CHAPTER 6
Judicial Review of Agency Decisions

§ 6.1 Introduction

The Kansas Judicial Review Act (KJRA) was amended significantly in 2009. The changes do NOT apply retroactively, but instead apply only to agency decisions made after July 1, 2009. K.S.A. 77-621(a)(2); *Redd v. Kansas Truck Center*, 291 Kan. 176, Syl. ¶ 1, 239 P.3d 66 (2010). Given that fact, it is crucial to determine when the agency decision arose, so that the proper version of the statute may be applied. When citing appellate decisions, make sure the holding still applies in light of the 2009 amendments.

Prior to July 1, 2009, K.S.A. 77-621 allowed the appellate courts to review an agency's factual findings to make sure they were supported by "substantial evidence" in "light of the record as a whole." Appellate case law limited this review by directing courts to look at the evidence in the light most favorable to the agency's ruling. If courts found substantial evidence that would support the agency's decision, courts were not concerned about other evidence that may have led to a different result. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 553-54, 161 P.3d 695 (2007).

As amended in 2009, K.S.A. 77-621 defines "substantial evidence" "in light of the record as a whole" to include evidence both supporting and detracting from an agency's finding. Courts must now determine whether the evidence supporting the agency's factual findings is substantial when considered in light of all of the evidence. *Redd v. Kansas Truck Center*, 291 Kan. at 183.

Appellate review of an agency's interpretation of a statute has also changed. Historically, Kansas courts have given substantial deference to an administrative agency's interpretation of a statute that the agency administers, especially when the agency is one of "special competence and experience." *Coma Corporation v. Kansas Dept. of Labor*, 283 Kan. 625, 629, 154 P.3d 1080 (2007). However, the Kansas Supreme Court no longer extends deference to an agency's statutory interpretation. Appellate review is now unlimited, and practitioners should not cite cases which rely on the doctrine of operative construction. *In re Tax Appeal of LaFarge Midwest*, 293 Kan. 1039, 1044, 271 P.3d 732 (2012).

§ 6.2 Scope of KJRA

Since 1984 the exclusive remedy for appealing state agency action has been the Kansas Judicial Review Act (KJRA), codified at K.S.A. 77-601 *et seq.* The KJRA provides the exclusive means of judicial review of action by a state agency. K.S.A. 77-606. *Midwest Crane & Rigging, Inc. v. Kansas Corporation Comm'n*, 38 Kan. App. 2d 269, 271, 163 P.3d 1244 (2007). The KJRA applies to all state agencies unless specifically exempt by statute. K.S.A. 77-603(a). See *State v. Ernesti*, 291 Kan. 54, 61, 239 P.3d 40 (2010). The first step in preparing to appeal an agency action is to check the agency's specific enabling legislation to determine if the agency or any of its discrete proceedings are exempt from the KJRA. The judicial and legislative branches of state government and political or taxing subdivisions of the state, or an agency of a subdivision, are specifically exempt from the KJRA. K.S.A. 77-602(k) ("state agency" defined). *Frick v. City of Salina*, 289 Kan. 1, 10-11, 208 P.3d 739 (2009).

Under the KJRA, any person who has standing and has exhausted administrative remedies may timely seek judicial review of "final agency action." K.S.A. 77-607. "Agency action" is defined in K.S.A. 77-602(b) as:

- The whole or a part of a rule and regulation or an order;
- The failure to issue a rule and regulation or an order; or
- An agency's performance of, or failure to perform, any other duty, function or activity, discretionary or otherwise. See *Jones v. State*, 279 Kan. 364, 367-68, 109 P.3d 1166 (2005).

K.S.A. 77-607(b)(1) negatively defines "final agency action" as "other than nonfinal agency action." Agency action is "nonfinal" if the "agency intends or is reasonably believed to intend [such action] to be preliminary, preparatory, procedural or intermediate." K.S.A. 77-607(b)(2). For a good discussion on the difference between "final" and "nonfinal" agency action, see *Bartlett Grain Co. v. Kansas Corporation Comm'n*, 292 Kan. 723, 727, 256 P.3d 867 (2011).

