ONE HUNDRED AND EIGHTH LEGISLATURE

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MAY M. ROSS, Secretary

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED SEVENTY-SEVEN

AN ACT to Create the Maine Administration Procedure Act.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. 4 MRSA c. 25 is enacted to read:

CHAPTER 25

ADMINISTRATIVE COURT

§ 1151. Administrative Court

1. Establishment. The Administrative Court, as heretofore established, shall be part of the Judicial Department of the State and subject to the authority of the Chief Justice of the Supreme Judicial Court. The Administrative Court shall consist of the Administrative Court Judge and such Associate Administrative Court Judges as the Legislature shall authorize. In the event of the disability of the Administrative Court Judge, an Associate Administrative Court Judge shall perform any and all of his duties. The Administrative Court shall be a court of record. The Administrative Court Judge shall establish a seal. Except as otherwise provided in this chapter, the Administrative Court Judge shall be responsible for the efficient operation of the Administrative Court and for the proper conduct of business therein.

2. Licensing jurisdiction. Except as provided in Title 5, section 10004 and Title 29, chapter 17, the Administrative Court shall have exclusive jurisdiction upon complaint of an agency to revoke or suspend licenses issued by the agency.

3. Administrative structure. The Administrative Court shall have the following structure.

A. The Administrative Court Judge and Associate Judges shall be appointed by the Governor, subject to review of the Joint Standing Committee on Judiciary and to confirmation by the Legislature. Each shall hold office for a term of 7 years and until a successor has been appointed and confirmed.

B. The Administrative Court Judge and the Associate Administrative Court Judges shall be members of the bar of this State. Each shall devote full time to his judicial duties, shall not practice law during his term of office, nor shall he during such term be the partner or associate of any person in the practice of law.

C. The Administrative Court Judge shall receive as annual compensation an amount which is $1,500 less than that of a Superior Court Justice. He shall be entitled to actual and necessary expenses in the performance of his duties. He may employ necessary clerical assistance for the court. An Associate Administrative Court Judge shall receive as annual compensation an amount which is $1,000 less than the Administrative Court Judge and he shall be entitled to actual and necessary expenses in the performance of his duties.

D. On receipt of a written complaint from an agency, a Judge of the Administrative Court shall conduct a hearing on the applicable facts and law. The judge may subpoena and examine witnesses.

E. Whenever the Administrative Court Judge determines that he has a personal interest or a financial interest, directly or indirectly, in a case which is before him, he shall disqualify himself from hearing an individual case. He shall assign the case to an Associate Administrative Court Judge.

Whenever an Associate Administrative Court Judge determines that he has a personal interest or a financial interest, directly or indirectly, in a case which is before him, he shall disqualify himself and give written notice to the Administrative Court Judge.

Whenever all judges of the Administrative Court have disqualified themselves in a case, the Administrative Court Judge shall give written notice of same to the parties to the action and shall file a copy of the notice in the docket of the case.

The moving party shall, within 10 days thereafter, commence an action by filing or refiling his complaint in the District Court. Jurisdiction is granted to the District Court to hear and determine such matters and to enter such rulings and orders as the nature of the case may require. The case shall be heard in the District Court in accordance with procedures governing the Administrative Court. The court reporter from the Administrative Court shall transcribe the testimony as in cases before a judge of the Administrative Court. An aggrieved party may appeal from the decision of the District Court Judge to the Superior Court in the same manner as from a decision of the Administrative Court.

F. Section 103, providing for compensation upon retirement of Justices of the Superior Court and to benefits for their spouses and surviving minor

children, is made applicable to the Administrative Court Judge and Associate Administrative Court Judges. The years in which the Administrative Court Judge served in the capacity of Administrative Hearing Commissioner during 1963 to 1973 shall be included in computing his retirement compensation and his spouse's and minor children's survivor benefits.

G. As head of the Judicial Department, the Chief Justice of the Supreme Judicial Court shall approve the Administrative Court Judge's determination of the Administrative Court's budget and procedures for scheduling cases.

§ 1152. Procedure in contested cases

In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

1. Complaint filed. On commencement of any contested case, a written complaint shall be filed with the Administrative Court Judge. A copy of the complaint and summons shall be served on the defendant either by personal delivery in hand, by leaving it with a person of suitable age or discretion at his dwelling place or usual place of abode or by sending it by certified mail to his last known address. The summons shall inform the defendant of the time limit for filing an answer to the complaint and the consequences of his failure to do so. The complaint shall contain a conclusion indicating the violation of a statute or rule, citing the statute or rule violated and stating the relief requested.

2. Witness sworn. At the hearing before any testimony is received, the presiding judge shall swear in the witness.

3. Official record. The presiding judge shall prepare an official record, including testimony and exhibits, in each contested case, but he need not have a transcript of the testimony prepared unless required for rehearing or appeal. The record of the hearing may be taken by stenographic notes or by mechanical recording.

4. Disposition by agreement. On approval of the presiding judge, disposition of any contested case may be made by agreement or consent decree.

5. Rules of procedure. The Supreme Judicial Court shall have the power to adopt, amend, repeal or modify rules governing the forms of complaints, pleadings and motions and the practice, procedure and evidence in and appeals from the Administrative Court. The rules shall neither abridge nor enlarge the substantive rights of any litigant. Such rules shall be filed with the Secretary of State in the manner required by Title 5, section 8056, subsection 1, paragraph B.

§ 1153. Emergency proceedings

The Administrative Court shall have jurisdiction to revoke temporarily or suspend a license without notice or hearing upon the verified complaint of an agency or the Attorney General. Such complaint shall be accompanied by affidavits demonstrating that summary action is necessary to prevent an immediate threat to the public health, safety or welfare. Upon issuance of an

order revoking or suspending a license under this section, the Administrative Court shall promptly schedule a hearing on the agency's complaint, which hearing shall take precedence over all other matters except older matters of the same character on the docket of the court. Any order temporarily suspending or revoking a license shall expire within 30 days of issuance, unless renewed by the court after such hearing as it may deem necessary.

Nothing in this section shall be deemed to abridge or affect the jurisdiction of the Superior Court to issue injunctive relief or to exercise such other powers as may be authorized by law or rule of the court.

§ 1154. Subpoenas by Administrative Court

At the request of a party in a contested case, a judge of the Administrative Court shall issue subpoenas for the attendance of witnesses or for the production of documents. He may issue subpoenas on his own motion.

1. Failure to obey subpoena. A person who fails to obey the subpoena of a judge of the Administrative Court may be punished as for contempt of court on application to the Superior Court by the Administrative Court or by the party requesting issuance of the subpoena.

§ 1155. Decisions

After hearing, on default, or by agreement of the parties, a judge of the Administrative Court may suspend, revoke or modify the license of any party properly served with process, or if the applicable law so provides he may order issuance of a license to an applicant according to the terms of the applicable law. He may take any other action with relation to the party which could have been taken before the enactment of this section by the agency involved in the hearing.

Every final decision of the Administrative Court shall be in writing or stated in the record, and shall include findings of fact and conclusions of law sufficient to apprise the parties and any interested member of the public of the basis for the decision. A copy of the decisions shall be delivered or promptly mailed to each party to the proceeding or his representative of record. Written notice of the party's rights to review of the decision and of the action required, and the time within which such action shall be taken in order to exercise the right of review, shall be given to each party together with the decision.

§ 1156. Fines

Notwithstanding any other provisions of this chapter, a judge of the Administrative Court, in his judicial discretion, may impose a fine of a specific sum, which shall not be less than $50 nor more than $1,500 for any one offense, or such other limits as the statutes relating to the licensing question may provide. Such a fine may be imposed instead of or in addition to any suspension, revocation or modification of a license by the court.

The Administrative Court Judge shall maintain a record of all fines received by the court and shall pay the fines into the General Fund of the State Treasury on or before the 15th day of each month.

§ 1157. Judicial review

Judicial review of an Administrative Court decision may be had in the Superior Court in the manner provided by rules adopted for this purpose by the Supreme Judicial Court.

Sec. 2. 5 MRSA, Pt. 6 is repealed.

Sec. 3. 5 MRSA, Pt. 18 is enacted to read:

PART 18

ADMINISTRATIVE PROCEDURES

CHAPTER 375

MAINE ADMINISTRATIVE PROCEDURE ACT

SUBCHAPTER I

GENERAL PROVISIONS

§ 8001. Short title

This chapter shall be known and may be cited as the "Maine Administrative Procedure Act."

