

Senate Bill 529

Sponsored by Senator GIROD; Senators FINDLEY, THATCHER (Pre-session filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Modifies standards for judicial review of agency rules and orders.

A BILL FOR AN ACT

Relating to judicial review of agency actions; creating new provisions; and amending ORS 183.400, 183.482 and 421.630.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 183.400 is amended to read:

183.400. (1) The validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases. The court shall have jurisdiction to review the validity of the rule whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, but not when the petitioner is a party to an order or a contested case in which the validity of the rule may be determined by a court.

(2) The validity of any applicable rule may also be determined by a court, upon review of an order in any manner provided by law or pursuant to ORS 183.480 or upon enforcement of such rule or order in the manner provided by law.

(3) Judicial review of a rule shall be limited to an examination of:

(a) The rule under review;

(b) The statutory provisions authorizing the rule; *[and]*

(c) Copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures[.]; **and**

(d) The complete evidentiary record, including all testimony submitted during public hearings about the rule.

(4) The court shall declare the rule invalid only if it finds that *[the rule]*:

(a) **The rule** violates constitutional provisions;

(b) **The rule** exceeds the statutory authority of the agency; *[or]*

(c) **The rule** was adopted without compliance with applicable rulemaking procedures[.]; **or**

(d) Adoption of the rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

(5) Adoption of an agency rule is arbitrary and capricious under subsection (4) of this section if:

(a) The agency relied on factors in adopting the rule that the Legislative Assembly did not intend the agency to consider;

(b) The agency entirely failed to consider an important aspect of the problem;

(c) The adoption of the rule runs counter to the evidence before the agency; or

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 **(d) The adoption of the rule is so implausible that it could not be ascribed to a difference**
 2 **in view or the product of agency expertise.**

3 [(5)] (6) In the case of disputed allegations of irregularities in procedure which, if proved, would
 4 warrant reversal or remand, the Court of Appeals may refer the allegations to a master appointed
 5 by the court to take evidence and make findings of fact. The court's review of the master's findings
 6 of fact shall be de novo on the evidence.

7 [(6)] (7) The court shall not declare a rule invalid solely because it was adopted without com-
 8 pliance with applicable rulemaking procedures after a period of two years after the date the rule
 9 was filed in the office of the Secretary of State, if the agency attempted to comply with those pro-
 10 cedures and its failure to do so did not substantially prejudice the interests of the parties.

11 **SECTION 2.** ORS 183.482 is amended to read:

12 183.482. (1) Jurisdiction for judicial review of contested cases is conferred upon the Court of
 13 Appeals. Proceedings for review shall be instituted by filing a petition in the Court of Appeals. The
 14 petition shall be filed within 60 days only following the date the order upon which the petition is
 15 based is served unless otherwise provided by statute. If a petition for rehearing has been filed, then
 16 the petition for review shall be filed within 60 days only following the date the order denying the
 17 petition for rehearing is served. If the agency does not otherwise act, a petition for rehearing or
 18 reconsideration shall be deemed denied the 60th day following the date the petition was filed, and
 19 in such cases, petition for judicial review shall be filed within 60 days only following such date. Date
 20 of service shall be the date on which the agency delivered or mailed its order in accordance with
 21 ORS 183.470.

22 (2) The petition shall state the nature of the order the petitioner desires reviewed, and shall
 23 state whether the petitioner was a party to the administrative proceeding, was denied status as a
 24 party or is seeking judicial review as a person adversely affected or aggrieved by the agency order.
 25 In the latter case, the petitioner shall, by supporting affidavit, state the facts showing how the
 26 petitioner is adversely affected or aggrieved by the agency order. Before deciding the issues raised
 27 by the petition for review, the Court of Appeals shall decide, from facts set forth in the affidavit,
 28 whether or not the petitioner is entitled to petition as an adversely affected or an aggrieved person.
 29 Copies of the petition shall be served by registered or certified mail upon the agency, and all other
 30 parties of record in the agency proceeding.

31 (3)(a) The filing of the petition shall not stay enforcement of the agency order, but the agency
 32 may do so upon a showing of:

33 (A) Irreparable injury to the petitioner; and

34 (B) A colorable claim of error in the order.