K.S.A. 77-608 allows for judicial review of nonfinal agency action only if:

- It appears likely that the person seeking review will qualify for judicial review of the related final agency action; and
- Postponement of judicial review would result in an "inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement."

For a general discussion, see *Friedman v. Kansas State Bd. of Healing Arts*, 287 Kan. 749, 753-54, 199 P.3d 781 (2009).

§ 6.3 Persons Entitled to Review

The next step in the process in preparing for judicial review of an administrative agency action is to be sure that the person requesting review is qualified to seek judicial review under the Act. K.S.A. 77-607.

§ 6.4 Standing

To qualify for standing under K.S.A. 77-611, the person seeking review must:

- Be a person to whom the action is specifically directed;
- Have been a party to the agency proceedings that led to the agency action; see *Board of Sumner County Comm'rs v. Bremby*, 286 Kan. 745, 751-761, 189 P.3d 494 (2008).
- Be a person subject to the rule or regulation being challenged; or
- Be a person authorized to challenge an agency action under another provision of law.

§ 6.5 Exhaustion of Remedies

K.S.A. 77-612 establishes that a petition for judicial review may be filed only after all administrative remedies are exhausted. This includes remedies both within the agency whose action is being challenged and within any other agency authorized to exercise administrative review. See, generally, *Friedman v. Kansas State Bd. of Healing Arts*, 287 Kan. 749, 752, 199 P.3d 781 (2009). Exhaustion of remedies refers to administrative procedures and not to individual issues. *Rebel v. Kansas Dept. of Revenue*, 288 Kan. 419, 427, 204 P.3d 551 (2009).

After July 1, 2009, there are four exceptions to this rule:

- A petitioner for judicial review of a rule or regulation need not have participated in the rulemaking proceeding upon which that rule and regulation is based, or have petitioned for its amendment or repeal;
- A petitioner for judicial review need not exhaust administrative remedies to the extent that the KJRA or any other statute states that exhaustion is not required;
- A petitioner for judicial review need not seek reconsideration unless a statute makes the filing of a petition for reconsideration a prerequisite for seeking judicial review; and
- A court may relieve a petitioner of the requirement to exhaust any or all administrative remedies to the extent that the administrative remedies are inadequate or would result in irreparable harm. K.S.A. 77-612.

If a statute requires that a petition for reconsideration by the agency must be filed as a prerequisite to the accrual of any cause of action in district court, administrative remedies are not exhausted until the petitioner files a petition for reconsideration and the agency files its order on reconsideration or fails to file an order within the prescribed time. See *United Steelworkers of America v. Kansas Comm'n on Civil Rights*, 253 Kan. 327, Syl. ¶¶ 2-3, 855 P.2d 905 (1993). In order to sufficiently exhaust administrative remedies, the petition for reconsideration must be filed by an aggrieved party. *In re Tax Exemption Application of Reno Township*, 27 Kan. App. 2d 794, 796, 10 P.3d 1 (1999).

Counsel should consult the enabling statutes of the applicable agency to determine if there is any deviation in the exhaustion requirement. See *Zarda v. State*, 250 Kan. 364, 826 P.2d 1365 (1992) (taxpayer can challenge constitutionality of regulations without exhausting administrative remedies but cannot seek tax relief without exhausting administrative remedies); *Expert Environmental Control, Inc. v. Walker*, 13 Kan. App. 2d 56, 761 P.2d 320 (1988).

§ 6.6 Primary Jurisdiction

Although it has not been codified in the KJRA, Kansas courts will apply the concept of primary jurisdiction and refuse to act on a petition for judicial review until agency action is complete.

"The doctrine of primary jurisdiction applies only when an agency and a court have concurrent jurisdiction over an action and is usually applied to isolated issues rather than to the entire proceeding. 'The doctrine is invoked when the courts have initial jurisdiction over a claim but when it is likely that the action will require resolution of issues which, under a regulatory scheme, have been placed in the hands of the administrative body.' [Citation omitted.]" *Grindsted Products, Inc. v. Kansas City Power & Light Co.*, 21 Kan. App. 2d 435, 446-47, 901 P.2d 20 (1995).

