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CASE NUMBER: 2019-CV-000005

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IN THE 24TH JUDICIAL DISTRICT
DISTRICT COURT OF EDWARDS COUNTY, KANSAS

WATER PROTECTION ASS'N OF CENTRAL KANSAS, *Plaintiff,* *v.* DAVID BARFIELD, P.E., IN HIS OFFICIAL CAPACITY AS CHIEF ENGINEER, DIVISION OF WATER RESOURCES, KANSAS DEPARTMENT OF AGRICULTURE, *Defendant,* *v.* THE CITY OF HAYS, KANSAS AND THE CITY OF RUSSELL, KANSAS, *Intervenors.*	Case No. 2019-CV-000005

Pursuant to K.S.A. Chapter 77

INTERVENORS' RESPONSE TO
WATER PACK'S DISCOVERY MOTION

Statement of Facts

Water PACK's counsel has not conferred with counsel for the Intervenors.

1. Water PACK's counsel "certifies" that he "conferred with counsel . . . regarding discovery in this matter" on August 5, 2019.[1]

2. Research has not revealed a specific provision in the Kansas Judicial Review Act,[2] ("KJRA"), or a Local Rule requiring that counsel confer before filing a K.S.A. 77-619 Motion.

3. In email correspondence on August 5th, counsel for Water PACK stated his "intent to request some discovery in this matter." Counsel for the parties exchanged emails on this topic on the 5th and 7th.[3]

4. On August 7th, counsel for Water PACK stated he would be filing "a motion that covers a discovery request and a case management conference."[4]

5. Counsel for the City of Hays responded, asking what discovery Water PACK wants and suggested that the Cities would "probably be willing to produce it voluntarily."[5] The response went on to point out that Water PACK could request

[1] Petitioner's Memorandum, p. 1. (the "Memorandum.")

[2] K.S.A. 77-601, *et seq*.

[3] Exhibit A.

[4] *Id.*

[5] *Id.*

additions to the Agency Record either informally or in a Motion. Specifically, Counsel for the City of Hays stated:

> Micah, what discovery do you want?
>
> If you need something from the Cities, ~~we may be willing~~ we will probably be willing to produce it voluntarily.
>
> If you need something from DWR that they overlooked when they put the Agency Record together, I think that a simple request for additions to the record might accomplish the same thing. If they push back and you disagree with their reasoning, a Motion to Supplement the Agency Record would be in order.
>
> I haven't been through the entire record yet, but I anticipate asking DWR to add some documents that I think are part of the record.[6]

6. In a telephone conversation on August 15th, counsel for the City of Hays again told counsel for Water PACK that the Cities would probably be willing to produce documents voluntarily.

7. The Memorandum supporting the instant Motion is the most substantive response to these inquiries, but the Intervenors still have no information about the nature or scope of the discovery being requested.

8. Moreover, Water PACK has not identified any procedural issues that would give rise to an opportunity for the discovery permitted by K.S.A. 77-719.

Water PACK could have intervened in the proceeding before the agency but did not.

[6] *Id.*

9. On March 27, 2019, the Chief Engineer signed the *Master Order Contingently Approving Change Applications Regarding R9 Water Rights*[7] (the "Master Order") and the 32 initial orders titled, *Approval of Application to Change the Place of Use, the Point of Diversion and the Use Made of the Water Under an Existing Water Right*[8] (the "Approvals"). The Approvals are attached to and incorporated in the Master Order.[9]

10. These documents were served by mail on March 29, 2019.[10]

11. The administrative proceeding that resulted in the Master Order began when the Cities of Hays and Russell submitted 30[11] "Change Applications" to the Chief Engineer on June 26, 2015.[12]

12. Water Pack was aware of the proceeding from early on. In a letter dated March 8, 2016, about eight and a half months after the Change Applications were filed, the Chief Engineer, David W. Barfield, informed the Cities that the change applications were discussed in a February 15 Water PACK annual meeting.[13] Mr. Barfield stated:

> The Hays change applications and proposed transfer were the focus of many of the audience's questions at the annual meeting of Water PACK in

[7] R. 58-137.

[8] R. 138-296.

[9] R. 65, ¶ 43.

[10] R. 109-10. *See* the Certificates of Service for each of the 32 Approvals.

[11] Two of the original 30 water rights were divided.

[12] R. 61, ¶4.

[13] R. 669.

St. John on February 15. Comments and questions from the audience included:

- Will basin stakeholders' concerns related to the City of Hays change applications be formally heard?
- Will the City of Hays be allowed to take more water of the area than the safe yield?
- The irrigation of alfalfa was not sustainable long-term and therefore that high level of water use should not be a basis for determining how much water can be converted from irrigation to municipal use.[14]

13. Water PACK retained Andrew Keller of Keller-Bliesner Engineering, LLC, Logan, UT, to provide a "site specific" consumptive-use analysis of the water rights on the R9 Ranch. Dr. Keller prepared a report dated November 24, 2016, about eight and a half months after the February 15, 2016, Water PACK annual meeting, with (unmarked) corrections dated November 12, 2017, almost a year after the initial draft.[15]

14. Water PACK did not provide the report to DWR or the Cities until July 2018.[16]

15. DWR provided a proposed draft of the Master Order and draft Change Approvals to the GMD and Water PACK in a letter dated May 4, 2018, about five and one-half months after the report was completed.[17]

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[14] *Id.*

[15] R. 959-992.

[16] R. 750 & 754.

[17] R. 394-5.

16. The Chief Engineer also provided the draft Master Order and draft Change Approvals to the public via DWR's website.[18]

17. The Chief Engineer held an informational Public Meeting in Kiowa County on June 21, 2018, to explain the Change Applications and to receive comments from the public.[19]

18. Dr. Keller made video presentation at that Public Meeting and Water PACK provided DWR and the Cities with Dr. Keller's detailed report in July 2018 almost eight months after it was complete.[20]

19. The Cities' and DWR's negotiation of the Master Order and the Change Approvals was not conducted in secret; Water PACK has been aware of these negotiations from the outset and could have presented its "alternative" approach much sooner.[21]

Argument and Authorities

Water PACK admits that discovery is only available if it is "needed to decide disputed issues regarding . . . unlawfulness of procedure or of decision-making

[18] R. 68, ¶ 58.

[19] R. 68, ¶ 59.

[20] R. 754.

[21] R. 754, 993, & 1019.

process."[22] But, Water PACK has not asserted facts to support its claim that the Master Order should be overturned because the "Chief Engineer engaged in an unlawful procedure or failed to follow prescribed procedure."[23]

The KJRA requires that a Petition for Judicial Review include "facts to demonstrate that the petitioner is entitled to obtain judicial review" and "the petitioner's reasons for believing that relief should be granted."[24] Water PACK's pleadings do not allege any facts or theories that support a claim for review under K.S.A. 77-621(c)(5). Put another way, Water PACK says it is seeking review based on the use of unlawful procedures or decision-making process but has not actually done so.

More specifically, Water PACK's only assertions of "unlawful procedures employed by Chief Engineer" are:

> (a) conditioning approval of the change orders in a manner not contemplated in KSA § 82a-708b and K.A.R. 5-5-1;
>
> (b) approving change applications shown by the Cities to cause impairment of existing water rights in violation of K.A.R. 5-5-8 and K.A.R. 5-5-9(c) (the latter, the 1994 version);
>
> (c) ignoring conflicts between Farm Service Agency data and satellite imagery showing that the change applications, if approved, would impair

[22] Memorandum, p. 2.

[23] Petition, p. 11, ¶ c.

[24] K.S.A. 77-614(b)(5) and (6).

> existing water rights and increase consumptive use at the R9 Ranch in violation of K.A.R. 5-5-3.[25]

Paragraphs (b) and (c) raise fact issues. These allegations are not about unlawful procedure. Water PACK disagrees with the Chief Engineer's decision which is not enough to obtain discovery (or relief) in a KJRA appellate case.

Paragraph (a) raises a question of law, not an allegation that the procedure or the decision-making process were unlawful. Moreover, as will be more fully briefed, the Kansas Administrative Procedures Act[26] ("KAPA") specifically allows contingent approval of administrative orders.[27]

> (b) **Unless a later date is stated in an initial order** or a stay is granted, an initial order **shall become effective** and **shall become the final order**: . . . (2) when the agency head serves an order stating, after a petition for review has been filed, that review will not be exercised.

The Chief Engineer is not the "agency head."[28] When he signed the Master Order and the attached Approvals that are the subject of this judicial review proceeding, they were KAPA "initial orders."[29] When the Secretary of Agriculture issued an Order

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[25] Memorandum, p. 5.

[26] K.S.A. 77-501, *et seq*.

[27] K.S.A. 77-530(b)(2) (emphasis added).

[28] K.S.A. 77-502(b).

[29] K.S.A. 77-526 and 527.

declining Water PACK's request for secretarial review on April 29, 2019,[30] the Master Order and the Approvals became KAPA "final orders."[31]

The Master Order clearly states that it does not become effective until two contingencies occur.[32] Because the Master Order is contingent on future events, i.e., at a "later date," it is now a KAPA "final order" that does not "become effective" until the contingencies occur.

This matter will be resolved when the Court decides whether K.S.A. 77-530 means what it says. But Water PACK's Motion should be denied because it fails to identify the evidence it seeks and fails to assert facts that demonstrate that the Chief Engineer's procedures were unlawful.

The Kansas Supreme Court has *not* held that discovery is available in KJRA cases.

A court reviewing agency action may only receive evidence outside of the agency record if it:

> relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
>
> > (1) Improper constitution as a decision-making body; or improper motive or grounds for disqualification, of those taking the agency action; or

[30] R. 1-2.

[31] K.S.A. 77-526 and 527.

[32] R. 107-08, ¶¶ 253-4.

(2) unlawfulness of procedure or of decision-making process.[33]

In *County Comm's v. Kan. Racing & Gaming Comm'n*,[34] the Court explained that "[a]lthough there are several cases in which the district court has considered additional evidence, the general availability of traditional discovery in KJRA proceedings has been largely unlitigated."[35] Contrary Water PACK's assertion, the Court did not squarely address the agency's argument that traditional discovery is not available in KJRA proceedings.[36] Instead, it side-stepped the issue because the discovery sought in *Kansas Racing* did not fall under the additional-evidence exceptions listed in K.S.A. 77-619(a) and was not aimed at the grounds for review listed in the plaintiffs' petition, which listed no grounds based on unlawful procedures or decision-making processes.[37]

This alone was sufficient reason to decline the requested discovery.[38] Even so, the Court elaborated on the issue *in dicta*, stating that although it "decline[d] to answer the broader question of whether traditional discovery is unavailable as a matter of law in KJRA proceedings," its ruling did "not necessarily foreclose future litigants from seeking traditional discovery in KJRA proceedings—either pursuant to the inherent

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[33] K.S.A. 77-619(a).

[34] 306 Kan. 298, 322, 393 P.3d 601 (Kan. 2017).

[35] 306 Kan. at 318–19.

[36] *Id.* at 318.

[37] *Id.* at 319.

[38] *Id.* at 319–321.

powers of the court or a statutory grant of authority—in the appropriate circumstances."[39]

Water PACK cites footnote 108 in Judge Leben's article, *Challenging and Defending Agency Action in Kansas*.[40] The cited text recites portions of a Shawnee County District Court ruling, not Judge Leben's own opinions.[41]

In his article, Judge Leben asserts that "[e]xcept for cases in which new issues may be raised on appeal, discovery is inconsistent with the statutory framework and should not be available in KJRA appeals."[42] While he concedes that the result in the

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[39] *Id.* at 322 (citing K.S.A. 77-619(a)).

[40] Steve Leben, *Challenging & Defending Agency Actions in Kansas*, 64 J. K.B.A. 22, n.108 (1995) (attached as Exhibit B).

[41] Water PACK's reliance on three out of state cases is also misplaced. In *Minton v. Board of Medical Examiners*, the Nevada Supreme Court did not consider whether discovery was allowable in an action for judicial review of an agency's decision. 881 P.2d 1339 (Nev. 1994). Instead, the Court was only asked to determine whether a district court abused its discretion when declining to allow additional evidence in the form of affidavits and sworn letters from people who had attended the agency hearings. *Id.* at 1353–54.

The same is true of *Nightlife Partners v. City of Beverly Hills*, 133 Cal. Rptr. 2d 234, 240–42 (Cal. Ct. App. 2003), and the Court in *City of Federal Way v. King County* was not asked to address an appeal from agency action under a judicial review act—it was a declaratory judgment action, 815 P.2d 790, 793 (Wash. Ct. App. 1991), *superseded by statute on other grounds*.

K.S.A. 77-619(a) clearly allows the Court to accept additional evidence under certain circumstances but that alone does not mean that it authorizes discovery while the case is on appeal. In *Minton* and *Nightlife*, there is no reference to gathering the additional evidence sought to be submitted through discovery while the cases were on appeal. Though seemingly logically related, permission to consider additional evidence does not necessarily equate to permission to engage in discovery, let alone unlimited discovery.

[42] Leben, *supra*, at 31 (footnote omitted).

Shawnee County case "seems to be a reasonable result," he qualifies his concession stating that "Chapter 60['s] [discovery rules] should not be considered directly applicable."[43]

Judge Leben lists five persuasive reasons for this conclusion:[44]

> First, KJRA provides "the exclusive means of judicial review of agency action" and does not include any discovery provisions.
>
> Second, KAPA, which was passed in the same legislative session and clearly considered in tandem with KJRA, explicitly provides for discovery. The difference should be considered an intentional one.
>
> Third, some KJRA provisions are contrary to Chapter 60 provisions and others would have been wholly unnecessary had Chapter 60 provisions been intended to apply to KJRA appeals.
>
> Fourth, application of the Chapter 60 discovery provisions to KJRA appeals would lead to an absurd result: broader discovery would be available on appeal than in the underlying administrative proceeding. KAPA gives the presiding officer wide discretion in determining whether to allow discovery and generally allows discovery only as to "relevant" matters in adjudicatory proceedings; Chapter 60 provides an explicit right to discovery and allows a broader scope of inquiry of anything that "appears reasonably calculated to lead to the discovery of admissible evidence." The Legislature does not appear to have intended to allow such broad discovery in administrative actions.
>
> Last, discovery generally is not available on appeal, whether in Chapter 60 or elsewhere. KJRA actions are appellate in nature and, except when new issues are explicitly allowed on appeal, no discovery should be necessary.[45]

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[43] *Id.* at 31–32.

[44] The quoted text was a single paragraph in Judge Leben's article.

[45] *Id.* at 31 (internal footnotes and citations omitted).

In light of the dearth of authoritative discussion on the issue, Judge Leben's article provides the best and most reliable framework within which to consider the extent of any discovery that *may* be allowable in a KJRA action: Kansas Civil Procedure discovery rules do not apply, and no greater discovery should be allowed on appeal than would be allowed under KAPA.

Respectfully submitted,

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By: /s/ *David M. Traster*
David M. Traster, #11062

Attorneys for the City of Hays, Kansas

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September, 2019, I presented the foregoing to the Clerk of the Court for filing and uploading to the Kansas Courts e-Filing system that will send notice of electronic filing to the following:

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*/s/David M. Traster*_____
David M. Traster, #11062

Exhibit A

Traster, David

From: Traster, David
Sent: Wednesday, August 7, 2019 12:07 PM
To: Micah Schwalb; Oleen, Aaron [KDA]; Ken Cole; John T. Bird; Titus, Kenneth [KDA]; Ashley Kinderknecht; Ballinger, Pam; Buller, Daniel; Kenneth L. Cole (ken@russellcity.org); Malone, Victoria; Todd D. Powell
Subject: RE: City of Hays/City of Russell - Water - RE: Case Management Conference

Micah, what discovery do you want?

If you need something from the Cities, ~~we may be willing~~ we will probably be willing to produce it voluntarily.

If you need something from DWR that they overlooked when they put the Agency Record together, I think that a simple request for additions to the record might accomplish the same thing. If they push back and you disagree with their reasoning, a Motion to Supplement the Agency Record would be in order.

I haven't been through the entire record yet, but I anticipate asking DWR to add some documents that I think are part of the record.

