agency action would result in an inadequate remedy or irreparable harm that outweighs public benefit because of postponing judicial review.* **Section 501 (c)**

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 502	**SECTION 502. RELATION TO OTHER JUDICIAL REVIEW LAW AND RULES.** (a) Except as otherwise provided by law of this state other than this [act], judicial review of final agency action may be taken only as provided by rules of [appellate] [civil] procedure [of this state]. The court may grant any type of legal and equitable remedies that are appropriate. (b) This [article] does not limit use of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law of this state other than this [act]. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is available under this [article] or under law of this state other than this [act], final agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.	**2.2-4026**	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 and whether exempted from the procedural requirements of Article 2 (§ 2.2-4006 et seq.) or 3 (§ 2.2-4018 et seq.) of this chapter, shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia. Actions may be instituted in any court of competent jurisdiction as provided in § 2.2-4003, and the judgments of the courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. In addition, when any regulation or case decision is the subject of an enforcement action in court, it 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. • Section 419(a) does not appear to be addressed in Virginia. Section 419(b) does not appear to be addressed directly by § 2.2-4019, but it contains some language that may be relevant. Virginia Code § 2.2-4020.1 references applications for licenses, but it addresses summary case decisions.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 503	**SECTION 503. TIME TO SEEK JUDICIAL REVIEW OF AGENCY ACTION; LIMITATIONS.** (a) Judicial review of a rule on the ground of noncompliance with the procedural requirements of this [act] must be commenced not later than [two] years after the effective date of the rule. Judicial review of a rule or guidance document on other grounds may be sought at any time. (b) Judicial review of an order or other final agency action other than a rule or guidance document must be commenced not later than [30] days after the date the parties are notified of the order or other agency action. (c) The time for seeking judicial review under this section is tolled during any time a party pursues an administrative remedy before the agency which must be exhausted as a condition of judicial review. (d) A party may not petition for judicial review while seeking reconsideration under Section 416. During the time a petition for reconsideration is pending before an agency, the time for seeking judicial review in subsection (b) is tolled.	**2.2-402**	Any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision and whether exempted from the procedural requirements of Article 2 (§ 2.2-4006 et seq.) or 3 (§ 2.2-4018 et seq.) of this chapter, **shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents** in the manner provided by the rules of the Supreme Court of Virginia. Actions may be instituted in any court of competent jurisdiction as provided in § 2.2-4003, and the judgments of the courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. In addition, when any regulation or case decision is the subject of an enforcement action in court, it 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. • *Part 2A of the Rules of the Supreme Court of Virginia provides specific timeframes for the filing of appeals and the filing of the record on appeal.* **Rule 2A:2. Notice of Appeal.** (a) **Any party appealing from a regulation or case decision shall file with the agency secretary, within 30 days after adoption of the regulation or after service of the final order in the case decision, a notice of appeal signed by the appealing party or that party's counsel.** In the event that a case decision is required by § 2.2-4023 or by any other provision of law to be served by mail upon a party, 3 days shall be added to the 30-day period for that party. Service under this Rule shall be sufficient if sent by registered or certified mail to the party's last address known to the agency. (b) The notice of appeal shall identify the regulation or case decision appealed from, shall state the names and addresses of the appellant and of all other parties and their counsel, if any, shall specify the circuit court to which the appeal is taken, and shall conclude with a certificate that a copy of the notice of appeal has been mailed to each of the parties. Any copy of a notice of appeal that is sent to a party's counsel or to a party's registered agent, if the party is a corporation, shall be deemed adequate and shall not be a cause for dismissal of the appeal; provided, however, sending a notice of appeal to an agency's

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			counsel shall not satisfy the requirement that a notice of appeal be filed with the agency secretary. The omission of a party whose name and address cannot, after due diligence, be ascertained shall not be cause for dismissal of the appeal. (c) Any final agency case decision as described in § 2.2-

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§ 504	**STAYS PENDING APPEAL.** A petition for judicial review does not automatically stay an agency decision. A challenging party may request the reviewing court for a stay on the same basis as stays are granted under the rules of [appellate] [civil] procedure [of this state], and the reviewing court may grant a stay regardless of whether the challenging party first sought a stay from the agency.	**2.2-4028**	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 the 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 § 2.2-4027. Actions 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.