§ 6.7 Initiating Review – Where to File

An action for judicial review is initiated by filing a petition for judicial review in the proper court, along with payment of the appropriate fee. K.S.A. 77-614(a). The fee schedule is established at K.S.A. 60-2001.

The type of relief available to a petitioning party is limited by K.S.A. 77-622. Damages or compensation are allowable only if authorized by another provision of law. K.S.A. 77-622(a). Other available remedies include declaratory or injunctive relief. K.S.A. 77-622(b).

Generally, jurisdiction for relief under the KJRA is in district court. But the enabling statutes of some agencies provide for appellate review directly by the Kansas Court of Appeals, the Kansas Supreme Court, or some different manner of review.

Some examples include:

- Orders from the Workers Compensation Board of Appeals. K.S.A. 44-556(a).
- Decisions of the Court of Tax Appeals. K.S.A. 74-2426(c)(2).
- Appeals of utility rate cases from the Kansas Corporation Commission. K.S.A. 66-118a(b).

Except as otherwise provided, venue under the KJRA is in the county in which the order or agency action is entered or effective, or where the rule is promulgated. K.S.A. 77-609(b). See *Mildfelt v. State*, 11 Kan. App. 2d 617, 620-21, 731 P.2d 884 (1987).

§ 6.8 Timely Filing and Service

The time frame within which a petition for judicial review must be filed is determined and dependent upon the type of action being challenged. Review of an agency rule or regulation may be filed at any time unless the agency's enabling statutes provide otherwise. K.S.A. 77-613(a). If reconsideration has not been requested and is not a prerequisite for seeking judicial review, a petition seeking review of an agency order must be filed within 30 days after service of the order. K.S.A. 77-613(b). See also *In re Tax Appeal of Newton Country Club Co.*, 12 Kan. App. 2d 638, 753 P.2d 304, *rev. denied* 243 Kan. 779 (1988).

If an agency, other than the Kansas Corporation Commission, fails to act in a timely manner as required by law, the aggrieved party is entitled to interlocutory review of the agency's failure to act. K.S.A. 77-631. If the Kansas Corporation Commission does not issue an order on a petition for reconsideration within 30 days, it is deemed denied. K.S.A. 77-529(b). If reconsideration has been requested or is a prerequisite for seeking judicial review, a petition for judicial review must be filed: (1) Within 30 days after service of the order rendered after reconsideration unless a further petition is required under K.S.A. 66-118b (relating to Kansas Corporation Commission); (2) within 30 days after the order denying the request for reconsideration; or (3) in proceedings before the Kansas Corporation Commission, within 30 days of the date the request for reconsideration is deemed to have been denied. K.S.A. 77-613(c).

Review of an agency action other than a final order, rule, or regulation must be requested within 30 days after such action occurs. K.S.A. 77-613(d). This deadline may be extended to include petitioner's attempts to exhaust administrative remedies. K.S.A. 77-613(d)(1). The deadline may also be extended to include any period where petitioner did not know and had no duty to discover, or had a duty to discover but could not reasonably do so, that the agency had taken action or that the effect of the action was sufficient to confer standing on the petitioner to request review. K.S.A. 77-613(d)(2). See also *Jones v. State*, 279 Kan. 364, 369, 109 P.3d 1166 (2005).

Because the deadline for filing a petition for judicial review begins with service of the order, it is important to check service provisions in the Act. Service can be obtained by delivery or by mailing a copy of the order. As with traditional court service, proper delivery includes handing the order to the person to be served or leaving it at that person's place of business or residence with a person of suitable age. Unless reconsideration is a prerequisite for seeking judicial review, the final order must state the agency officer to receive service. K.S.A. 77-613(e). See *Heiland v. Dunnick*, 270 Kan. 663, 670-71, 19 P.3d 103 (2001).