§ 8002. Definitions

As used in this chapter, unless the context otherwise indicates, the following words and phrases shall have the following meanings.

1. Adjudicatory proceeding. "Adjudicatory proceeding" means any proceeding before an agency in which the legal rights, duties or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for hearing.

2. Agency. "Agency" means any body of State Government authorized by law to adopt rules, to issue licenses or to take final action in adjudicatory proceedings, including, but not limited to, every authority, board, bureau, commission, department or officer of the State Government so authorized; but the term shall not include the Legislature, Governor, courts, University of Maine, Maine Maritime Academy, school districts, special purpose districts or municipalities, counties or other political subdivisions of the State.

3. Agency member. "Agency member" means an individual appointed or elected to the agency who is charged by statute with that agency's decision-making functions. It does not include counsel to the agency or agency staff.

4. Final agency action. "Final agency action" means a decision by an agency which affects the legal rights, duties or privileges of specific persons, which is dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the agency.

5. License. "License" includes the whole or any part of any agency permit, certificate, approval, registration, charter or similar form of permission

required by law which represents an exercise of the state's regulatory or police powers.

6. Licensing. "Licensing" means the administrative process resulting in the grant, denial, renewal, revocation, suspension or modification of a license.

7. Party. "Party" means:

A. The specific person whose legal rights, duties or privileges are being determined in the proceeding;

B. Any person participating in the adjudicatory proceeding pursuant to section 9051, subsections 1 or 2; or

C. Any agency bringing a complaint to Administrative Court under section 10051.

8. Person. "Person" means any individual, partnership, corporation, governmental entity, association or public or private organization of any character, other than the agency conducting the proceeding.

9. Rule.

A. "Rule" means the whole or any part of every regulation, standard, code, statement of policy, or other agency statement of general applicability, including the amendment, suspension or repeal of any prior rule, that has the force of law, or the violation of which may result in the imposition of sanctions, and implements, interprets or makes specific the law administered by the agency, or describes the procedures or practices of the agency.

B. The term does not include:

(1) Policies or memoranda concerning only the internal management of an agency and not affecting the rights of or procedures available to any person;

(2) Advisory rulings issed under subchapter III;

(3) Decisions issued in adjudicatory proceedings; or

(4) Any form, instruction or explanatory statement of policy which in itself does not have force of law, or the violation of which is not punishable by any sanction, and which is intended solely as advice to assist persons in determining, exercising or complying with their legal rights, duties or privileges.

SUBCHAPTER II

RULEMAKING

§ 8051. Adoption of rules of practice

In addition to other rule-making requirements imposed by statute, each agency shall adopt rules of practice governing the conduct of adjudicatory proceedings, licensing proceedings and the rendering of advisory rulings, except to the extent that such rules are provided by statute.

§ 8052. Rule making

1. Notice; public hearing. Prior to the adoption of any rule, the agency shall give notice as provided in section 8053 and may hold a public hearing, provided that a public hearing shall be held if otherwise required by statute or requested by an interested person.

2. Requirements. Any public hearing shall comply with any requirements imposed by statute, but shall not be subject to subchapter IV.

3. Statements and arguments filed. When a public hearing is held, written statements and arguments concerning the proposed rule may be filed with the agency within 10 days after the close of the public hearing, or within such longer time as the agency may direct.

4. Relevant information considered. The agency shall consider all relevant information available to it, including public comments, before adopting any rule.

5. Written statement adopted. At the time of adoption of any rule, the agency shall adopt a written statement explaining the factual and policy basis for the rule.

§ 8053. Notice

1. Prior to adoption of rules. At least 20 days prior to the adoption of any rule, the agency shall:

A. Publish notice:

(1) In a newspaper of general circulation in the area of the State affected, and shall publish a 2nd notice in the same paper no more than 10 days before the hearing; and

(2) In any other trade, industry, professional or interest group publication which the agency deems effective in reaching persons affected; and

B. Notify:

(1) Any person specified by the statute authorizing the rule-making; and

(2) Any person who has filed within the past year a written request with the agency for notice of rulemaking. Notification under this subparagraph shall be by mail or otherwise in writing to the last address provided to the agency by that person.

2. Notice. Notice shall:

A. Refer to the statutory authority under which the adoption of the rule is proposed;

B. State the time and place of any schedule public hearing, or state the manner in which a hearing may be requested;

C. State the manner and time within which data, views or arguments may be submitted to the agency for consideration, whether or not a hearing is held; and

D. If possible, contain the express terms of the proposed rule or, otherwise, describe the substance of the proposed rule, stating the subjects and issues involved and indicate where a copy of the proposed rule may be obtained.

3. Fee schedule. The agency may establish a fee schedule for notice under subsection 1, paragraph B, subparagraph (2), imposing a cost reasonably related to the actual expense entailed.

§ 8054. Emergency rulemaking

1. Emergency. If the agency finds that immediate adoption of a rule by procedures other than those set forth in sections 8052 and 8053 is necessary to avoid an immediate threat to public health, safety or general welfare, it may modify those procedures to the minimum extent required to enable adoption of rules designed to mitigate or alleviate the threat found. Emergency rules shall be subject to the requirements of section 8056.

2. Agency findings. Any emergency rule shall include the agency's findings with respect to the existence of an emergency, and such findings shall be subject to judicial review under section 8058.

3. Emergency period. Any emergency rule shall be effective only for 90 days, or any lesser period of time specified in an enabling statute or in the emergency rule. After the expiration of the emergency period, such rule shall not thereafter be adopted except in the manner provided by section 8052.

§ 8055. Petition for adoption or modification of rules

1. Petition. Any person may petition an agency for the adoption or modification of any rule.

2. Form designated. Each agency shall designate the form for such petitions and the procedure for their submission, consideration and disposition.

3. Receipt of petition. Within 60 days after receipt of a petition, the agency shall either notify the petitioner in writing of its denial, stating the reasons therefor, or initiate appropriate rule-making proceedings.

§ 8056. Filing and publication

1. Requirements. With respect to every rule adopted, the agency shall:

A. Submit the rule to the Attorney General for approval as to form and legality;

B. File a certified copy of the rule with the Secretary of State; and

C. Supply, without cost or at actual cost, copies of each such rule to any person who has filed with the agency within the past year a written request to be supplied with all copies of the agency's rules.

2. Form. With respect to every rule adopted by the agency and in effect, the agency shall print and compile in a form which shall be prescribed by the Secretary of State and made available to any person, at each of its offices, for inspection at no charge and for copying with or without cost, as the

agency shall determine, and for distribution free or at actual cost, complete sets of such rules currently in effect. Such form shall be susceptible to frequent and easy revision.

3. Secretary of State. The Secretary of State shall:

A. Maintain and make available at his office, for inspection at no charge and for copying or purchase at actual cost, current copies of complete rules for all agencies filed in accordance with subsection 1, paragraph B; and

B. Supply, at actual cost, annually updated copies of complete sets of rules of an agency to any person who has filed with the Secretary of State within the past year a written request for such sets of rules.

4. Additional requirements. The requirements of subsection 2 shall additionally be applicable to the agency's forms, instructions, explanatory statements and other items defined in section 8002, subsection 9, paragraph B, subparagraph (4).

5. Record of vote. In addition to the foregoing each agency shall keep, at its principal office, and make available for inspection to any person a record of the vote of each member of the agency taken in rule-making proceedings.

§ 8057. Compliance

1. Rules; exception. Rules adopted in a manner other than that prescribed by sections 8052, 8053 and 8054 shall be void and of no legal effect, provided that insubstantial deviations from the requirements of section 8053 shall not invalidate the rule subsequently adopted.

2. Rules not approved. Rules not approved and filed in the manner prescribed by section 8056, subsection 1, paragraphs A and B, shall be void and of no legal effect

3. Agency, responsibility. The requirements of this subchapter do not relieve any agency of the responsibility of compliance with any statute requiring that its rules be filed with or approved by any designated person before they become effective.

