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# North Carolina's New Administrative Procedure Act: An Interpretive Analysis

Charles E. Daye

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# NORTH CAROLINA'S NEW ADMINISTRATIVE PROCEDURE ACT\*: AN INTERPRETIVE ANALYSIS

CHARLES E. DAYE†

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\* Readers are cautioned to compare the language discussed in this article with the Act as it may be amended during the 1975 legislative session, especially section 1, N.C. GEN. STAT. § 150A-1 (Supp. 1974).

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This article was prepared in cooperation with the North Carolina Law Center and is an outgrowth of administrative law seminars conducted at the University of North Carolina School of Law in the spring sessions of 1973 and 1974. Although the views expressed herein are the responsibility of the author, special appreciation is expressed to the students—now alumni—who as members of those seminars contributed to the research on the below identified subjects. The students in alphabetical order are: Grainger R. Barrett—rulemaking; John G. Ciconne—adjudication; Terry L. Collins—adjudication; Kenneth M. Johnson—policy and publication; Steven R. Jurash—judicial review; J. Kirk Osborn—rulemaking; Ms. Elizabeth H. Pope—judicial review; Billy Gene Sandlin—policy and definitions; Bryce O. Thomas, Jr.—judicial review; and Peter J. Underhill—licensing. Additionally an expression of appreciation is due to Richard H. Weisberg, who served ably as research assistant for this article.

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## I. INTRODUCTION

A. *Scope and Purpose of Article*

In its 1974 special session the North Carolina General Assembly enacted an administrative procedure act.<sup>1</sup> When the Act becomes effective on February 1, 1976, North Carolina for the first time will have a comprehensive statute governing major parts of the procedures by which most agencies of the State execute their functions. The Act also sets out procedures that are to govern the relationship between the agencies and citizens affected by agency action and the relationship between agencies and the courts.<sup>2</sup>

As might be expected of comprehensive legislation, the Act will raise a number of interpretive questions, some relatively minor, but others quite significant.<sup>3</sup> The purpose of this article is to discuss some of these questions.<sup>4</sup> When interpretation will be aided, comparisons will be made with other state administrative procedure provisions<sup>5</sup> or

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1. In this article the statute will be referred to as the "North Carolina Administrative Procedure Act," the "NC APA," or "the Act," N.C. GEN. STAT. §§ 150A-1 to -64 (Supp. 1974).

2. Prior to the enactment of the NC APA several individual statutes had been enacted to govern aspects of administrative procedure in the State, some of which the new law repeals and others which it incorporates without substantial change. See text accompanying notes 16, 151, 187, 223, 228-29, 288, 291 *infra*. However the NC APA is the first attempt in this State to bring together in one comprehensive statute many of the significant general provisions governing administrative procedure.

3. It should be noted that the drafters of the Act and the General Statutes Commission worked under time constraints, and together with the Legislature, had to anticipate political constraints. Moreover, hindsight and detached reflection, none of which were available prior to enactment, are likely to improve one's perception. Accordingly, none of the comments herein should be taken as criticism of the efforts involved, nor as impugning the Act. On the contrary, it is the author's judgment that the Act constitutes a substantial and important step in the right direction.

4. The provisions of NC APA governing publication will not be discussed in this article. Article 5 of the NC APA contains publication provisions which in substance are identical to provisions previously proposed but not enacted. These provisions are discussed by Professor Bell of Wake Forest University School of Law in Bell, *Administrative Law: The Proposed North Carolina Statutes for Registration and Publication of State Administrative Regulations*, 8 WAKE FOREST L. REV. 309 (1972).

Moreover, since the NC APA addresses administrative procedure, as opposed to "substantive" doctrines, this article will be limited to the scope of the statute. Several administrative law substantive areas therefore will not be discussed, *e.g.*, the delegation doctrine and the separation of powers principle. Similarly, substantive agency functions and powers are set forth in organic acts creating the agencies (or enabling legislation) which will not be affected by the NC APA. Thus such acts will not be discussed.

5. A survey undertaken in connection with research for this article reveals that about thirty states have adopted varying kinds of administrative procedure statutes. Provisions of other state administrative procedure acts are cited in various parts of this article.

cases interpreting them as well as the federal legislation in this area.<sup>6</sup> Finally, reference will be made to North Carolina laws and judicial doctrines when this will help clarify understanding of the new statute.

### B. Importance of Administrative Action

At the federal level, since the turn of the century, there has occurred a gradual rise in the activities and number of agencies. In the thirties a rapid proliferation of federal administrative agencies took place.<sup>7</sup> A similar pattern emerged in the states.<sup>8</sup> The reasons for such a trend generally have been attributed to the practical advantages of agency action over all available alternatives, the trend toward preventive or remedial legislation, and the need for expeditious disposition of a large volume of business, related to a similar or generalized subject matter.<sup>9</sup>

It may be asserted with confidence today that the action of administrative agencies so pervasively impinges on the daily lives of citizens and has become so thoroughly accepted as a mode of carrying out government business that the phenomenon often goes largely unnoticed.<sup>10</sup> The *North Carolina Manual*, which attempts a comprehensive listing of state agencies, boards, commissions, departments, and bureaus—all broadly classifiable as administrative agencies—has over one hundred entries.<sup>11</sup>

6. The federal legislation is generally referred to as the Federal Administrative Procedure Act, although no longer codified in United States Code as a single unit. See 5 U.S.C. §§ 551-58, 701-06, 1305, 3105, 3344, 5362, 7521 (1970).

7. See generally ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 7-11 (1941) [hereinafter cited as ATTORNEY GENERAL'S REPORT]; K. DAVIS, ADMINISTRATIVE LAW—CASES, TEXT, PROBLEMS 6-10 (1973).

8. See R. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 9 (1942); I F. COOPER, STATE ADMINISTRATIVE LAW 1-7 (1965).

9. ATTORNEY GENERAL'S REPORT, *supra* note 7, at 11-18. The compendium of reasons for the rise of agencies in the cited reference was given with respect to federal agencies. These reasons seem sufficiently related to the generally recognized unique advantages of agency action to be applicable to state agencies as well. Moreover, no basis readily appears for distinguishing between federal and state agencies in terms of the nature and quality of the subject matter these agencies have been created to oversee.

10. Mr. Justice Jackson, dissenting over twenty years ago, in *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952), stated that "[t]he rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values are today affected by their decisions than by those of all the courts . . . ." Similarly Professor Kenneth C. Davis, the renowned administrative law scholar, has stated that "the administrative process affects nearly everyone in many ways nearly every day." K. DAVIS, *supra* note 7, at 3.

11. NORTH CAROLINA SECRETARY OF STATE, NORTH CAROLINA MANUAL 699-792 (1973). In popular parlance it is sometimes asserted that at least two things in human experience are certain—death and taxes. Given the present pervasive character of their

### C. Background of the NC APA

North Carolina's administrative procedure act is the product of an Administrative Procedure Drafting Committee, which began work in 1970 under the aegis of the Revisor of Statutes of the General Statutes Commission.<sup>12</sup> The Committee began preparation of a comprehensive administrative procedure act<sup>13</sup> that was submitted to the General Statutes Commission which, in turn, recommended the draft bill for enactment.<sup>14</sup> The bill was introduced in the 1973 Session and was enacted in the 1974 Session on April 12, 1974.<sup>15</sup>

The Act repeals Chapter 150 of the General Statutes which was the Uniform Revocation of Licenses Act, and the "evidence," publication, and judicial review provisions.<sup>16</sup>

## II. THRESHOLD CONSIDERATIONS

### A. Overview of Administrative Procedure

Before proceeding to a discussion of the provisions of the NC APA, a few basic concepts should be isolated.<sup>17</sup> The basic purpose of a comprehensive administrative procedure act (APA) is to provide minimum uniform standards to govern administrative action. To be "comprehensive" an act must contain provisions governing administrative adjudication, rulemaking, judicial review of agency action, and publication of administrative pronouncements.<sup>18</sup> Under such procedural acts the two unique types of agency functions are identified.

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activities one might add administrative agencies. See, e.g., N.C. GEN. STAT. §§ 90-203 to -210.17 (1965), as amended, (Cum. Supp. 1974) (embalmers and funeral directors); *id.* § 105-269.2 (1972) (tax review board). See also 1 F. COOPER, *supra* note 8, at 7.

12. For a discussion of the Committee's formation, members and operations see Bell, *supra* note 4, at 310-12.

13. *Id.* at 326 n.55.

14. General Statutes Comm'n, Docket No. 250/252 (1972).

15. Act of April 12, 1974, ch. 1331, [1973] N.C. Sess. Laws 691 (codified at N.C. GEN. STAT. §§ 150A-1 to -64 (Supp. 1974)).

16. *Id.*, repealing N.C. GEN. STAT. §§ 150-1 to -34, 143-195 to -198.1, 143-306 to -316, 143-317 to -318 (1974).

17. The reader familiar with the lexicon of administrative law may not need this review and may wish to proceed directly to Part II B *infra*.

18. These elements of comprehensiveness are developed from the statement of the National Conference of Commissioners on Uniform State Laws of "major principles" embraced by the Model State Administrative Procedure Act, first adopted by the conference in 1944. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 195 (1946) [hereinafter cited, e.g., as 1946 HANDBOOK]. The full statement of the Commissioners was as follows:

- (1) Requirement that each agency shall adopt essential procedural rules and that, so far as practicable, all rulemaking, both procedural and substantive,

Administrative agencies may take action which affects a particularly identified person who is a party to a proceeding before the agency.<sup>19</sup> This function is generally characterized as quasi-judicial and is generally defined in state acts as a "contested case."<sup>20</sup> When this adjudicatory function is involved, statutory provisions and often due process require adequate notice stating the grounds for the action, and require the holding of an evidentiary hearing prior to taking the action. Often there may be restrictions on evidence which may be relied upon, as well as a requirement that a record of the evidence be maintained. A party who will be affected by an adjudicatory decision must be given an opportunity to present evidence and argument at the hearing. The decisionmaker must rely only upon evidence adduced at the hearing in reaching a decision and must furnish to all affected persons a written decision which states findings and reasons for the decision.

As distinguished from adjudicatory (or quasi-judicial) functions, an agency may take an action which affects a general group or class of persons. The group may be composed of all persons engaged in a particular activity—for example, all persons selling fertilizer, or using pesticides or manufacturing a particular item. Agencies may affect the manner in which members of this class of persons carry on their businesses. The agency would then issue a general pronouncement applicable to all persons in the group or class. A pronouncement of general applicability is often referred to as a rule or regulation,<sup>21</sup> although other terms, such as "standard" or "policy," may also be used.