Service by mail, for purposes of the KJRA, is deemed to be complete upon mailing consistent with provisions of the Kansas Administrative Procedure Act (KAPA). K.S.A. 77-531. Both the KJRA and the KAPA provide that, where service is completed by mail, a 3-day extension period is added to the time calculation. K.S.A. 77-613(e); K.S.A. 77-531.

The party seeking review must provide notice and service to the head of the agency being challenged. The petitioner bears the burden of providing notice of the petition for judicial review to all other parties participating in any adjudicative proceeding that led to the challenged agency action. K.S.A. 77-614(d). See *Claus v. Kansas Dept. of Revenue*, 16 Kan. App. 2d 12, 825 P.2d 172 (1991).

Prior to July 1, 2009, the Kansas appellate courts held that the notice requirements of K.S.A. 77-613(e) require strict compliance. *Claus v. Kansas Dept. of Revenue*, 16 Kan. App. 2d 12, 825 P.2d 172 (1991). However, the July 1, 2009, changes to the KJRA included an amendment which provides that when using any method of serving process, "substantial compliance shall effect valid service of process" if the court finds that,

notwithstanding the service irregularity, the party served was "made aware that the petition or appeal" was filed. K.S.A. 77-614(e).

At all stages of this process, the three mail days allowed by K.S.A. 60-206(d) apply to most administrative appeals, but do NOT apply to cases involving the Workers Compensation Board of Appeals, *Jones v. Continental Can Co.*, 260 Kan. 547, 557, 920 P.2d 939 (1996), or cases involving an appeal of unemployment benefits from the Department of Human Resources, K.S.A. 44-709(c).

§ 6.9 Pleading Requirements of Petition for Judicial Review

As stated in K.S.A. 77-614(b), the KJRA requires that the petition for judicial review:

(1) list name and mailing address of petitioner;

(2) list name and mailing address of the agency whose actions are being challenged;

(3) identify agency action being challenged and include a copy, summary, or brief description of the agency action;

(4) identify all parties to any adjudicative proceedings that led to the agency action;

(5) state facts demonstrating petitioner is entitled to judicial review;

(6) state reasons petitioner believes relief should be granted; and

(7) specify the type and extent of relief requested.

Because the KJRA is the exclusive remedy for seeking judicial review of state agency action akin to an appellate process, the Kansas Supreme Court has, in the past, applied a strict compliance standard to the pleading requirements enumerated in K.S.A. 77-614(b). See *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 397, 204 P.3d 562 (2009).

Perhaps in response to *Kingsley* and its predecessors, the Kansas Legislature amended K.S.A. 77-614 in 2009 to add subsection (c), which now provides that the failure to include some of the information required by K.S.A. 77-614(b) "in the initial petition" does not deprive the reviewing court of jurisdiction. Rather, the reviewing court should "freely" give leave to supplement the petition with omitted information "when justice so requires." A party responding to a petition for judicial review has 30

days after the agency has been served or other parties received notice in which to file an answer or other responsive pleading with the court. A party in a judicial review proceeding is not required to file an answer. K.S.A. 77-614(d).

§ 6.10 Stays and Other Remedies

Unless precluded by other law, a state agency may grant a stay or other temporary remedy during the pendency of judicial review. K.S.A. 77-616(a). Interlocutory review of the agency's disposition of an application for stay is permitted by K.S.A. 77-616(b). The KAPA likewise provides for a stay of the effectiveness of an agency order until the time to seek judicial review has run. K.S.A. 77-528.

A court may not grant an application for a stay or other temporary remedy where an agency has determined its action is justified to protect against a substantial threat to the public health, safety, or welfare, unless the court finds:

- The applicant is likely to prevail on final disposition of the case;
- In the absence of the relief sought the applicant will suffer irreparable injury;
- The granting of the relief sought will not substantially harm other parties; and
- The threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action.

K.S.A. 77-616(c).

Where the court determines that such relief is justified, it may remand the matter back to the agency for action consistent with the determination or issue a stay itself. No court may issue an *ex parte* order granting a stay under the KJRA unless authorized by a rule of the Kansas Supreme Court. K.S.A. 77-616(f). See *Buchanan v. Kansas Dept. of Revenue*, 14 Kan. App. 2d 169, 172, 788 P.2d 285 (1989).

