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**HOUSE BILL NO. 1532**

Offered January 22, 1996

*A BILL to amend and reenact §§ 9-6.14:4, 9-6.14:16, 10.1-1318, and 62.1-44.29 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 9-6.14:7.2, relating to the Administrative Process Act; rights of citizens.*

Patrons—Grayson, Abbitt, Barlow, Connally, Deeds, Jones, J.C., Murphy, Plum, Van Yahres and Woodrum; Senators: Maxwell, Miller, Y.B. and Ticer

Referred to Committee on General Laws

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 9-6.14:4, 9-6.14:16, 10.1-1318, and 62.1-44.29 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 9-6.14:7.2 as follows:**

§ 9-6.14:4. Definitions.

As used in this chapter:

A. "Agency" means any authority, instrumentality, officer, board or other unit of the state government empowered by the basic laws to make regulations or decide cases.

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

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

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

"Guidance document" means any official record, as that term is defined in § 2.1-341, which an agency uses as direction, instruction or advice in applying regulations or making determinations regarding regulated activities that include, but are not limited to, permitting activities, issuance of certificates or granting of other authorizations.

E. "Hearing" means agency processes other than those informational or factual inquiries of an informal nature provided in §§ 9-6.14:7.1 and 9-6.14:11 of this chapter and includes only (i) opportunity for private parties to submit factual proofs in formal proceedings as provided in § 9-6.14:8 of this chapter in connection with the making of regulations or (ii) a similar right of private parties or requirement of public agencies as provided in § 9-6.14:12 hereof in connection with case decisions.

F. "Rule" or "regulation" means any statement of general application, having the force of law, affecting the rights or conduct of any person, promulgated by an agency in accordance with the authority conferred on it by applicable basic laws.

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

~~H. [Repealed.]~~

§ 9-6.14:7.2. Use of supplemental information by agency.

A. When an agency uses supplemental information in applying their regulations, the supplemental information shall be known as a "guidance document."

B. Use of guidance documents shall not replace the function of regulations. If a guidance document is anticipated to be or is routinely used for at least a year before being substantially changed, the agency is charged with promulgating the guidance document as a regulation.

C. Notice of the use of a guidance document by an agency shall be published by the agency in at least three consecutive issues of the Virginia Register of Regulations, before implementing its use. Notice of substantial changes to the guidance document shall be published in the same manner. The agency shall accept and consider public comment on the guidance document for at least forty-five days, either concurrent with the public notice period or subsequent to it.

D. If the agency receives public comment which it chooses not to incorporate in the guidance

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60 document, it shall send a letter of explanation and justification to all citizens who submitted comments  
61 on the guidance document. A copy of the explanation and justification shall be kept as part of the  
62 record of the regulation.

63 § 9-6.14:16. Right, forms, venue.

64 A. Any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by  
65 and claiming unlawfulness of a case decision, as the same are defined in § 9-6.14:4 of this chapter and  
66 whether or not excluded from the procedural requirements of Article 2 (§ 9-6.14:7.1 et seq.) or 3  
67 (§ 9-6.14:11 et seq.) hereof, shall have a right to the direct review thereof by an appropriate and timely  
68 court action against the agency as such or its officers or agents in the manner provided by the  
69 rulesRules of the Supreme Court of Virginia. Any person claiming the unlawful use of a guidance  
70 document shall have a right to direct review thereof by an appropriate and timely court action against  
71 the agency as such or agents in the manner provided by the Rules of the Supreme Court. In the case of  
72 environmental-permitting decisions made under the authority of §§ 10.1-1318, 10.1-1457, or 62.1-44.29,  
73 "aggrieved" shall be interpreted consistent with the provisions of Article III of the U.S. Constitution as  
74 interpreted by the Supreme Court of the United States, as being that (i) the person must have suffered  
75 an injury in fact, that is, an invasion of a legally protected interest which is concrete and particularized,  
76 and actual or imminent, not conjectural or hypothetical; (ii) there must be a casual connection between  
77 the injury and the conduct complained of, that is, the injury has to be fairly traceable to the challenged  
78 action of the defendant, and not the result of the independent action of some third party not before the  
79 court; and (iii) it must be likely, as opposed to merely speculative, that the injury will be redressed by a  
80 favorable decision. Such actions may be instituted in any court of competent jurisdiction as provided in  
81 § 9-6.14:5, and the judgments of such courts of original jurisdiction shall be subject to appeal to or  
82 review by higher courts as in other cases unless otherwise provided by law. In addition, when any such  
83 regulation or case decision is the subject of an enforcement action in court, the same shall also be  
84 reviewable by the court as a defense to the action, and the judgment or decree therein shall be  
85 appealable as in other cases.

86 B. The provisions of this article shall apply to case decisions regarding the grant or denial of aid to  
87 dependent children, Medicaid, food stamps, general relief, auxiliary grants, or state-local hospitalization.  
88 However, no appeal pursuant to this article may be brought regarding the adequacy of standards of need  
89 and payment levels for public assistance programs. Notwithstanding the provisions of § 9-6.14:17, such  
90 review shall be based solely upon the agency record, and the court shall be limited to ascertaining  
91 whether there was evidence in the agency record to support the case decision of the agency acting as the  
92 trier of fact. If the court finds in favor of the party complaining of agency action, the court shall remand  
93 the case to the agency for further proceedings. The validity of any statute, regulation, standard or policy,  
94 federal or state, upon which the action of the agency was based shall not be subject to review by the  
95 court. No intermediate relief shall be granted under § 9-6.14:18.

96 § 10.1-1318. Appeal from decision of Board.

97 A. Any owner aggrieved by a final decision of the Board under § 10.1-1309, § 10.1-1322 or  
98 subsection D of § 10.1-1307 is entitled to judicial review thereof in accordance with the provisions of  
99 the Administrative Process Act (§ 9-6.14:1 et seq.).

100 B. Any person who is aggrieved by a final decision of the Board under § 10.1-1322, who  
101 participated, in person or by submittal of written comments, in the public comment process related to  
102 the Board's decision and who has exhausted all available administrative remedies for review of the  
103 Board's decision, shall be entitled to judicial review of the Board's decision in accordance with the  
104 provisions of the Administrative Process Act (§ 9-6.14:1 et seq.). The person invoking jurisdiction under  
105 this subsection bears the burden of establishing that (i) such person has suffered an actual, threatened or  
106 imminent injury; (ii) such injury is an invasion of an immediate, legally protected, pecuniary and  
107 substantial interest which is concrete and particularized; (iii) such injury is fairly traceable to the  
108 decision of the Board and not the result of the action of some third party not before the court; and (iv)  
109 such injury will likely be redressed by a favorable decision by the court. For purposes of this section,  
110 "aggrieved" shall have the meaning ascribed to it in § 9-6.14:16.

111 § 62.1-44.29. Judicial review.

112 (1) Any owner person aggrieved by a final decision of the Board under §§ 62.1-44.15 (5), 62.1-44.15  
113 (8a), (8b), and (8c), 62.1-44.16, 62.1-44.17, 62.1-44.19 or § 62.1-44.25, whether such decision is  
114 affirmative or negative in form, is entitled to judicial review thereof in accordance with the provisions of  
115 the Administrative Process Act (§ 9-6.14:1 et seq.). For purposes of this section, "aggrieved" shall have  
116 the meaning ascribed to it in § 9-6.14:16.

117 (2) through (8) [Repealed.]