§ 8058. Judicial review of rules

1. Judicial review. Judicial review of an agency rule, or of an agency's refusal or failure to adopt a rule where the adoption of a rule is required by law, may be had by any person who is aggrieved in an action for declaratory judgment in the Superior Court conducted pursuant to Title 14, section 5951, et seq., which provisions shall apply to such actions wherever not inconsistent with this section. Insofar as the court finds that a rule was improperly adopted or exceeds the rule-making authority of the agency, it shall declare the rule invalid. In the event that the court finds that an agency has failed to adopt a rule as required by law, the court may issue such orders as are necessary and appropriate to remedy such failure.

2. Failure to seek judicial review. The failure to seek judicial review of an agency rule in the manner provided by subsection 1 shall not preclude judicial review thereof in any civil or criminal proceeding.

SUBCHAPTER III

ADVISORY RULINGS

§ 9001. Advisory rulings

1. Written request. Upon written request of any interested person, an agency may make an advisory ruling with respect to the applicability of any statute or rule administered by that agency to him or his property or actual state of facts.

2. Rules written. All advisory rulings shall be in writing.

3. Advisory ruling not binding. An advisory ruling shall not be binding upon an agency, provided that in any subsequent enforcement action initiated by the agency which made the ruling, any person's justifiable reliance upon the ruling shall be considered in mitigation of any penalty sought to be assessed.

4. Advisory rulings. Each agency shall prescribe by rule, in accordance with section 8051, the procedure for the submission, consideration and disposition of requests for advisory rulings. In issuing an advisory ruling, the agency need not comply with the requirements of subchapters II or IV.

SUBCHAPTER IV

ADJUDICATORY PROCEEDINGS

§ 9051. Scope

1. Adjudicatory proceeding. In any adjudicatory proceeding, except those proceedings involving either correctional facilities or the State Parole Board, the procedures of this subchapter shall apply.

2. Hearing. Unless a hearing is required by statute, the requirements of this subchapter, except the notice provisions of section 9052, subsection 1, shall not apply until a request for a hearing is made under section 9052, subsection 1, paragraph A, or a hearing is set by the agency.

§ 9052. Notice

1. Notice of hearing. When the applicable statute or constitutional law requires that an opportunity for hearing shall be provided, notice shall be given as follows:

A. To the person or persons whose legal rights, duties or privileges are at issue, by regular mail, sufficiently in advance of the anticipated time of the decision to afford an adequate opportunity to prepare and submit evidence and argument, and to request a hearing if so desired; and

B. In any proceeding deemed by the agency to involve the determination of issues of substantial public interest, to the public sufficiently in advance of the anticipated time of the decision to afford interested persons an adequate opportunity to prepare and submit evidence and argument, and to request a hearing if so desired.

2. Hearing required. When a hearing is required by the applicable statute or by agency regulation, or has been requested pursuant to subsection 1, paragraph A, or has been set in an exercise of the agency's discretion, notice shall be given as follows:

A. To the person or persons whose legal rights, duties or privileges are at issue, by regular mail, sufficiently in advance of the hearing date to afford an adequate opportunity to prepare and submit evidence and argument; and

B. In any proceeding deemed by the agency to involve the determination of issues of substantial public interest, to the public sufficiently in advance of the hearing date to afford interested persons an adequate opportunity to prepare and submit evidence and argument and to petition to intervene pursuant to section 9054.

3. Notice to the public. Notice to the public shall be given:

A. By publication, at least twice in a newspaper of general circulation in the area of the state affected;

B. By publication in any other trade, industry, professional or interest group publication which the agency deems effective in reaching persons who would be entitled to intervene as of right under section 9054, subsection 1; and

C. In any other manner deemed appropriate by the agency.

4. Notice. Notice shall consist of:

A. A statement of the legal authority and jurisdiction under which the proceeding is being conducted;

B. A reference to the particular substantive statutory and rule provisions involved;

C. A short and plain statement of the nature and purpose of the proceeding and of the matters asserted;

D. A statement of the time and place of the hearing, or the time within which a hearing may be requested;

E. A statement of the manner and time within which evidence and argument may be submitted to the agency for consideration, whether or not a hearing has been set; and

F. When a hearing has been set, a statement of the manner and time within which applications for intervention under section 9054 may be filed.

§ 9053. Disposition without full hearing

Unless otherwise provided by law, agencies may:

1. Responsibility. Place on any party the responsibility of requesting a hearing if the agency notifies him in writing of his right to a hearing, and of his responsibility to request the hearing;

2. Stipulation, settlement, consent order. Make informal disposition of any adjudicatory proceeding by stipulation, agreed settlement or consent order;

3. Default. Make informal disposition of any adjudicatory proceeding by default, provided that notice has been given that failure to take required action may result in default, and further provided that any such default may be set aside by the agency for good cause shown; and

4. Issues limited. Limit the issues to be heard or vary any procedure prescribed by agency rule or this subchapter if the parties and the agency agree to such limitation or variation, or if no prejudice to any party will result.

§ 9054. Public participation

1. Intervention. On timely application made pursuant to agency rules, the agency conducting the proceedings shall allow any person showing that he is nor may be, or is a member of a class which is or may be, substantially and directly affected by the proceeding, or any other agency of federal, state or local government, to intervene as a party to the proceeding.

2. Intervention; interested person. The agency may, by order, allow any other interested person to intervene and participate as a full or limited party to the proceeding. This subsection shall not be construed to limit public participation in the proceeding in any other capacity.

3. Participation limited or denied. When participation of any person is limited or denied, the agency shall include in the record an entry to that effect and the reasons therefor.

4. Consolidation of presentations. Where appropriate, the agency may require consolidation of presentations of evidence and argument by members of a class entitled to intervene under subsection 1, or by persons allowed to intervene under subsection 2.

5. Participation. The agency shall allow any of its staff to appear and participate in any adjudicatory proceeding.

§ 9055. Ex parte communications; separation of functions

1. Communication. In any adjudicatory proceeding, no agency members authorized to take final action or presiding officers designated by the agency to make findings of fact and conclusions of law shall communicate, directly or indirectly, in connection with any issue of fact, law or procedure, with any person, except upon notice and opportunity for all parties to participate.

2. Prohibition. This section shall not prohibit any agency member or other presiding officer described in subsection 1 from:

A. Communicating in any respect with other members of the agency or other presiding officers; or

B. Having the aid or advice of those members of his own agency staff, counsel or consultants retained by the agency who have not participated and will not participate in the agency proceeding in an advocate capacity.

§ 9056. Opportunity to be heard

1. Opportunity for hearing. The opportunity for hearing in an adjudicatory proceeding shall be afforded without undue delay.

2. Rights. Unless limited by stipulation under section 9053, subsection 4, or by agency order pursuant to section 9054, subsections 2 or 4, or unless otherwise limited by the agency to prevent repetition or unreasonable delay in proceedings, every party shall have the right to present evidence and arguments on all issues, and at any hearing to call and examine witnesses and to make oral cross-examination of any person present and testifying.

§ 9057. Evidence

1. Rules of privilege. Unless otherwise provided by statute, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law.

2. Evidence. Evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude irrelevant or unduly repetitious evidence.

3. Witnesses. All witnesses shall be sworn.

4. Prefiling testimony. Subject to these requirements, an agency may, for the purposes of expediting adjudicatory proceedings, require procedures for the prefiling of all or part of the testimony of any witness in written form. Every such witness shall be subject to oral cross-examination.

5. Written evidence; exception. No sworn written evidence shall be admitted unless the author is available for cross-examination or subject to subpoena, except for good cause shown.

§ 9058. Official notice

1. Official Notice. Agencies may take official notice of any facts of which judicial notice could be taken, and in addition may take official notice of general, technical or scientific matters within their specialized knowledge and of statutes, regulations and nonconfidential agency records. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the substance or materiality of the facts noticed.

2. Facts. Facts officially noticed shall be included and indicated as such in the record.

3. Evaluation of evidence. Notwithstanding the foregoing, agencies may utilize their experience, technical competence and specialized knowledge in the evaluation of the evidence presented to them.

§ 9059. Record

1. Record. In an adjudicatory proceeding, the agency shall make a record consisting of:

A. All applications, pleadings, motions, preliminary and interlocutory rulings and orders;

B. Evidence received or considered;

C. A statement of facts officially noticed;

D. Offers of proof, objections and rulings thereon;

E. Proposed findings and exceptions, if any;

F. The recommended decision, opinion or report, if any, by the presiding officer;

G. The decision of the agency; and

H. All staff memoranda submitted to the members of the agency or other presiding officers by agency staff in connection with their consideration of the case, except memoranda of counsel to the agency.