§ 6.11 Preserving Issues for Review Under the KJRA

In an appeal of a decision by an administrative agency, a party may only argue issues raised before the agency. The KJRA specifically forbids

raising new or additional issues on review of an agency action. K.S.A. 77-617; *In re Equalization Appeal of Prieb Properties*, 47 Kan. App. 2d 122, 126, 275 P.3d 56 (2012).

If a transcript of an administrative hearing is not available, the reviewing court will examine the record, including the administrative hearing notes, to determine the issues raised. *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 204 P.3d 562 (2009).

> **PRACTICE NOTE:** If an administrative hearing is not transcribed, counsel must be sure all issues raised are reflected in the record, for example, listed in the hearing officer's notes. A better practice is for counsel to file a written list of challenges to be presented at the administrative hearing to ensure all issues are preserved for judicial review.

A party may obtain judicial review of a new issue only if:

- The agency lacked jurisdiction to grant an adequate remedy based on a determination of the issue;
- The action taken is a rule and regulation and the person seeking review has not been a party to adjudicative proceedings in which the issues have been raised;
- The action challenged is an order and the party seeking review was not notified of the adjudicative proceeding; or
- The court determines that the interests of justice would be served through judicial resolution of an issue that arose from a change in controlling law after the agency action, or when the agency action occurred after the party had exhausted administrative remedies.

K.S.A. 77-617. See *Chowning v. Cannon Valley Woodwork, Inc.*, 32 Kan. App. 2d 982, 991, 93 P.3d 1210 (2004) (if issue does not qualify as an exception in K.S.A. 77-617, court cannot review issue if it was not raised at administrative level).

§ 6.12 The Agency Record

The only action required of an agency under the KJRA is the submission of the agency record. The original or a certified copy of the official record in the matter appealed from must be transmitted to the court within 30 days after service of the petition for judicial review unless the court or another statutory provision allows additional time for transmitting the record. K.S.A. 77-620(a). See *Pieren-Abbott v. Kansas Department of Revenue*, 279 Kan. 83, 95, 106 P.3d 492 (2005).

The record must contain any agency documents that evidence the action taken by the agency. In addition, the record must include any documents identified by the agency as having been considered before the action was taken or that served as a basis for the action. K.S.A. 77-620(a).

The list of documents that must be maintained as part of the "official record" of an agency adjudicative proceeding is found in the KAPA at K.S.A. 77-532. The statute was amended in 2009.

The parties to an action for judicial review may stipulate to a shortened, summarized, or organized record. K.S.A. 77-620(c). Where a party unreasonably refuses such a stipulation, the court may impose the costs of preparing transcripts or copies of the record on that party. K.S.A. 77-620(d).

If part of the record has been preserved without a transcript, the agency has the duty to prepare a transcript to be included in the record transmitted to the court. The costs of preparing such a transcript, however, will be borne by the party challenging the agency action unless the court orders otherwise. K.S.A. 77-620(b).

§ 6.13 Scope of Review

Unless a statute provides otherwise, the KJRA defines the scope of review of state agency action in K.S.A. 77-621. Enabling statutes may provide for the method of review of certain agency action:

- Review of decisions under the Workers Compensation Act is limited to questions of law. K.S.A. 44-556(a). The determination of whether the factual findings of the Workers Compensation Board are supported by substantial competent evidence is a question of law. See

Gleason v. Samaritan Home, 260 Kan. 970, 976, 926 P.2d 1349 (1996). As amended in 2009, the KJRA requires the court to review the adequacy of the evidence "in light of the record as a whole," by considering evidence that supports and contradicts the Board's findings. K.S.A. 77-621(d);

- When reviewing decisions by the Kansas Human Rights Commission (formerly Kansas Commission on Civil Rights) under the Kansas Act Against Discrimination or the Kansas Age Discrimination in Employment Act, the district court must examine the record and make independent findings of fact and conclusions of law. K.S.A. 44-1011(b). See *Kansas State Univ. v. Kansas Comm'n on Civil Rights*, 14 Kan. App. 2d 428, 431-32, 796 P.2d 1046, *rev. denied* 246 Kan. 767 (1990); and
- Decisions other than under K.S.A. 8-254 made by the division of motor vehicles, including orders that deny, cancel, suspend, or revoke a driver's license are subject to de novo review by the district court, but administrative decisions are still reviewed under KJRA. See *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 396, 204 P.3d 562 (2009).