The agency process which results in a rule is characterized as

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- shall be accompanied by notice of hearing to interested persons;
- (2) Assurance of proper publicity for administrative rules that affect the public;
  - (3) Provision for advance determination or "declaratory judgments" on the validity of administrative rules, and provision for "declaratory rulings" affording advance determination of the application of administrative rules to particular cases;
  - (4) Assurance of fundamental fairness in administrative hearings, particularly in regard to rules of evidence and the taking of official notice in quasi-judicial proceedings;
  - (5) Provision assuring personal familiarity on the part of the responsible deciding officers and agency heads with the evidence in quasi-judicial cases decided by them;
  - (6) Assurance of proper scope of judicial review of administrative orders to guarantee correction of administrative errors.

*Id.*

19. See text accompanying notes 171-73 *infra*.

20. *Id.*

21. See text accompanying notes 69-72 *infra*.

rulemaking. Quite often this process is classified as quasi-legislative, by analogy to the legislature's enactment of a statute.<sup>22</sup> With participation in the rulemaking process by persons who will be affected by a proposed rule, the agency will be better informed and will thereby be better able to discharge its legislatively assigned duties.

Rulemaking provisions thus require notice to persons likely to be affected by a rule under consideration and an opportunity to be heard.<sup>23</sup> When the agency has not issued a rule, persons may petition for adoption of one. Conversely, when the agency has adopted a rule, persons may petition for its amendment or repeal.<sup>24</sup>

Formality in adjudication and rulemaking functions is limited for the same reasons that prompted the creation of administrative agencies. The adjudication requirements preserve the essential safeguards of fair procedure without unduly restraining agencies from acting expeditiously; yet all the rigors of court proceedings are not imposed.<sup>25</sup>

Administrative procedure acts universally recognize that emergency situations may require quick agency action. Thus emergency rulemaking provisions permit agency action—to protect the public health, safety or welfare—without observing general rulemaking requirements which would forestall quick action. Because of its summary nature, emergency rulemaking is an extraordinary proceeding. Its use is circumscribed with requirements that emergency conditions be specified and that a limit be placed on the period for which such rules may be effective.<sup>26</sup>

Since important rights may be adversely affected because of arbitrary, unlawful, discriminatory, or overly zealous agency conduct, procedure acts incorporate, in varying ways, the general principle of judicial review. Review is generally initiated by a petition to the court.<sup>27</sup> Since the functions of agency adjudication and rulemaking affect rights in different ways, the scope of review is different.<sup>28</sup> The primary difference is that a more extensive review is provided for adjudication<sup>29</sup> than for rulemaking.<sup>30</sup>

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22. *Id.*

23. See text accompanying notes 98-140 *infra*.

24. See text accompanying notes 148-70 *infra*.

25. See text accompanying notes 202-09, 222-37 *infra*.

26. See text accompanying notes 141-47 *infra*.

27. See text accompanying notes 346-47 *infra*.

28. See text accompanying notes 360-62 *infra*.

29. See text accompanying notes 363-404 *infra*.

30. See text accompanying notes 405-11 *infra*.

It should be noted, however, that administrative agencies are vital and unique mechanisms for executing legislatively determined governmental business. Therefore courts must not usurp roles created for agencies since agencies frequently possess skills and subject matter experience courts do not have and judicial time should not be consumed second guessing agencies since this would result in both waste of agency time and judicial inefficiency. But since agencies possess no greater skills for interpreting constitutional and statutory requirements than do courts, it is generally considered that courts are free to substitute their judgments for those of the agencies on such matters. On factual questions, however, special agency skills may be involved. Thus administrative procedure acts generally provide that courts may reverse or modify agency decisions in limited circumstances.<sup>31</sup>

Publication provisions of administrative procedure acts have the purpose of requiring agencies to inform citizens of agency determinations which may affect them. In furtherance of this purpose such acts provide various means for providing information to the public. All generally applicable rules on substantive matters and procedures for complying with requirements of statutes administered by agencies are required to be filed in a central location. Often a state official is required to arrange and compile agency rules and to publish them in a manner available to the public at large.<sup>32</sup>

## B. Basic Principles of the NC APA

### (1) General Purpose

The basic purpose of the NC APA, as stated in section 1(b),<sup>33</sup> is to establish, to the extent possible, uniform administrative procedures for agencies.<sup>34</sup> However, this purpose is subject to two significant qualifications. The Act does not apply where any other "statute makes specific provisions to the contrary." Secondly, the Act contains a complete exemption of the Employment Security, Industrial, and Utilities Commissions, and the Occupational Safety and Health Re-

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31. See text accompanying notes 368-411 *infra*.

32. As noted, this article will not discuss the publication provisions of the NC APA. See generally Bell, *supra* note 4.

33. "The purpose and intent of this Chapter shall be to establish as nearly as possible a uniform system of administrative procedure for State agencies." N.C. GEN. STAT. § 150A-1(b) (Supp. 1974).

34. This purpose is similar to that which was first stated by the National Conference of Commissioners on Uniform Laws. See note 18 *supra*.

view Board, and a partial exemption for the Department of Motor Vehicles and the Department of Revenue<sup>35</sup> from the Act's rulemaking<sup>36</sup> and adjudication provisions.<sup>37</sup>

No logical basis for the exemption of the Industrial and Utilities Commissions is apparent. The exemption of the Employment Security Commission and the Occupational Health and Safety Review Board might have been based on their extensive federal regulatory relationship. The partial exemption of the Departments of Revenue and Motor Vehicles might have been influenced by the sheer volume of driver's and revenue licenses involved, as well as the limited utility the required procedures would have in the vast majority of cases.<sup>38</sup>

The logic of the provisions respecting conflict with other statutes seems clearly to avoid interpretive problems, but those provisions may themselves raise problems; for example, determining the scope of the "inapplicability" of the NC APA (*i.e.* the "extent" and "particulars" in which another statute "makes specific provisions to the contrary" of the Act). The wording of the "specific provision to the contrary" clause, however, should be strictly construed, as it evinces a legislative purpose that the Act's inapplicability should exist only in narrow respects.<sup>39</sup>

Uniformity, to the extent that the NC APA is applicable, is potentially limited in two other important respects. The rulemaking provisions establish *minimum* requirements—when other statutes establish additional requirements, such additional requirements continue to exist over and above the NC APA.<sup>40</sup> Moreover, the Act's judicial re-

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35. This Chapter shall apply except to the extent and in the particulars that any statute makes specific provisions to the contrary. The following are specifically exempted from the provisions of this Chapter: the Employment Security Commission; the Industrial Commission; the Occupational Safety and Health Review Board; and the Utilities Commission. However, Articles 2 and 3 of this Chapter shall not apply to the Department of Motor Vehicles or the Department of Revenue.

N.C. GEN. STAT. § 150A-1(a) (Supp. 1974).

36. *Id.* §§ 150A-9 to -17. See text accompanying notes 69-170 *infra*.

37. N.C. GEN. STAT. §§ 150A-23 to -37 (Supp. 1974). See text accompanying notes 171-286 *infra*.

38. Drivers licenses are issued or denied based upon a standardized test. Revocations are mandatory upon judicial adjudication that certain violations have been committed by the licensee. See N.C. GEN. STAT. §§ 20-1 to -319.2 (1965). Revenue licenses are issued upon payment of the required fee that is statutorily prescribed. See *id.* §§ 105-1 to -270 (1972).

39. In a few rare instances an entire agency function may be exempted from the Act when it can be determined that an entire function is governed by a statute that "makes specific provisions to the contrary."

40. N.C. GEN. STAT. § 150A-9 (Supp. 1974).

view provisions may be invoked only when "adequate procedure" is not provided by some other statute.<sup>41</sup>

## (2) The Definitional Coverage of the Act

The administrative bodies to which the Act applies are determined by the definition of "agency." The NC APA contains a broad definition of "agency,"<sup>42</sup> with specific exceptions by category, although no attempt is made in the definition section to name individual agencies excepted.<sup>43</sup>

An administrative body of the executive branch of state government, (however described—board, institution, commission, bureau, department, council) is included in the definition of "agency." Excluded by the definition are four categories of bodies: (1) agencies in the legislative or judicial branches of state government, (2) the political subdivisions of the State (cities, towns, counties) or agencies thereof, (3) other bodies that are local in nature (as opposed to state-wide), and (4) private corporations created by legislative act.<sup>44</sup>

41. *Id.* § 150A-43. See text accompanying notes 294-306 *infra*.

42. State APA's evidence three basic approaches to definitional applicability:

(1) Broad definitions, *e.g.*, ALASKA STAT. § 44.62.640(a)(4) (Cum. Supp. 1974); ARIZ. REV. STAT. ANN. § 41-1001(1) (1974); FLA. STAT. ANN. § 120.52(1) (Supp. 1974); ILL. ANN. STAT. ch. 127, § 263 (Smith-Hurd 1967); W. VA. CODE ANN. § 29A-1-1(a) (1971).

(2) Broad definitions, with specific exceptions of listed bodies, *e.g.*, GA. CODE ANN. § 3A-102 (Supp. 1974); MD. CODE ANN. art. 41, § 244 (Supp. 1973); MICH. STAT. ANN. § 3.560(103) (Supp. 1974); VA. CODE ANN. § 9-6.2(a) (Supp. 1974).

(3) No general definition but the statute contains a list of agencies covered, *e.g.*, CAL. GOV'T CODE § 11500(a) (West 1966); OHIO REV. CODE § 119.01 (Page Supp. 1973).

43. "Agency" means every agency, institution, board, commission, bureau, department, division, council, member of Council of State, or officer of the State government of the State of North Carolina but does not include those agencies in the legislative or judicial branches of the State government; and does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State or any agencies of such subdivisions, or county or city boards of education, other local public districts, units or bodies of any kind, or private corporations created by act of the General Assembly.

N.C. GEN. STAT. § 150A-2(2) (Supp. 1974).

44. The exclusions of agencies in the legislative or judicial branches, municipal corporations and political subdivisions are easy enough to work with. See *generally* Board of Trustees v. Webb, 155 N.C. 379, 71 S.E. 520 (1911); McCormac v. Commissioners of Robeson, 90 N.C. 452, 456 (1884).