2. Hearings recorded. The agency shall record all hearings in a form susceptible to transcription. Portions of the record as required and specified in subsection 1 may be included in the recording. The agency shall transcribe the recording when necessary for the prosecution of an appeal.

3. Record; copies. The agency shall make a copy of the record, including recordings made pursuant to subsection 2, available at its principal place of operation, for inspection by any person during normal business hours; and shall make copies of the record, copies of recordings or transcriptions of recordings available to any person at actual cost. Notwithstanding the provisions of this subsection, the agency shall withhold, obliterate or otherwise prevent the dissemination of any portions of the record which are made confidential by state or federal statute, but shall do so in the least restrictive manner feasible.

4. Part of the record. All material, including records, reports and documents in the possession of the agency, of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record and no other factual information or evidence shall be considered in rendering a decision.

5. Documentary evidence. Documentary evidence may be incorporated in the record by reference when the materials so incorporated are made available for examination by the parties before being received in evidence.

§ 9060. Subpoenas and discovery

1. Proceedings. In any adjudicatory proceeding for which the agency, by independent statute, has authority to issue subpoenas, any party shall be entitled as of right to their issuance in the name of the agency to require the attendance and testimony of witnesses and the production of any evidence relating to any issue of fact in the proceeding.

In any proceeding in which the conducting agency lacks independent authority to issue subpoenas, any party may request the issuance of a subpoena by the agency, and the agency is hereby authorized to issue the same if it first obtains the approval of the Attorney General or of any deputy attorney general. Such approval shall be given when the testimony or evidence sought is relevant to any issue of fact in the proceeding.

When properly authorized, subpoenas may be issued by the agency or by any person designated by the agency for that purpose, in accordance with the following provisions:

A. The agency may prescribe the form of subpoena, but it shall adhere, insofar as practicable, to the form used in civil cases before the courts. Witnesses shall be subpoenaed only within the territorial limits and in the same manner as witnesses in civil cases before the courts, unless another territory or manner is provided by law. Witnesses subpoenaed shall be paid the same fees for attendance and travel as in civil cases before the courts. Such fees shall be paid by the party requesting the subpoena.

B. Any subpoena issued shall show on its face the name and address of the party at whose request it was issued.

C. Any witness subpoenaed may petition the agency to vacate or modify a subpoena issued in its name. The agency shall give prompt notice to the party who requested issuance of the subpoena. After such investigation as the agency considers appropriate, it may grant the petition in whole or in part upon a finding that the testimony or the evidence whose production is required does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive or has not been issued a reasonable period in advance of the time when the evidence is requested.

D. Failure to comply with a subpoena lawfully issued in the name of the agency and not revoked or modified by the agency as provided in this section shall be punishable by a fine of not less than $500 and not more than $5,000, or by imprisonment not to exceed 30 days, or both.

2. Adoption of rules. Each agency having power to conduct adjudicatory proceedings may adopt rules providing for discovery to the extent and in the manner appropriate to its proceeding.

§ 9061. Decisions

Every agency decision made at the conclusion of an adjudicatory proceeding shall be in writing or stated in the record, and shall include findings of fact sufficient to apprise the parties and any interested member of the public of the basis for the decision. A copy of the decision shall be delivered or promptly mailed to each party to the proceeding or his representative of record. Written notice of the party's rights to review or appeal of the decision within the agency or review of the decision by the courts, as the case may be, and of the action required and the time within which such action must be taken in order to exercise the right of review or appeal, shall be given to each party with the decision.

The agency shall maintain a record of the vote of each member of the agency with respect to the agency decision.

§ 9062. Presiding officers

1. Presiding officer. An agency may authorize any agency member, employee or agent to act as presiding officer in any hearing.

2. Substitute officer. Whenever a presiding officer is disqualified or it becomes impracticable for him to continue the hearing, another presiding officer may be assigned to continue with the hearing; provided that, if it is shown substantial prejudice to any party will thereby result, the substitute officer shall commence the hearing anew.

3. Presiding officer; duties. Subject to rules or limitations imposed by the agency, presiding officers may:

A. Administer oaths and affirmations;

B. Rule on the admissibility of evidence;

C. Regulate the course of the hearing, set the time and place for continued hearings, and fix the time for filing of evidence, briefs and other written submissions; and

D. Take other action authorized by statute or agency rule consistent with this subchapter.

4. Report. In the event that the presiding officer prepares any report or proposed findings for the agency, the report or findings shall be in writing. A copy of the report or findings shall be provided to each party and an opportunity shall be provided for response or exceptions to be filed by each party.

§ 9063. Bias of presiding officer or agency member

1. Hearings; impartial. Hearings shall be conducted in an impartial manner. Upon the filing in good faith by a party of a timely charge of bias or of personal or financial interest, direct or indirect, of a presiding officer or agency member in the proceeding requesting that that person disqualify himself, that person shall determine the matter as a part of the record.

2. Counsel. Notwithstanding section 9055, the person involved may consult with private counsel concerning the charge.

§ 9064. Enforcement

The agency shall be entitled to enforce its order in the courts by way of injunction or other appropriate legal remedy.

SUBCHAPTER V

LICENSING

§ 10001. Adjudicatory proceedings

When licensing is required as a matter of constitutional right or by statute to be preceded by notice and opportunity for hearing, the provisions of subchapter IV concerning adjudicatory proceedings shall apply.

§ 10002. Expiration

Except as otherwise provided in this subchapter, when a licensee has made timely and sufficient application for renewal of a license, the existing license shall not expire until the application has been finally determined by the agency.

§ 10003. Right to Hearing

1. Opportunity for hearing. Subject to the provisions of section 10004, an agency shall not amend, modify or refuse to renew any license unless it has afforded the licensee an opportunity for hearing in conformity with subchapter IV. In any such proceeding deemed by the agency to involve a substantial public interest an opportunity for public comment and participation shall also be given by public notice in conformity with subchapter IV.

2. Proceeding. In any proceeding involving a proposed modification or amendment of a license which was the subject of an earlier hearing, the agency shall give notice thereof to all parties to the earlier proceeding and in any other manner required by section 9052, and may reopen the earlier proceeding for consideration of the proposed amendment or modification.

§ 10004. Action without hearing

Notwithstanding the provisions of sections 10003 and 10051, an agency may revoke, suspend or refuse to issue or renew any license without proceedings in conformity with subchapters IV or VI, if the decision to take such action rests solely upon a conviction in court of any offense which by statute is expressly made grounds for revocation.

SUBCHAPTER VI

ADMINISTRATIVE COURT

§ 10051. Jurisdiction of Administrative Court; retained powers of agency

1. Jurisdiction. Except as provided in section 10004, the Administrative Court shall have exclusive jurisdiction upon complaint of an agency to revoke or suspend licenses issued by such agency.

2. Complaining agency. The complaining agency shall retain every other power granted to it by statute or necessarily implied therein, except the power of revoking or suspending licenses issued by it. Such retained powers shall include, but not be limited to, the granting or renewing of licenses, the investigating and determining of grounds for the filing of a complaint under this section, and the prosecution of such complaints.

SUBCHAPTER VII

JUDICIAL REVIEW — FINAL AGENCY ACTION

§ 11001. Right to review

1. Agency action. Except where a statute provides for direct review by the Supreme Judicial Court or to the extent judicial review is specifically limited by statute, any person who is aggrieved by final agency action shall be entitled to judicial review thereof in the Superior Court in the manner provided by this subchapter. Preliminary, procedural, intermediate or other nonfinal agency action shall be independently reviewable only if review of the final agency action would not provide an adequate remedy.

2. Failure or refusal of agency to act. Any person aggrieved by the failure or refusal of an agency to act shall be entitled to judicial review thereof

in the Superior Court. The relief available in the Superior Court shall include an order requiring the agency to make a decision within a time certain.

§ 11002. Commencement of Action

1. Proceedings instituted. Proceedings for judicial review of final agency action shall be instituted by filing a petition for review in the Superior Court for the county where:

A. One or more of the petitioners reside or have their principal place of business;

B. The agency has its principal office; or

C. The activity or property which is the subject of the proceeding is located.

The court may grant a change of venue for good cause shown.