With a few exceptions limited to specific agencies, the KJRA provides that judicial review of disputed issues of fact must be confined to the agency record supplemented by any additional evidence taken pursuant to the Act. K.S.A. 77-618. The KJRA envisions only one circumstance where the court may receive additional evidence. K.S.A. 77-619. Supplemental evidence can be received only if the evidence relates to the validity of the agency's actions at the time they were taken and the evidence is necessary to assist the court in deciding issues concerning:

- Improper constitution of the decision-making body;
- Improper motives or grounds for disqualification of the individuals making the decision; or
- Unlawfulness of the procedure or decision-making process. K.S.A. 77-619(a). See *Doe v. Kansas Dept. of Human Resources*, 277 Kan. 795, 812-14, 90 P.3d 940 (2004).

If a court finds additional fact-finding and other proceedings are needed before the court can make a final disposition of the matter on review, the court may remand the matter to the agency to take action needed and to make those findings. A matter may be remanded to an agency if:

- The agency failed to prepare or preserve a record adequate for judicial review;
- The court finds new evidence has become available relating to the validity of agency action at the time it was taken, that the parties did not know and had no duty to or could not have reasonably discovered until after the agency action, and the interests of justice would be served by remand to the agency;
- The agency improperly excluded or omitted evidence from the record; or
- A relevant provision of the law changed after the agency action and the court has determined that the new provision may control the outcome of the proceeding. K.S.A. 77-619(b).

Under the KJRA, as at common law, the burden of proving the invalidity of an administrative agency action is on the challenging party. The validity of the agency action shall be determined by applying the standards of judicial review to the action at the time it was taken. K.S.A. 77-621(a). See also *Peck v. University Residence Committee of Kansas State Univ.*, 248 Kan. 450, 455-56, 807 P.2d 652 (1991); *Angle v. Kansas Dept. of Revenue*, 12 Kan. App. 2d 756, 761, 758 P.2d 226, *rev. denied* 243 Kan. 777 (1988).

The KJRA requires that the court conducting the review make a separate and distinct ruling on each material issue on which it bases its decision. K.S.A. 77-621(b). In K.S.A. 77-621(c), the Act requires relief to be granted when the court determines:

- The agency action was based on a facially unconstitutional action, statute, or rule and regulation;
- The agency acted outside its jurisdiction as provided by law;

- The agency has failed to decide an issue requiring resolution;
- The agency has erroneously interpreted or applied the law;
- The agency engaged in an unlawful procedure or otherwise failed to follow prescribed procedure;
- The agency was not properly constituted as a decision-making body or was subject to disqualification;
- The agency action was based on a determination of fact not supported by substantial evidence when viewing the record as a whole; or
- The action is otherwise unreasonable, arbitrary, or capricious.

In contrast to prior practice, the courts no longer extend deference to an agency's statutory interpretation. *In re Tax Appeal of LaFarge Midwest*, 293 Kan. 1039, 1044, 271 P.3d 732 (2012). The doctrine of operative construction should no longer be applied.

In July 2009, K.S.A. 77-621 was amended to add subsection (d), which reads:

> "For purposes of this section, 'in light of the record as a whole' means that the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record, compiled pursuant to K.S.A. 77-620, and amendments thereto, cited by any party that supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. In reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review."