The express exclusion of county or city boards of education but the failure to exclude boards of trustees of the state colleges or universities raises the question whether boards of trustees fall within any of the exclusions. It seems clear that colleges and universities come within the terms "agency, institution, board, bureau, department . . . of the State government." Similarly they are not "in" the legislative or judicial branches of the State government. Are they "other municipal corporations or political subdivi-

## (3) The Functions Governed by the Act

In a particular case, if it is determined that an administrative body is not exempted from the Act and is included in the Act's definition of "agency," the Act governs any agency functions in the areas covered. Stated generally, the Act's functional applicability is triggered if a covered administrative body engages in the making of "rules" or the determining of "contested cases," as these terms are defined.<sup>45</sup> When a covered function is involved, reference must be made to the particular procedures applicable to the function in question.

Licensing has been given special recognition in the Act.<sup>46</sup> Given

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sions of the state?" The terms "municipal corporations" and "political subdivisions" have been interpreted to mean quasi-public corporations for governmental purposes created out of a subdivision of the state's territory. *Board of Trustees v. Webb, supra*. They have been seen as related to power to act within a geographic district, such as counties, townships, school districts and road districts. *McCormac v. Commissioners of Robeson, supra*. Arguably these terms are so related to geographic divisions that they would not include state entities that are not geographically limited. Are the universities "other local public districts, units or bodies of any kind?" Under the 1971 legislation which consolidated the several state colleges and universities into the "University of North Carolina," there is created the "Board of Governors of the University of North Carolina," as a governing body with statewide jurisdiction. N.C. GEN. STAT. §§ 116-1, -3 (Supp. 1974). On different facts but in a similar context, the North Carolina Supreme Court has drawn a distinction between statewide and local bodies in defining "agency." *Humble Oil & Ref. Co. v. Board of Aldermen*, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974) (interpreting the term "agency" as applying only to an agency of "statewide jurisdiction," although the provision contained no exclusion of local bodies as the NC APA does).

Accordingly, since the consolidation law gave the Board of Governors of the University of North Carolina statewide jurisdiction of higher education in North Carolina, it appears that the Board of Governors is not covered by the exclusion of local bodies from the definition of "agency."

The final exclusion of "private corporations created by the Act of the General Assembly" would not seem to include the University of North Carolina because by definition the University is not a "private corporation" but is a "body politic." N.C. GEN. STAT. § 116-3 (Cum. Supp. 1974).

It should be noted that *In re Carter*, 262 N.C. 360, 137 S.E.2d 150 (1964), held N.C. GEN. STAT. § 143-306 (1974) (repealed by NC APA) applicable to an individual university; but that statute did not contain the "local bodies" exclusion contained in section 2(1) of NC APA.

45. The Act contains two definitions of "rule"—one for purposes of the rulemaking provision, N.C. GEN. STAT. § 150A-10 (Supp. 1974), and a slightly different one for purposes of the publication and registration provisions, *id.* § 150A-58. The definition of "contested case" determines the action which generally must be preceded by a hearing, *id.* § 150A-23, and, in general, action that is subject to judicial review, *id.* § 150A-43.

Although the Act contains special provisions when the function of "licensing" is involved, licensing is itself included in the definition of contested case and thus would be covered under the Act in any event. *Id.* § 150A-2(2).

46. The Act contains two relevant definitions: "'License' means any certificate, permit or other evidence, by whatever name called, of a right or privilege to engage in a trade, occupation, or other activity, except licenses issued under Chapter 20 and Subchapter I or Chapter 105 of the General Statutes." *Id.* § 150A-2(3). "'Licensing' means any administrative action issuing, failing to issue, suspending or revoking a li-

the inclusion of the licensing function within the definition of "contested case," thus bringing it within the procedural protections applicable to the adjudicatory function,<sup>47</sup> the reasons for according additional treatment to licensing are unclear. Several practical reasons might be advanced. The Revised Model State APA, which has influenced the formulation of many state APA's, contains special provisions on licensing.<sup>48</sup> In addition special attention to licensing is perhaps warranted because of the sheer number of licensing agencies,<sup>49</sup> as

cense." *Id.* § 150A-2(4).

It should be noted that consistently with the partial exemption from the Act of the Department of Motor Vehicles and the Department of Revenue, licenses issued in connection with motor vehicles, *id.* §§ 20-1 to -319.2 (1965), and for revenue purposes, *id.* §§ 105-1 to -270 (1972), are excluded from the definition of license.

47. See text accompanying note 276 *infra*.

48. REVISED MODEL STATE APA, § 14 (1970 version). The Model State APA originally promulgated by the Commissioners did not contain special licensing provisions. See 1946 HANDBOOK, *supra* note 18, at 191-217. These were added by the Commissioners in the 1961 revisions with the comment that "in view of the widespread importance of the subject in state affairs, it would seem desirable to take notice of certain other facets of the matter." 1961 *id.* at 220.

49. Prior to the adoption of the NC APA, chapter 150 of the General Statutes contained the Uniform Revocation of Licenses Act. Section 9 of the Licenses Act listed the following licensing boards which will now fall within the NC APA:

Board of Architecture, N.C. GEN. STAT. § 83-8 (1965);

Board of Barber Examiners, *id.* § 86-11;

Board of Certified Public Accountant Examiners, *id.* § 93-12(5);

Board of Chiropody Examiners, *id.* §§ 90-191, -192;

Board of Chiropractic Examiners, *id.* §§ 90-143, -145;

Board of Contractors, *id.* § 87-10;

Board of Cosmetic Art Examiners, *id.* § 88-17;

Board of Dental Examiners, *id.* § 90-29 (Supp. 1974);

Board of Electrical Contractors, *id.* § 87-42;

Board of Examiners of Electrical Contractors, *id.* § 87-42 (1965);

Board of Embalmers and Funeral Directors, *id.* § 90-210;

Board of Registration for Engineers and Land Surveyors, *id.* § 89-7;

Board of Nursing, *id.* § 90-168;

Board of Examiners for Nursing Home Administrators, *id.* § 90-278 (Supp. 1974);

Board of Opticians, *id.* § 90-240 (1965);

Board of Examiners in Optometry, *id.* § 90-118 (Supp. 1974);

Board of Osteopathic Examiners and Registration, *id.* § 90-131 (1965);

Pesticide Board, *id.* § 143-442 (1974);

Board of Examiners of Plumbing and Heating Contractors, *id.* § 87-21 (Supp. 1974);

Examining Committee of Physical Therapists, *id.* § 90-260;

Board of Examiners of Practicing Psychologists, *id.* § 90-270.11;

Real Estate Licensing Board, *id.* § 93A-3 (1965);

Board of Refrigeration Examiners, *id.* § 87-57;

Veterinary Medical Board, *id.* § 90-183;

Water Treatment Facility Operators Board of Certification, *id.* § 90A-24 (Supp. 1974);

Wastewater Treatment Plant Operators Board of Certification, *id.* § 90A-38 (1965).

In addition, an examination of other statutory provisions has disclosed the following state departments or agencies involved in the licensing function which are not solely for

well as the fact that occupational licensing directly affects a person's ability to earn a livelihood<sup>50</sup> and "regulatory" licensing immediately affects the public health, welfare or safety.<sup>51</sup>

### C. *The Necessity for Balancing Competing Considerations*

One overriding interpretive norm seems applicable to all questions which might arise under the Act: a balancing of the desirable, but often competing, considerations which affect administrative action. The reasons for creating administrative agencies include efficiency, speed, volume, flexibility and informality. Weighed against these are fairness considerations—equitable treatment of persons in like circumstances, notice, opportunity to participate, regularized process, articulated reasons for agency action and overall "rationality" in agency process. The inherent clash of such objectives can only be minimized by careful balancing in particular instances. The balancing must also weigh the interests affected by agency action, the press of volume, the need for expeditious agency action and the number and costs of

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revenue generating purposes:

- Commissioner of Agriculture, *id.* §§ 106-50.4, -65.14, -168.4, -277.18 (1966);
- Child Day-Care License Board, *id.* § 110-88 (Supp. 1974);
- Board of Conservation and Development, *id.* §§ 113-152, -154 to -156 (1966);
- Department of Conservation and Development, *id.* § 113-114;
- Board of Education, *id.* § 115-153 (Supp. 1974);
- Commissioner of Game and Inland Fisheries, *id.* § 113-91 (1966);
- Department of Human Resources, *id.* § 130-176 (1974);
- Commissioner of Insurance, *id.* §§ 58-40, 85A-2 (1965);
- Board of Landscape Architects, *id.* § 89A-4 (Cum. Supp. 1974);
- Board of Law Examiners, *id.* § 84-24 (1965);
- Board of Commissioners of Navigation and Pilotage of Cape Fear River, *id.* § 76-3;
- Board of Commissioners of Navigation and Pilotage of Old Topsail Inlet, *id.* § 76-28;
- Structural Pest Control Committee, *id.* § 106-65.27 (1966).

50. This occurs in two ways: (1) The administration of criteria and qualifications for *initial entry* into a profession or occupation. *See, e.g., id.* § 58-41.1 (Supp. 1974) (insurance agent or adjuster); *id.* §§ 76-3, -28 (1965) (pilots); *id.* § 83-8 (Supp. 1974) (architects); *id.* § 84-24 (attorneys); *id.* §§ 86-3 to -5 (1965) (barbers); *id.* § 87-10 (Supp. 1974) (contractors); *id.* §§ 89-7(b) to -8 (1965) (engineers and surveyors); *id.* § 110-91 (Supp. 1974) (day care centers); (2) The administration of professional standards of conduct or practice for *continued* professional or occupational *qualification*. *See, e.g., id.* § 76-3 (1965) (pilots); *id.* § 83-9 (architects); *id.* § 84-28 (Supp. 1974) (attorneys); *id.* §§ 87-11, -13 (1965) (contractors); *id.* § 89-9 (engineers and surveyors); *id.* § 110-91 (Supp. 1974) (day care centers).

51. Through the licensing function general regulatory controls may be established for activities that affect the public health, safety or welfare; *e.g., id.* §§ 130-171 to -176 (1974) (licensing bedding manufacturers to insure sanitation); *id.* §§ 143-215.105 to .114 (permits to control sources of water pollution); *id.* §§ 72-46 to -49 (1965) (permits, after inspection, to regulate sanitation of eating and food preparation establishments).

providing staff personnel.