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From: Micah Schwalb <micah.schwalb@roenbaughschwalb.com>
Sent: Wednesday, August 7, 2019 10:13 AM
To: Oleen, Aaron [KDA] <Aaron.Oleen@ks.gov>; Traster, David <dtraster@foulston.com>; Ken Cole <cole_ken@hotmail.com>; John T. Bird <jtbird@haysamerica.com>; Titus, Kenneth [KDA] <Kenneth.Titus@ks.gov>; Ashley Kinderknecht <ankinderknecht@haysamerica.com>; Ballinger, Pam <pballinger@foulston.com>; Buller, Daniel <DBuller@foulston.com>; Kenneth L. Cole (ken@russellcity.org) <ken@russellcity.org>; Malone, Victoria <VMalone@foulston.com>; Todd D. Powell <tdpowell@haysamerica.com>
Subject: RE: City of Hays/City of Russell - Water - RE: Case Management Conference

Aaron:

In light of your email below, we will prepare a motion that covers a discovery request and a case management conference. More to follow.

Best,
Micah

From: Oleen, Aaron [KDA] <Aaron.Oleen@ks.gov>
Sent: Monday, August 5, 2019 1:17 PM
To: Traster, David <dtraster@foulston.com>; Micah Schwalb <micah.schwalb@roenbaughschwalb.com>; Ken Cole <cole_ken@hotmail.com>; John T. Bird <jtbird@haysamerica.com>; Titus, Kenneth [KDA] <Kenneth.Titus@ks.gov>; Ashley Kinderknecht <ankinderknecht@haysamerica.com>; Ballinger, Pam <pballinger@foulston.com>; Buller, Daniel <DBuller@foulston.com>; Kenneth L. Cole (ken@russellcity.org) <ken@russellcity.org>; Malone, Victoria <VMalone@foulston.com>; Todd D. Powell <tdpowell@haysamerica.com>
Subject: RE: City of Hays/City of Russell - Water - RE: Case Management Conference

DWR's position is that formal discovery generally is neither needed nor allowed in KJRA actions. DWR certainly opposes broad discovery of the type normally conducted in typical litigation. DWR reserves the right to oppose even a limited request for discovery in this case.

If a party here believes that certain limited discovery is warranted, then DWR thinks that belief should be memorialized in a written motion for review and response by the other parties. The discovery issue will likely be too significant to be taken up orally at the scheduling conference, without the benefit of written motions and responses.

Aaron B. Oleen, Staff Attorney
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From: Traster, David <dtraster@foulston.com>
Sent: Monday, August 5, 2019 11:00 AM
To: Micah Schwalb <micah.schwalb@roenbaughschwalb.com>; Ken Cole <cole_ken@hotmail.com>; John T. Bird <jtbird@haysamerica.com>; Oleen, Aaron [KDA] <Aaron.Oleen@ks.gov>; Titus, Kenneth [KDA] <Kenneth.Titus@ks.gov>; Ashley Kinderknecht <ankinderknecht@haysamerica.com>; Ballinger, Pam <pballinger@foulston.com>; Buller, Daniel <DBuller@foulston.com>; Kenneth L. Cole (ken@russellcity.org) <ken@russellcity.org>; Malone, Victoria <VMalone@foulston.com>; Todd D. Powell <tdpowell@haysamerica.com>
Subject: RE: City of Hays/City of Russell - Water - RE: Case Management Conference

My point was that discovery isn't available to either of us unless we challenge Water PACK's standing. You made no K.S.A. 77-619(a) claims, so even though I would like to know more about Water PACK, at this point, I don't think I want any discovery.

You did not answer my question about the 6-month extension. Did Water PACK seek an extension to file it's 990? If so, please provide a copy of the request.

Given the fact that discovery is not available, let's just propose a scheduling order for the Judge's review.

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From: Micah Schwalb <micah.schwalb@roenbaughschwalb.com>
Sent: Monday, August 5, 2019 10:52 AM
To: Traster, David <dtraster@foulston.com>; Ken Cole <cole_ken@hotmail.com>; John T. Bird <jtbird@haysamerica.com>; Oleen, Aaron [KDA] <Aaron.Oleen@ks.gov>; Titus, Kenneth [KDA] <Kenneth.Titus@ks.gov>; Ashley Kinderknecht <ankinderknecht@haysamerica.com>; Ballinger, Pam <pballinger@foulston.com>; Buller, Daniel <DBuller@foulston.com>; Kenneth L. Cole (ken@russellcity.org) <ken@russellcity.org>; Malone, Victoria <VMalone@foulston.com>; Todd D. Powell <tdpowell@haysamerica.com>
Subject: RE: City of Hays/City of Russell - Water - RE: Case Management Conference

Dave:

The KJRA provisions speak for themselves. Let me know how much time you think you'll need, and I'll try to get us on Judge Gatterman's calendar for further discussion.

Micah

From: Traster, David <dtraster@foulston.com>
Sent: Monday, August 5, 2019 10:19 AM
To: Micah Schwalb <micah.schwalb@roenbaughschwalb.com>; Ken Cole <cole_ken@hotmail.com>; John T. Bird <jtbird@haysamerica.com>; Oleen, Aaron [KDA] <Aaron.Oleen@ks.gov>; Titus, Kenneth [KDA] <Kenneth.Titus@ks.gov>; Ashley Kinderknecht <ankinderknecht@haysamerica.com>; Ballinger, Pam <pballinger@foulston.com>; Buller, Daniel <DBuller@foulston.com>; Kenneth L. Cole (ken@russellcity.org) <ken@russellcity.org>; Malone, Victoria <VMalone@foulston.com>; Todd D. Powell <tdpowell@haysamerica.com>
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Micah, I would like to conduct some discovery as well but in light of the following KJRA provisions, the opportunity to do so is very limited. What discovery do you have in mind?

> **K.S.A. 77-618. Review of disputed facts, extent.** Judicial review of disputed issues of fact shall be ***confined to the agency record*** for judicial review as supplemented by additional evidence taken pursuant to this act, except that review of:

K.S.A. 77-619. Additional evidence. (a) The court may receive evidence, in addition to that contained in the agency record for judicial review, ***only if it relates to the validity of the agency action*** at the time it was taken ***and*** is needed to ***decide disputed issues regarding***:

(1) Improper constitution as a decision-making body; or improper motive or grounds for disqualification, of those taking the agency action; or

(2) unlawfulness of procedure or of decision-making process.

(Emphasis added.)

There's a judicial exception allowing discovery relating to tradition standing but that's probably not available to Water PACK in this case.

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From: Micah Schwalb <micah.schwalb@roenbaughschwalb.com>
Sent: Monday, August 5, 2019 9:52 AM
To: Ken Cole <cole_ken@hotmail.com>; Traster, David <dtraster@foulston.com>; John T. Bird <jtbird@haysamerica.com>; Oleen, Aaron [KDA] <Aaron.Oleen@ks.gov>; Titus, Kenneth [KDA] <Kenneth.Titus@ks.gov>; Ashley Kinderknecht <ankinderknecht@haysamerica.com>; Ballinger, Pam <pballinger@foulston.com>; Buller, Daniel <DBuller@foulston.com>; Kenneth L. Cole (ken@russellcity.org) <ken@russellcity.org>; Malone, Victoria <VMalone@foulston.com>; Todd D. Powell <tdpowell@haysamerica.com>
Subject: RE: City of Hays/City of Russell - Water - RE: Case Management Conference

The 12th and 13th work for us as well. We may need to shift the briefing schedule, however, in light of our intent to request some discovery in this matter. I will follow up with Ms. Tammen to get us some time on Judge Gatterman's calendar—please let me know if you all prefer an in-person or telephone hearing.

Thanks,
Micah

From: Ken Cole <cole_ken@hotmail.com>
Sent: Friday, August 2, 2019 11:03 AM
To: Traster, David <dtraster@foulston.com>; John T. Bird <jtbird@haysamerica.com>; Micah Schwalb <micah.schwalb@roenbaughschwalb.com>; Oleen, Aaron [KDA] <Aaron.Oleen@ks.gov>; Titus, Kenneth [KDA] <Kenneth.Titus@ks.gov>; Ashley Kinderknecht <ankinderknecht@haysamerica.com>; Ballinger, Pam <pballinger@foulston.com>; Buller, Daniel <DBuller@foulston.com>; Kenneth L. Cole (ken@russellcity.org) <ken@russellcity.org>; Malone, Victoria <VMalone@foulston.com>; Todd D. Powell <tdpowell@haysamerica.com>
Subject: Re: City of Hays/City of Russell - Water - RE: Case Management Conference

I am available the afternoon of the 12th and on the 13th. Also I am in agreement with Dave's suggestion on a briefing schedule.

Kenneth L. Cole 11003

Woelk & Cole

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From: Traster, David <dtraster@foulston.com>
Sent: Thursday, August 1, 2019 4:58 PM
To: John T. Bird <jtbird@haysamerica.com>; Micah Schwalb <micah.schwalb@roenbaughschwalb.com>; Oleen, Aaron [KDA] <Aaron.Oleen@ks.gov>; Titus, Kenneth [KDA] <Kenneth.Titus@ks.gov>; Ashley Kinderknecht <ankinderknecht@haysamerica.com>; Ballinger, Pam <pballinger@foulston.com>; Buller, Daniel <DBuller@foulston.com>; Kenneth L. Cole (cole_ken@hotmail.com) <cole_ken@hotmail.com>; Kenneth L. Cole (ken@russellcity.org) <ken@russellcity.org>; Malone, Victoria <VMalone@foulston.com>; Todd D. Powell <tdpowell@haysamerica.com>
Subject: RE: City of Hays/City of Russell - Water - RE: Case Management Conference

I talked with Paula Tammen, Judge Gatterman's assistant. She says that the Judge just left on vacation and will be back on the 12th. He is available on the 12th and the 13th after 10:30. Paula is holding those dates for us so we need to get back with her as soon as we can. The Judge is not available again until September.

Instead of taking the Judge's time, I suggest that we agree on a briefing schedule and submit and agreed order. Here's my proposed schedule.

Days	Date	
46	9/16/2019	Water PACK Brief
45	10/31/2019	DWR and Intervenors' Briefs
32	12/2/2019	Water PACK Reply
	To be set by the Judge	Oral Argument

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From: John T. Bird <jtbird@haysamerica.com>
Sent: Monday, July 29, 2019 4:43 PM
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Subject: City of Hays/City of Russell - Water - RE: Case Management Conference

Although I am in trial on the 7th, I am sure that Dave Traster will be covering for the City of Hays and either Todd or I are available on the other two dates. Normally, these settings originate from the Judge and I assume that that is the case here and that his AA has told us these dates are available to him? I am also assuming that this will be via telephone and not in person. Coincidentally, my trial is in Kinsley, so I could probably cover there, in person, if it is in the morning. In any event, let us know when it is set.
jtb

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From: Micah Schwalb <micah.schwalb@roenbaughschwalb.com>
Sent: Friday, July 26, 2019 3:29 PM
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Subject: RE: Case Management Conference

Those are all fine on this end as well.

From: Oleen, Aaron [KDA] <Aaron.Oleen@ks.gov>
Sent: Friday, July 26, 2019 12:03 PM
To: Traster, David <dtraster@foulston.com>; Titus, Kenneth [KDA] <Kenneth.Titus@ks.gov>; Micah Schwalb <micah.schwalb@roenbaughschwalb.com>; Ashley Kinderknecht (ankinderknecht@haysamerica.com) <ankinderknecht@haysamerica.com>; Ballinger, Pam <pballinger@foulston.com>; Buller, Daniel <DBuller@foulston.com>; John T. Bird (jtbird@haysamerica.com) <jtbird@haysamerica.com>; Kenneth L. Cole (cole_ken@hotmail.com) <cole_ken@hotmail.com>; Kenneth L. Cole (ken@russellcity.org) <ken@russellcity.org>; Malone, Victoria <VMalone@foulston.com>; Todd D. Powell (tdpowell@haysamerica.com) <tdpowell@haysamerica.com>
Subject: RE: Case Management Conference

It appears that Kenny and I are available on all of those dates, morning or afternoon. So no preference from DWR unless Kenny speaks up.

Aaron B. Oleen, Staff Attorney
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, Kansas 66502
Phone (direct): (785) 564-6738 | Fax: (785) 564-6777
My e-mail address has changed: aaron.oleen@ks.gov
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From: Traster, David <dtraster@foulston.com>
Sent: Friday, July 26, 2019 11:59 AM
To: Oleen, Aaron [KDA] <Aaron.Oleen@ks.gov>; Titus, Kenneth [KDA] <Kenneth.Titus@ks.gov>; Micah Schwalb <micah.schwalb@roenbaughschwalb.com>; Ashley Kinderknecht (ankinderknecht@haysamerica.com) <ankinderknecht@haysamerica.com>; Ballinger, Pam <pballinger@foulston.com>; Buller, Daniel <DBuller@foulston.com>; John T. Bird (jtbird@haysamerica.com) <jtbird@haysamerica.com>; Kenneth L. Cole (cole_ken@hotmail.com) <cole_ken@hotmail.com>; Kenneth L. Cole (ken@russellcity.org) <ken@russellcity.org>; Malone, Victoria <VMalone@foulston.com>; Todd D. Powell (tdpowell@haysamerica.com) <tdpowell@haysamerica.com>; Traster, David <dtraster@foulston.com>
Subject: Case Management Conference

Micha called suggesting a Case Management Conference on August 7, 8, or 9. I'm available all of those dates except after 3:00 on Wednesday, August 7th. Any preferences?

David M. Traster
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Exhibit B

64-JUL J. Kan. B.A. 22

Journal of the Kansas Bar Association
June/July, 1995
Steve Leben

CHALLENGING AND DEFENDING AGENCY ACTIONS IN KANSAS

More than a decade has now passed since adoption of the Kansas Administrative Procedure Act [1] (KAPA) and the Kansas Judicial Review Act (KJRA). [2] During this time, there has been a steady expansion in the extent of state agency interaction in the daily affairs of everyone. [3] Further, it would appear that the increase in involvement and power of state agencies in the lives of average citizens will continue for some time to come. [4] Accordingly, practitioners daily meet clients who seek protection from potential agency action or who seek to challenge actions already taken by administrative agencies. Lawyers representing state agencies see increasing challenges to agency actions.

A significant body of case law has now developed in Kansas under KJRA and, to a lesser extent, under KAPA. This article attempts to provide a practical discussion [5] of some of the issues involved in challenging or defending administrative agency actions in Kansas, paying particular attention to the case law development under KAPA and KJRA. [6]

***23** I. Kansas Administrative Procedure Act (KAPA)

KAPA sets out uniform procedures applicable to most state agency proceedings. It creates four types of hearings: (1) formal adjudicative hearings, [7] (2) conference hearings, [8] (3) emergency hearings [9] and (4) summary hearings. [10] These proceedings are explained in the statute and in administrative regulations of the various agencies, [11] have been described elsewhere [12] and are not reviewed here. With respect to KAPA, this article focuses on the availability of discovery and significant case law developments.