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§ 505	**STANDING.** The following persons have standing to obtain judicial review of a final agency action: (1) a person aggrieved or adversely affected by the agency action; and (2) a person that has standing under law of this state other than this [act].	**2.2-4027**	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. Such issues of law include: (i) accordance with constitutional right, power, privilege, or immunity, (ii) 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, (iii) observance of required procedure where any failure therein is not mere harmless error, and (iv) the substantiality of the evidentiary support for findings of fact. The determination of such fact issue shall be made upon the whole evidentiary record provided by the agency if its proceeding was required to be conducted as provided in § 2.2-4009 or 2.2-4020 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. **In addition to any other judicial review provided by law, a small business, as defined in subsection A of § 2.2-4007.1, that is adversely affected or aggrieved by final agency action shall be entitled to judicial review of compliance with the requirements of subdivision A 2 of § 2.2-4007.04 and § 2.2-4007.1 within one year following the date of final agency action.** When the decision on review is to be made on the agency record, the duty of the court with respect to issues of fact shall be 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. Where there is no 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 § 2.2-4007.01 or 2.2-4019 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

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			the scope of the legal authority of the agency. Whether the 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. **Notice of Appeal.** (a) Any party appealing from a regulation or case decision shall file with the agency secretary, within 30 days after adoption of the regulation or after service of the final order in the case decision, a notice of appeal signed by the appealing party or that party's counsel. In the event that a case decision is required by § 2.2-4023 or by any other provision of law to be served by mail upon a party, 3 days shall be added to the 30-day period for that party. Service under this Rule shall be sufficient if sent by registered or certified mail to the party's last address known to the agency. (b) The notice of appeal shall identify the regulation or case decision appealed from, shall state the names and addresses of the appellant and of all other parties and their counsel, if any, shall specify the circuit court to which the appeal is taken, and shall conclude with a certificate that a copy of the notice of appeal has been mailed to each of the parties. Any copy of a notice of appeal that is sent to a party's counsel or to a party's registered agent, if the party is a corporation, shall be deemed adequate and shall not be a cause for dismissal of the appeal; provided, however, sending a notice of appeal to an agency's counsel shall not satisfy the requirement that a notice of appeal be filed with the agency secretary. The omission of a party whose name and address cannot, after due diligence, be ascertained shall not be cause for dismissal of the appeal. (c) Any final agency case decision as described in § 2.2-4023 shall advise the party of the time for filing a notice of appeal under this Rule. 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 the effective dates or preserve existing status or rights pending

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			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 § 2.2-4027. Actions 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.
		Rule 2A:2	**Notice of Appeal.** (a) Any party appealing from a regulation or case decision shall file with the agency secretary, within 30 days after adoption of the regulation or after service of the final order in the case decision, a notice of appeal signed by the appealing party or that party's counsel. In the event that a case decision is required by § 2.2-4023 or by any other provision of law to be served by mail upon a party, 3 days shall be added to the 30-day period for that party. Service under this Rule shall be sufficient if sent by registered or certified mail to the party's last address known to the agency. (b) The notice of appeal shall identify the regulation or case decision appealed from, shall state the names and addresses of the appellant and of all other parties and their counsel, if any, shall specify the circuit court to which the appeal is taken, and shall conclude with a certificate that a copy of the notice of appeal has been mailed to each of the parties. Any copy of a notice of appeal that is sent to a party's counsel or to a party's registered agent, if the party is a corporation, shall be deemed adequate and shall not be a cause for dismissal of the appeal; provided, however, sending a notice of appeal to an agency's counsel shall not satisfy the requirement that a notice of appeal be filed with the agency secretary. The omission of a party whose name and address cannot, after due diligence, be ascertained shall not be cause for dismissal of the appeal. (c) Any final agency case decision as described in § 2.2-4023 shall advise the party of the time for filing a notice of appeal under this Rule. 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

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			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 the 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 § 2.2-4027. Actions 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.
		2.2-4028	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 the 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 § 2.2-4027. Actions 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.