While *maximum* efficiency might call for autocratic, procedureless action, such "efficiency" in a society of laws is manifestly out of place. Citizens must be prepared to pay the costs, sacrifice the speed, suffer the formality and tolerate the inefficiency—which in the aggregate may be substantial—inherent in an attempt to insure a greater degree of fairness. The NC APA explicitly recognizes these principles.<sup>52</sup>

In determining the applicability of the NC APA to agency action, the Act properly avoids a need to determine whether the action is "formal" or "informal." But in delineating the scope of its applicability, problems are encountered that have a conceptual similarity to those presented in classifying agency action as formal or informal. Thus a brief discussion of the classification problem may be helpful. As will be seen, a balancing process is involved.

Strictly speaking, all administrative action (other than perhaps purely ministerial nondiscretionary functions) may be classified as "formal" or "informal."<sup>53</sup> The classification dichotomy traditionally has carried with it fundamental consequences.<sup>54</sup> Professor Kenneth

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52. *Id.* § 150A-1(b) (Supp. 1974) requires a uniform system of administrative procedure "as nearly as possible." Rules promulgated under the Act must be adopted "in substantial compliance"—not literal compliance—with the rulemaking provisions. *Id.* § 150A-9. The adjudication provisions employ terms such as opportunity for hearing without "undue delay" and "reasonable" notice of a hearing. *Id.* §§ 150A-23(a), (b). The judicial review section authorizes a court order compelling action when "unreasonable delay" on the part of the agency is found. *Id.* § 150A-44.

53. This, of course, is a substantial oversimplification, but seems analytically sound. Cf. Clagett, *Informal Action—Adjudication—Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51 ("all administrative decision-making involving the formulation of policy is divided into three parts: informal action, rulemaking, and formal adjudication"). Since it would appear that rulemaking, for most purposes, can be divided into formal and informal rulemaking, see Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974), separating out rulemaking does not seem necessary for purposes of this discussion.

54. The dichotomy originates, in large measure, from the Federal APA. See Clagett, *supra* note 53, at 52 n.3, generally defining the term "informal" as "those formulations of agency policy which are subject neither to the notice and public-participation requirements of sections 553(b) and (c) [of the Federal APA, 5 U.S.C. §§ 553 (b)-(c) (1970)] nor to the requirements of a formal adjudication [required to be determined on the record after opportunity for an agency hearing by *id.* § 554(a)]."

However, analysis under the Federal APA of the distinction between "formal" and "informal" action resolves into something like an Alice-in-Wonderland situation anyway: formal adjudication is agency action which, under the Federal APA, is "required by statute to be determined on the record after opportunity for an agency hearing," *id.* § 554 (a), and formal rulemaking is agency action which, again under Federal APA, is required by statute to be made on the record after opportunity for an agency hearing. *Id.* §§ 553(c), 556-57. This all works fine when some other statute requires a "record" and a "hearing," but as can be seen, the Federal APA lends scant guidance to a determination of the administrative decision-making model applicable in the absence of such

Culp Davis, one of the eminent scholars of administrative law, argues most persuasively that eighty to ninety percent of all administrative action is "informal" in the sense that it is neither accompanied by a hearing nor subject to judicial review.<sup>55</sup> The largest amount of attention in the administrative law field has been given to the ten percent of formal administrative action mostly in attempts to perfect oral hearing procedures<sup>56</sup> or to formulate boundaries between formal rule-making and adjudication procedures.<sup>57</sup>

It is doubtful that a formal mode of procedure for all administrative action would ever be advocated (even if one excluded purely ministerial administrative functions). The reasons are not difficult to see. The capacity of agencies to render judgments (whether in a rulemaking or adjudication context) utilizing an informal decisionmaking model is one of their unique capacities. A degree of informality may be essential if agencies are to accomplish the missions assigned to them with flexibility and expedition. Also state agencies characteristically are smaller than federal agencies,<sup>58</sup> both in agency officers and in staff,<sup>59</sup> which has fairly obvious implications for the extent to which such agencies can be expected to formalize procedures.

Accordingly, the impulse to include an increasingly larger portion of agency action within the coverage of the Act by labeling such action "formal," and thus subjecting it to the rigors of all the requirements of the NC APA, must be resisted. As will be discussed more fully,<sup>60</sup> the

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requirements founded upon other statutes, or when the other statutes require a hearing, but no record.

55. K. DAVIS, *supra* note 7, at 516. The statement was made primarily in connection with federal agencies. It seems equally applicable to state agencies, if not more so.

56. *Id.*

57. Clagett, *supra* note 53, at 53. Mr. Clagett suggests that one way to deal with the vast ninety percent of administrative action that is informal—at least at the federal level—is to restrict the realm of such action by bringing more of it within the ambit of either formal rulemaking or adjudication—and thus presumably according such previously informal action the full panoply of procedural rigors applicable to formal action.

Speaking generally and in a traditional sense, this would include a requirement of a participation opportunity by parties (perhaps with an oral "hearing"), the making of a transcript or other verbatim record, some restriction on the type of "evidence" which may be relied upon, a decision with articulated reasons in written form, and the availability of judicial review. *But see* Verkuil, *supra* note 53, at 230-44.

58. State agencies may have part-time commissioners, smaller geographic jurisdiction, limited assistance from staff and the like. 1 F. COOPER, *supra* note 8, at 3-5.

59. This is not intended to imply that all state agencies are smaller than all federal agencies. Indeed some state agencies are quite substantial. For example, the North Carolina State Highway Commission employs over 10,000 persons, and the Board of Health over 600.

60. See text accompanying notes 69-79 and 171-87 *infra*.

Act's broad formulations could be read literally to extend formal procedural requirements to all agency action<sup>61</sup> (other than perhaps purely ministerial, nondiscretionary functions).<sup>62</sup> Such a reading would be counterproductive and unwise.<sup>63</sup> The Act should be interpreted to accomplish its essential purposes rather than to insure literal compliance. These purposes are assurance of fundamental fairness by the agency to persons whose interests are affected,<sup>64</sup> reasoned decisions and actions,<sup>65</sup> and creation of an adequate basis to permit the courts to ascertain the propriety of the decision or action.<sup>66</sup> Such purposes<sup>67</sup> are applicable to formal as well as "informal-looking" action where any exercise of discretion is involved. Accordingly, a quest for a rigid or fixed dividing line between the supposed discrete realms of formal and informal action need not be undertaken. In interpreting the NC APA the most productive inquiry to determine its applicability to particular agency functions is to ask where the best balance can be struck between the essential purposes of the Act on the one hand and the practical

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61. *E.g.*, N.C. GEN. STAT. § 150A-2(2) (Supp. 1974) defines "contested case" as "any agency proceeding, by whatever name called, wherein the legal rights, duties or privileges of specific parties are to be determined." As to contested cases sections 21-36 prescribe procedures applicable.

Similarly, section 10, with exceptions, defines "rule" to include each "regulation, standard or statement of general applicability that implements or prescribes law or policy . . . ." *See id.* §§ 150A-9, -11 to -17.

62. While empirical study would be necessary to determine the precise effects such an interpretation might have, it may be reasonable to assume that many state agencies could not comply with the full procedural rigors of the NC APA in the vast bulk of their actions, because of lack of sufficient personnel or because present personnel would, without further training, lack the technical and legal skills necessary in many instances. To equip agencies for such full compliance would likely prove prohibitively expensive. *See also* R. BENJAMIN, *supra* note 8, at 13-15.

63. The added time and money costs to taxpayers of requiring such procedures likely could not be justified where either the risk or substantial procedural error is slight or the adverse effect on an interest by a procedural error is likely to be insubstantial or harmless.

64. This requires notice of procedures available, and of agency action contemplated a reasonable time in advance of the action to permit a response by one affected and fair evaluation of the response, if any.

65. This requires that a deciding officer be familiar with the evidence, that any decision be based upon a sufficient quantum of probative evidence, that evidence or factual matter to be relied upon be available for scrutiny by an affected party, that decisions rendered be unaffected by bias or prejudice, and that decisions be within statutory purposes and powers.

66. This requires that a decision reveal the facts it relies upon, the conclusions derived from the facts and the legal basis upon which the decision rests.

67. *See generally* F. BENJAMIN, *supra* note 8, at 36-44; 1961 HANDBOOK, *supra* note 18, at 204. The foregoing statement of purposes is intended only briefly to summarize categories of basic considerations and not to constitute an exhaustive compendium of the detailed aspects of administrative procedure which might touch upon the purposes. To do so would, of course, require a multi-volume treatise. *See* 1-4 K. DAVIS, ADMINISTRATIVE LAW TREATISE (1958) [hereinafter cited as DAVIS, TREATISE].

reasons calling for agency action and flexibility on the other.<sup>68</sup>

### III. RULEMAKING: THE LEGISLATIVE ANALOGY

#### A. *Characteristics of the Rulemaking Function*

An agency's promulgation of a rule (*i.e.* rulemaking) is in many respects analogous to the legislature's enactment of a statute.<sup>69</sup> However, no single general description can encompass all the facets of this function.<sup>70</sup> Moreover, in its various permutations rulemaking shades almost indistinguishably into agency adjudication.<sup>71</sup> One helpful definition of "rulemaking" is "the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations . . ."<sup>72</sup>

This definition will be relevant for a number of purposes. It may become necessary to distinguish between a rulemaking decisional model and an adjudicatory model to determine the procedures applicable within the agency, the mode of seeking judicial review, and, in some instances, the applicable scope of review.<sup>73</sup> Also it is necessary to classify rules according to type as "procedural," "interpretive," or "legislative."<sup>74</sup> The type of rule so described may be a relevant consideration in determining the extent to which a deviation from the precise provisions of the Act can be permissible and in applying to specific

68. In its initial implementation, administrative agencies will be called upon to comply with the provisions of the Act. In many instances they will have the advice and guidance of the Office of the Attorney General. But even so, numerous interpretive issues will arise as to specific provisions. The best agencies can do is make a good faith interpretation, guided by considerations such as those outlined. The state supreme court, of course, will have the final word on interpretation. It is to be hoped that the court's interpretation will reflect such basic considerations as well in cases when they arise.

69. See generally 1 DAVIS, *TREATISE*, *supra* note 67, § 5.01.

70. See generally Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259 (1938).

71. Rulemaking, though of general applicability, may in fact involve only one or two parties, who, for example, are engaged in the activity being regulated. In this instance rulemaking can begin to look very much like adjudication.