A. Availability of Discovery During Agency Proceeding

One issue that has been controversial under KAPA is the extent to which discovery is available during an administrative proceeding. KAPA's discovery provisions have been amended twice since its initial enactment; the second amendment took place before the previous amendment had even taken effect. [13] The current provision states:

> Discovery shall be permitted to the extent allowed by the presiding officer or as agreed to by the parties. Requests for discovery shall be made in writing to the presiding officer and a copy of each request for discovery shall be served on the party or person against whom discovery is sought. The presiding officer may specify the times during which the parties may pursue discovery and respond to discovery requests. The presiding officer may issue subpoenas, discovery orders and protective orders in accordance with the rules of civil procedure. [14]

As amended, KAPA does not provide an explicit right to discovery, conditioning discovery upon the approval of the presiding officer. However, a party may still have an implicit right to issuance of subpoenas and, perhaps, other discovery. [15] At least when

an agency has sought discovery, the courts have liberally interpreted statutory provisions providing for discovery. [16] A new case suggests that a more relaxed relevance standard applies in investigative administrative proceedings than in adjudicatory ones. [17] The court states that a subpoena duces tecum in an adjudicatory proceeding "is subject to K.S.A. 60-245(b), and it must be relevant and not unreasonable or oppressive." [18] Under most circumstances, relevancy is to be interpreted fairly broadly. [19]

B. Enforcement of Discovery During Agency Proceeding

KJRA provides the mechanism for enforcement of discovery during an agency administrative proceeding. K.S.A. 77-624 allows any party to an agency hearing to file suit under KJRA to "seek enforcement of a subpoena, discovery order or protective order...." The petition must name as defendants each person against whom discovery is sought to be enforced. Such a suit may also offer a mechanism for a private party to use in resolving a discovery ***24** dispute with an agency. If the presiding officer refuses to allow discovery that a private party considers absolutely vital, suit could be brought against the agency, seeking to obtain and enforce a subpoena (or subpoena duces tecum). However, the better view appears to be that K.S.A. 77-624 authorizes court proceedings only to enforce discovery that has been ordered by the presiding officer; otherwise, K.S.A. 77-624 would itself become a vehicle for interlocutory appeals of denials by the hearing officer of discovery requests, something clearly not intended under the KJRA. [20]

C. Rulemaking vs. Adjudication for Policy Pronouncements

In what may be a significant decision, the Kansas Supreme Court has held that an agency may not enforce previously adopted, written policies of general application unless it has followed the rulemaking procedures set out by statute. In Bruns v. Kansas State Board of Technical Professions, [21] the court noted that rules and regulations must be filed and published as required by law to be effective. [22] If a policy of general application is adopted but not filed and published, the court held that it is of no effect. [23] On the other hand, duly adopted regulations have the force and effect of law. [24] In Bruns, the Kansas State Board of Technical Professions had refused an application for reciprocal licensure based solely upon a pre-existing, written policy that had not been filed under statutory procedures. [25] The matter was remanded to the board to consider the application for licensure on its merits. [26]

Ordinarily, state administrative agencies have the discretion to establish standards of conduct under statutes within their authority either through rulemaking or adjudication. [27] However, when the agency chooses to proceed by rule, it must comply with statutory requirements. [28] Bruns is consistent with these generally accepted rules and with the Kansas statutes. In other states, there has been a trend toward requiring that policy pronouncements be made by rule when possible, [29] although most states continue to give the agency discretion to choose either rulemaking or adjudication. [30] Some of the language in Bruns could be read to suggest that statutory standards of general applicability must be established by rule, although the holding in Bruns is more limited, since the board there was trying to apply a pre-existing policy, not announcing one, in the adjudicatory proceeding. It will remain to later cases to see how broadly Bruns will be interpreted, although arguments may often be available that the adjudicatory action being taken by an agency constitutes the forbidden promulgation of a "policy...of general application" without benefit of rulemaking procedures. An argument may also be made that changes in agency policy must be made by rulemaking. [31] At present, Kansas appears to be representative of most states in this area: an agency may establish standards of conduct through either rulemaking or adjudication, but it may not adopt regulations except through the statutory procedures and it may not apply rules previously ***25** adopted without benefit of the statutory procedures in a contested proceeding. [32]

D. Emergency Proceedings Are Limited

When emergency proceedings are employed under KAPA, the agency must proceed as quickly as feasible to complete any proceedings that would be required if the matter did not justify the use of emergency proceedings. [33] In Corder v. Kansas Board of Healing Arts, [34] agency action suspending a doctor's license without an initial hearing and then continuing the suspension indefinitely because he refused to submit to a mental examination was held improper. The agency was still required to give the doctor a hearing on the merits on the temporary order "as quickly as feasible." This had to be done before requiring him to submit to a mental examination. The Kansas Supreme Court, reading the specific statutes concerning licensing of health professionals in conjunction with KAPA, held that the mental exam could not be ordered until formal proceedings were begun, which would give the licensee a forum to address all issues on proper notice.

E. Many KAPA Provisions Are Directory, Not Mandatory

Although many KAPA provisions use "shall" language, they are often held to be directory, not mandatory, in nature. [35] Thus, requirements that an agency head personally sign an order granting reconsideration [36] and various time limits have been held to be directory. [37]

II. Kansas Judicial Review Act (KJRA)

A. Scope of Review

K.S.A. 77-621 sets forth the scope of review to be applied in KJRA actions, specifying the conditions under which agency action may be invalidated and noting that the harmless error rule must be applied in reviewing any agency action. [38]

Some preliminary matters are appropriately addressed before discussing the scope of review in detail. First, because review of agency decisions is generally available only as provided by statute, [39] it follows that the review is limited by the authority provided in the statute. Second, judgments about the extent and intensity of review should be based upon consideration of the relative abilities of agencies and the courts. [40] Third, review may be described both with respect to the extent of review and the intensity of review. [41] The extent of review refers to the issues that may be subject to review by the court; the intensity of review refers to the degree to which the court is free to ***26** substitute its judgment for that of the agency on a given issue.

Simplified, K.S.A. 77-621 provides that an agency action is invalid if it is (1) unconstitutional; (2) beyond the agency's statutory authority; (3) incomplete, in that a necessary issue was not decided; (4) based on an erroneous legal interpretation or application; (5) the product of procedural irregularity; (6) the product of an improperly constituted or biased group; (7) not supported by substantial evidence on the whole record; or (8) otherwise unreasonable, arbitrary or capricious.

The first six of these categories appear relatively straightforward. Each of these categories will include review of legal issues, a task to which courts are generally well suited. However, varying degrees of intensity of review may be given to agency interpretations of law, with the greatest deference paid to interpretation of highly specialized and complex statutory schemes that usually require the application of the law to complicated and specialized fact patterns.

Many cases have cited the rule that deference will be paid to an agency's interpretation of statute as to which that agency has been given administrative responsibilities. [42] Greater deference is given when the agency is one of special competence and experience, such as the Board of Tax Appeals. [43] An agency interpreting statutory provisions within its administrative duties should carefully spell out the basis for its interpretation and, if unclear, the basis of its expertise, to strengthen the chances for affirmance by the courts. A recent case in which the arguments for deference were closely contested is In re Appeal of Chief Industries, Inc., [44] a four to three decision overturning an administrative regulation as contrary to statutory interpretation as set forth in a 26-year-old case law precedent. The dissenting justices would have deferred to the agency regulation, even

though it appeared to conflict with the prior case, because of the need for interstate tax uniformity and subsequent legislative recognition of that need.

Less deference is generally afforded to the agency under the remaining tests. The substantial evidence standard is applied to test the factual basis for an agency order entered following a recorded hearing. It is discussed in substantial detail below. The remaining standard — whether the agency's action is "otherwise unreasonable, arbitrary or capricious" — is generally applied to discretionary actions [45] of the agency and is subject to considerable interpretation. The Kansas Supreme Court has offered several explanations of this standard:

- "[A]rbitrary and capricious" means action that is "unreasonable" or "without foundation in fact," [46]

- "Inconsistency within an administrative decision may render it arbitrary," [47]

- "[U]nreasonable" means "action taken without regard to the benefit or harm to all interested parties," [48] and

- "The arbitrary and capricious test relates to whether that particular action should have been taken or is justified, such as the reasonableness of the agency's exercise of discretion in reaching the determination...." [49]

One area that may still be ripe for future development is the meaning of the term "otherwise unreasonable" in K.S.A. 77-621. The Kansas Supreme Court initially held that K.S.A. 77-621 merely codified prior case law concepts, [50] but a later, separate line of court authority has held that the KJRA standard of review is "somewhat broader" than the old standard under the Foote case. [51] The term "otherwise unreasonable" had seemed to signal a ***27** more stringent review than prior case law when it was included in KJRA. The "otherwise unreasonable" language was contained in a bracketed section of the Model Act that the comments suggested "may provide judicial opportunities for interpretations that differ from precedents decided under the 1961 Model Act." [52] Recent cases may offer an opening to a more stringent review of when administrative action may be held to have been "otherwise unreasonable," which seemed to have been intended by the inclusion of the bracketed language from the Model Act. [53]

B. Substantial Evidence Test Misapplied

The substantial evidence test is consistently misstated in KJRA cases. Kansas appellate courts have incorrectly applied the substantial evidence test used in civil cases rather than the one set forth in KJRA.

In appeals from civil cases tried to the court, Kansas applies a version of the substantial evidence test in which only the evidence supporting the court's findings is reviewed and all inferences capable of being drawn from the evidence are made in support of those findings. [54] If there is evidence, including inferences, to support the trial court's findings, those findings must be upheld even if they are against the great weight of the evidence: evidence conflicting with the trial court's findings must be "disregarded." [55] Kansas courts take this one step further in civil cases with respect to "negative findings" by the trial court, which include findings that a party did not meet its burden of proof. A trial court's negative finding may not be set aside "absent proof of an arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion or prejudice" on the part of the trial judge. [56]

The plain language of the KJRA, like the federal APA, calls for the substantial evidence test to be applied to the whole record, not just the portion supporting the agency finding. K.S.A. 77-621(c) provides:

> The court shall grant relief only if it determines any one or more of the following: ....
>
> (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act.... [57]

K.S.A. 77-621(c)(7) is identical to section 5-116 of the 1981 Model State Administrative Procedure Act. [58] The official comment to that act refers to the test as the "'substantial evidence on the whole record' test for judicial review of determinations of fact that are made or implied by the agency." [59] Professor Schwartz, whose earlier treatise is also cited in those official comments, states that section 5-116 was intended to adopt the same substantial evidence test as applied under the federal APA. [60] Both the 1961 Model State Administrative Procedure Act, which uses a clearly erroneous standard, [61] and the 1981 Model Act, which uses a substantial ***28** evidence standard, [62] applied the test to the evidence found in the "whole record." [63] This is also the standard under the federal APA. [64]

Whole record review has a clear meaning in administrative law, one that was well understood prior to Kansas' adoption of the Model Act's substantial evidence on the whole record standard of review for fact findings. Prior to the enactment of the federal APA in 1946, federal courts applied a substantial evidence test to agency findings that was similar to the Kansas test now in use: if there was any evidence in the record to support the agency finding, it was upheld and all contrary evidence was disregarded. [65]

Dissatisfaction with this restrictive interpretation of the substantial evidence test was a major factor in enactment of the APA, which included an express direction that courts consider the "whole record" in determining whether findings were supported by substantial evidence. [66] In the 1951 Universal Camera Corp. v. NLRB decision, [67] the United States Supreme Court made it clear that whole record review required consideration of the portion of the record that detracts from the agency's findings as well as the portion that supports its findings. [68] This continues to be the standard under the federal APA. [69] The model state administrative procedure acts were based upon the federal APA [70] and adopted this concept of review on the whole record, [71] and state courts elsewhere had interpreted whole record review consistently with Universal Camera under these acts. [72] In addition, a law review article cited with approval in the official comments to 1981 Model Act section 5-116 specifically noted that both federal and state statutes required whole record review in which "detracting evidence must also be considered." [73] This well-developed meaning of whole record review clearly was intended to be incorporated into the Model Act provision, which was adopted verbatim in Kansas.

It does not appear that anyone has raised an issue with regard to the KJRA "when viewed in light of the record as a whole" language and that the courts have simply applied the test as used in civil cases without consideration of the statutory language. [74] The statutory language itself is quite clear, as is the underlying body of state and federal administrative law on this point.

Properly applied to the entire record, the substantial evidence standard tests the reasonableness of the agency's ***29** conclusion in terms of the evidence. [75] The Kansas Supreme Court has given at least two statements of the test. The first is: "Substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion." [76]

That statement is clearly in line with precedents under the federal APA and the intent of the Model Act. Some Kansas cases have also said that a decision may be overruled under the substantial evidence test only when the evidence shows the agency's determination "is so wide of the mark as to be outside the realm of fair debate." [77] This second statement appears to have no counterpart in federal administrative law or the Model Act case law and, instead, to be based upon the mistaken Kansas application of whole record review described above. [78] Since the first statement accurately describes the test, [79] the second should be disregarded in future cases.

A final area of some confusion has been to whom deference is owed as to fact findings. If there is no de novo review, deference is owed to the findings of the agency. [80] If a statute provides for de novo review in the district court, then deference is owed on appeal to the district court's findings. [81] Some cases have mistakenly identified the entity to which deference was owed, although it appears that the correct entity was actually given deference in the decision. [82] A more interesting issue arises when the agency head rejects fact findings made by a hearing officer, who made first-hand credibility determinations while hearing the evidence. Federal authorities generally indicate, although with some disagreement when a hearing officer's specific credibility determination is disregarded by the agency head, that it is the agency's findings that are due the deference, not those of the hearing officer. [83] The same result would appear to be appropriate under Kansas law. One basis for the federal APA ruling is that the APA provides that the agency, when reviewing a hearing officer's order on motion, "has all the powers which it would have in making the initial decision...." [84] KAPA contains a similar provision, which provides that the "agency head ... shall exercise all the decision-making power that the agency head ... would have had to render a final order had the agency head presided over the hearing...." [85] It is clear, then, that it is the agency head's findings, not those of the hearing officer, that are entitled to deference. However, the test remains one of whether the evidence provides reasonable support for the factual findings and conclusions. Thus, there probably are outer limits in which an agency head's rejection of at hearing officer's credibility determinations would be unreasonable. [86]

C. Burden of Proof

K.S.A. 77-621(a)(I) provides that the burden of proving the invalidity of agency action is on the party asserting its invalidity. This burden remains with the party opposing the validity of the agency's action for all issues.

This rule was explained in Angle v. Kansas Department of Revenue. [87] In the underlying administrative statute in Angle, the administrative action suspending the driver's license would be valid only if the initial stop of the motorist by the police officer was based upon "reasonable grounds" for the officer to believe the driver was operating under the influence of alcohol. Under normal evidentiary standards, one might expect the ***30** agency to have the burden of proof regarding the resonableness of the officer's belief. However, the Angle case held that the driver had the burden under KJRA to prove that the officer's beliefs were unreasonable. Later cases have followed the rule set forth in Angle. [88]

D. Limitation on New Issues and Evidence on Review

KJRA has two provisions limiting the issues and evidence on review. K.S.A. 77-617 prevents raising issues in court that were not raised before the agency except when (1) the agency had no jurisdiction to grant an adequate remedy based on determination of that issue, (2) the agency action being challenged is a rule that the party did not have an opportunity to challenge, (3) the agency action is an order as to which the person was not notified, or (4) a change in the law or further agency action has occurred following the administrative proceeding. K.S.A. 77-619 prevents introduction of new evidence before the reviewing court except when it relates to the validity of agency action and either to (1) improper motives or makeup of the decision-making body or (2) unlawfulness of procedure of the decision-making process. [89]

K.S.A. 77-618 provides that judicial review of disputed facts shall be confined to the agency record, as supplemented under section 77-619, except for specified actions in which de novo review is permitted. De novo review may be based upon the transcript of the administrative hearing, as in state law age discrimination cases, [90] or upon a fresh presentation of testimony to the district court, as in driver's license suspension cases. [91] However, in either case, although the review is de novo, the hearing in the district court is still limited to the issues that were raised at the administrative hearing or allowed under K.S.A. 77-617 and 77-619. [92] The rationale for this rule is that, although proceedings in the district court may allow de novo consideration of the facts, "the proceeding is still predominantly appellate in nature." [93]

The rule that new issues may not be raised in a de novo appeal hearing applies equally to administrative agencies and other parties. In Meigs v. Kansas Department of Revenue, [94] the Court of Appeals held that an issue not raised by the Department of Revenue at the administrative hearing (which takes place before an agency hearing officer without the participation of an agency attorney/advocate) cannot be raised in the de novo appeal in the district court. The Supreme Court affirmed without specifically discussing this issue, but the issue was hotly contested by the Department of Revenue on appeal to the Supreme Court, [95] which concluded, "Other issues and arguments asserted by the KDR have been carefully considered and, upon the record before us, we find them to be without merit." [96]

The Court of Appeals has reaffirmed and extended the rule that issues on appeal are limited to those raised in the agency hearing in Zurawski v. Kansas Department of Revenue. [97] In Zurawski, the court held that an objection to evidence must be made at the administrative hearing and, if not made there, cannot be made at the de novo appeal to the district court. The court took a broad view of what constitutes an "issue" that must be raised in the administrative ***31** hearing. This decision may have significant ramifications to agencies that, like the KDR, do not have attorneys representing the agency at the administrative hearings. [98]

E. Discovery on Appeal to District Court

Because lawyers and judges are used to the provisions of the Kansas Rules of Civil Procedure (K.S.A. Chapter 60), they often assume that all of the discovery provisions of Chapter 60 are applicable in KJRA actions. Except for cases in which new issues may be raised on appeal, [99] discovery is inconsistent with the statutory framework and should not be available in KJRA appeals.