35 (b) When a petitioner makes the showing required by paragraph (a) of this subsection, the
 36 agency shall grant the stay unless the agency determines that substantial public harm will result if
 37 the order is stayed. If the agency denies the stay, the denial shall be in writing and shall specifically
 38 state the substantial public harm that would result from the granting of the stay.

39 (c) When the agency grants a stay, the agency may impose such reasonable conditions as the
 40 giving of a bond, irrevocable letter of credit or other undertaking and that the petitioner file all
 41 documents necessary to bring the matter to issue before the Court of Appeals within specified rea-
 42 sonable periods of time.

43 (d) Agency denial of a motion for stay is subject to review by the Court of Appeals under such
 44 rules as the court may establish.

45 (4) Within 30 days after service of the petition, or within such further time as the court may

1 allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire
2 record of the proceeding under review, but, by stipulation of all parties to the review proceeding,
3 the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may
4 be taxed by the court for the additional costs. The court may require or permit subsequent cor-
5 rections or additions to the record when deemed desirable. Except as specifically provided in this
6 subsection, the cost of the record shall not be taxed to the petitioner or any intervening party.
7 However, the court may tax such costs and the cost of agency transcription of record to a party
8 filing a frivolous petition for review.

9 (5) If, on review of a contested case, before the date set for hearing, application is made to the
10 court for leave to present additional evidence, and it is shown to the satisfaction of the court that
11 the additional evidence is material and that there were good and substantial reasons for failure to
12 present it in the proceeding before the agency, the court may order that the additional evidence be
13 taken before the agency upon such conditions as the court deems proper. The agency may modify
14 its findings and order by reason of the additional evidence and shall, within a time to be fixed by
15 the court, file with the reviewing court, to become a part of the record, the additional evidence,
16 together with any modifications or new findings or orders, or its certificate that the agency elects
17 to stand on its original findings and order, as the case may be.

18 (6) At any time subsequent to the filing of the petition for review and prior to the date set for
19 hearing the agency may withdraw its order for purposes of reconsideration. If an agency withdraws
20 an order for purposes of reconsideration, the agency shall, within such time as the court may allow,
21 affirm, modify or reverse its order. If the petitioner is dissatisfied with the agency action after
22 withdrawal for purposes of reconsideration, the petitioner may refile the petition for review and the
23 review shall proceed upon the revised order. An amended petition for review shall not be required
24 if the agency, on reconsideration, affirms the order or modifies the order with only minor changes.
25 If an agency withdraws an order for purposes of reconsideration and modifies or reverses the order
26 in favor of the petitioner, the court shall allow the petitioner costs, but not attorney fees, to be paid
27 from funds available to the agency.

28 (7) Review of a contested case shall be confined to the record, and the court shall not substitute
29 its judgment for that of the agency as to any issue of fact or agency discretion. In the case of dis-
30 puted allegations of irregularities in procedure before the agency not shown in the record which, if
31 proved, would warrant reversal or remand, the Court of Appeals may refer the allegations to a
32 master appointed by the court to take evidence and make findings of fact upon them. The court shall
33 remand the order for further agency action if the court finds that either the fairness of the pro-
34 ceedings or the correctness of the action may have been impaired by a material error in procedure
35 or a failure to follow prescribed procedure, including a failure by the presiding officer to comply
36 with the requirements of ORS 183.417 (8).

37 [(8)(a) *The court may affirm, reverse or remand the order. If the court finds that the agency has*
38 *erroneously interpreted a provision of law and that a correct interpretation compels a particular action,*
39 *the court shall:]*

40 [(A) *Set aside or modify the order; or]*

41 [(B) *Remand the case to the agency for further action under a correct interpretation of the provision*
42 *of law.]*

43 [(b) *The court shall remand the order to the agency if the court finds the agency's exercise of dis-*
44 *cretion to be:]*

45 [(A) *Outside the range of discretion delegated to the agency by law;]*

1 *[(B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency prac-*
 2 *tice, if the inconsistency is not explained by the agency; or]*

3 *[(C) Otherwise in violation of a constitutional or statutory provision.]*

4 *[(c) The court shall set aside or remand the order if the court finds that the order is not supported*
 5 *by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the*
 6 *record, viewed as a whole, would permit a reasonable person to make that finding.]*

7 **(8)(a) The court may affirm, reverse, or remand the order if the court finds that the**
 8 **order:**