72. Fuchs, *supra* note 70, at 265. See also 1 DAVIS, *TREATISE*, *supra* note 67, § 5.01, at 286-87.

73. See text accompanying notes 152-54, 171-74, and 315-21 *infra*.

74. 1 F. COOPER, *supra* note 8, at 173-76. "Procedural" rules might conceptually be seen as not constituting a distinct category of rules, but as either "legislative" or "interpretive" depending upon whether the rules are promulgated with a statutory grant of rulemaking power ("legislative") or whether they purport merely to "explain" statutory requirements ("interpretive"). 1 DAVIS, *TREATISE*, *supra* note 67, § 5.03, at 299-300. Moreover, it is necessary to separate out procedural rules because the NC APA contains special requirements governing rulemaking and rules involving agency procedures. See text accompanying notes 95-97 *infra*.

facts such terms as "substantial compliance"<sup>75</sup> and "best calculated."<sup>76</sup>

Moreover, it should be noted that, depending upon the factual context in which rulemaking occurs, differences in procedural requirements or the meaning of terms may be reasonable. Such factual contexts can be grouped as follows: (1) the character of the parties affected; (2) the nature of the problems to be dealt with; (3) the character of the administrative determination; (4) the types of administrative agencies exercising the rulemaking function; and (5) the character of enforcement which attaches to the resulting regulations.<sup>77</sup>

With these general considerations in view, we turn now to the specific provisions of the NC APA. For purposes of the rulemaking provisions, the Act defines "rule" as any "agency regulation, standard or statement of general applicability that implements or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency," including the "amendment or repeal of a prior rule," and lists six exclusions.<sup>78</sup> Thus an administrative pronouncement which sets forth law or policy or sets out the manner of operation of an agency or the manner in which persons may appear before the agency is encompassed within the definition of "rule." Since this definition standing alone is sufficiently broad as to encompass the vast bulk of pronouncements by agencies, the significant interpretive questions are likely to involve the six exclusions.

The first exclusion contains two parts: (1) statements concerning *only* "internal management" of the agency which (2) do not affect private rights or procedures available to the public.<sup>79</sup> Accordingly, a statement regarding internal management *and* subject matter not excluded from the term "rule" is covered under the Act.<sup>80</sup> Similarly, an internal management statement which affects private rights or the procedures available to the public is within the term "rule," notwithstanding its concern with internal management.<sup>81</sup>

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75. N.C. GEN. STAT. § 150A-9 (Supp. 1974).

76. *Id.* § 150A-12(c).

77. Fuchs, *supra* note 70, at 266-73.

78. See notes 79-87 and accompanying text *infra*.

79. N.C. GEN. STAT. § 150A-10(1) (Supp. 1974).

80. Perhaps if an "internal management" statement can be severed from other included subjects, it would appear that the exclusion would apply to the severed internal management part, thus leaving only the other included subject covered by the rulemaking provisions.

81. Internal management has been given a practical interpretation under the Federal APA. It has been held that a post office rule requiring that all categories of overseas mail be routed by the most expeditious air service without regard to type of aircraft used did not fall within the internal management exclusion, notwithstanding that it was

The second exclusion concerns "declaratory rulings" issued under section 17 of the Act and is discussed below.<sup>82</sup> The third exclusion is intra-agency memoranda, *except* those "to agency staff which implement or prescribe law or policy."<sup>83</sup> Statements of policy or interpretations that are made in the decision of a contested case are covered by the fourth exclusion.<sup>84</sup> The fifth exclusion is rules "concerning use or creation of public roads or facilities which are communicated to the public by use of signs or symbols."<sup>85</sup>

The exclusion of "interpretive rules" and "general statements of policy" from the definition of "rule"<sup>86</sup> is likely to raise significant questions. In developing the parameters of the interpretive-rule exclusion, it may be useful to consider the other classifications, mentioned above, into which rules may be placed, *i.e.* procedural and legislative.<sup>87</sup>

### (1) Procedural Rules

Generally speaking, agency procedural rules are those pronouncements that relate to *how* the agency executes the functions charged to it and to the steps persons must take in dealing with the agency.<sup>88</sup> The NC APA sets out in section 11 special additional requirements for procedural rules.<sup>89</sup> It requires that agencies adopt rules of practice set-

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directed to employees, because it substantially affected interests of parties outside the agency. *Seaboard World Airlines, Inc. v. Gronouski*, 230 F. Supp. 44 (D.D.C. 1964).

82. N.C. GEN. STAT. § 150A-10(2) (Supp. 1974). *See* text accompanying notes 155-70 *infra*.

83. N.C. GEN. STAT. § 150A-10(3) (Supp. 1974).

84. *Id.* § 150A-10(4). However, it would appear that if the agency, based on the result in a contested case, desired to promulgate a general rule to govern a matter in the future based on a given set of facts, the promulgation would constitute a rule subject to rulemaking requirements unless within another exclusion.

85. *Id.* § 150A-10(5). This exclusion would not appear to be troublesome because it is limited to actions of agencies which are communicated to the public by "signs or symbols."

86. *Id.* § 150A-10(6).

87. *See* E. GELLHORN, *ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL* 122-27 (1972).

88. 1 F. COOPER, *supra* note 8, at 173-74.

89. Special requirements.—In addition to other rulemaking requirements imposed by law, each agency shall:

- (1) Adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency.
- (2) Make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions.
- (3) With respect to all final orders, decisions, and opinions made after July 1, 1975, make available for public inspection together with all materials that were before the deciding officers at the time the final

ting forth all procedures available (including a description of forms used) and make available for public inspection all rules or other written matter pertaining to how the agency conducts its business.<sup>90</sup>

## (2) Legislative Rules

Many statutes invest the agency created with a power "to issue rules and regulations to carry out the purposes of this act."<sup>91</sup> For an agency to promulgate legislative rules, such a statutory rulemaking power or, at least, a statutory inference that a rule or regulation may have authoritative force, is necessary.<sup>92</sup> Legislative rules fill the interstices of statutes. They go beyond mere interpretation of statutory language or application of such language and within statutory limits

order, decision, or opinion was made, except materials properly for good cause held confidential.

N.C. GEN. STAT. § 150A-11 (Supp. 1974).

90. For example, a statement of how hearings may be sought (even if the hearing itself would be part of a contested cause) would involve procedures available to aggrieved persons. Accordingly, an agency's formulation or statement of procedures for seeking a contested case hearing would constitute a rule and thus be subject to the rule-making provisions. *See, e.g.*, 1 F. COOPER, *supra* note 8, at 173 n.1, 174 n.3; 1 DAVIS, *TREATISE, supra* note 67, § 5.03, at 299.

91. A survey of the general statutes has shown that agencies with rulemaking powers can be separated into two broad classifications: (1) those with generally described rulemaking powers and (2) those with rulemaking powers relating to specific subjects. Agencies with general powers include:

Board of Agriculture, N.C. GEN. STAT. § 106-139(a) (1966);  
 Commission for the Blind, *id.* § 143B-157 (1974);  
 Department of Natural and Economic Resources, *id.* § 113-8 (Cum. Supp. 1974);  
 Commissioner of Insurance, *id.* § 143-146 (1974);  
 John H. Kerr Reservoir Committee, *id.* § 143B-328 (Supp. 1974);  
 Commissioner of Labor, *id.* § 110-18 (1966);  
 Structural Pest Control Committee, *id.* § 106-65.29 (Cum. Supp. 1974);  
 Commission for Health Services, *id.* § 143B-142 (1974);  
 Board of Pensions, *id.* § 112-8 (1966);  
 Pesticide Board, *id.* § 143-437 (1974);  
 Ports Authority, *id.* § 143-218(11);  
 Rural Rehabilitation Corporation, *id.* § 137-32.1;  
 Agency for Surplus Property, *id.* § 143-64.2(b);  
 Wildlife Resources Commission, *id.* § 113-81.7(2) (1966).

Rulemaking authority with respect to specific matter is granted to the agencies enumerated below (although this does not preclude the existence of a general rulemaking power):

Board of Agriculture, *id.* § 106-50.15 (1966);  
 Advisory Budget Commission, *id.* §§ 143-53(1)-(11) (1974);  
 Building Code Council, *id.* §§ 143-138, -146(c)-(d);  
 Board of Education, *id.* §§ 115-11, 115A-5 (Cum. Supp. 1974);  
 Department of Natural and Economic Resources, *id.* § 113-391 (Cum. Supp. 1974);  
 Ports Authority, *id.* § 143-224(c) (1974);  
 Social Services Commission, *id.* § 143B-153.

92. 1 F. COOPER, *supra* note 8, at 175-76.

set down additional substantive requirements.<sup>93</sup>

### (3) Interpretive Rules

Generally speaking, interpretive rules carry no sanction, and if a sanction is involved, it is seen as emanating from the statute.<sup>94</sup> Interpretive rules and general policy statements of agencies are excluded from the rulemaking provisions,<sup>95</sup> while procedural rules and substantive legislative rules are not excluded, unless falling within one of the other exclusions of the Act.<sup>96</sup> In determining the rulemaking requirements applicable to particular rules, courts are not limited to the label placed on the rule by the agency, but will look instead to the substance of the rule in question.<sup>97</sup> It should be emphasized that careful scrutiny of the substance of the rule in question is critical, since the interpretive-rule exclusion, if not confined to proper boundaries, could well subsume the rulemaking provisions.

#### B. Promulgation of Rules

Assuming an administrative pronouncement constitutes a rule and does not fall within one of the exclusions of section 10, the rulemaking procedures are applicable. With respect to such covered rules two distinguishing procedural norms are recognizable: general rulemaking (in circumstances other than an emergency) to which the basic requirements of the Act apply; and emergency rulemaking which permits disregard of several requirements normally applicable.

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93. See R. BENJAMIN, *supra* note 8, at 294.

94. See generally Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretive Rules and General Statements of Policy Under the A.P.A.*, 23 AD. L. REV. 101, 108-13 (1971).

95. N.C. GEN. STAT. § 150A-10(6) (Supp. 1974).

96. See *id.* §§ 150A-10(1)-(5).

97. *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 481-82 (2d Cir. 1972) (Secretary's action suspending "Precertification List" exempting aliens engaged in certain occupations from requirement of showing job offer at time of entrance visa application was subject to rulemaking requirement of the Federal APA, notwithstanding agency label placing the action in category excluded from rulemaking requirements since the action changed existing rights and obligations); *Pharmaceutical Mfrs. Ass'n v. Finch*, 307 F. Supp. 858 (D. Del. 1970) (regulations that had substantial impact on regulated industries were not within interpretive rule exclusion of the Federal APA); *accord*, *Gibson Wine Co. v. Snyder*, 194 F.2d 329 (D.C. Cir. 1952); *cf.* *American President Lines, Ltd. v. Federal Maritime Comm'n*, 316 F.2d 419 (D.C. Cir. 1963) (Commission rule interpreting requirements of Shipping Act not subject to judicial review under the Federal APA since Commission rule had no binding effect but was essentially opinion of the legal staff).