Several arguments lead to the conclusion that discovery is generally not available in KJRA appeals. First, KJRA provides "the exclusive means of judicial review of agency action" [100] and does not include any discovery provisions. Second, KAPA, which was passed in the same legislative session and clearly considered in tandem with KJRA, explicitly provides for discovery. [101] The difference should be considered an intentional one. Third, some KJRA provisions are contrary to Chapter 60 provisions and others would have been wholly unnecessary had Chapter 60 provisions been intended to apply to KJRA appeals. [102] Fourth, application of the Chapter 60 discovery provisions to KJRA appeals would lead to an absurd result: broader discovery would be available on appeal than in the underlying administrative proceeding. KAPA gives the presiding officer wide discretion in determining whether to allow discovery and generally allows discovery only as to "relevant" matters in adjudicatory proceedings; [103] Chapter 60 provides an explicit right to discovery and allows a broader scope of inquiry of anything that "appears reasonably calculated to lead to the discovery of admissible evidence." [104] The Legislature does not appear to have intended to allow such broad discovery in administrative actions. [105] Last, discovery generally is not available on appeal, whether in Chapter 60 or elsewhere. KJRA actions are appellate in nature [106] and, except when new issues are explicitly allowed on appeal, no discovery should be necessary. [107]

Limited discovery should be allowed when the applicable KJRA provision allows consideration of some new issues on review. In a case in which the right to take discovery was contested (in a dispute over the state census), Shawnee County District Judge James Macnish Jr. ruled that discovery was available, but only as to the issues on which the district court was allowed to take

additional evidence under K.S.A. 77-619. [108] This seems to be a reasonable result, although, for the reasons stated above, ***32** Chapter 60 should not be considered directly applicable. A trial court does possess inherent authority to control proceedings that are properly before it, including the provision of discovery when necessary and not contrary to statute. [109] The procedures for discovery found in Chapter 60 can be applied by analogy [110] when necessary, without the wholesale incorporation of Chapter 60, including its scope of discovery, which clearly was not intended.

F. Ex Parte Orders

A district court is forbidden from issuing any ex parte stay orders in any action under the KJRA. [111] K.S.A. 77-616(f) forbids ex parte orders in KJRA actions "[e]xcept as otherwise authorized by rule of the supreme court." No Kansas Supreme Court rule provides for ex parte stay orders.

III. Non-KJRA Cases

A. Local Units of Government

In cases involving political subdivisions, including local units of government, the KJRA does not apply. In these cases, the scope of review is found in Kansas Board of Healing Arts v. Foote: the court may not substitute its judgment for the agency or examine the issues de novo, but is limited to deciding whether (1) the agency acted fraudulently, arbitrarily or capriciously; (2) the order is supported by substantial evidence; and (3) the action was within the agency's scope of authority. [112]

B. Limited Use of Extraordinary Remedies

Umbehr v. Board of County Commissioners [113] limits the use of the extraordinary remedies of injunction, mandamus or quo warranto. In the absence of a statutory right of appeal (e.g., non-KJRA situations), extraordinary remedies may be invoked only in cases of illegal, fraudulent or oppressive acts of a government body. A prior case [114] that had held that those remedies were also available in cases of unreasonable acts of a government body was overruled by Umbehr. Oppression in this context is an act that "subjects a person to cruel or unusual hardship through misuse or abuse of authority or power or one that deprives a person of any rights, privileges or immunities secured by our Constitution or laws." [115]

C. KJRA Not Applied by Implication

KJRA provisions will not be applied by implication to appeals from acts of municipalities. In Landau v. City Council of Overland Park, [116] the court refused to apply a KJRA provision in a zoning appeal even though to do so "would perhaps have a salutary effect" in reducing confusion in the applicable law. The court noted that the Kansas Legislature specifically excluded local governments from KJRA; thus, any application of its provisions will have to await legislative action.

IV. Some Traps That Could Cause Lost Sleep or Worse....

A. Time Limits/Computations

The time for filing a KJRA appeal has been the subject of some dispute in recent years. K.S.A. 77-613(b) provides:

A petition for judicial review of an order is not timely unless filed within 30 days after service of the order, but the time is extended during the pendency of the petitioner's timely attempts to exhaust administrative remedies.

1. Some simple counting rules....

Many practitioners had apparently assumed that this statute simply required that the KJRA appeal be filed within thirty days of the final administrative agency action in the case. [117] This interpretation was brought into question in United Steelworkers of America Local No. 4706 v. Kansas Commission on Civil Rights. [118] The key facts of the case were:

July 6, 1990 KCCR filed its order

July 16, 1990 Union filed motion for rehearing

July 20, 1990 KCCR denied motion for rehearing

Aug. 17, 1990 Union filed KJRA petition

The Court of Appeals held that the petition for review ***33** came too late. In its view, the 30-day time period began to run when order was issued, then was tolled between July 16 and 20 while the rehearing petition was pending, then began to run again. The 30-day period did not, as the appellant thought, begin to run only after the motion for rehearing was denied. The Kansas Supreme Court reversed, based on consideration of the Kansas Act Against Discrimination, [119] which requires the filing of a motion for reconsideration in proceedings under that act. Since that motion was required, the Kansas Supreme Court held that the time to appeal under K.S.A. 77-613(b) did not begin to run until the motion for reconsideration had been denied.

The Kansas Supreme Court declined to address the question of interpretation of K.S.A. 77-613(b) standing alone. The court noted that K.S.A. 77-529 "provides that the filing of a petition for reconsideration is not a prerequisite to judicial review except in orders from [BOTA, KCC and KHRC]," but that K.S.A. 77-612 "provides that a petition for judicial review ... can only be filed after all administrative hearings have been exhausted." The court then left the ultimate question for later cases in doubt, concluding: "In those instances where the filing of a petition for reconsideration with the agency is not mandatory, those two statutes could very well be in conflict." The court also said, without clear explanation, that K.S.A. 77-613(b) is "ambiguous, at best." It is significant to note that both the district court and the Court of Appeals held the action time-barred under K.S.A. 77-613(b), and the Supreme Court relied solely upon non-KJRA provisions to find this appeal timely.

The Court of Appeals has confirmed its view of the KJRA rule in Office of State Bank Commissioner v. Emery. [120] When the filing of a motion to reconsider is permissive, the court held, the filing of such a motion "temporarily tolls the running of the time to file a petition for judicial review. If the motion to reconsider is denied, the count towards the time for filing a petition for judicial review recommences from the point at which it was tolled when the motion to reconsider was filed." [121]

Following these cases, the test for determining when an appeal must be filed depends upon whether a petition for rehearing or reconsideration was required to be submitted to the administrative agency. If a request for rehearing was required before the administrative process would be exhausted, then the 30-day time for appeal does not begin to run until the timely petition for reconsideration has been denied. However, if a petition for reconsideration is not required to exhaust administrative remedies, then the filing of a petition for reconsideration merely tolls the 30-day time period, which begins to run upon the issuance of the original administrative decision.

2. Reliance on Agency Interpretation

Reliance upon an agency regulation and the language of an agency order regarding the time for filing an appeal was held unreasonable when the agency's position was contrary to the statute, causing Cessna Aircraft Co. in one case to lose its ability to appeal the assessed valuation of its personal property inventory. [122] The Board of Tax Appeals issued its initial order, advising Cessna that it could request a rehearing within 30 days and that, if no such request was made, the order would "become a final order from which no further appeal is available." A BOTA regulation [123] provided that a party could request rehearing within 30 days. Cessna filed for rehearing 25 days after issuance of the order. Unfortunately, a statutory provision enacted after initial promulgation of the BOTA regulation limited the period to seek a rehearing to 15 days. Cessna's numerous statutory construction arguments were rejected, the court finding that the original order was a final order; no request for rehearing was made within 15 days; and a timely request for rehearing was a statutory prerequisite for appeal of a BOTA order.

Undue reliance upon an agency's interpretation of its statutory authority arguably led a party to forfeit its appeal rights by failing to file a timely appeal in In re Little Balkans Foundation. [124] In this case, the Kansas Racing Commission issued what it called a "conditional organization license" to one party and denied the Little Balkans' racetrack license application. However, Little Balkans waited until it saw whether its competitor would be able to meet the various conditions before deciding to appeal, reasoning that no final, appealable "order" had been issued so long as the license was "conditional." However, the court reviewed the statutes on its own and found that the so-called "conditional" license actually was the real thing. Accordingly, Little Balkans' appeal, which was filed well over 30 days after initial issuance of the "conditional ***34** license," was dismissed for lack of jurisdiction. This case and the Cessna case serve as strong warnings that reliance on an agency's legal interpretations or regulations — in the absence of clear, independent confirmation of the relevant statutory provisions — may be a big mistake.

3. Limited Allowance of Untimely Appeals

In limited situations, an untimely appeal may be accepted under an estoppel doctrine known in Kansas as the "unique circumstances doctrine." Recognized in Schroeder v. Urban, [125] an otherwise untimely appeal may be allowed in the interest of justice if (1) appellant reasonably and in good faith relied upon judicial (not agency) action seemingly extending the appeal period, (2) the court order extending the appeal period was for no more than 30 days and was entered prior to expiration of the appeal period, and (3) notice of appeal was filed within the period apparently judicially extended. The Cessna court refused to apply this doctrine to allow Cessna's appeal, distinguishing Schroeder because that case involved a court order, not an order of an administrative agency. In addition, the Cessna court held that a party's reliance must be reasonable to use this estoppel-based doctrine; Cessna's belief was unreasonable because the statutes clearly limited the time to seek rehearing to 15 days.

B. Pleading Requirements

In a recent case, the Court of Appeals has ruled that there is no jurisdictional problem for the KJRA appellant who fails to include the information required by K.S.A. 77-614(b) [126] in the petition for judicial review. In University of Kansas v. Department of Human Resources, [127] the court held that the responding party, which is not even required to file an answer, [128] must file a motion for more definite statement under the Kansas Rules of Civil Procedure [129] or any defect in the petition is deemed to have been waived. The court rejected "one district court opinion in another case" that had thrown out a petition that did not comply with K.S.A. 77-614 on the ground that the court lacked jurisdiction unless there was compliance with this KJRA provision. The district court decision that had been cited was rendered by the author of this article. [130] Since the losing party in the University of Kansas case did not raise the argument in the district court there and did not seek review in the Kansas Supreme Court, there is still substantial risk to any party who does not fully comply with K.S.A. 77-614.

The better argument, contrary to the University of Kansas case, is that failure to comply with K.S.A. 77-614 leaves the court without jurisdiction to hear the appeal. The analysis must begin with a party's entitlement to judicial review. In Kansas, there is no automatic right to court review of administrative agency decisions. Judicial review of agency decisions is, with

limited exceptions not applicable here, [131] limited to what is specifically provided by statute. [132] It is also well established that mandatory procedures prescribed by statute for taking an administrative appeal must be followed or the court is without jurisdiction to hear an appeal from an administrative agency proceeding. [133] As the Court of Appeals has previously stated, " T he procedural requirements set forth in the KJRA must be followed" to obtain judicial relief. [134] When the ***35** method for appeal is provided by statute, it must be followed or the court is without jurisdiction. [135]

K.S.A. 77-614(b) sets forth in plain language certain required elements of a KJRA petition. Even a cursory review of K.S.A. 77-614 makes it clear that notice pleading is not the standard under the KJRA. [136] A careful comparison of K.S.A. 77-614 with K.S.A. 60-208 leaves no doubt that a more stringent standard applies under the KJRA than under the Kansas Rules of Civil Procedure.

Similar KJRA provisions have been strictly enforced. In Claus v. Kansas Department of Revenue, [137] discussed below, [138] the court dismissed the case for lack of jurisdiction for lack of compliance with K.S.A. 77-615, noting that the statute contained mandatory ("shall") language and that the KJRA does not contain "provisions for 'substantial compliance' ... comparable to those provided in the Rules of Civil Procedure...." [139]

Nor does the KJRA provide for the filing of an amended petition to cure the jurisdictional defect, whether on a motion for more definite statement or otherwise, at least when filed outside the initial 30-day time limit for filing the appeal. The KJRA requires the filing of a petition in compliance with the statute within that specified time to confer jurisdiction on the court. Similarly, although K.S.A. 77-615 does not provide a specific deadline for service of the KJRA petition on the agency head, the court in Claus found itself without jurisdiction when service had not been accomplished in a reasonable time as specifically provided by the statute. Here, the deadline for filing of the petition for judicial review is firmly set at 30 days and the petition must include the items that are required by K.S.A. 77-614. The provisions of K.S.A. 60-215 regarding amendment of pleadings are not applicable: the KJRA does not contain provisions for substantial compliance similar to those found in Chapter 60. [140] Once the 30-day period to appeal has expired without compliance with the applicable statutory provisions, the court does not have jurisdiction to hear the appeal or to grant leave to file an amended petition.

The authorities cited by the court in the University of Kansas case are not compelling. The only administrative law case cited is an Iowa case affirming a trial court order that a plaintiff in an administrative appeal file a more specific petition. This is cited in support of the Kansas court's holding that the filing of an inadequate petition does not deprive the court of jurisdiction. However, Iowa, unlike Kansas, has a specific court rule incorporating its rules of civil procedure in administrative appeal cases. [141] Thus, motions for more definite statement are specifically provided for in Iowa administrative appeals. There is no indication in KJRA that Chapter 60 motion practice and rules are applicable in such proceedings and every indication ***36** that they are not. [142] The Kansas cases cited in the University of Kansas opinion are all civil cases, which are not on point. A party in a civil case has a right to redress in the courts, protected by the Kansas Constitution. [143] Since there is no inherent right to appeal most administrative decisions, the situations are simply not analogous.

An argument for the application of K.S.A. 60-215 or 60-212 in KJRA cases could be based upon the opinion in In re Tax Appeal of Newton Country Club Co., [144] which appears to have applied K.S.A. 60-206(a) to preserve jurisdiction over a KJRA appeal. In that case, the administrative order was mailed to the parties on April 10. Under K.S.A. 77-613(d), the sending of the order by mail added three days to the deadline for filing an appeal. The appeal was filed on Monday, May 11. The court there concluded that the failure to file the appeal on Sunday, May 10, was not a jurisdictional defect, citing K.S.A. 60-206(a) for the proposition that the last day of a period cannot fall on a Sunday or legal holiday. Whether aided by citation to K.S.A. 60-206(a) or not, it is obvious that legal filings are not required to be filed on Sundays or on legal holidays when the courts and clerk's offices are closed. The language in Newton Country Club applying K.S.A. 60-206(a) in a KJRA appeal should not undermine the later

holdings of Claus and Lovett that the KJRA does not contain provisions for substantial compliance like those of Chapter 60. [145] In addition, no Kansas Supreme Court decisions have found any provisions of Chapter 60 dispositive in a KJRA appeal. [146]

The ruling in the University of Kansas case that the KJRA respondent must file a motion for more definite statement or be deemed to have waived the failure to comply with K.S.A. 77-614 is contrary to the KJRA statutory framework. The KJRA does not even require the respondent or other parties to file a reply or answer to the petition. [147] It makes no sense that a respondent who is not even required to file an answer by the explicit language of the statute is required, by implication of provisions of the separate rules of civil procedure, to file a motion for more definite statement before the unambiguous provisions of K.S.A. 77-614 will be enforced.

The Kansas Legislature appears to have concluded that the appellate review process, which begins in these matters in the district court, would be materially enhanced by provision of the specific items required to be contained in the petition for judicial review by K.S.A. 77-614. [148] Provision of the appellant's reasons for believing that relief should be granted, at least in a summary form, and provision of a request for relief, specifying the type and extent of relief requested, are essential to allow a court to review the file and render a decision on the appeal. [149] In any event, the Kansas Legislature has made the inclusion of these matters a mandatory part of the process for conferring jurisdiction upon the district court under the KJRA.