9 **(A) Violates constitutional provisions;**

10 **(B) Exceeds the statutory authority of the agency; or**

11 **(C) Is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance**
 12 **with law.**

13 **(b) An agency order is arbitrary and capricious under paragraph (a) of this subsection if:**

14 **(A) The agency relied on factors that the Legislative Assembly did not intend the agency**
 15 **to consider;**

16 **(B) The agency entirely failed to consider an important aspect of the problem;**

17 **(C) The order runs counter to the evidence before the agency; or**

18 **(D) The order is so implausible that it could not be ascribed to a difference in view or the**
 19 **product of agency expertise.**

20 **SECTION 3.** ORS 421.630 is amended to read:

21 421.630. (1) Notwithstanding ORS 183.400, 183.482, 183.484 and 197.825 or any other law, exclu-
 22 sive jurisdiction for review of any decision relating to the establishment of, addition to, remodeling
 23 of or siting of a corrections facility including the establishment of criteria under ORS 421.614, the
 24 nomination of sites under ORS 421.616 or any actions under ORS 421.623 or 421.626 is conferred
 25 upon the Supreme Court.

26 (2) Proceedings for review shall be instituted when any person or local government adversely
 27 affected files a petition with the Supreme Court that meets the following requirements:

28 (a) The petition shall be filed within 21 days of issuance of the specific decision on which the
 29 petition is based, except that a petition based on a decision to adopt criteria pursuant to ORS
 30 421.614 shall be filed within 21 days of the issuance of the criteria. A decision made pursuant to
 31 ORS 421.623 or 421.626 with respect to any site may be reviewed by the Supreme Court as provided
 32 in ORS 421.611 to 421.630.

33 (b) The petition shall state the nature of the decision the petitioner desires reviewed, in what
 34 manner the decision below rejected the position raised by the petitioner below and shall state, by
 35 supporting affidavit, the facts showing how the petitioner is adversely affected. In the case of a de-
 36 cision by the Corrections Facilities Siting Authority, the petitioner is adversely affected only when
 37 the petitioner can establish by clear and convincing evidence in the affidavit that:

38 (A) The petitioner participated before the authority;

39 (B) The petitioner will be within sight or sound of the facility or is affected economically in
 40 excess of \$5,000 in value; and

41 (C) The petitioner proposed conditions as required by ORS 421.623 (2) that were rejected by the
 42 authority.

43 (c) The petitioner shall serve a copy of the petition by registered or certified mail upon the
 44 Department of Corrections, the authority and the Attorney General.

45 (d) Within 30 days after service of the petition, the department shall transmit to the Supreme

1 Court, or a special master it designates, the original or a certified copy of the entire record and any
 2 findings that may have been made. The court shall not substitute its judgment for that of the Gov-
 3 ernor, the department or the authority as to any issue of fact or issue within executive branch dis-
 4 cretion.

5 (3) If the petition is for review of a decision made by the siting authority, the record shall in-
 6 clude only:

7 (a) The report of the authority.

8 (b) The conditions, if any, on the nomination.

9 (c) The transcript of the hearing before the authority. However, on motion of the authority, the
 10 Supreme Court may limit the transcript to those matters in which the petitioner is interested as
 11 provided in subsection (2)(b) of this section.

12 (d) Evidence submitted by the petitioner to the authority, but on motion of any party to the ju-
 13 dicial review, the Supreme Court may supplement the record with additional materials from the
 14 hearing before the authority.

15 (e) The transcript of the decision-making meeting of the authority.

16 (f) The authority findings and decision.

17 (4) Upon review, the Supreme Court may reverse or remand the decision if the Supreme Court
 18 concludes that the department, the authority or the Governor:

19 (a) Exceeded the statutory or constitutional authority of the decision maker;

20 (b) Made a decision based on findings that are not supported by substantial evidence in the re-
 21 cord [*as described in ORS 183.482 (8)(c)*]; or

22 (c) Refused to adopt a proposed condition submitted under ORS 421.623 (2) and failed to provide
 23 the statement required by ORS 421.623 (3)(b).

24 (5) Proceedings for review under this section shall be given priority over all other matters be-
 25 fore the Supreme Court.

26 **SECTION 4. The amendments to ORS 183.400, 183.482 and 421.630 by sections 1 to 3 of this**
 27 **2021 Act apply to rules adopted and orders issued on or after the effective date of this 2021**
 28 **Act.**

29 _____