## (1) Non-Emergency Rulemaking—The Basic Procedural Norm

As previously noted, the Act provides that, with the exception of emergency rulemaking, no rule adopted after the effective date of the Act<sup>98</sup> shall be valid unless adopted in "substantial compliance" with the rulemaking requirements.<sup>99</sup> The basic procedural requirements for rulemaking are designed to assure that agencies adopt essential procedural rules and, so far as practicable, that all rulemaking, both procedural and substantive, be accompanied by notice of hearing and an opportunity for interested persons to present information for the agency's consideration.<sup>100</sup> These basic requirements are contained in section 12.<sup>101</sup>

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98. The Act becomes effective on February 1, 1976. Law of April 12, 1974, ch. 1331, § 54.4, [1973] N.C. Sess. Laws 691, 703.

99. **Minimum procedural requirements.**—It is the intent of this Article to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative rules. Except for emergency rules which are provided for in G.S. 150A-13, the provisions of this Article are applicable to the exercise of any rule-making authority conferred by any statute, but nothing in this Article repeals or diminishes additional requirements imposed by law or any summary power granted by law to the State or any agency thereof. No rule hereafter adopted is valid unless adopted in substantial compliance with this Article.

N.C. GEN. STAT. § 150A-9 (Supp. 1974).

100. This statement of basic procedural requirements is a modified version of the statement made by the Commissioners in connection with the Model State APA, 1946 HANDBOOK, *supra* note 18, at 200.

101. **Procedure for adoption of rules.**—(a) Before the adoption, amendment or repeal of a rule, an agency shall give notice of a public hearing and offer any person an opportunity to present data, views, and arguments. The notice shall be given within the time prescribed by any applicable statute, or if none then at least 10 days before the public hearing and at least 20 days before the adoption, amendment, or repeal of the rule. The notice shall include:

- (1) A reference to the statutory authority under which the action is proposed.
- (2) The time and place of the public hearing and a statement of the manner in which data, views, and arguments may be submitted to the agency either at the hearing or at other times by any person.
- (3) A statement of the terms or substance of the proposed rule or a description of the subjects and issues involved, and the proposed effective date of the rule.

(b) The agency shall transmit copies of the notice to the Attorney General and all persons who have requested the agency in writing for advance notice of proposed action which may affect them. The notices shall be in writing and shall be forwarded by mail or otherwise to the last address specified by the person.

(c) The agency shall publish the notice as prescribed in any applicable statute or, if none, shall publish the notice in a manner selected by the agency as best calculated to give notice to persons likely to be affected by the proposed rule. Methods that may be employed by the agency, depending upon the circumstances, include publication of the notice in one or more newspapers of general circulation or, when appropriate, in trade, industry, governmental or professional publications. If the persons likely to be affected by the proposed rule are unorganized or diffuse in character and location, then the agency shall publish the notice as a display advertisement in at least three newspapers of general circulation in different parts of the State.

(a) *Notice of proposed rulemaking—adoption, amendment, or repeal of a rule*

In order for an opportunity to participate in rulemaking to be effective, there must, of course, be adequate notice to the persons who would participate. One primary aspect of adequacy is the time between notice and the hearing. The NC APA requires that notice be given at least ten days before the hearing and at least twenty days before the adoption, amendment, or repeal of a rule, unless another statute specifies a different notice period.<sup>102</sup>

A second aspect of the adequacy of notice is whether the persons receiving it are informed of the substance and effect of the rule proposed so that an assessment of the rule's impact on their interests and an informed decision about a formal presentation can be made.

The NC APA confronts this problem by requiring that the notice refer to the statutory authority under which the rulemaking is proposed, state the time, place and manner in which a presentation may be made to the agency, and contain a statement of the terms or substance of the proposed rule or the subjects or issues involved.<sup>103</sup> The NC APA follows the Model Act's notice theory rather than state statutes which always require a full text or informative summary of the proposed rule.<sup>104</sup> Nevertheless it would appear that in most instances the agency should set forth the full text (or tentative text) of the proposed rule under consideration if the proposed rule is not so lengthy that including the text in the notice would be unduly expensive. However, when undue expense would make textual inclusion unwise or the text of the proposed rule is technical (or for some other reason would not be informative) the agency should include a concise but informative summary.<sup>105</sup>

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(d) The public hearing shall comply with any applicable statute but is not subject to the provisions of this Chapter governing contested cases, unless a rule is required by law to be adopted pursuant to adjudicatory procedures.

(e) The agency shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule, the agency, if requested to do so by an interested person either prior to adoption or within 30 days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the consideration urged against its adoption.

N.C. GEN. STAT. § 150A-12 (Supp. 1974). On the general question of rulemaking procedure see E. GELLHORN, *supra* note 87, at 127-31. For broader treatment see 1 DAVIS, *TREATISE, supra* note 67, at §§ 6.01-.04.

102. N.C. GEN. STAT. § 150A-12(a) (Supp. 1974).

103. *Id.*

104. See 1 F. COOPER, *supra* note 8, at 188-89.

105. It has been held that inadequacy of the notice of proposed rulemaking invali-

The third aspect of notice adequacy is the method and scope of dissemination. Section 12 provides that "any person" must be given an opportunity to present data, views, and arguments. While it might be argued that some kind of universal notice should be given, since there is unlimited opportunity to make a presentation before the agency, practically speaking only persons who are significantly affected are likely to undergo the expense or devote the time required to make a presentation.

Moreover, the statute specifies that the notice be disseminated in three ways. First, copies of the notice are to be sent to the Attorney General.<sup>106</sup> Second, persons who have requested notice must be given direct written notice by mail (or other appropriate means) in advance of the action proposed and within the applicable time limit.<sup>107</sup> Third, with respect to the general public, the agency is required to give notice by publication as required by statute, or if no statute specifies a publication method, in a manner "best calculated" to give notice to persons "likely to be affected by the proposed rule."<sup>108</sup> Here the exercise of informed judgment by the agency is required to select the method by which actual notice to such persons is likely to occur. This is evidenced by the last sentence of section 12(c) which provides that "[i]f the persons likely to be affected by the proposed rule are unorganized or diffuse in character and location, then the agency shall publish the notice as a display advertisement in at least three newspapers of general circulation in different parts of the State."<sup>109</sup>

(b) *The rulemaking hearing*

The NC APA provides that a rulemaking hearing, when required, shall comply with any applicable statute and that the requirements

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dates a subsequently adopted rule. *State v. Squally*, 474 P.2d 897 (Wash. 1970) (en banc) (notice of proposed rulemaking affecting Puget Sound could not be considered adequate description of subjects involved to permit a rule prohibiting fishing in rivers emptying into the Sound).

106. Presumably the notice will then be available for public inspection in the Attorney General's office, and moreover that this office can be checked for all notices of rulemaking since this provision effectively designates the Attorney General's office as central depository or registry for notices of proposed rulemaking. See N.C. GEN. STAT. § 150A-62 (Supp. 1974).

107. *Id.* § 150A-12(b).

108. *Id.* § 150A-12(c).

109. *Id.* A "display advertisement" is an advertisement which is not part of the "classified" ads that appear in newspapers but, generally, is one set off in a box by lines.

governing contested cases do not apply.<sup>110</sup> The agency must hold a "public hearing" and offer "an opportunity to present data, views and arguments."<sup>111</sup> This requirement taken with the usual connotation of the term "public hearing" raises the question whether all rulemaking hearings must be conducted orally with any affected persons being permitted to make an oral presentation, or alternatively, whether "data, views and arguments" *may* be in the form of written submissions. Other related issues are also suggested: may persons have presentations made in their behalf by attorneys (or other representatives); is the agency required to make any sort of record of the hearing (verbatim transcript or other); may data, views and arguments be addressed to facts or be in the nature of legal arguments; and are persons making presentations to be sworn in some fashion?

Generally speaking, the purpose of an administrative hearing is to allow persons who would be affected by a proposed rule to present relevant factors for the agency's consideration in order to inform the agency of the effect of a proposed rule.<sup>112</sup> Unless the Act commands a particular type of hearing, an agency proceeding which satisfies the basic purposes of the hearing requirement ought not to be condemned because of form alone.<sup>113</sup>

Permissible "hearing" forms might include a spectrum from trial-type procedures to informal consultation with affected parties.<sup>114</sup> The requirement that "an agency shall give notice of a public hearing and offer any person an opportunity to present data, views, and arguments"<sup>115</sup> could be literally interpreted as permitting only the most formal procedures or at a minimum, a hearing which included oral speechmaking.<sup>116</sup>

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110. N.C. GEN. STAT. § 150A-12(d) (Supp. 1974).

111. *Id.* § 150A-12(a).

112. See, e.g., Bell, *Administrative Law: Rule Making and a "Hearing."* *A Tale of Two Cases (Three Rules) or What the Dickens!*, 8 GA. L. REV. 19, 63 (1973).

113. See text accompanying notes 103-05 *supra*; notes 128-38 *infra*.

114. Professor Davis, for example, has made the following observations: "rules may be formulated through any one or more of the following methods: no participation by the parties affected, consultations and conferences between the agency and the parties, consultation with advisory committees representing parties, written briefs or presentation of written data, speech-making hearings, and trial-type hearings." 1 DAVIS, TREATISE, *supra* note 67, § 6.01, at 360.

115. N.C. GEN. STAT. § 150A-2A (Supp. 1974).

116. See 1 DAVIS, TREATISE, *supra* note 67, § 7.01. It can be argued that whenever the term "hearing" is used in a statute, it means at least an oral speechmaking procedure, on the grounds that the term can have no other meaning. However, if the term can have any non-oral meaning, the task in interpreting a statute is *not* what the term intrinsically means for most situations, but what the legislature intended the term to mean

Reference to other language of the Act provides the unmistakable inference that trial-type hearings are not required. Several practical considerations intimate that the legislature could not have intended to require trial-type hearings in every instance of rulemaking. Section 12(d) provides that the rulemaking hearing is not subject to the provisions governing contested cases that require a trial-type hearing.<sup>117</sup> Accordingly, it can be concluded that the most formal procedures are not always required. This is not to say, however, that such procedures may not be appropriate in some instances. One such instance is when disputed issues of fact are involved in a rulemaking proceeding.<sup>118</sup>

Parenthetically, it should be pointed out that section 12(a)(2) provides that the notice of hearing shall contain "[a] statement of the manner in which data, views, and arguments may be submitted to the agency *either* at the hearing or *at other times . . .*"<sup>119</sup> Section 12 (e) provides that "[t]he agency shall consider fully all *written* and oral submissions . . ." <sup>120</sup> These provisions mean that at least *in addition* to a speechmaking hearing, written submissions may be permitted in a rulemaking context (before, at, or after a hearing).