C. Service of Process

K.S.A. 77-615(a) provides that the petition for judicial review must be served "upon the agency head or on any other person or persons designated by the agency head to receive service." It means what it says — and substantial compliance will not do. A driver appealing his license suspension (and his attorney) learned this lesson the hard way in Claus v. Kansas Department of Revenue. [150] The suspension notice indicated that it was issued by the "Kansas Department of Revenue, Division of Vehicles-Driver Control Bureau, P. O. Box 2744, Topeka, Kansas 66601-2744." The petition for judicial review was identically addressed. KDR admitted its receipt, but argued that the only person authorized to receive service was the Secretary of Revenue himself. The court agreed and dismissed the case for ***37** lack of jurisdiction, stating: "There are no provisions for 'substantial compliance' contained in KJRA comparable to those provided in the Rules of Civil Procedure...." In addition to service on the agency, notice of the KJRA appeal also must be served on all other parties to the agency proceeding. [151] However, the notice to parties other than the agency head may be mailed to the attorneys for those parties. [152]

D. Exclusive Means of Review

K.S.A. 77-606 provides that the KJRA is "the exclusive means of judicial review of agency action." The losing party in Kansas Sunset Association v. Kansas Department of Health and Environment [153] understands the meaning of that seemingly simple provision better than most of us. In Kansas Sunset Association, the KDHE had issued a wastewater disposal permit that was effective until such time as "interceptors become available." When that occurred, wastewater would have to be transported to the interceptor. The permittee filed a KJRA appeal when KDHE later informed it that the interceptors were available and that KDHE intended to enforce the condition on the permit. The court held that the permittee was required to file its KJRA challenge in a timely manner after initial issuance of the conditional permit. The court held that a party does have a right to bring declaratory judgment actions, even after KJRA, but that it must bring them within the time specified in KJRA after agency action.

In a recent case, [154] the court held that the KJRA was the exclusive means to review the Kansas Lottery's refusal to pay claim on a lost winning ticket, stating that a breach of contract claim was not available. This case should not be read broadly to preclude breach of contract actions against state agencies except in similar situations, in which the activity at issue is governed by both statute and regulation and the claim has been processed by the agency pursuant to the statute and those regulations. Tort actions against an agency are not governed by KJRA. [155]

E. Exhaustion and Primary Jurisdiction

Both the exhaustion and primary jurisdiction doctrines determine when judicial review may take place. [156] Under the exhaustion doctrine, a party must first exhaust administrative remedies that could grant relief before resorting to the courts, [157] while under the primary jurisdiction doctrine, it is not necessary that the administrative proceeding be able to grant relief. The primary jurisdiction doctrine simply defines situations in which the court should refer the matter to an agency for an initial determination of some fact or issue. [158]

A number of KJRA appeals have been dismissed for failure to exhaust the administrative remedies. For example, appeals of tax issues have been dismissed when not first presented to the Board of Tax Appeals. [159] When statutes preclude court review unless a petition for reconsideration is first filed with the agency, administrative remedies are not exhausted unless reconsideration is requested. [160] Once a petition for reconsideration is filed with the agency, the agency must be given a reasonable time to act upon it. [161] However, when a statute specifically provides that a claim may be brought in court without mentioning an exhaustion requirement, there may be concurrent jurisdiction so that exhaustion in an agency proceeding is not required prior to going to court. [162] In at least some circumstances in which two agencies may have jurisdiction over related claims and a party initiates actions in both agencies, ***38** he or she must exhaust the proceedings in both agencies before going to court. [163] There are exceptions to the exhaustion requirement, such as when no administrative remedy is available [164] or with regard to a specific issue that the agency has no authority to decide, such as the constitutionality of a statute. [165] However, when the agency could grant relief on some ground [166] or where the issue requires interpretation of a statute administered by the agency, [167] exhaustion is still required.

The doctrine of primary jurisdiction is reviewed in Western Kansas Express, Inc. v. Dugan Truck Line, Inc., [168] in which the court said that exhaustion applies when the law provides that the claim may first be treated by the proper administrative agency, while primary jurisdiction applies even when the court has jurisdiction over the claim from the outset, but the case will likely require resolution of issues that "under a regulatory scheme have been placed in the hands of the administrative body." [169] In Dugan, the court found no need for referral because the KCC had previously entered a finding that the defendant trucking company had been acting without regulatory authority and the agency had no authority to grant relief in an action for damages. [170] Courts considering deferral to an agency under the primary jurisdiction doctrine should consider both the benefits of referral to the agency, such as uniformity of result and need for expertise, and the detriments, such as cost and delay to the parties. [171]

F. Res Judicata and Collateral Estoppel

When a matter within an agency's competence is fully litigated on the merits, with discovery and the opportunity to present witnesses, collateral estoppel and res judicata will apply. [172] In Murphy v. Silver Creek Oil & Gas, Inc., [173] the administrative determination in a worker's compensation proceeding that a person was acting within the scope of his employment was held binding in a subsequent tort suit. However, when the administrative remedy provided in a proceeding may be inadequate, res judicata may not be applicable. [174] Federal courts will give preclusive effect to state agency proceedings when state courts would do so and the federal court finds that the party had a full and fair opportunity to litigate the claims. [175]

V. The Interplay Between State and Federal Administrative Law Decisions in Kansas Courts

Lawrence Preservation Alliance, Inc. v. Allen Realty, [176] marked the first time that Kansas courts had cited Citizens to Preserve Overton Park v. Volpe, [177] a major federal administrative law decision that had held that the presumption of regularity afforded

to administrative agencies did not "shield agency action from a thorough, probing, in-depth ***39** review." In determining whether an agency action was arbitrary or capricious, Overton Park stated that a reviewing court should determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." [178] Overton Park represented a stringent form of review that became known as the "hard look" doctrine; [179] Overton Park may be considered to represent a high water mark of sorts for stringent review in the federal courts. [180]

Lawrence Preservation Alliance cites the portion of Overton Park that is subject to the broadest potential interpretation in reviewing agency action — "whether the decision was based on a consideration of the relevant factors." One portion of the decision in Lawrence Preservation Alliance found that the city's action was unreasonable because it did not take into account the "relevant factors." [181] Other Kansas cases have noted, like Overton Park, that standards or factors to guide an agency in the application of a statute may be inferred from the statutory language and purpose. [182] These cases may provide guidance for the interpretation of the term "unreasonable" in the KJRA standard of review.

The bottom line, practical conclusion that one may take away from the Lawrence Preservation Alliance case is that one should feel free to look for federal authority when there is no Kansas authority on point (or, perhaps more to the point, on your side). Although Kansas citations to major federal administrative law cases like Overton Park have been rare, federal cases have been cited in cases other than Lawrence Preservation Alliance [183] and the basic concepts of Kansas administrative law are similar to ones under federal administrative law. [184] Indeed, Professor Shapiro has urged the adoption in Kansas administrative law of the primary Supreme Court cases of Chevron v. Natural Resources Council, [185] which governs deference to federal agency interpretations of law, and Motor Vehicle Manufacturers Association v. State Farm Automobile Insurance Co., [186] which governs determination of whether an agency action is arbitrary and capricious. [187]

Footnotes

Note

1. STEVE LEBEN is a district judge in Johnson County. He is a former president of the Kansas Bar Association Administrative Law Section and is a frequent lecturer in Continuing Legal Education programs on Kansas Administrative Law.

1 KAPA was adopted in 1984. KAPA was initially applicable only to specified state agencies, but was expanded to apply to most state agency actions in a 1988 amendment. The initial passage and provisions of KAPA are reviewed in Steve A. Leben, "Survey of Kansas Law: Administrative Law," 37 Kan.L.Rev. 679, 680-87 (1989). KAPA is found at K.S.A. 77-501 to 77-541.

2 The KJRA, officially given the awkward title of "the act for judicial review and civil enforcement of agency actions," K.S.A. 77-601, also was adopted in 1984. As initially passed, from July 1, 1984, to July 1, 1985, KJRA applied only to state agency actions for which no other judicial review was provided by statute. After July 1, 1985, it became applicable to all state agency actions that were not specifically exempted by statute from its application. The initial passage and provisions of KJRA are reviewed in Leben, supra note 1, at 680-82, 688-89.

3 Arthur Earl Bonfield, State Administrative Rule Making xxi (1986 & Supp.1992).

4 In addition to political pressures to reduce the size of the federal government and transfer powers to state governments, a Supreme Court decision on April 26, 1995, invalidating a Congressional action for the first time since 1936 under the Commerce Clause, may also result in a transfer of powers to state agencies. United States v. Lopez, 63 U.S.L.W. 4343 (April 26, 1995)(5-4 decision).

5 This article is intended to assist practitioners in spotting issues and potential problems, as well as to examine some areas in which Kansas administrative law may benefit from additional analysis. The article is not a comprehensive review of all of the administrative law issues that may arise. To assist the practitioner, frequent reference is made to additional sources of information on the issues addressed. Two of the best one-volume reference works in administrative law are Richard J. Pierce, Sidney A. Shapiro and Paul R. Verkuil, Administrative Law and Process (2d ed. 1992), and Bernard Schwartz, Administrative

Law (3d ed. 1991). A treatment of some aspects of Kansas administrative law can be found in David L. Ryan, Kansas Administrative Law with Federal References (3d ed. 1991).

6 There is, of course, some pause when a district judge presents an article that is critical in some respects of the decisions of the appellate courts. Case law, of course, develops in a gradual manner and often without presentation by the parties of a broader perspective. Accordingly, as with many pursuits, it is often much easier after-the-fact to point out errors than it is before-hand. (Of course, this principle often aids the appellate courts in their review of trial court decisions.) This article represents, at least in part, a response in the spirit requested by a member of the Kansas Supreme Court in Fred N. Six, "A Request for Thoughtful Criticism," 41 Kan.L.Rev. 655 (1993).

7 K.S.A. 77-513 to -532.

8 K.S.A. 77-533 to -535.

9 K.S.A. 77-536.

10 K.S.A. 77-537 to -541.

11 E.g., K.A.R. 4-13-40 to 4-13-42 (Kansas State Board of Agriculture regulations specifying hearing procedure per KAPA); K.A.R. 26-8-10 to 26-8-11 (Kansas Department on Aging regulations specifying hearing procedure per KAPA).

12 Ryan, supra note 5; Leben, supra note 1, at 682-87.

13 See Leben, supra note 1, at 685-87 (summarizing prior amendments).

14 K.S.A. 77-522(a).

15 See Wulfkuhle v. Kansas Department of Revenue, 234 Kan. 241, 671 P.2d 547 (1983)(agency abused its discretion by refusing to subpoena necessary witness for hearing even though statute merely provided that agency director "may" issue subpoena); Ryan, supra note 5, at 13-10.

16 See, e.g., Kansas Department of Revenue v. Coca-Cola Co., 240 Kan. 548, 731 P.2d 273 (1987)(agency allowed to conduct additional discovery in middle of adjudicatory administrative hearing); State ex rel. Wolgast v. Schurle, 11 Kan. App. 2d 390, 722 P.2d 585 ("stringent relevancy requirements" of civil discovery not applicable in agency investigatory proceeding, in which only "a possibility of relevancy" need be shown if discovery is not oppressive).

17 In re Appeal of Collingwood Grain, Inc., 257 Kan. 237, 254-57, 891 P.2d 422, 433-35 (1995)(affirming BOTA refusal to issue subpoena duces tecum sought by Kansas Department of Revenue for records of taxpayer's expert witness and a trade association).

18 Id. at 256-57, 891 P.2d at 435.

19 "Where there is a possibility of relevancy in documents subpoenaed and there is no showing that a subpoena is unreasonable or oppressive, the statutes granting the power to subpoena should be liberally construed to permit inquiry." Id. at 237, 891 P.2d at 424 (Syllabus ¶7).

20 See K.S.A. 77-608 (providing only limited interlocutory appeals).

21 255 Kan. 728, 877 P.2d 391 (1994).

22 See K.S.A. 77-415, 77-425.

23 255 Kan. at 728, 877 P.2d at 392. "Generally, a rule or regulation is a policy which is of general application and has the effect of law." Id.

24 E.g., State v. Pierce, 246 Kan. 183, 189, 787 P.2d 1189, 1195 (1990).

25 255 Kan. at 729-30, 733, 877 P.2d at 392-93, 394.

26 255 Kan. at 736-37, 877 P.2d at 396-97.

27 Ron Smith Trucking, Inc. v. Jackson, 196 Ill. App. 3d 59, 65, 552 N.E.2d 1271, 1276 (1990). For a thorough review of the case law and arguments concerning rulemaking versus adjudication as a means of announcing policy standards in state agencies, see Arthur Earl Bonfield, State Administrative Rule Making (1986 & Supp.1992); Arthur Earl Bonfield and Michael Asimow, State and Federal Administrative Law § 5.4 (1989); and Carl A. Auerbach, "Bonfield on State Administrative Rulemaking: A Critique," 71 Minn.L.Rev. 543 (1987). For a thorough discussion of the federal precedents on this issue, see Pierce, Shapiro and Verkuil, supra note 5, § 6.4.

28 Ron Smith Trucking, Inc., 196 Ill. App. 3d at 65, 552 N.E.2d at 1276.

29 The leading case in this movement is Megdal v. Oregon State Board of Dental Examiners, 288 Ore. 293, 605 P.2d 273 (1980), which held that when an agency is given a broad and vague statutory standard to administer, it must announce the principal outline of its regulatory standard by rule. The statute at issue there authorized revocation of a dentist's license for "unprofessional conduct" and gave the examining board authority to make rules to carry out the statute. The court held that the legislature intended that such a broad standard would first be defined more clearly by rule before being enforced in ad hoc adjudicatory proceedings. Id. at 304-08, 311-14, 605 P.2d at 279-80, 282-83. In a similar, Kansas case in which Megdal was cited to the court, the court found that a statutory provision allowing license revocation for "immoral" or "dishonorable" conduct was not sufficiently vague as to be invalid or to require that rules be adopted before it could be enforced. Kansas State Board of Healing Arts v. Acker, 228 Kan. 145, 612 P.2d 610 (1980). Because the Kansas court, unlike its Oregon counterpart, concluded that the statute was sufficiently clear that no regulations were required to guide those affected, it did not directly address the central principle of Megdal. A later Oregon case narrowed the Megdal holding and listed factors to consider in determining whether the legislature intended that an agency develop the standards to be applied under a particular statute first by rule. Trebesch v. Employment Division, 300 Ore. 264, 710 P.2d 136 (1985). For other cases requiring rulemaking rather than adjudication, see Bonfield, supra note 27, §§ 4.3.1 and 4.3.1A (1986 & Supp.1992)(collecting and discussing cases). A provision of the 1981 Model Act requires the adoption of rules "to the extent practicable ... embodying appropriate standards [and] principles" under statutes administered by each agency. 1981 Model State Administrative Procedure Act § 2-104(3), 15 U.L.A. 29 (1990). The rulemaking provisions of the 1981 Model Act have not been adopted in Kansas.

30 See Bonfield, supra note 27, § 4.1.1 (1986 & Supp.1992)(collecting and discussing cases).

31 This argument was rejected in In re Tax Appeal of Morton Thiokol, Inc., 254 Kan. 23, 864 P.2d 1175 (1993), on the basis that no change in policy had taken place. The argument will presumably be addressed on its merits in a later case in which a clear change in policy has been announced in an agency adjudication.

32 In re Tax Appeal of Morton Thiokol, Inc., 254 Kan. 23, 864 P.2d 1175 (1993), the court rejected an argument that the Department of Revenue may change a pre-established policy only through regulation, holding that the agency had not changed its policy. Id. at 33, 864 P.2d at 1183. The court made an ambiguous conclusion about the issue of whether a change in policy must be made by regulation: "Nor, according to BOTA, has Morton Thiokol established, as a matter of law, that Revenue is required to issue a regulation in order to change a policy — a true statement, but rather broad." Id. (emphasis added). By indicating that the statement was "rather broad," the court may be suggesting that there are some cases in which a change in policy must be made through regulation. However, the opinion also quotes what it notes has been referred to "as the seminal decision in the area of rulemaking," Securities Commission v. Chenery Corp., 332 U.S. 194 (1947): "There is...a very definite place for the case-by-case evolution of statutory standards. And the choice between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." In re Morton Thiokol, Inc., 254 Kan. at 32-33, 864 P.2d at 1183 (quoting Chenery). In Bruns, the court noted its Morton Thiokol rejection of an argument that the agency must announce a change in policy through regulations because it found that no change had been made. 255 Kan. at 736-37, 877 P.2d at 397.

33 See K.S.A. 77-536(e).

34 256 Kan. 638, 889 P.2d 1127 (1994)(revised opinion).