2. Petition; contents. The petition for review shall specify the persons seeking review, the manner in which they are aggrieved, and the final agency action which they wish reviewed. It shall also contain a concise statement as to the nature of the action to be reviewed, the grounds upon which relief is sought and a demand for relief, which may be in the alternative.

3. Petition filed. The petition for review shall be filed within 30 days after receipt of notice if taken by a party to the proceeding of which review is sought. Any other person aggrieved shall have 40 days from the date the decision was rendered to petition for review. If the review sought is from an agency's refusal to act, the petition for review shall be filed within 6 months of the expiration of the time within which the action should reasonably have occurred. Cross-petitions, which may be for enforcement or review, shall be filed within 15 days of the filing of the petition for review.

§ 11003. Service

1. Petition served. The petition for review shall be served by certified mail, return receipt requested, upon:

A. The agency;

B. All parties to the agency proceeding; and

C. The Attorney General.

2. Certification. Upon request, the agency shall certify to the petitioner the names and addresses, as disclosed by its records, of all parties to the proceeding in which the decision sought to be reviewed was made, and service upon parties so certified shall be sufficient.

§ 11004. Stay

The filing of a petition for review shall not operate as a stay of the final agency action pending judicial review. Application for a stay of an agency decision shall ordinarily be made first to the agency, which may issue a stay upon a showing of irreparable injury to the petitioner, a strong likelihood of

success on the merits, and no substantial harm to adverse parties or the general public. A motion for such relief may be made to the Superior Court, but the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial, or that the action of the agency did not afford the relief which the petitioner had requested. In addition, the motion shall show the reasons for the relief requested and the facts relied upon, which facts, if subject to dispute, shall be supported by affidavits. Reasonable notice of the motion shall be given to all parties to the agency proceeding. The court may condition relief under this rule upon the posting of a bond or other appropriate security, except that no bond or security shall be required of the State or any state agency or any official thereof.

§ 11005. Responsive pleading; filing of the record

No responsive pleading need be filed unless required by order of the reviewing court. The agency shall file in the reviewing court within 30 days after the petition for review is filed, or within such shorter or longer time as the court may allow on motion, the original or a certified copy of the complete record of the proceedings under review. Within 20 days after the petition for review is filed, all parties to the agency proceeding who wish to participate in the review shall file a written appearance which shall state a position with respect to affirmance, vacation, reversal or modification of the decision under review.

§ 11006. Power of court to correct or modify record

1. Review. Judicial review shall be confined to the record upon which the agency decision was based, except as otherwise provided by this section.

A. In the case of alleged irregularities in procedure before the agency which are not adequately revealed in the record, evidence thereon may be taken and determination made by the reviewing court.

B. The reviewing court may order the taking of additional evidence before the agency if it finds that additional evidence, including evidence concerning alleged unconstitutional takings of property, is necessary to deciding the petition for review; or if application is made to the reviewing court for leave to present additional evidence, and it is shown that the additional evidence is material to the issues presented in the review, and could not have been presented or was erroneously disallowed in earlier proceedings before the agency. After taking the additional evidence, the agency may modify its findings and decisions, and shall file with the court, to become part of the record for review, the additional evidence and any new findings or decision.

C. If a required hearing was not held before the review proceedings were initiated, the reviewing court shall remand to the agency for a hearing in accordance with subchapter IV.

D. In cases where final agency action was not required by statute to be made after an adjudicatory proceeding, the court may either remand for hearing or conduct a hearing de novo.

2. Reviewing court. The reviewing court may require or permit subsequent corrections to the record.

§ 11007. Manner and scope of review

1. Schedule. The court, upon request or its own motion, shall set a schedule for the filing of briefs by the parties and for oral argument.

2. Review by court. Except where otherwise provided by statute or constitutional right, review shall be conducted by the court without a jury.

3. Judgment. The court shall not substitute its judgment for that of the agency on questions of fact.

4. Duties. The court may:

A. Affirm the decision of the agency;

B. Remand the case for further proceedings, findings of fact or conclusions of law; or

C. Reverse or modify the decision if the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by bias or error of law;

(5) Unsupported by substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion.

§ 11008. Appeal to law court

1. Appeal. Any party to the review proceeding in the Superior Court under this subchapter may obtain review by appeal to the Supreme Judicial Court sitting as the law court. The appeal shall be taken as in other civil cases.

2. Supreme Judicial Court. The Supreme Judicial Court shall have the power to make and amend rules of pleading, practice and procedure, for the purposes of securing a simple, speedy and effective judicial review under this subchapter.

Sec. 4. 28 MRSA § 153, sub-§ 1, last ¶, 1st sentence, as amended by PL 1975, c. 741, § 10 and as repealed and replaced by PL 1975, c. 780, § 2, is repealed and the following enacted in its place:

Any applicant aggrieved by a decision made by the Bureau of Alcoholic Beverages may appeal the decision to the Administrative Court by means of filing a complaint with the Administrative Court Judge and serving a copy of the complaint upon the bureau, within 15 days of the mailing of the decision of the bureau by certified mail to the mailing address given by the applicant in his application for a special agency store permit.

Sec. 5. Transitional provision. Every agency as defined in Title 5, section 8002, subsection 2, shall provide to the legislative committees and the Secretary of State whatever assistance is requested in accomplishing the purposes of this Act. Such assistance shall be provided both prior to the effective date, for the purpose of implementing this Act and subsequent thereto.

Sec. 6. Revision clause. Wherever there appears in the Revised Statutes a reference to Title 5, Part 6 or to Title 5, chapters 301 to 307, the reference shall be changed to Title 5, Part 18.

Sec. 7. Effective date. This Act shall be effective on July 1, 1978.

STATEMENT OF FACT

This bill is the result of a study conducted by the Joint Standing Committee on State Government of the 107th Legislature, pursuant to S. P. 511. Copies of the study are available in the committee's office in the statehouse. Under the terms of that study order, the committee worked with a drafting subcommittee composed of members of the Attorney General's office and of the administrative law section of the Maine Bar Association. This bill is the product of that drafting effort. The 107th's Joint Standing Committee on State Government recommended neither for nor against the specific provisions of this bill. Rather, it recommended strongly in favor of the concept of a comprehensive administrative procedure act and in favor of using this bill as a draft, suitable for consideration by the Legislature. The Attorney General's office, the Administrative law section, and the Maine Bar Association have not voted for or against the bill.

The committee endorsed legislative consideration knowing that additional legislation will have to be adopted in order to make the bill operational. This legislation as described would consist mainly of repeal of, or changes in, existing statutes which would be in conflict with this bill. Once the Legislature has indicated its choice of the exact form of a comprehensive administrative procedures act, such additional legislation could be prepared. To accommodate the time required, this bill proposes an effective date of July 1, 1978.

Because of the complexity of the subject and this bill, a relatively lengthy discussion follows.

I. The Concept of a Comprehensive Administrative Procedure Act

One of the leading authorities on the subject has defined administrative law to be:

> " . . . the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action . . . It does not include the enormous mass of substantive law produced by the agencies such as tax law, labor law, . . . and the like."

He goes on to describe the administrative process or administrative action as:

> " . . . the complex of methods by which agencies carry out their tasks of adjudication, rulemaking and related functions. The administrative process is often compared or contrasted with the judicial process, the executive process, and the Legislative process."[1]

For Maine State Government agencies, most of which conduct at least some administrative action, the administrative law is both statutory and judge-made. The administrative law for certain agencies is found in Title 5, Part 18. For other agencies, it is found in other parts of the statutes, most commonly in the substantive law authorizing the agency and its program. For still other agencies, there is no specific statutory law. Rather, they are subject to the requirements of common law (e.g., court decisions) with respect to certain of their activities—giving legally sufficient notice before taking an administrative action, for example. And it is likely that, in at least some of the agencies in this latter group, activities are undertaken which are subject to the law but which are conducted in a manner inconsistent with it, because the agency members are not aware of its requirements.

It was in response to situations similar to this that the Federal Government and over 30 state governments have enacted all or major parts of a comprehensive administrative procedures act. Such an act sets out in one place in the statutes a uniform law relating to the administrative process.

The argument in favor of such a law is simple: It applies to the administrative processes of all agencies uniform requirements that are systematic, open and predictable. As a consequence, the agencies are put on notice as to what is required of them and the public is better informed and better able to participate in the administrative process.