The KJRA mandates the court use the harmless error rule in reviewing agency action. K.S.A. 77-621(e). Thus, even if the agency action is invalid or flawed, it will be upheld unless the action caused actual harm to a party. See *Frank v. Kansas Dept. of Agriculture*, 40 Kan. App. 2d 1024, 1035, 198 P.3d 195 (2008). An appellate court reviews a district court decision on a petition for judicial review in the same manner as decisions in other civil cases. K.S.A. 77-623. When appellate courts review a district court decision under KJRA, the scope and method of review is the same as the district court's review. See *Jones v. Kansas State University*, 279 Kan. 128, 139, 106 P.3d 10 (2005).

§ 6.14 Remedies

The remedy provision of the KJRA vests the court with considerable discretion in formulating a remedy when considering a petition for judicial review. K.S.A. 77-622. The only limitation placed on an available remedy is that damages or compensation for agency action will be available only to the extent they are expressly authorized by another statute. K.S.A. 77-622(a). Usually this will be the enabling statute or statutes for the specific agency. It is imperative that counsel refer to the organic law of the agency whose action is being challenged to determine the scope of remedies available.

Other than the limitation on damages, the KJRA allows the court to grant practically any relief that the court may deem appropriate whether it be mandatory, injunctive or declaratory; preliminary or final; temporary or permanent; equitable or legal. K.S.A. 77-622(b). In fashioning relief under K.S.A. 77-622(b), the court may:

- Order the administrative agency to take action or exercise discretion as required by law;
- Set aside or modify an action taken by the agency;
- Enjoin or stay an action of the agency;
- Remand a matter for further proceedings;
- Render a declaratory judgment; or
- Take any other action that is both authorized and appropriate.

See, *e.g.*, *Kansas Industrial Consumers Group, Inc. v. Kansas Corporation Comm'n*, 36 Kan. App. 2d 83, 138 P.3d 338, *rev. denied* 282 Kan. 790 (2006) (KCC orders reversed and remanded for further consideration); *Hallmark Cards, Inc. v. Kansas Dept. of Commerce & Housing*, 32 Kan. App. 2d 715, 729, 88 P.3d 250 (2004) (reversed and remanded with directions to agency to certify taxpayer as eligible for tax credit); *Kansas Sunset Assocs. v. Kansas Dept. of Health & Environment*, 16 Kan. App. 2d 1, 3, 818 P.2d 797 (1991) (declaratory relief possible under KJRA).

The KJRA allows a court to grant any ancillary relief necessary to compensate for the effects of official acts wrongfully taken or withheld. However, attorney fees may be awarded only to the extent they are expressly authorized by other law. K.S.A. 77-622(c). It is, therefore, imperative that counsel consult the enabling statutes of the specific agency to determine if and under what circumstances attorney fees are available.

§ 6.15 Appeals Outside of the KJRA

As indicated earlier, some political or taxing subdivisions and even some agency actions are not governed by the KJRA. If the legislature has exempted a particular agency or agency action, such a provision will be controlling. For agencies falling outside of the KJRA and whose enabling statutes do not provide a method for seeking judicial review, K.S.A. 60-2101(d) is the statutory provision establishing judicial review of quasi-judicial action taken by administrative agencies. For a list of state agency actions exempted from the KJRA, see K.S.A. 77-603(c).

Administrative agencies and political subdivisions often have broad powers, and actions taken can be categorized as legislative, administrative, executive, or judicial/quasi-judicial. Only the latter can be appealed under K.S.A. 60-2101(d). True judicial functions are functions "with which a court might have been charged in the first instance or functions courts have historically performed or did perform prior to the creation of the administrative body. A function that is not a true judicial function may nevertheless be quasi-judicial if it involves a discretionary act *of a judicial nature* taken by a body empowered to investigate facts, weigh evidence, and draw conclusions as a basis for official actions." *Brown v. U.S.D. No. 333*, 261 Kan. 134, 135, Syl. ¶ 13, 928 P.2d 57 (1996). "A decision of a legislative body is quasi-judicial if a state or local law (1) requires notice to the community before the action, (2) requires a public

hearing pursuant to notice, and (3) requires the application of criteria established by law to the specific facts of the case." *Heckert Construction Co. v. City of Ft. Scott*, 278 Kan. 223, 224, 91 P.3d 1234 (2004).