35 The leading Kansas case discussing the difference between mandatory and directory provisions of statutes is Wilcox v. Billings, 200 Kan. 654, 438 P.2d 108 (1968). Directory provisions are intended to be followed, but actions are not automatically

invalidated when compliance is not had. However, failure to comply with a mandatory provision either results in an invalid action or other affirmative legal liabilities. The court in Wilcox stated that no "absolute test" determines whether a particular provision is mandatory or directory; the legislative intent is determined from a consideration of the statutory language and purpose and other legislative interpretation aids.

36 Sunflower Racing, Inc. v. Board of County Commissioners, 256 Kan. 426, 885 P.2d 1233 (1994)(K.S.A. 77-529(b) is directory; failure of BOTA to have agency head sign order granting reconsideration and to include findings of fact and conclusions of law in order thus not deemed a failure by BOTA to act on request).

37 Expert Environmental Control, Inc. v. Walker, 13 Kan. App. 2d 56, 58, 761 P.2d 320, 322-23 (1988)(time limits in KAPA for agency to act are directory, not mandatory).

38 K.S.A. 77-621 provides:
Scope of review. (a) Except to the extent that this act or another statute provides otherwise:
(1) The burden of proving the invalidity of agency action is on the party asserting invalidity; and
(2) the validity of agency action shall be determined in accordance with the standards of judicial review provided in this section, as applied to the agency action at the time it was taken.
(b) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.
(c) The court shall grant relief only if it determines any one or more of the following:
(1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
(2) the agency has acted beyond the jurisdiction conferred by any provision of law;
(3) the agency has not decided an issue requiring resolution;
(4) the agency has erroneously interpreted or applied the law;
(5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
(6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;
(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or
(8) the agency action is otherwise unreasonable, arbitrary or capricious.
(d) In making the foregoing determinations, due account shall be taken by the court of the rule of harmless error.
Two recent cases restating most of the standards applied by the courts under K.S.A. 77-621 are Sunflower Racing, Inc. v. Board of County Commissioners, 256 Kan.426, 885 P.2d 1233 (1994), and In re Application of City of Wichita, 255 Kan. 838, 877 P.2d 437 (1994).

39 Olathe Community Hospital v. Kansas Corporation Commission, 232 Kan. 161, 161, 652 P.2d 726, 731 (1982). See also cases cited at note 132 infra.

40 William R. Andersen, "The 1988 Washington Administrative Procedure Act — An Introduction," 64 Wash.L.Rev. 781, 831-32 (1989). See also Pierce, Shapiro and Verkuil, supra note 5, §§ 7.1 and 7.6; Alfred C. Aman Jr. and William T. Mayton, Administrative Law § 13.1 (1993).

41 These terms were used by Professor Andersen in Andersen, supra note 40, at 831.

42 E.g., Department of Social and Rehabilitation Services v. Public Employees Relations Board, 249 Kan. 163, 163, 815 P.2d 66, 68 (1991)(statutory interpretation of agency responsible for enforcing statute "entitled to judicial deference"). Cf., Boatright v. Kansas Racing Commission, 251 Kan. 240, 240, 834 P.2d 368, 370 (1992)(agency's statutory interpretation is "persuasive" but should be corrected when erroneous); Hixon v. Lario Enterprises, 257 Kan. 377, 379, 892 P.2d 507, 508-09 (1995)(same).

43 E.g., In re Appeal of Harbour Brothers Construction Co., 256 Kan. 216, 221, 883 P.2d 1194, 1198 (1994).

44 255 Kan. 640, 875 P.2d 278 (1994).

45 The test is the proper one to use in reviewing the exercise of agency discretion. Andersen, supra note 40, at 843. K.S.A. 77-621 does not specifically provide that any of its subsections are only applicable in certain types of cases. However, under the federal APA, which provides a similar list of the situations in which agency action may be overturned, the arbitrary and

capricious standard has been applied to discretionary acts. Pierce, Shapiro and Verkuil, supra note 5, § 7.3.2; Schwartz, supra note 5, § 10.14. As applied to findings of fact, it is not clear that the arbitrary and capricious test is different than the substantial evidence test. Pierce, Shapiro and Verkuil, supra, § 7.3.3.

46 Zinke & Trumbo, Ltd. v. Kansas Corporation Commission, 242 Kan. 470, 475, 749 P.2d 21, 25 (1988).

47 Southwestern Kansas Royalty Owners Association v. Kansas Power & Light Co., 244 Kan. 157, 169, 769 P.2d 1, 11. See also Matter of University of Kansas Faculty, 2 Kan. App. 2d 416, 420-21, 581 P.2d 817, 822 (1978)("[T]here may be instances where inconsistency within or between decisions will render an administrative decision arbitrary ...."(emphasis added).

48 Zinke, 242 Kan. at 474-75, 749 P.2d at 25 (1988).

49 Sunflower Racing, Inc. v. Board of County Commissioners, 256 Kan. 426, 445, 885 P.2d 1233, 1244 (1994).

50 Kansas Gas & Electric Co. v. Kansas Corporation Commission, 239 Kan. 483, 497, 720 P.2d 1063, 1076 (1986).

51 E.g., In re Tax Appeal of A.M. Castle & Co., 245 Kan. 739, 741, 783 P.2d 1286, 1288 (1989)("[O]ur scope of review is controlled by K.S.A. 77-621, which is somewhat broader than the traditional three-pronged scope of review as set forth in [Foote] ...."); The Woman's Club of Topeka v. Shawnee County, 253 Kan. 175, 180, 853 P.2d 1157, 1161 (1993)("This Court has declared that under K.S.A. 77-601 et seq. the scope of review is somewhat broader than the traditional scope of review."); Board of County Commissioners v. Smith, 18 Kan. App. 662, 857 P.2d 1386 (1993)("Under [KJRA], the court's scope of review is controlled by K.S.A. 77-621, which this court recognizes as somewhat broader than the traditional three-pronged scope of review set forth in [Foote]."). Neither the Kansas Supreme Court nor the Court of Appeals has ever addressed the source for these statements, although they do seem to reflect the intent of KJRA correctly, particularly in light of the inclusion of the "otherwise unreasonable" language. Arguably, however, all of these statements to date have been dicta.

52 Model State Admin. Procedure Act, comment to § 5-116, 15 U.L.A. 127-29 (1990). See Leben, supra note 1, at 689-90.

53 See discussion in text at nn. 176 to 187 infra.

54 Tucker v. Hugoton Energy Corp., 253 Kan. 373, 377-78, 855 P.2d 929, 934 (1993).

55 Id. ("In reviewing the decision of a trial court, [the appellate court must accept as true the evidence and all inferences to be drawn therefrom to support the findings of the trial court, and must disregard any conflicting evidence or other inferences that might be drawn therefrom.")(citation omitted). Further, even if a trial judge fails to make adequate findings to support the decision, "the trial court is presumed to have found all facts necessary to support the judgment" unless the losing litigant raises the issue of inadequate findings in the trial court prior to appeal. Id. at 378, 855 P.2d at 934. See also Comment to K.S.A. 60-252 in Vernon's Kansas Statutes Annotated (Supp.1993)(citing cases).

56 Board of County Commissioners v. Graham, 254 Kan. 260, 269, 864 P.2d 1141, 1148 (1993). See also, e.g., Brown v. Lang, 234 Kan. 610, 610, 675 P.2d 842, 843 (1984); Highland Lumber Co. v. Knudson, 219 Kan. 366, 371, 548 P.2d 719, 724 (1976). There is some question about the validity of this rule in civil cases as well. The Kansas Code of Civil Procedure provides for reversal of trial court findings that are "clearly erroneous," K.S.A. 60-252(a), and federal courts under the identical rule reverse trial court findings when "the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made." Las Vegas Ice & Cold Storage Co. v. Far West Bank, 893 F.2d 1182, 1185 (10th Cir.1990)(citation omitted). This standard under the federal rule was well established before Kansas adopted Rule 52(a) of the Federal Rules of Civil Procedure as K.S.A. 60-252(a) in 1963. E.g., United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948)("A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."); Linn v. ULA Uranium, Inc., 265 F.2d 916, 917 (10th Cir.1959)(same). However, despite this historical background of K.S.A. 60-252, the federal standard of review has not been applied under the Kansas statute. See Short v. Sunflower Plastic Pipe, Inc., 210 Kan. 68, 73, 500 P.2d 39, 44 (1972)("Decisions of our court after the adoption of the new code of civil procedure do not suggest that any change was made by 60-252(a)...."). Whether the cases have applied a proper standard of review under K.S.A. 60-252 is beyond the scope of this article.

57 K.S.A. 77-621(c)(emphasis added).

58 15 U.L.A. 127 (1990). The KJRA is based upon the 1981 Model State Administrative Procedure Act, which was approved by the National Conference of Commissioners on Uniform State Laws. Specifically, the KJRA is based upon Article V, Chapter 1 of the Model Act, which contained the provisions for judicial review. K.S.A. 77-614(6) and (7) are identical to section 5-109(6) and (7) of the Model Act. 15 U.L.A. 118-119 (1990). Because the Model Act was the basis for the KJRA, pertinent comments from the Model Act are cited as persuasive authority for construction of these statutory provisions.

59 15 U.L.A. 128-29 (1990).

60 Schwartz, supra note 5, § 10.12.

61 1961 Model State Administrative Procedure Act § 15(g)(5), 15 U.L.A. 301 (1990). More than half the states adopted statutes based on the 1961 Model Act. 15 U.L.A. 1, 137 (1990).

62 1981 Model State Administrative Procedure Act § 5-116(c)(7), 15 U.L.A. 127 (1990). It would seem especially unlikely that the test to be applied under K.S.A. 77-621(c)(7) would be the one applied in Kansas civil cases, since the 1981 Model Act provision, which was adopted in Kansas, had explicitly moved from the "clearly erroneous" standard, which is also found in K.S.A. 60-252 for civil cases, to the "substantial evidence on the whole record" standard. It is generally believed that the substantial evidence test is more deferential to agency findings than the clearly erroneous standard, but it is not clear whether it makes a significant difference in practice so long as the whole record is examined. Compare William R. Andersen, "Judicial Review of State Administrative Action — Designing the Statutory Framework," 44 Admin. L. Rev. 523, 551-53 (1992)("Most commentators feel that little operational difference exists between [the two standards]."), with Schwartz, supra note 5, § 10.11 (discussing difference in standards and concluding that most authorities support view that clearly erroneous standard gives broader authority to reviewing court).

63 1961 Model State Administrative Procedure Act § 15(g)(5), 15 U.L.A. 301 (1990).

64 Schwartz, supra note 5, § 10.7; 2 Kenneth Culp Davis and Richard J. Pierce Jr., Administrative Law Treatise § 11.2 at 176 (3d ed. 1994); Pierce, Shapiro and Verkuil, supra note 5, § 7.3.1.

65 Schwartz, supra note 5, § 10.7.

66 Id. at 639. See also 2 Davis and Pierce, supra note 64, § 11.2 at 176 (citing legislative history that APA required consideration of portions of record detracting from agency findings). The APA provides that an agency action may be set aside when it is "unsupported by substantial evidence ... reviewed on the record of an agency hearing provided by statute...." 5 U.S.C. § 706(2)(E). The statute continues: "In making the foregoing determination[], the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706.

67 340 U.S. 474 (1951).

68 The Court stated:
Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement ... that courts consider the whole record.
340 U.S. at 487-88.

69 2 Davis and Pierce, supra note 64, § 11.2; Schwartz, supra note 5, §§ 10.7 to 10.11.

70 See Arthur Earl Bonfield, "The Federal APA and State Administrative Law," 72 Va.L.Rev. 297 (1986).

71 The 1961 Model State Administrative Procedure Act provided for agency action to be reversed when its factual findings were "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." 1961 Model Act § 15(g)(5), 15 U.L.A. 301 (1990). The official comment to the 1961 act specifically cited the federal APA whole record provision. Comment to section 15, 1961 Model Act, 15 U.L.A. 303 (1990). The 1981 Model State Administrative Procedure

Act provided for agency action to be reversed when its factual findings were "not supported by evidence that is substantial when viewed in light of the whole record...." 1981 Model Act, § 5-116(c)(7), 15 U.L.A. 127 (1990).

72 E.g., Baxter v. Arkansas State Board. of Dental Examiners, 269 Ark. 67, 75, 598 S.W.2d 412, 416 (1980); Thompson v. Wake County Board of Education, 292 N.C. 406, 410, 253 S.E.2d 538, 541 (1977). See also Schwartz, supra note 5, § 10.12 ("Most state courts increasingly purport to follow that requirement as stated in Universal Camera."); 73A C.J.S. Public Administrative Law and Procedure § 237 (1983 & Supp.1994)("record on the whole [review] ... should not be limited to evidence which supports the agency's findings or decision")(citing cases). Still, there are other courts that have looked only at evidence supporting the agency's finding, though not based on analysis of a statutory provision for whole record review. E.g., Chilton v. General Motors Parts Div., 634 S.W.2d 304, 305 (Mo. App. 1982) (evidence reviewed in light most favorable to agency findings).

73 Donald W. Brodie and Hans A. Linde, "State Court Review of Administrative Action: Prescribing the Scope of Review." 1977 Ariz. St. L.J. 537, 547-48 (1977). The article cited to Universal Camera and provisions of the 1961 Model Act on this point. Id. at nn. 48, 52.

74 For some examples of application of the present Kansas rules, see Sunflower Racing, Inc. v. Board of County Commissioners. 256 Kan. 426, 885 P.2d 1233 (1994)(applying negative findings test to review of agency findings); Beech Aircraft Corp. v. Kansas Human Rights Commission, 254 Kan. 270, 270, 864 P.2d 1148, 1150 (1993)(applying negative findings test to trial court's de novo findings in KJRA appeal); and Kaufman v. Kansas Dept. of SRS, 248 Kan. 951, 962, 811 P.2d 876, 884 (1991)(court ignores evidence contrary to agency findings in KJRA appeal). Even in de novo review, such as those from the Kansas Human Rights Commission (KHRC), the appeal is under KJRA. E.g., K.S.A. 44-1011 (KHRC appeals are pursuant to KJRA, but district court hears evidence de novo). Thus, K.S.A. 77-621(c)(7) is still applicable. Instead of considering the effect of the statutory language, the courts have simply continued to apply the old tests. Cf., Box v. Cessna Aircraft Co., 236 Kan. 237, 246, 689 P.2d 871, 879 (1984)(applying negative findings test to trial court's de novo findings in workers compensation appeal)(pre-KJRA).

75 Bernard Schwartz, Administrative Law § 10.7 at 640 (3d ed. 1991).

76 In re Appeal of Collingwood Grain, Inc., 257 Kan. 237, 237, 891 P.2d 422, 423 (1995)(Syllabus ¶ 2).

77 Zinke, 242 Kan. at 474, 749 P.2d at 25.

78 See note 74 and text at notes 54 to 56 supra. Prior to passage of KJRA, Kansas courts were allowed to review agency action under the substantial evidence test only to see that there was some evidence in the record to support the agency action. E.g., Coggins v. Public Employee Relations Board, 2 Kan. App. 2d 416, 418, 581 P.2d 817, 821 (1978). The "fair debate" phrasing of the test may be reasonably accurate under that standard of review. Although the "fair debate" phrasing was initially announced in an administrative law case under earlier statutes, Southern Kansas Stage Lines Co. v. Public Service Commission, 135 Kan. 657, 662, 11 P.2d 985, 987 (1932), it is most frequently applied today in zoning cases. E.g., Landau v. City of Overland Park, 244 Kan. 257, 263, 767 P.2d 1290, 1295 (1989). Because zoning cases involve the exercise of police powers, where the power is quite broad, the "fair debate" rule is properly applied in most states in such cases. E. C. Yokley, Zoning Law and Practice § 25.2 (4th ed. 1979 & Supp.1994).

79 The first statement is in accord with the 1981 Model Act comments to this section of the statute: "Substantial evidence is such evidence as might lead a reasonable person to make a finding. The evidence in support of a fact-finding is substantial when from it an inference of existence of the fact may be drawn reasonably. In such a case, the reviewing court must uphold the finding, even if it would have drawn a contrary inference from the evidence." Comment to § 5-116, 1981 Model Act, 15 U.L.A. 129 (quoting Bernard Schwartz, Administrative Law § 210 (1st ed. 1976)).

80 K.S.A. 77-621(c)(7) provides that the "agency action" is to upheld unless it is "based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole...." (emphasis added). It is the agency whose findings are given deference. Wolf Creek Golf Links, Inc. v. Board of County Commissioners, 18 Kan. App. 2d 263, 263, 853 P.2d 62, 62-63 (1993).