Overview of this bill

Very generally, this bill:

1. Repeals the current "administrative code" (Title 5, Part); it does not repeal the administrative law found in other parts of the statutes which may be inconsistent with the bill (most often, this is a law unique to an agency and located in its substantive law); the precise language necessary to repeal these laws will depend upon the language of this bill when enacted and will be prepared in time for action by the 2nd Regular Session of the 108th Legislature;

2. Establishes a uniform, comprehensive set of procedures, covering all state agencies with respect to:

A. Their administrative actions, including rulemaking, advisory rulings, adjudicatory proceedings and licensing; and

B. Judicial review of these actions. The procedures are discussed in more detail below; and

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[1] Kenneth Culp Davis, **Administrative Law — Cases, Text, Problems, 1965 Edition** (West Publishing Co., St. Paul, 1965) p. 1.

3. Continues the administrative court, essentially as currently established and with essentially the same jurisdiction (i.e., revocation and suspension of certain licenses), but with coverage over the activities of several more state agencies; the court is placed in the judicial department, under the supervision of the Chief Justice, consistent with supervision given to other courts in the State.

The provisions of this Act cover state agencies, only, and do not cover municipalities, unorganized territories, school districts or other special districts.

Comments on Section 3 of the bill which establishes the "Maine Administrative Procedure Act".

Section 3 of the bill establishes the Maine Administrative Procedure Act, and is organized into 7 subchapters, as follows:

Subchapter I — General Provisions (sections 8001-8002)

Subchapter II — Rulemaking (sections 8051-8058)

Subchapter III — Advisory Rulings (section 9001)

Subchapter IV — Adjudicatory Proceedings (sections 9051-9064)

Subchapter V — Licensing (sections 10001-10004)

Subchapter VI — Administrative Court (section 10051)

Subchapter VII — Judicial Review-Final Agency Action (sections 11001-11008)

Section 8001. Short Title, Self explanatory

Section 8002. Definitions.

1. **Adjudicatory proceeding.** By way of this definition, the Act itself does not create any rights to a hearing. Those rights exist independently of this Act and arise from statutory or constitutional requirements. The only such statutory requirements in this Act are in section 10003 in subchapter V on licensing. Subchapter IV, which is keyed to this definition, provides uniform procedures for any hearing so commanded.

2. **Agency.** Apart from the exceptions listed in the last clause, this definition is intended to be comprehensive and all-inclusive. The "authorized by law" clause makes the coverage of the Act coextensive with its scope. (i.e., applicability of this Act will expand and contract automatically as the Legislature authorizes or removes substantive authority.)

The reference to licenses is included for 2 reasons: First because not all licensing comes under the definition of "adjudicatory proceedings" and, hence, under the coverage of this Act; and 2nd, because subchapter V provides additional provisions concerning licensing.

3. **Agency member.** This definition designates those having final authority and decision-making functions within the agency. An agency may

have one or more "members." Examples are the 11 members of the Soil and Water Conservation Commission, the 5 members of each Indian Housing Authority, and the 7 members of the Maine Board of Accounting.

4. **Final agency action.** This section is the key to judicial review of agency action under subchapter VII. The definition is intended to make all agency decisions affecting one's legal rights, duties or privileges judicially reviewable, not just those made in licensing or adjudicatory proceedings. The definition's requirement that agency remedies be exhausted before recourse is had to the courts is intended to include provisions for rehearing, if available.

The failure of an agency to make a legally required decision is separately made reviewable by section 11001, subsection 2.

This definition does not intend to change the traditional notion of what constitutes interlocutory rulings or the nonreviewability of such rulings, except as provided for in section 11001, subsection 1 of the judicial review section. The wording is intended as a codification of existing doctrines of "finality."

5. **License.** The last clause of this definition was added to limit the scope of the licensing subchapter to those decisions that are made to protect the public health, safety or welfare. Decisions which might be construed as "certificates" or "approvals" or "permission," but are not regulatory in nature, are thus excluded from the licensing subchapter.

6. **Licensing.** Several acts of other jurisdictions include such other terms as withdrawal, annulment, cancellation, limitation, amendment or conditioning in place of, or in addition to, the terms used in this definition. It is felt, however, that the terms used are sufficiently broad to encompass all actions with respect to a license.

7. **Party.** This provision defines the classes of persons who are entitled to assert the various rights accorded parties under subchapter IV. This definition does not regulate who may be admitted by an agency as a party to its adjudicatory proceeding; specifically it does not preclude an agency from entitling any class of persons to party status through intervention, or admitting any person as a party in any hearing by order.

The "party" status described by this section relates only to proceedings before an agency and is not intended to either confer upon or deny any person a right of appeal.

8. **Person.** This definition is intended to be broadly inclusive.

9. **Rule.** This provision defines the subject matter of the rule-making procedure which are specified in subchapter II. The definition is fairly standard among the acts of the several jurisdictions examined. It is intended to be broad, to encompass both substantive and procedural rules, and to include both the adoption and withdrawal of rules.

Paragraph B and subparagraphs (2) and (4) are intended to facilitate and encourage the ready dispersal of advice and information about the agency, its

policies and procedures to the public by plainly exempting these activities from the burdensome rule-making requirements. By contrast, any regulations which an agency wishes to enforce must be promulgated through the rule-making procedures of subchapter II.

Section 8051. Adoption of rules of practice. The small number of procedures filed as required under the present Administrative Code led to the conclusion that strong language was necessary. Rules adopted under this section are subject to the requirements of section 8056.

Section 8052. Rule-making. This section sets out the basic rule-making procedure, which is subject to modification only by section 8054. Subsection 1 alters present practice by requiring an opportunity for public hearing before an agency may adopt a rule.

In this and other sections, the language is limited to "adoption" of rules because the definition of "rule" specifically includes amendment, suspension or repeal of previous rules.

Subsections 3 and 4 are intended to convey the idea that these proceedings are not pro forma. Subsection 5 will assist in judicial review and will insure that the agency explains the rationale for the rule.

Section 8053. Notice. The substance of this section follows the Massachusetts and New York Acts. The 20-day notice period is provided in order to make the opportunity for public comment meaningful. The "emergency" provisions of section 8054 prevent this lead time from being a burden to the agency in crucial situations.

The content requirements seek to have the agency disclose as much as it knows about the proposed rule in order to give the public something on which to prepare comments. Otherwise, public opportunity to comment would be meaningless. The potential recipients under this section are more numerous than would be the case with standard published notice, with an intent to provide an opportunity for comment to all those who are most likely to be affected by the rule.

Section 8054. Emergency rule-making. The exception provided by this section is limited to emergencies: Situations where the requirement for a rule-making hearing would result in dangerous delay which might prevent the rule from having the necessary effect. The use of "minimum extent" and the provision for judicial review under section 8058 are meant to strictly circumscribe this exception.

Section 8055. Petition for adoption or modification of rules. This provision for citizen input is found in less elaborate form in the Massachusetts Act and the provisions of subsection 3 are derived from the Uniform Law Commissioners' Revised Model APA and are designed to assure that each such petition is seriously considered. This subject is currently covered in Title 5, section 2354.

Section 8056. Filing and publication. This subject is currently covered in Title 5, section 2351, subsection 4, and section 2352, subsection 3. Such pro-

visions are highly valuable to the general public as well as to the practicing bar. The inclusions in subsection 4 are designed to make such items available to the public. The availability of voting records is a means of making agency members accountable for their decisions. Subsection 2 is not intended to make each agency office an official repository for rules, as the Secretary of State is under section 8057, subsection 2, but is intended to aid the public by providing greater public access to agency rules.

Section 8057. Compliance. This is an amalgamation of the compliance provision of the New York and Massachusetts Acts. Subsection 1 is intended to forgive clerical errors. Subsection 2 is intended to enforce public availability.

Section 8058. Judicial review of rules. The purpose of this section is to provide a uniform method for review of agency rule-making. Subsection 1 contemplates and permits suits to obtain judicial review of an agency's refusal to adopt a rule, where the agency's function is nondiscretionary. In the event that the reviewing court determines that the agency has wrongfully failed to exercise nondiscretionary power, it may issue such orders, including injunctions, to remedy such failure. Subsection 2 makes it clear that a rule may be challenged in an enforcement proceeding against a regulated party.