It can be argued that the term "hearing" read in light of the purposes of the rulemaking requirement is not necessarily limited to its traditional connotation that implies oral speechmaking.<sup>121</sup> Whether oral

in the instance at hand. When there is no direct or empirical evidence of the legislature's intent (which is the case with the NC APA), the question becomes what the legislature have intended the term to mean, in light of the purposes the legislature was attempting to accomplish.

117. N.C. GEN. STAT. § 150A-12(d) (Supp. 1974).

118. See DAVIS, TREATISE, *supra* note 67, § 6.01.

Any or all of the methods of party participation may be used for the formulation of one set of rules: an original draft may be prepared through consultation of the agency's staff with an advisory committee, then questionnaires or invitations for written comments may be sent to affected parties with or without submission of a tentative draft of the rules, then the tentative rules as modified may be discussed at a speechmaking type of hearing, and finally *disputed issues of fact that emerge may be isolated for a trial-type hearing.*

*Id.* at 360 (emphasis added).

119. N.C. GEN. STAT. § 150A-12(a)(2) (Supp. 1974) (emphasis added).

120. *Id.* § 150A-12(e) (emphasis added).

121. For a concise traditional definition of the term "hearing" see BLACK'S LAW DICTIONARY 852 (rev. 4th ed. 1968). However, it should be noted that the purpose for a definition may well have direct bearing on the definition questions. Compare *Morgan v. United States*, 298 U.S. 468 (1936), with *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294 (1933). See also 1 DAVIS, TREATISE, *supra* note 67, § 7.01, at 407 ("A 'hearing' is any oral proceeding before a tribunal.") (emphasis added); *id.* § 7.07, at 433 ("The meaning of the term 'hearing,' when a trial is not intended [by the legislature], is often unclear. Probably an opportunity to submit written evidence or argument without an oral process is not within the term."). But see note 116 *supra*.

hearings are always required cannot be answered definitively by reference to the terms of the Act. The Federal APA provides that “[t]he agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”<sup>122</sup> Similarly the Revised Model State APA generally provides for “reasonable opportunity to submit data, views, or arguments, orally or in writing”<sup>123</sup> but adds a special requirement if “substantive” rules<sup>124</sup> are involved—an oral hearing if requested by twenty-five persons, by a governmental subdivision or agency, or by an association having not less than twenty-five members.<sup>125</sup> Several states that require oral hearings in certain instances provide for dispensing with oral rulemaking procedures in certain situations.<sup>126</sup>

Against these precedents of statutory specificity the silence of the NC APA is troublesome. Nevertheless, for the reasons hereinafter discussed, it is doubtful that the legislature intended to require oral hearings in every instance of rulemaking. Accordingly, the better interpretation of the Act would be to construe “hearing” in a rulemaking context to permit agencies to limit the participation opportunity in appropriate instances to written presentations.<sup>127</sup>

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122. 5 U.S.C. § 553(c) (1970).

123. REVISED MODEL STATE APA § 3(a)(2) (1970 version); 1961 HANDBOOK, *supra* note 18, at 209-10.

124. Substantive in the context involved would generally mean “legislative” rules, as distinguished from “procedural” or “interpretive” rules.

125. 1961 HANDBOOK, *supra* note 18, at 209-10. This requirement is inflexible and seems arbitrary. A less arbitrary provision is contained in the Montana APA which requires an oral hearing if requested by 10% of the persons who will be affected by a proposed rule. MONT. REV. CODES ANN. § 82-4204 (Supp. 1974). The interpretation urged herein would make the NC APA preferable to the Model Act and the Montana APA, because it would permit an agency to tailor the hearing to fit the circumstances of each case. Suppose there exist only twenty persons who would be directly affected by a proposed rule. Under the Model APA an oral proceeding apparently could never be required. Suppose, on the other hand, that there are 10,000 persons who would be directly affected. Under the Montana APA 1,000 persons must request an oral hearing. Assuming they did, imagine 1,000 speeches! Moreover, the oral proceeding provisions of the Model and Montana APA’s are not specifically related to hearing purposes. Under the NC APA, as urged herein, an agency faced with factual disputes in a rulemaking context could permit oral proceedings, without being forced to do so based on the arbitrary number of persons who requested oral proceedings, if hearing purposes would not be furthered thereby.

126. *E.g.*, COLO. REV. STAT. ANN. § 24-4-103(4) (1973) (oral hearing required unless agency deems such procedure unnecessary); MASS. GEN. LAWS ANN. ch. 30A, § 3 (2) (1973) (oral proceeding may be eliminated if it is unnecessary or impracticable).

127. *Cf.* Verkuil, *supra* note 53, at 245. If the Act should not be interpreted as urged, the legislature should amend it to permit agencies to dispense with oral proceeding in rulemaking contexts, in appropriate instances, as discussed textually below. In connection with the interpretation urged, given the language of the Act, an oral proceed-

The vast bulk of state APA's, particularly those patterned after the Revised Model State APA, and the Federal APA permit agencies to receive written submissions in lieu of oral hearings in rulemaking, unless otherwise required by law.<sup>128</sup> The NC APA contains no general provision to this effect, but has a narrow, limited provision in the case of rulemaking in emergencies.<sup>129</sup>

Moreover, the NC APA's requirement of a "hearing" applies to all rules subject to the basic rulemaking provisions of the Act. An oral hearing could tie up an agency's staff for substantial periods listening to speeches. This possibility might cause agencies to underutilize rulemaking notwithstanding its advantages, or to adopt evasive devices to fit rules into exceptions. Burdening agencies with form, therefore, could be inimical to the broader public interest.

Noncontroversial matters will not generate a need for any kind of hearing (or other participation by the public); yet, if oral procedures are always required, the agency must go through the motions of setting a hearing date, time and place, and designating someone to preside over the speechmaking; but no one may appear. In contrast, if only written submissions are permitted, a place and cutoff date for filing written submissions can be established without an undue burden on agency personnel.

Moreover, an oral hearing in all situations may not be the best mode of either effective participation by the public or enlightened decisionmaking by the agency. The late Professor Cooper has noted that:

More significant than the statutory right to present views at a formal hearing are the opportunities which may be afforded interested persons to engage in informal consultations with agency representatives before the rule is adopted. Even in cases where the statute does not require, and the agency does not voluntarily solicit, public participation in rule-making procedures, the members of an agency staff engaged in drafting the rule will almost always be found willing to receive the suggestions of interested persons as to the formulation of the rule, and to discuss informally the problems involved.

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ing might well be treated as a presumption which may be rebutted by cogent agency reasons.

128. A survey undertaken in preparation of this article revealed only Michigan as having an absolute "hearing" requirement, MICH. STAT. ANN. § 3.560(141) (Supp. 1974), in substance identical to the NC APA. Many other states have adopted the Model APA formulation, or specify instances in which oral hearings are required.

129. For a discussion of emergency rulemaking see text accompanying notes 141-47 *infra*.

Such informal consultation may afford the most effective method for participation in rule-making proceedings. If one can discuss the problems involved with the draftsmen within the agency's staff who will write the proposed rule that the heads of the agency will consider, it is often possible to obtain a more intimate insight into the agency's views than is available in more formal public hearings.

In such discussions, furthermore, representatives of private parties are afforded an unparalleled opportunity to suggest methods whereby the agency's purposes can be achieved with least dislocation of business practices. Staff members can point out administrative objections to the proposals urged by private parties. Frequently, an area of mutually satisfactory compromise can be discovered.

A device that can be employed most effectively in many instances is that of an unofficial advisory committee. Such committees have the function of working out technically acceptable solutions to problems complicated both by administrative difficulties and by emotional clashes between competing special interest groups.<sup>130</sup>

Assuming that oral hearings should not always be required, it becomes very difficult to provide anything more than a general statement that the agency should have flexibility to exercise discretion to formulate a rulemaking procedural mode best suited to the purpose at hand.<sup>131</sup> Factors that should be considered in making this determination include: the nature of the rule proposed, the possible number of parties it would affect, the nature of the interests of the parties, and the nature of the question or issues involved.<sup>132</sup> If the rule involves a broad policy question, written presentations may be quite adequate.<sup>133</sup> If an unduly large number of persons could be expected to appear at an oral hearing thus making it laborious and time-consuming perhaps again written procedures would be appropriate.<sup>134</sup> On the other hand, if the rule proposed involves factual issues, oral proceedings (perhaps even in an adversarial format) would be preferable if not necessary.<sup>135</sup>

Both oral or written participation opportunities have their limita-

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130. 1 F. COOPER, *supra* note 8, at 198 (footnote omitted).

131. Cf. E. GELLHORN, *supra* note 87, at 131.

132. R. BENJAMIN, *supra* note 8, at 301-02.

133. Cf. E. GELLHORN, *supra* note 87, at 128-29.

134. See, e.g., 1 F. COOPER, *supra* note 8, at 194; 1 DAVIS, *TREATISE*, *supra* note 67, § 6.02.

135. In this connection, Professor Gellhorn notes that such issues as the "who, what, where, when and how questions" may well be best tested in trial-type proceedings. E. GELLHORN, *supra* note 87, at 139.

tions. Written submissions can be skimmed over or disregarded.<sup>136</sup> Agency personnel can impassively listen at hearings and then forget all that has been said.<sup>137</sup> In an attempt to forestall such eventualities the NC APA requires that an agency "consider fully all written and oral submissions," and upon adoption of a rule, if requested by an interested person, "issue a concise statement of the principal reasons for and against its adoption" including reasons for overruling considerations urged against adoption.<sup>138</sup>

If an oral rulemaking hearing is held, the agency should have broad discretion to set reasonable limits on the number of persons who may appear, the record to be made of the hearing, as well as the subjects to be covered at the hearing. In addition when parties desire presence of counsel, there is no evident policy that should preclude such legal assistance.<sup>139</sup> The making of a "record" of a rulemaking proceeding should not be required, at least not in the sense of a hearing-on-the-record when "formal" rulemaking occurs under the Federal APA.<sup>140</sup> However, some method should be employed by the agency through which oral presentations are preserved and written submissions are compiled by agency personnel so that, if requested, the agency can issue the statement required by section 12(e). Oath administration would not seem mandatory except when full-blown trial-type procedures are being utilized.