81 E.g., Beech Aircraft Corp. v. Kansas Human Rights Commission, 254 Kan. 270, 270, 275, 864 P.2d 1148, 1150, 1153 (1993); Elder v. Arma Mobile Transit Co., 253 Kan. 824, 824, 861 P.2d 822, 823, 824-25 (1993).

82 For example, in Reed v. Kansas Racing Commission, 253 Kan. 602, 860 P.2d 684 (1993), the court stated that it "must accept as true the evidence and all inferences drawn therefrom which support or tend to support the findings of the trial court." Id. at 609-10, 860 P.2d at 690 (citations omitted)(emphasis added). It appears that this misstatement was not relied upon in the court's actual analysis: the court clearly deferred to the agency's findings. "We do not evaluate credibility. We accept the KRC's version of the facts." Id. at 614, 860 P.2d at 693.

83 Pierce, Shapiro and Verkuil, supra note 5, § 7.3.1;2 Davis and Pierce, supra note 64, § 11.2; Aman and Mayton, supra note 40 § 13.4.2.

84 5 U.S.C. § 557(b). See Andersen, supra note 62, at 556 (discussing 5 U.S.C. § 557(b), 1981 Model Act § 4-216(d), and related policy considerations).

85 K.S.A. 77-527(d), based on 1981 Model Act § 4-216(d).

86 See Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074 (9th Cir.1977) (finding NLRB decision not supported by substantial evidence when contrary to credibility determination of administrative law judge on issue of improper motive, which is largely a credibility issue). See also sources cited in note 83 supra.

87 12 Kan. App. 2d 756, 758 P.2d 226, rev. denied, 243 Kan. 777, 758 P.2d 226 (1988).

88 E.g., Lincoln v. Kansas Department of Revenue, 18 Kan. App. 2d 635, 638, 856 P.2d 1357, 1359 (1993).

89 In an unpublished decision, the Kansas Court of Appeals approved the presentation of "explanatory evidence" to help the court determine the validity of the agency action and whether procedures had been proper. In re Protest of TXO Production Corp., 1988 Kan. App. Lexis 560 (Aug. 5, 1988). The valuation figures at issue were contained in documents in the record, but it appears that additional testimony was taken "to provide explanation of the complicated process of valuation of gas wells and not to provide additional evidence from which additional findings of fact were to be made." Id. at *7. Under the facts of that case, the procedure, and its approval, were appropriate. The Board of Tax Appeals had refused to accept stipulated values agreed upon, after taxes had been paid under protest, between the Harper County appraiser and the taxpayer; BOTA had also issued its ruling without granting a hearing. Id. at *2-*3. The appellate court affirmed the district court finding that BOTA had acted arbitrarily by failing to provide a hearing, id. at *6, and noted that the facts relied upon for the district court's ultimate findings were in documents in the record. 1d. at *8-*9. Since BOTA had not provided a hearing and the documents were not self-explanatory, it seems reasonable to allow explanatory testimony regarding them. While the district court would have had the authority to remand to BOTA to provide a hearing and make further findings, K.S.A. 77-622(b), it was not required to do so on these facts. Id.

90 Beech Aircraft Corp. v. Kansas Human Rights Commission, 254 Kan. 270, 864 P.2d 1148 (1993).

91 Zurawski v. Kansas Department of Revenue, 18 Kan. App. 2d 325, 851 P.2d 1385 (1993).

92 See Ryan, supra note 5, at 25-1 to 25-11 (3d ed. 1991).

93 Angle v. Kansas Department of Revenue, 12 Kan. App. 2d 756, 764, 758 P.2d 226, 233 (1988). See also Zurawski v. Kansas Department of Revenue, 18 Kan. App. 2d 325, 327-28, 851 P.2d 1385, 1387 (1993) (reviewing "different degrees of de novo review" under Kansas law).

94 16 Kan. App. 2d 537, 825 P.2d 1175 (1992), aff'd, 251 Kan. 677, 840 P.2d 448 (1992).

95 KDR argued on appeal that its hearings were non-adversarial in nature and, therefore, that it should be allowed to raise new issues on appeal. KDR Brief (6/4/92) at 14-19. It also argued that the KJRA did not require it to raise issues during the administrative hearing. Id. at 19. Finally, the KDR argued that requiring it to raise issues in such hearings would be unworkable, since it held 9,353 hearings statewide in 1993 through its four hearing examiners, but without attendance of a KDR attorney. Id. at 18. Meigs argued on appeal for application of the Angle rule: "The driver's license hearing before the KDR's hearing examiner is the forum in which the administrative agency, here the KDR, takes its action. The agency, through its agent, must take action either suspending, revoking or declining to suspend or revoke the driver's license. Once this action is taken, upon certain grounds and in the face of whatever arguments are made at the hearing, the administrative process is over. The

remainder of the proceedings are appellate in nature. New issues may not be raised for the first time on appeal in other cases, and the same rule holds for appeals from driver's license suspensions." Meigs Reply Brief (8/6/92) at 23 (citation omitted).

96 251 Kan. at 683, 840 P.2d at 453.

97 18 Kan. App. 2d 325, 851 P.2d 1385 (1993).

98 See note 95 supra regarding the extent of the KDR's hearing docket.

99 See text at notes 89 to 98 supra.

100 K.S.A. 77-606. While K.S.A. 77-603(b) does provide that KJRA "creates only procedural rights and imposes only procedural duties[, which] ... are in addition to those created and imposed by other statutes," that provision should not be read as incorporating wholesale the provisions of Chapter 60. The reference to "other statutes" should reasonably be understood to refer to the various statutes that provide specific procedures for specific agencies.

101 K.S.A. 77-522(a). See text at notes 13 to 19 supra. The initial version of K.S.A. 77-522(a) provided: "The presiding officer may issue subpoenas, discovery orders and protective orders in accordance with the rules of civil procedure." 1984 Kan. Sess. Laws chap. 313, § 22(a). When KAPA was passed, it applied to only a few state agencies. See Leben, supra note 1, at 680/-82. When amendments in 1988 broadened KAPA to apply to most state agencies, the discovery provision was narrowed, providing specifically that the presiding officer had the power to limit discovery "to the issues before the agency for determination." Leben, supra note 1, at 683-86 and note 26. The 1988 amendment to KAPA's discovery provision had a delayed effective date of July 1, 1989, and was never effective; a 1989 amendment changed the provision to its present from. Id.

102 These provisions are detailed in note 142 infra.

103 K.S.A. 77-522(a); In re Appeal of Collingwood Grain, Inc., 257 Kan. 237, 256-57, 891 P.2d 422, 435 (1995).

104 K.S.A. 60-226(b)(1). In addition, discovery under the rules of civil procedure only need relate to the "subject matter involved" in the action, not necessarily to the specific issues. Id.

105 When KAPA was broadened to include most state agencies, its discovery provision was narrowed considerably. See, note 101 supra. The discovery provisions of KAPA were hotly contested, which is shown by the amendment in 1989 of a KAPA discovery provision that had not yet gone into effect. Id.

106 See text at notes 93 to 98 supra.

107 In an unpublished decision, the Kansas Court of Appeals affirmed a trial court's denial of a request to take dispositions, including those of the Kansas State Board of Dental Examiners, which had issued the order at issue. Endicott v. Kansas State Board of Examiners of Dentists, No. 59,426 (July 16, 1987)(available on Lexis). The issues raised on appeal were whether there was substantial evidence to support the board's findings; whether due process was provided; whether the open meetings act had been followed; and whether the board's actions were unreasonable, arbitrary or capricious. The court noted that the agency "record clearly establishes that the statutory procedural requirements were fully complied with" and that K.S.A. 77-619 limited the issues as to which additional evidence could be received on appeal. Based upon these findings and the issues that were raised on appeal, the court found no abuse of discretion in the trial court's refusal to allow the appellant to take discovery depositions.

108 The relevant portion of his decision follows:
The next question before the Court is whether discovery may be allowed in a KJRA proceeding. K.S.A. 77-603(b) (Supp.1988) provides that the KJRA "creates only procedural duties. They are in addition to those created and imposed by other statutes." Id (emphasis added). Consequently, the Court finds that discovery procedures in the Kansas Code of Civil Procedure are also applicable to a KJRA proceeding.
Discovery is allowed under K.S.A. 60-226(b), when the evidence sought "appears reasonably calculated to lead to the discovery of admissible evidence." Jones v. Bordman, 243 Kan. 444, 455 (1988); see also K.S.A. 60-226(b) (Supp.1988).
K.S.A. 77-619(a) (1984) of the KJRA provides:
The court may receive evidence, in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

(1) Improper constitution as a decision-making body; or improper motive or grounds for disqualification, of those taking agency action; or
(2) unlawfulness of procedure or of decision-making process. Id.; see also Southwest Kansas Royalty Owners Ass'n v. Kansas Corporation Comm'n, 244 Kan. 157, 168 (1989) (K.S.A. 77-619 gives court discretion to receive additional evidence).
Petitioners claim that the applicable provision of K.S.A. 77-619 is K.S.A. 77-619(a)(2), referring to unlawful procedure or decision-making process. Accordingly, discovery is allowed as long as the evidence Petitioners seek appears to be "reasonably calculated to lead to the discovery of admissible evidence" relating "to the validity of the agency action at the time it was taken and ... needed to decide disputed issues regarding ... unlawfulness of procedure or of decision-making process." See K.S.A. 60-226(b) (Supp.1988); K.S.A. 77-619(a) (1984).
Memorandum Decision and Order at 5-6, City of Kansas v. Hayden, Case No. 89-CV-206 (Dec. 15, 1989)(emphasis in original).

109 "A court has certain inherent powers it may exercise — those reasonably necessary for the administration of justice — provided these powers in no way contravene or are inconsistent with substantive statutory law." Wilson v. American Fidelity Insurance Co., 229 Kan. 416, 416, 625 P.2d 1117, 1118 (1981). A trial court's inherent powers are broad, including the power to control its docket, In re Marriage of Soden, 251 Kan. 225, 231-32, 834 P.2d 358, 364 (1992), the power to compensate those who are called upon to assist it, Shelter Mutual Insurance Co. v. Williams, 248 Kan. 17, 31-32, 804 P.2d 1374, 1384 (1981), and the power to impose sanctions for litigation misconduct, Richards v. Bryan, 19 Kan. App. 2d 950, 951, 879 P.2d 638, 641 (1994). This power should include the authority to order limited discovery when no procedure has been explicitly provided and discovery has not been explicitly forbidden. A trial court's inherent power to order discovery has been recognized. State v. Gregg, 226 Kan. 481, 602 P.2d 85 (1979)(court has authority to order psychiatric exam of non-party crime victim, rejecting view that courts have no inherent authority to order such exams). See also Bortzfield v. Sutton, 180 Kan. 46, 52, 299 P.2d 584, 588 (1956)(trial court did not abuse discretion in denying inspection of premises in pending suit; opinion notes trial court statement that "such an order was within its authority). Cf. Pyramid Life, Insurance Co. v. Gleason Hospital, 188 Kan. 95, 360 P.2d 858 (1961)(Kansas does not recognize "equitable bill of discovery" in which suit may be brought against third party solely to obtain discovery).

110 See State v. Osoba, 234 Kan. 443, 672 P.2d 1098 (1983)(applying statutory provision by analogy); 2B Norman J. Singer, Statutes and Statutory Construction §§ 55.01 to 55.04 (5th ed. 1992).

111 Buchanan v. Kansas Department of Revenue, 14 Kan. App. 2d 169, 788 P.2d 285 (1989).

112 200 Kan. 447, 450, 436 P.2d 828, 831 (1968).

113 252 Kan. 30, 843 P.2d 176 (1992).

114 Brinson v. School District #431, 233 Kan. 465, 576 P.2d 602 (1978).

115 252 Kan. at 30, 843 P.2d at 177.

116 244 Kan. 257, 767 P.2d 1290 (1989).

117 Professor Ryan was apparently one of those operating under this interpretation. After the United Steelworkers cases cited here were issued, he wrote about "[t]he unfortunate demise of the simple thirty days to appeal calculation," which he called "the most significant development of the year and perhaps the decade since the inception of [KJRA]." 1993 Kansas Annual Survey, Administrative Law, at 1 (KBA 1993). Professor Ryan also stated that the United Steelworkers decision was "contrary to common belief and practice." Id.

118 17 Kan. App. 2d 863, 845 P.2d 89 (1993), reversed on non-KJRA grounds, 253 Kan. 327, 855 P.2d 905 (1993).

119 K.S.A. 44-1010.

120 19 Kan. App. 2d 1063, 880 P.2d 783 (1994).

121 Id. (Syllabus ¶ 4).

122 In re Appeal of Cessna Aircraft Co., 16 Kan. App. 2d 229, 821 P.2d 328 (1991).

123 K.A.R. 94-2-11(a).

124 247 Kan. 180, 795 P.2d 368 (1990).

125 242 Kan. 710, 750 P.2d 405 (1988).

126 K.S.A. 77-614(b) provides:
A petition for judicial review shall set forth:
(1) The name and mailing address of the petitioner;
(2) the name and mailing address of the agency whose action is at issue;
(3) identification of the agency action at issue, together with a duplicate copy, summary or brief description of the agency action;
(4) identification of persons who were parties in any adjudicative proceedings that led to the agency action;
(5) facts to demonstrate that the petitioner is entitled to obtain judicial review;
(6) the petitioner's reasons for believing that relief should be granted; and
(7) a request for relief specifying the type and extent of relief requested.

127 20 Kan. App. 2d 554, 887 P.2d 1147 (1995).

128 K.S.A. 77-614(c).

129 K.S.A. 60-212.

130 That decision was Knight v. Ringier America, Case No. 93C5130 (Journal Entry, Feb. 7, 1994, District Court of Johnson County)(Leben, D.J.). A later decision of the same district court was to the same effect, Tush v Unified Judicial Department 677, Case No. 93C10711 (Journal Entry, May 23, 1994, District Court of Johnson County)(Leben, D.J.) Neither of the losing parties in Knight and Tush docketed an appeal.

131 Even in the absence of a statutorily created right to appeal an administrative agency decision to the courts, illegal acts of public officials may be challenged through quo warranto, injunction or mandamus proceedings. Bush v. City of Wichita, 223 Kan. 651, 651, 576 P.2d 1071, 1072 (1978). In addition, even without statutory authority, constitutional challenges, such as a claim that required due process had not been provided in a license revocation proceeding, could be raised in a court challenge. Pierce, Shapiro and Verkuil, supra note 5, §§ 5.21 6.4.10.

132 Olathe Community Hospital v. Kansas Corporation Commission, 232 Kan. 161, 161, 167, 652 P.2d 726, 727, 731 (1982); Bush v. City of Wichita, 223 Kan. 651, 651, 654, 659-660, 576 P.2d 1071, 1072, 1074, 1077-78 (1978). “The legislature has full authority to establish procedural prerequisites to the exercise of jurisdiction by the district courts over administrative appeals.” Vaughn v. Nadel, 228 Kan. 469, 475-76, 618 P.2d 778, 784 (1980)(citations omitted).

133 E.g., W.S. Dickey Clay Manufacturing Co. v. Kansas Corporation Commission, 241 Kan. 744, 749-51, 740 P.2d 585, 589-91 (1987)(no jurisdiction when party fails to timely file to intervene and appeal); Claus, supra (no jurisdiction when service not obtained on agency head); Kansas Sunset Associates v. Kansas Department of Health and Environment, 16 Kan. App. 2d 1, 3-4, 818 P.2d 797, 799-800 (1991) (failure to appeal conditional permit when issued left court without jurisdiction to hear appeal when conditional event actually occurred three years later).

134 Kansas Sunset Associates, 16 Kan. App. 2d at 1, 818 P.2d at 798.

135 Resolution Trust Corp. v. Bopp, 251 Kan. 539, 539, 836 P.2d 1142, 1143 (1992)(“The right to appeal is statutory.... An appellate court has jurisdiction to entertain an appeal only if the appeal is taken within the time limitations and in the manner provided by the applicable statutes.”)(emphasis added). See also Cribbs v. Pacific Intermountain Express, 208 Kan. 813, 815, 494 P.2d 1142, 1145 (1972)(failure to complete all steps necessary to docket appeal within time set out in rule mandates dismissal of appeal).