Section 9001. Advisory rulings. The intention of this section is to enable and encourage agencies to advise persons, subject to the laws the agency administers, of the probable agency reaction to an existing condition or a planned course of conduct. If agencies are bound by such rulings, the commentators (Benjamin, Cooper, Davis) generally agree that rulings simply will not be given, short of a much fuller factfinding and consideration process, akin to adjudication.

This provision may be thought unnecessary, since informal advice is and undoubtedly always will be given by nearly every agency official and employee. This provision will not change that. It will, however, accomplish 2 other things: Enable persons who have no "friend in the agency" to obtain advice; and by requiring the establishment of procedures, assure that the advice is reliable, even if not binding, by assuring that it will be the product of consideration by a person qualified to render the advice. Subsection 2 safeguards the situation where such rulings are effectively precedent for formal decision. Subsection 3 provides protection for the recipient of an opinion who relies on an opinion only to have the ruling later reversed.

Section 9051. Scope. Proceedings involving correctional facilities and the Parole Board have been excluded because they are the subject of substantial constitutional decision which is greatly at variance with the procedures set forth in this subchapter.

Subsection 2 allows an agency to carry on its normal operations until a hearing is set or requested, depending on the agency's particular statute, when the provisions of this subchapter are triggered. It is especially significant with respect to the ex parte communication limits in section 9055. The language used does not contradict the fact that every required hearing must be set by the agency.

An example of the application of this section would be Title 38, section 483. Under that provision the Department of Environmental Protection can approve a site location application ex parte, order a hearing or hold a hearing at the request of the applicant. The mechanism of this subchapter would be triggered only in the latter 2 situations.

Section 9052. Notice. In applying this section, agencies will be dealing with the fact that the extent of notice appropriate varies greatly depending on the nature of the proceeding. This section is drafted to preserve the flexibility thus made necessary.

The contemplated purpose of this section is not to sanction the least notice possible, but to permit tailoring of notice to the situation. A more precise formulation of situations where public notice is required would not be feasible in any workable length statute. Examples of proceedings with broad impact calling for broad participation would include the following: Utility rate determinations, site location applications, proceedings involving milk prices and environmental matters. At other extreme would be unemployment compensation, workmen's compensation and other social welfare determinations for individuals, and, generally, license revocation proceedings. These matters, while crucial to the individuals involved, do not involve the same degree of regional or general interest.

Section 9053. Disposition without full hearing. This provision is intended to enable an agency to avoid the expense of time and money, and the delay entailed in a full adjudicatory hearing, where to do so does not prejudice the rights of the parties.

Many statutes require a hearing, and this section would not alter the basic requirements. Due process, however, is generally held to require only that a person have an opportunity for hearing before his rights or duties are determined. This standard is reflected in many other Maine statutes, and in the definition of "adjudicatory proceedings," section 8002, subsection 1.

Subsection 1 enables agencies to avoid holding hearings, if not required by statute, as a matter of course, and places appropriate safeguards around use of this technique. Subsection 2 enables settlement without hearing and substantially as written appears in each other state APA examined. Subsection 3 expands on the standard default language in an attempt to avoid the unfairness that surrounds, or appears to surround, decisions by default. Subsection 4 is standard practice for allowing the streamlining of proceedings, a practice approved in In re Maine Clean Fuels, Inc., 310 A.2d 736 (Me. 1973).

Section 9054. Public participation. This provision provides the general standards for intervention. Several Maine state agencies have similar rules. It is based on the assumption that any person who can clearly make the requisite "direct and substantial" showing should have a right to intervene, rather than making this intervention discretionary. Allowing for intervention by class representatives prevents exclusion of persons directly, but not substantially, affected, as for example in utility rate cases. Persons who cannot make that showing to the satisfaction of the agency are not precluded from intervention; rather, intervention, and more importantly, the degree of participation, are left to agency discretion.

The provision in subsection 1 allowing any government agency to intervene as of right was drawn from Rule 20.12(c) of the Maine Department of Environmental Protection. Every agency of government was created by a legislative body to administer and protect an important public interest. If an agency considers that interest so affected by an adjudicatory proceeding that it desires to assert the interest, it is felt that the agency conducting the adjudication should not have discretion to deny or restrict the interested party's participation.

Subsection 4 is designed to give the agency flexibility. The agencies may, via the consolidation language in subsection 4, provide for presentations by spokesmen for classes admitted under subsections 1 and 2. Membership in a class, however, is simply one standard for a right to intervene and is not a limitation on the arguments which may be advanced by intervenors. Thus, a person intervening by reason of membership in a class of persons similarly situated may not thereby be limited or restricted in presenting his or her particular views on the issue which affects the class more broadly, should he or she at some point diverge from the class viewpoint. Such divergence would be subject to reasonable agency rules of practice in the interest of manageable proceedings, but could not be stifled.

The final sentence comes from Public Utility Commission rule 4.4 and is an affirmation of the propriety of participation by agency staff in an advocacy role.

This section governs the participation of persons in proceedings before an agency only, and is not intended to either expand or counteract the rights of judicial review that any person may otherwise hold.

Section 9055. Ex parte communications; separation of functions. This provision is considered to be among the most vital in the proposed Act, both because off the record communications between decision-makers and advocates are so likely to be prejudicial to those parties not present, and because many of Maine's administrative agencies are so small that the problem occurs frequently.

Two broad objects are intended: First, to plainly prohibit outside influences on the decision; and 2nd, to equally plainly allow the decision-maker access to the factual and legal assistance needed for an informed decision. Thus, the basic prohibition extends equally to fact, law and procedure. Confinement of factual argument to the record is clearly essential to impartiality. As to legal argument, the allowance of consultation with counsel is sufficient to solve any legal quandries. Procedure is included because the procedural posture of a proceeding, especially where disposition without full hearing is contemplated, is often determinative of the outcome.

Subsection 2, paragraph B, prohibits communications between the decision-makers and those who are advocating a particular position, except during a hearing or at other times when all "parties" are present.

Communications between the parties are not regulated, nor is the prohibition viewed as prohibiting the agency or an agency member from making an

initial prosecuting decision, i.e., that facts presented to him consitute a prima facie case and that an adjudicatory proceeding should be instituted.

Section 9056. Opportunity to be heard. This section makes explicit the rights of parties to fully present their case. The right of oral cross-examination is expressly not limited. The harmless error rule applies to this section as it does throughout the Act. The drafters believe that In Re Maine Clean Fuels, Inc., 310 A.2d (Me. 1973), must be read as limited to the facts of that case. Oral cross-examination is believed to be one of the best tools of the adversary process for contesting and establishing factual issues. The parties may, however, agree by stipulation to limit the issues or cross-examination. The agency may, consistent with section 9057, subsection 2 or section 9054, subsection 4, regulate or eliminate such cross-examination. Also, see comment for section 9057.

Section 9057. Evidence. This provision appears consistent with Maine case law regarding administrative proceedings (See In Re Maine Clean Fuels, Inc. 310 A.2d 736 (Me. 1973). It is adapted from the Massachusetts APA, and is consistent with the Federal APA. Subsection 4, adapted from the New York APA, is viewed as another means for an egency to minimize the costs and delays entailed in an adjudicatory proceeding.

Sections 9056 and 9057 establish 4 classes of evidence: (1) That given by those present and testifying, (2) prefiled testimony, (3) sworn affidavits, and (4) all other evidence. The first 3 classes are all subject to cross-examination. These sections refer only to the admissibility of evidence, however, and are not intended to affect the common law rule that an agency may determine the weight of the evidence received.

Section 9058. Official notice. This provision is drawn principally from the Massachusetts APA, though the New York APA and the Uniform Law Commissioners' Revised Model State APA are very similar. Standards for taking official and judicial notice are to be found in State v. Rush, 324 A.2d 748 (Me. 1974).

Section 9059. Record. The itemized contents requirement for the record is taken from the Uniform Law Commissioners' Revised Model Act. Of special note is subsection 1, paragraph H, which provides a method for the reviewing court to police ex parte influence. The command that findings of fact be made strictly on the record is in the same vein.

The requirement of recording the proceedings parallels the provisions of Rule 76 of the Maine District Court Rules. The method of recording is left to the agencies' ingenuity subject to the feasibility of transcription. The provision requiring availability of a copy of the record for public inspection is considered a minor price to pay for increased public information. The fact that a person seeking a copy of the record must bear the cost should not deter public interest since this cost may be recoverable under section 11007, subsection 5.