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§ 506	**EXHAUSTION OF ADMINISTRATIVE REMEDIES.** (a) Subject to subsection (d) or law of this state other than this [act] which provides that a person need not exhaust administrative remedies, a person may file a petition for judicial review under this [act] only after exhausting all administrative remedies available within the agency the action of which is being challenged and within any other agency authorized to exercise administrative review. (b) Filing a petition for reconsideration or a stay of proceedings is not a prerequisite for seeking judicial review. (c) A petitioner for judicial review of a rule need not have participated in the rulemaking proceeding on which the rule is based or have filed a petition to adopt a rule under Section 318. (d) The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies to the extent the administrative remedies are inadequate or the requirement would result in irreparable harm.		*See* case law. No comparable statute under VAPA.

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§ 507	**AGENCY RECORD ON JUDICIAL REVIEW; EXCEPTIONS.** (a) If an agency was required by [Article] 3 or 4, or by law of this state other than this [act], to maintain an agency record during the proceeding that gave rise to the action under review, the court review is confined to that record and to matters arising from that record. (b) In any case to which subsection (a) does not apply, the record for review consists of the unprivileged materials that agency decision makers directly or indirectly considered, or which were submitted for consideration by any person, in connection with the action under review, including information that is adverse to the agency's position. If the agency action was ministerial or was taken on the basis of a minimal or no administrative record, the court may receive evidence relating to the agency's basis for taking the action. (c) The court may supervise an agency's compilation of the agency record. If a challenging party makes a substantial showing of need, the court may allow discovery or other evidentiary proceedings and consider evidence outside the agency record to: (1) ensure that the agency record is complete as required by this [act] and other applicable law; (2) adjudicate allegations of procedural error not disclosed by the record; or (3) prevent manifest injustice.	**2.2-4027**	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. Such issues of law include: (i) accordance with constitutional right, power, privilege, or immunity, (ii) 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, (iii) observance of required procedure where any failure therein is not mere harmless error, and (iv) the substantiality of the evidentiary support for findings of fact. **The determination of such fact issue shall be made upon the whole evidentiary record provided by the agency** if its proceeding was required to be conducted as provided in § 2.2-4009 or 2.2-4020 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. In addition to any other judicial review provided by law, a small business, as defined in subsection A of § 2.2-4007.1, that is adversely affected or aggrieved by final agency action shall be entitled to judicial review of compliance with the requirements of subdivision A 2 of § 2.2-4007.04 and § 2.2-4007.1 within one year following the date of final agency action. When the decision on review is to be made on the agency record, the duty of the court with respect to issues of fact shall be 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. **Where there is no 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 § 2.2-4007.01 or 2.2-4019 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**

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			proofs, to be within the scope of the legal authority of the agency. Whether the 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.

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§ 508	**SCOPE OF REVIEW.** (a) Except as provided by law of this state other than this [act], in judicial review of an agency action, the following rules apply: (1) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity. (2) The court shall make a ruling on each material issue on which the court's decision is based. (3) The court may grant relief only if it determines that a person seeking judicial review has been prejudiced by one or more of the following: (A) the agency erroneously interpreted the law; (B) the agency committed an error of procedure; (C) the agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (D) an agency determination of fact in a contested case is not supported by substantial evidence in the record as a whole; or (E) to the extent that the facts are subject to a trial de novo by the reviewing court, the action was unwarranted by the facts. (b) In making a determination under this section, the court shall review the agency record or the parts designated by the parties and shall apply the rule of harmless error.	**2.2-4027**	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**. Such issues of law include: (i) accordance with constitutional right, power, privilege, or immunity, (ii) 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, (iii) observance of required procedure where any failure therein is not mere harmless error, and (iv) the substantiality of the evidentiary support for findings of fact. The determination of such fact issue shall be made upon the whole evidentiary record provided by the agency if its proceeding was required to be conducted as provided in § 2.2-4009 or 2.2-4020 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. In addition to any other judicial review provided by law, a small business, as defined in subsection A of § 2.2-4007.1, that is adversely affected or aggrieved by final agency action shall be entitled to judicial review of compliance with the requirements of subdivision A 2 of § 2.2-4007.04 and § 2.2-4007.1 within one year following the date of final agency action. When the decision on review is to be made on the agency record, the duty of the court with respect to issues of fact shall be 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. Where there is no 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 § 2.2-4007.01 or 2.2-4019 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

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			the scope of the legal authority of the agency. Whether the 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.