136 As Professor Ryan has noted:
Obviously, the KJRA contemplates a petition that goes beyond the simple “notice” petition which was conceptually the cornerstone of the new Code of Civil Procedure a few decades ago in this state. The reason is quite simple. By having a universal remedy that is universally available under one form of action no matter what type of agency action is challenged,

the petition itself becomes significant in terms of identifying the type of agency action challenged. It is important to know whether the agency action is basically a rule challenge or is appeal of a specific order. One reason is critical. The time lines for filing the different types are significantly different.... In addition, because the remedies under K.S.A. 77-622 constitute the broad range of all remedies conceptually available, then the kind of agency action complained of need be identified and the kind of relief requested. In other words, specificity in pleading is necessary to provide a more manageable framework for processing the petition within this "universal" appeal structure.

Ryan, supra note 5, § 22.06 (emphasis added). Professor Ryan was involved in the drafting of the KJRA, Ryan, "The New Kansas Administrative Procedure Judicial Review Acts," 54 J Kan. Bar Assoc. 63 (1985), and, therefore, his comments regarding the standard of pleading intended under the KJRA are worthy of consideration. Professor Ryan's initial article explaining the KJRA also contained language virtually identical to that cited in the text above. Id. at 67. In this case, however, it is not necessary to rely upon Professor Ryan's treatise or article on this point.

137 16 Kan. App. 2d 12, 825 P.2d 172 (1991).

138 See text at nn. 150 to 152 infra.

139 Claus v. Kansas Department of Revenue, 16 Kan. App. 2d 12, 13, 825 P.2d 172, 173 (1991). Accord State v. Lovett, 17 Kan. App. 2it 450, 450, 454-55, 839 P.2d 53, 54, 56-57 (1992)(no provisions for substantial compliance under KJRA). As the court in Claus stated, "The language of the statutes is clear and unambiguous. We find service was improper and that the district court, and thus this court, has no jurisdiction over KDR." 16 Kan. App. 2d at 14, 825 P.2d at 173. See also Pork Motel Corp. v. Kansas Dept. of Health and Environment, 234 Kan. 374, 390, 673 P.2d 1126, 1139 (1983)(substantial compliance, expressly allowed in Chapter 60, is not provided for in Chapter 20, so Chapter 20 service provisions must be explicitly followed or court lacks jurisdiction); Anderson v. Kansas Department of Revenue, 18 Kan. App. 2d 347, 353-55, 853 P.2d 69, 74 (1993)(substantial compliance not applicable to service requirements of Chapter 8, following Claus).

140 Claus, supra; Lovett, supra. By contrast, in pre-KJRA days, when administrative appeals were pursuant to Chapter 60, K.S.A. 60-215 was cited to allow amendment of the jurisdictional statement of the notice of appeal. In re Lakeview Gardens, Inc., 227 Kan. 161, 167, 605 P.2d 576, 581 (1980). Further, when the Legislature has wanted to incorporate procedural provisions from Chapter 60 into other proceedings, it has done so by specific reference. In 1979, the Legislature amended K.S.A. 44-556 to provide that appeals from the district court to the Kansas Court of Appeals in a workers' compensation case must be filed within "thirty (30) days after the filing of the entry of judgment as provided in K.S.A. 60-258...." 1979 Kan. Sess. Laws Ch. 158, § 1. Based upon that provision, the court held that Chapter 60 applied to both the entry of judgment and post-judgment motions. Dieter v. Lawrence Paper Co., 237 Kan. 139, 697 P.2d 1300 (1985). This reference to Chapter 60 was removed from K.S.A. 44-556 when KJRA provisions were made applicable to workers' compensation cases and replaced by reference to K.S.A. 77-623, which provides that a district court's decision on a petition for review is "reviewable by the appellate courts as in other civil cases." 1986 Kan. Sess. Laws Ch. 318, § 57; K.S.A. 77-623. The 1986 amendment cited here made no substantive change, but was part of a large number of amendments incorporating KJRA provisions into existing statutes.

141 Rule 331 of the Iowa Rules of Civil Procedure provides: "Except to the extent that they are inconsistent with any provisions of the Iowa Administrative Procedure Act, Iowa Code chapter 17A, or within the rules specifically set forth in this division, the rules of civil procedure shall be applicable to proceedings for judicial review of agency action brought under that Act."

142 As already noted, the KJRA specifically provides that no answer need be filed, K.S.A. 77-614(c), while the rules of civil procedure require an answer. K.S.A. 60-212. KJRA has specific pleading requirements for a petition, K.S.A. 77-614(b), while the rules of civil procedure provide for notice pleading. K.S.A. 60-208. KJRA provides for substantial evidence review, K.S.A. 77-621(c)(7), while the rules of civil procedure apply a clearly erroneous test. K.S.A. 60-252(a). The KJRA provides its own three-day addition for mailing, K.S.A. 77-613(d), which would not have been needed had K.S.A. 60-206(e) have been considered applicable. And the companion KAPA, enacted at the same time as KJRA, specifically incorporated the "rules of civil procedure" with respect to the issuance of discovery subpoenas and orders, K.S.A. 77-522, while KJRA makes no mention of Chapter 60 at all. See also text at notes 102-04 supra.

143 Kansas Bill of Rights §§ 5, 18.

144 12 Kan. App. 2d 638, 753 P.2d 304 (1988).

145 There is also contradictory language in a post-Newton Country Club opinion. In United Steelworkers v. Commission on Civil Rights, 17 Kan. App. 2d 863, 865, 845 P.2d 89, 91 (1993), reversed on other grounds, 253 Kan. 327, 855 P.2d 905 (1993), the court said: "The legislature did not indicate in K.S.A. 77-613(b) an intention to have judicial review of an order of an administrative agency follow the same procedure as in appeals under the code of civil procedure."

146 The only case in which the Kansas Supreme Court has cited a Chapter 60 provision as being applicable to a KJRA appeal was the early case of Southwest Kansas Royalty Owners Assoc. v. Kansas Corp. Comm'n, 244 Kan. 157, 166, 769 P.2d 1, 9 (1989). The court said, "The district court is required under K.S.A. 77-621(b) and K.S.A. 60-252 to weigh the evidence from the record in order to make a separate and distinct ruling on each material issue on which its decision is based." Id. The challenge to the findings of the trial court was rejected and the citation to K.S.A. 60-252 is dicta. Moreover, there is clearly no reason to apply K.S.A. 60-252 to a KJRA appeal. First, the requirement of K.S.A. 60-252 that the court state its findings is redundant because K.S.A. 77-621(b) requires that the trial court "make a separate and distinct ruling on each material issue on which the court's decision is based." Second, the "clearly erroneous" standard for review of trial court findings under K.S.A. 60-252 is contrary to the "substantial evidence" standard found in K.S.A. 77-621(c)(7).

147 See K.S.A. 77-614(c)(other parties "may file an answer or other responsive pleading").

148 This is another way of saying that the requirement of K.S.A. 77-614 should be held mandatory, not directory. Other provisions of the KJRA, which prescribes the method for taking appeals from administrative proceedings, have been held mandatory, e.g., Claus, supra, and Lovett, supra, while provisions of KAPA, which direct agency actions during the proceedings, have been held directory. See note 35 supra.

149 In addition, even when the review is de novo, there is no reason for the district court reconsider portions of the administrative agency's decision that are not alleged by any party to be in error. A written statement of the alleged errors and a specific request for relief allows the district court to conserve its time by considering and addressing only the items actually at issue. The drafters of the Model State Administrative Procedure Act contemplated this time savings from the detailed pleading requirement. "The detail contained in this [statute] ... may also facilitate the judicial task, by requiring petitions to contain the specified material." Model State Administrative Procedure Act (1981), Comment to § 5-109.

150 16 Kan. App. 2d 12, 825 P.2d 172 (1991).

151 77-615(b).

152 Hale v. Substance Abuse Center East, Inc., 19 Kan. App. 2d 569, 873 P.2d 932 (1994).

153 16 Kan. App. 2d 1, 818 P.2d 797 (1991).

154 Fowles v. State, 254 Kan. 557, 565, 867 P.2d 357, 362 (1994).

155 Lindenman v. Umscheid, 255 Kan. 610, 619-20, 875 P.2d 964, 972 (1994).

156 This discussion is based upon a more detailed presentation in Leben, supra note 1, at 707-11.

157 Exhaustion is specifically required by statute. K.S.A. 77-612. For a general analysis of exhaustion doctrine, see Schwartz, supra note 5, §§ 8.33 to 8.35.

158 For a general description of primary jurisdiction doctrine, see Pierce, Shapiro and Verkuil, supra note 5, at §§ 5.8 to 5.9; Schwartz, supra note 5, at §§ 8.26 to 8.32.

159 In Board of County Commissioners v. Schmidt, 12 Kan. App. 2d 812, 758 P.2d 254 (1988), the court held that a taxpayer could not protest his tax assessment for the first time in a tax foreclosure action, but must follow the statutory procedure to pay the tax under protest. The court noted a legislative intent "to channel all tax matters through the BOTA" so as to gain from the board's expertise in tax matters. Id. at 815, 758 P.2d at 256. In State ex rel. Smith v. Miller, 239 Kan. 187, 718 P.2d 1298 (1986), a challenge that the tax statutes at issue were unconstitutional was dismissed on exhaustion grounds, the court noting that the taxpayer's "obvious complaint" was actually that the assessed valuation was too high, an issue as to which BOTA must provide initial review. Id. at 190, 718 P.2d at 1301.

160 Simmons v. Vliets Farmers Cooperative Association, 19 Kan. App. 2d 1, 861 P.2d 1345 (1993)(discrimination action against private parties dismissed for failure to exhaust administrative remedies by requesting rehearing of agency order refusing to hear complaint since court action had already been filed).

161 Expert Environmental Control, Inc. v. Walker, 13 Kan. App. 2d 56, 761 P.2d 320 (1988)(KJRA appeal filed two weeks after petition for agency reconsideration was filed dismissed for failure to exhaust administrative remedies).

162 Spor v. Presta Oil Co., 14 Kan. App. 2d 696, 798 P.2d 68 (1990). In Spor, the court held that a claim for back wages may be brought in court without first making claim through the Secretary of Human Resources. The court relied upon long-standing examples of wage act claims that had been brought in court without first bringing an administrative claim and noted that the statute at issue specifically provided that a claim "may be brought in any court of competent jurisdiction." In this situation, the court held that the court and the agency had concurrent jurisdiction and that the claimant had a choice of forum. The KJRA exhaustion provision is not applicable in this situation, because no agency action is at issue.

163 In Mattox v. Kansas Department of Transportation, 12 Kan. App. 2d 403, 747 P.2d 174 (1987), a litigant brought proceedings before both the Civil Service Board and the Civil Rights Commission arising out of an alleged wrongful termination from state employment. The Board held the termination reasonable; the employee did not appeal or request rehearing, but had a discrimination claim pending at that time before the Commission. When the Commission later issued a "no probable cause" letter, the employee sued under the discrimination act claim that had been before the Commission. The court held the claim barred by the exhaustion doctrine because he had not exhausted his appeal and rehearing rights before the Board, which had the right to order his reinstatement. Although a later case has indicated that a negative Board finding does not in any way preclude judicial relief via res judicata, Parker v. Neurological Institute, 13 Kan. App. 2d 685, 778 P.2d 390 (1989), the Mattox exhaustion holding has not been questioned by the Court of Appeals.

164 Vann v. Employment Security Board of Review, 12 Kan. App. 2d 778, 756 P.2d 1107 (1988).

165 Colorado Interstate Gas Co. v. Beshears, 18 Kan. App. 2d 814, 860 P.2d 56 (1993).

166 Zarda v. State, 249 Kan. 529, 826 P.2d 1365 (1992)(party seeking tax refund must exhaust administrative remedies before raising constitutional challenge to tax assessment in court, even though agency has no authority to decide constitutional issue).

167 Dean v. State, 250 Kan. 417, 826 P.2d 1372 (1992) (administrative process must first be utilized to allow agency to provide its interpretation of statute at issue); Farmers Banshares of Abilene, Inc. v. Graves, 250 Kan. 520, 826 P.2d 1363 (1992)(same).

168 11 Kan. App. 2d 336, 341, 720 P.2d 1132, 1136 (1986).

169 Id. at 342, 720 P.2d at 1137.

170 Id. at 337-38, 342, 720 P.2d at 1134, 1137. Other Kansas cases regarding the primary jurisdiction doctrine are reviewed at Leben, supra note 1, at 710-11.

171 Pierce, Shapiro and Verkuil, supra note 5, § 5.9; Schwartz, supra note 5, § 8.30.

172 Neunzig v. Seaman Unified School District No. 345, 239 Kan. 654, 722 P.2d 569 (1986). For a general discussion of the application of res judicata and collateral estoppel to decisions made in agency adjudications, see Aman and Mayton, supra note 40, § 11.1; and Davis and Pierce, supra note 64, § 13.3

173 17 Kan. App. 2d 213, 837 P.2d 1319 (1992).

174 In Parker v. Kansas Neurological Institute, 13 Kan. App. 2d 685, 778 P.2d 390 (1989), the court held that res judicata did not preclude pursuit of a discriminatory discharge claim in court despite a negative finding by the Civil Service Board because the Board was not empowered to provide complete relief. See, also Dyer v. Kansas Neurological Institute 1990 Kan. App. Lexis 817 (Nov. 2, 1990)(unpublished opinion)(relying on and summarizing Parker holding); Best v. State Farm Mutual Automobile Insurance Co., 953 F.2d 1477, 1480-81 (10th Cir.1991)(criticizing Parker analysis as to relief available under Kansas law claim of discrimination).

175 Cases granting preclusive effect to Kansas agency findings include Morales v. Kansas State University, 1990 U.S. App. Lexis 25880 (10th Cir.1990)(res judicata applied to Kansas Civil Service Board findings in Title VII action); Hayes v. Kansas Department of Human Resources, 1994 U.S. Dist. Lexis 15938, 66 Fair Empl. Prac. Cas. 656 (D.Kan. 1994)(same). Cases refusing to give such effect include Scroggins v. State of Kansas, 802 F.2d 1289, 1292-93 (10th Cir.1986)(res judicata not applied to Kansas Civil Service Board findings in Title VII action); Gutierrez v. Board of County Commissioners, 791 F.Supp. 1529, 1533-34 (D.Kan. 1992)(res judicata not applied to findings of Kansas unemployment compensation hearing).

176 16 Kan. App. 2d 93, 819 P.2d 138 (1991), rev. denied, 250 Kan. 805 (1992).

177 401 U.S. 402 (1971).

178 401 U.S. at 416.

179 Sidney A. Shapiro and Robert L. Glicksman, "Congress, The Supreme Court and the Quiet Revolution in Administrative Law," 1988 Duke L.J. 819, 862 (1988).

180 See id. at 862-63; Sidney A. Shapiro and Richard E. Levy, "Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions," 1987 Duke L.J. 387, 436-39 (1987); Richard J. Pierce Jr., Sidney A. Shapiro and Paul R. Verkuil, Administrative Law and Process § 6.4.6b (2d ed. 1992).

181 16 Kan. App. 2d at 105, 819 P.2d at 147.

182 Kaufman v. Kansas Department of SRS, 248 Kan. 951, 811 P.2d 876 (1991); Vakas v. Kansas Board of Healing Arts, 248 Kan. 589, 808 P.2d 1355 (1991).

183 E.g., Water District No. 1 v. Kansas Water Authority, 19 Kan. App. 2d 236, 242, 866 P.2d 1076, 1081 (1994)(federal APA findings requirement cited as authoritative regarding similar Kansas statutory provision); Peck v. University Residence Committee, 248 Kan. 450, 464, 807 P.2d 652, 662 (1991)(citing federal district court decision discussing when a regulation is void for vagueness, which would make it "unreasonable" under Kansas administrative case law).

184 E.g., see text at notes 84-85 supra.

185 467 U.S. 837 (1984).

186 463 U.S. 29 (1983).

187 Professor Shapiro made these statements in a Kansas Bar Association Administrative Law Section seminar on March 12, 1993, in Topeka. The written outline of his remarks on "Federal and State Administrative Law" are available from the KBA. They are reported in June 1993 Kan. Bar Assoc. Admin. L. Sec. Newsletter at 2-3. Professor Shapiro is the John M. Rounds Professor of Law at the University of Kansas School of Law.

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