Where no specific enabling statute provides for judicial review of an administrative action and K.S.A. 60-2101(d) is inapplicable, a party must resort to extraordinary remedies to gain access to judicial review. The extraordinary remedies available in Kansas are actions for mandamus, declaratory judgment, injunction, and quo warranto. See *Barnes v. Board of Cowley County Comm'rs*, 293 Kan. 11, 17, 259 P.3d 725 (2011).

The scope of review of a judicial or quasi-judicial administrative decision made outside of the KJRA is limited to determining whether the government body acted within the scope of its authority, whether the decision was substantially supported by evidence, or whether the decision was fraudulent, arbitrary, or capricious. *Robinson v. City of Wichita Retirement Bd. of Trustees*, 291 Kan. 266, 270, 241 P.3d 15 (2010).

§ 6.16 Workers Compensation Cases

Under Supreme Court Rule 9.04, when an appeal is taken from the Workers Compensation Board to the Court of Appeals under K.S.A. 44-556, the appellant must file a petition for judicial review with the clerk of the appellate courts. See form at § 12.3, *infra*. The petition must be filed within 30 days of the date of the order. K.S.A. 44-556(a). The 3-day mail rule does not apply to extend the petition filing date in workers compensation cases. *Jones v. Continental Can Co.*, 260 Kan. 547, 920 P.2d 939 (1996). An appellee may cross-petition within 20 days of service of the petition. K.S.A. 44-556(a).

The petition for judicial review, filed with the clerk of the appellate courts, must comply with K.S.A. 77-614. The petition must be accompanied by certified copies of the decision(s) of the administrative law judge, the request for Workers Compensation Board review, and the order of the Workers Compensation Board. The petition must be accompanied by the docket fee and a docketing statement required by Supreme Court Rule 2.04. The petition must be served upon the board and all parties. Rule 9.04.

Within 14 days of the filing of the petition, the appellant must request in writing to the board that it certify the record of proceedings. See form at § 12.4, *infra*. If a record was made of any hearing before the board, a

transcript must be ordered by the appellant within 14 days of filing the petition. The transcript must otherwise be prepared and advance payment made in accordance with Rule 3.03. The appellant must file copies of the request(s) for transcript and certification of the record with the clerk of the appellate courts and serve copies upon all other parties at the time the request(s) are filed with the board. Rule 9.04.

> **PRACTICE NOTE:** It is acceptable, even preferable, to file with the petition for judicial review and docketing statement any requests for transcripts and the request for the board to certify the record of proceedings to the clerk of the appellate courts.

After any transcript of a board hearing is completed, the board must transmit the record to the clerk of the appellate courts and send notice, with a copy of the table of contents, to the parties that the record is being transmitted. The brief of the appellant is due 30 days from the date the record is transmitted to the appellate courts. Rule 9.04.

All other procedures and matters not provided for above are governed by the Supreme Court Rules Relating to Appellate Practice and applicable statutes.

§ 6.17 Checklist for Review of Agency Action

(1) Check the agency enabling legislation to determine whether state agency action is involved or if the agency action is exempt from the KJRA.

(2) Make sure that the agency action being appealed is a "final agency action" or that a basis for appealing "nonfinal agency action" is established.

(3) Ensure that the person seeking review meets all standing requirements.

(4) Check the enabling statutes of the specific agency (a) to ensure that all available administrative remedies have been exhausted, (b) to determine whether a petition for reconsideration must be filed, and (c) to consider whether the doctrine of primary jurisdiction applies.

(5) Check the enabling statutes of the specific agency to determine the appropriate court for review.

(6) Be sure the petition for judicial review meets pleading requirements.

(7) Review the service provisions and determine the filing deadline.

(8) Serve the agency head and all participating parties in the original proceeding with notice of the petition.

(9) Carefully review the specific agency enabling legislation to determine the appropriate scope of review.

(10) Review the organic law of the specific agency to determine the scope of remedies available, including the possibility of attorney fees.