Section 9060. Subpoenas and discovery. In administrative as well as judicial proceedings it is sometimes the case that important evidence or testimony

will not be volunteered, and will be unavailable unless its production is legally compelled. Subsection 1 reserves to legislative judgment which agencies should hold the subpoena power, and in which proceedings. In all other cases, the Attorney General must evaluate and approve the request before a subpoena may be issued. Subsection 1, paragraphs A to C, provide safeguards to prospective witnesses and subsection 1, paragraph D, provides criminal penalties for disobedience, all of which are deemed necessary for the careful and effective use of subpoenas.

Subsection 2 enables agencies to provide for discovery by rule, if it deems that such procedures are appropriate to its proceedings.

Section 9061. Decisions. This section is generally in accord with the acts of other jurisdictions, present Maine statutes, Title 1, section 407, and Title 5, section 8057, and the rules of several state agencies. The term "agency decision" rather than "final agency action" is used so that decisions of all intermediary steps will be included; for example, decisions regarding unemployment benefits made by a deputy, an appeal tribunal or the Employment Security Commission pursuant to Title 26, section 1194.

The provision requiring notice of the action required to perfect a right of appeal is not intended to require a technical recital of the rules of civil procedure but rather to make the party aware that there is a time limit and that certain action must be taken to take an appeal from the agency decision. The voting record provision parallels section 8056, subsection 4.

Section 9062. Presiding officers. This section is adapted and expanded from the federal and New York APA's. It is included to make explicit what might otherwise be uncertain. The powers enumerated in subsection 3 are subject to the initial modifying clause in that subsection; hence, the agency may modify or limit these powers of the presiding officer.

Section 9063. Bias of presiding officers or agency members. By this provision bias or interest is subject to special scrutiny on review.

Section 9064. Enforcement. Self explanatory.

Section 10001. Adjudicatory proceedings. This section says simply that if licensing functions fall within the definition of adjudicatory proceedings subchapter IV procedures apply.

Section 10002. Expiration. A license due for renewal survives for the period pending agency action beyond the original expiration date, but no further. This parallels the rule stated in subchapter VII of this Act, in Title 5, section 2451, subsection 3, and in Rule 80B(b) of the Maine Rules of Civil Procedure, that a petition for review of final agency action does not stay the effect of that action.

Section 10003. Right to hearing. This section creates a right to the protection of subchapter IV, subject to section 10004, for any action which has the effect of taking away or changing a license. In the case of amendments or modifications, both the licensee and the public are protected from "quiet changes" which may equal the original issuance in substance; for example, a proposed modification of pollution limitations in a major industrial permit

would require the public notice, and, if an initial hearing had been held, notice to intervenors, and procedural protections applicable to the original application.

Section 10004. Action without hearing. This section provides a very limited exception to the general principle embodied in sections 10003 and 10051 that a right to a factfinding proceeding before the agency (in the case of refusals to issue or renew) or the Administrative Court (in the case of suspension or modification) must accompany governmental action to deny a license.

The exception would apply only when another statute authorizes revocation upon conviction of the specified offense, and the applicant or licensee has already had full opportunity, in court, to contest the facts upon which the agency's action is based. The idea is drawn from certain motor vehicle statutes.

This section may be inconsistent with a recent general statute on the subject, Title 5, section 5302.

Section 10051. Jurisdiction of Administrative Court; retained powers of agency. This is one of the major portions of the proposed Act as it is a major departure from current practice. Current Maine law permits some agencies to undertake such actions themselves; other agencies currently covered by the Administrative Code must proceed before the Administrative Court. The intent is to provide on a comprehensive statewide basis an impartial forum for the consideration of license revocation and suspension.

Section 11001. Right to review. The form adopted for this section indicates a judgment that replacing the many provisions for review now existing with one set of procedures is desirable in order to greatly simplify the practice of agency law and the task of the courts. This approach is consistent with this Act's goal of simplification and standardization. The exception to this approach is for those issues already deemed by the Legislature to be so complex or critical as to warrant appeal directly to the law court, most notably Public Utility Commission rate hearings.

This section establishes a presumption in favor of judicial review (See Abbott Laboratories V. Gardiner, 387 U.S. 136 (1967)). It specifically allows persons who justifiably did not participate in the agency proceeding to initiate review; however, such persons' appeals may be limited to questioning the application of law to the facts the agency found since section 11006, subsection 1, paragraph B, limits the additional evidence which may be heard on review.

The 2nd sentence in subsection 1, taken from the Uniform Law Commissioners' Revised Model State APA, establishes a narrow exception for review of nonfinal action in cases where review of the final action would not be effective (See Isbrandtsen Co. v. U.S., 211 F.2d 51 (D.C. 1954), cert. den. 347 U.S. 990 (1954)).

Subsection 2 makes it clear that an agency's inaction may also be subject to judicial review (See also section 11002, subsection 3 and section 11006, subsection 1, paragraph C).

Section 11002. Commencement of action. The section is expanded from the Massachusetts APA, MASS. GEN. LAWS ANN. ch. 30A, § 14 (1) (Supp. 1976). Provision for venue at the situs of the controversy is potentially useful for cases where a view of the property might be needed and may also be less expensive for the petitioner. Subsection 3 attempts to give parties and nonparties equal opportunity to seek review by relating the available time period to the means by which they are most likely to receive notice of the decision. The time limit for review of inaction copies the language of Rule 80B of the Maine Rules of Civil Procedure, a rule intended to reflect an equitable spirit.

Section 11003. Service. Self explanatory.

Section 11004. Stay. This section is based upon Rule 18 of the Federal Rules of Appellate Procedure. Under the present Administrative Code, Title 5, section 2451, subsection 3, only the Superior Court has the authority to grant a stay. This section assumes that the agency is better able to determine the effects of a stay on various parties and the public interests. Requiring the agency to act first on a requested stay has the potential of saving court time, as they already are familiar with the facts. Not requiring a bond to be posted by the State, agency or official thereof is consistent with existing practice.

Section 11005. Responsive pleading; filing of record. Not requiring responsive pleading and requiring the filing of written appearances is consistent with present practice under Rule 80B of the Maine Rules of Civil Procedure. This provision differs from the present Administrative Code, Title 5, section 2451, subsection 4, in that it requires the transmission of the entire record to the reviewing court. It is felt this requirement will make the review procedures more efficient as it will eliminate delays due to disagreements between the parties as to contents of the record on review. Requiring a party to state his position with respect to the decision under review should help the court in its determination of a schedule for briefing and oral argument and will enable the petitioner to determine the position the parties below will take in the review proceeding.

Section 11006. Power of court to correct or modify record. Under this section the court may take additional evidence as a special check on improper procedure on the part of the decision-maker in the agency. Any other additional evidence must be taken before the agency as the drafters feel that the agency should have more expertise in evaluating evidence of this nature. Requiring remand to the original factfinder for any evidence of substantive nature may settle review proceedings, as after the additional evidence is taken a new decision may be rendered.

Subsection 1, paragraph C, is sufficient to compel agency action where it has been unlawfully withheld or unreasonably delayed, as does a similar provision in the federal APA. Subsection 1, paragraph D, is meant to codify Frank V. Assessors of Skowhegan, 329 A. 2d 167 (Me. 1974).

Section 11007. Manner and scope of review. This section is basically derived from the Uniform Law Commissioners' Revised Model State APA with the significant substitution of the "substantial evidence" test for the "clearly

erroneous" test. While this may be a matter of semantics in practice, the former is thought to indicate a stricter standard of review.

Section 11008. Appeal to law court. Self explanatory. An appropriation is not included because it is not certain at the time of introduction of this bill whether or to what extent costs may be involved. There are 2 potential costs:

1. Administrative court. The court may have a somewhat larger caseload because of the slight increase in its coverage under this bill. An appropriation bill has been introduced to the 1st Regular Session of the 108th Legislature to fund a new, Associate Judge established by the 107th Legislature. It is likely that the addition of this judge will provide staff sufficient to handle the caseload increase.

2. Secretary of State and other state agencies. The Secretary of State and the state agencies covered by the bill may need additional funds to carry out their responsibilities under the bill. It is not clear that the "other" agencies will need additional funds, since currently there are statutory provisions covering many of the requirements of this bill and these will simply be replaced by the requirements of this bill. The Secretary of State may need funds, especially for publishing rules.