## (2) Rulemaking in Emergencies

One trade-off when considering procedural regularity is maximum efficiency and speed. Ordinarily such reduced efficiency and

136. See 1 F. COOPER, *supra* note 8, at 194. "Such submissions are too easily skimmed over without careful study, or handed to staff assistants for their consideration, or even (it may be feared) sometimes disregarded." *Id.*

137. See Feller, *Administrative Law Investigation Comes of Age*, 41 COLUM. L. REV. 589 (1941).

Let it not be assumed too easily that hearings are a significant protection against bureaucratic absolutism. To a slothful administrator a hearing precedent to regulation may be a God-given opportunity to avoid work and thought. He need only listen with impassively judicial countenance and then forget all he has heard. It is the conference with its give and take of ideas and information, with its possibilities of detailed exploration of minor points and hidden corners which stirs the mind to action. Moreover, there are demonstrably situations where hearings produce little if anything of value.

*Id.* at 596.

138. N.C. GEN. STAT. § 150A-12(e) (Supp. 1974).

139. For example, Ohio specifies that an agency permit a person to appear in person or by an attorney. OHIO REV. CODE ANN. § 119.03(c) (Page 1969).

140. 5 U.S.C. § 553(c) (1970). See also Bell, *supra* note 112, at 46.

speed are acceptable from a public policy viewpoint. However, certain situations may make delay unacceptable.<sup>141</sup> Expeditious action is often necessary to protect the public health, safety or welfare.<sup>142</sup> In recognition of this situation, section 13 of the NC APA provides that upon finding that "imminent peril to the public health, safety, or welfare" requires rulemaking without the basic procedures specified in section 12, an agency may proceed "without prior notice or hearing" or upon such abbreviated notice and hearing as is practicable.<sup>143</sup> An emergency rule may be effective for a period of 120 days.

Emergency rulemaking is an extraordinary proceeding. Accordingly, its use is substantially circumscribed. As a condition to proceeding under the emergency rulemaking mode, the agency must find and set forth its findings in writing that a specified peril to the public health, safety or welfare requires dispensing with the basic procedures outlined in section 12.

If an agency does not initiate proceedings under section 12, it may not reissue or readopt the same or a substantially identical rule based upon the circumstances found in connection with the original emergency. The section 12 provision respecting the adoption of an identical rule clearly implies that an emergency rule *based on a particular fact situation* may be promulgated for *only* one 120 day period. Relying on somewhat different language, but a substantively similar formulation of the Wisconsin APA,<sup>144</sup> the Wisconsin Attorney General issued an opinion that an emergency rule could not be perpetuated by simply re-filing it before or after the 120 day period provided by the Wisconsin Act.<sup>145</sup>

Assuming notice of emergency rulemaking is not accorded in advance, notice must be given after-the-fact. In most circumstances the nature of the rule will require communication to persons required to do or refrain from doing an act for the regulation to accomplish its intended purpose. If this is not the case, however, an attempt to impose a sanction for violation of an emergency rule, or any other rule for

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141. See generally 1 F. COOPER, *supra* note 8, at 200.

142. It has been suggested that a state's power to take temporary action to meet conditions that imperil the public health, safety or welfare historically derives from the exercise of the police power to abate nuisances. See generally Freedman, *Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1 (1972).

143. N.C. GEN. STAT. § 150A-13 (Supp. 1974). This provision, in substance, is identical to REVISED MODEL STATE APA § 3(b) (1970 version). 1961 HANDBOOK, *supra* note 18, at 210.

144. WIS. STAT. ANN. § 227.027 (1957).

145. 1973 WIS. ATT'Y GEN. OP. (Dec. 19, 1973).

that matter, would appear to raise a substantial due process issue, if the person had not received at least constructive notice through publication, unless the person, through some other means, had received actual notice.<sup>146</sup> Raising the constitutional issue is likely to be unnecessary, however, since generally a rule not published under an APA requiring publication is invalid.<sup>147</sup>

### C. *Adoption by Reference, Rule Continuation, and Petitions for Adoption*

#### (1) Adoption by Reference

An agency dealing with a subject upon which there has been promulgated, for example, a national code may wish to adopt such a code without publishing the code itself. This process, if pursued, would constitute an adoption by reference, and is permitted by section 14.<sup>148</sup> This North Carolina provision is relatively unique among APA's, with research disclosing only Michigan with a similar provision.<sup>149</sup>

It is clear that the adoption-by-reference provision is not intended to permit dispensing with either the prior notice requirement (including a statement of the terms or substance of the proposed rule) or the procedural opportunity to participate through the submission of data, views, and arguments required by section 12. For example, the intent to adopt some standardized code by reference would seem to be a matter upon which views might be submitted in the course of a rulemaking proceeding.

#### (2) Continuation of Rules

Section 15 appears to be addressed to problems created by governmental reorganizations.<sup>150</sup> It provides for two instances in which

146. *Cf. Wuchter v. Pizzutti*, 276 U.S. 13 (1928).

147. 1 DAVIS, TREATISE, *supra* note 67, § 6.10, at 398; *id.* § 6.11, at 404.

148. **Adoption by reference.**—An agency may adopt, by reference in its rules and without publishing the adopted matter in full, all or any part of a code, standard or regulation which has been adopted by an agency of this State or of the United States or by a generally recognized organization or association. The reference shall fully identify the adopted matter by date and otherwise. The reference shall not cover any later amendments and editions of the adopted matter, but if the agency wishes to incorporate them in its rule, it shall amend the rule or promulgate a new rule therefor. The agency shall have available copies of the adopted matter for inspection and the rules shall state where copies of the adopted matter can be obtained and any charge therefor as of the time the rule is adopted.

N.C. GEN. STAT. § 150A-14 (Supp. 1974).

149. MICH. COMP. LAWS § 3.560(132)(4) (Supp. 1974).

150. N.C. GEN. STAT. § 150A-15 (Supp. 1974).

previously effective rules have a continuing validity, without the necessity of complying with the basic rulemaking procedures. First, when a law under which an agency is empowered to promulgate rules is repealed and "substantially the same rulemaking power" is vested in the same or a successor agency by a new provision of law, a previously promulgated rule has a continuing validity. Second, when the function of an agency that has promulgated rules is transferred to another agency, the existing rules of the original agency that relate to the transferred function remain in effect. In both of these instances a rule remains in effect until amended or repealed by the transferee agency.<sup>151</sup>

The other instance addressed by section 15 is one in which a law creating an agency or authorizing the promulgation of rules is repealed or the agency is abolished and "substantially the same rulemaking power" or duty is not vested in a continuing agency by a new provision of law. In this instance rules of the abolished agency are automatically repealed as of the effective date of the repeal of the law authorizing the promulgation of rules or the abolition of the agency.

### (3) Petition for Adoption of Rules

Section 16 deals with public requests that an agency promulgate, amend, or repeal a rule. It provides that a person may petition the agency to adopt, amend or repeal a rule and in so doing may set forth pertinent data, views, and arguments. Within thirty days after submission of a petition the agency must initiate a rulemaking proceeding under sections 12 and 13, or deny the petition in writing, stating reasons therefor.<sup>152</sup> Thereafter the petitioner may seek court review under the Act's judicial review provisions.<sup>153</sup> However, the scope of review of a decision denying a petition to initiate rulemaking is limited to whether the agency abused its discretion.<sup>154</sup>

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151. A recent example of this situation would appear to involve the creation of a Board of Nursing under *id.* § 90-159 (Cum. Supp. 1974), *repealing* Act of April 30, 1953, ch. 1199, § 1, [1953] N.C. Sess. Laws 1154 (replacing the Board of Nurse Registration and Nursing Education).

152. N.C. GEN. STAT. § 150A-16 (Supp. 1974).

153. The denial of a petition for adoption of rules will constitute a "contested case" for purposes of the judicial review provisions. Judicial review under the NC APA is discussed in Part V *infra*. However, in brief, the stated conclusion follows since the Act (1) provides for judicial review of "contest cases," *id.* § 150A-43; and (2) defines contested case as "any proceeding . . . wherein the legal rights, duties or privileges of specific parties are determined." *Id.* § 150A-2(2). Accordingly an agency ruling that denied a petition for adoption of rules would constitute a determination of a person's legal right to have the agency initiate a rulemaking proceeding under the Act. *See also* text accompanying notes 171-87 *infra*.

154. N.C. GEN. STAT. § 150A-16 (Supp. 1974).

#### D. Declaratory Rulings

The NC APA provides that in certain circumstances an agency may issue a binding ruling to settle uncertainty or controversy.<sup>155</sup> Since informal action—even that affecting private rights and interests—is the “life blood of the administrative process,”<sup>156</sup> declaratory rulings must be carefully distinguished from the innumerable consultations, informal exchanges of information, and other administrative advice-giving. Indeed it has been noted that the informal inquiry is probably the most commonly employed method of seeking an administrative agency’s advice with respect to a particular matter.<sup>157</sup> This informal advice may be given by legal counsel of an agency, a commissioner, or information officer. It may take place orally in person, by telephone, or written in a letter.<sup>158</sup> Ordinarily such advice or consultation is not considered to be binding on either the recipient or the agency. Yet this vital process is helpful, if not indispensable, to the efficient execution of agency business. Thus while the declaratory ruling procedure may serve a number of useful *formal* purposes, this device is not conceived as a replacement for informal procedures of advising and consulting.

By way of contrast the declaratory ruling device is a formal proceeding wherein a party may be advised in advance by an agency official empowered to issue a ruling which will be binding on both that party and the agency. A declaratory ruling may be issued as to the “validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency.”<sup>159</sup> How then can formal declaratory rulings and the vast bulk of agency action—informal consultation, information exchange, advice-giving—be distinguished? The primary distinguishing factor is that declaratory rulings are made pursuant to procedures specified by agency rules. The Act requires that an agency “shall prescribe in its rules the circumstances in which rulings shall and shall not be issued.”<sup>160</sup> Accordingly, agencies must engage in a rulemaking proceeding for the adoption of procedural rules governing declaratory rulings, under sections 12 and 13. As a general matter, however, it would appear that adjudicatory hearings would not be necessary to the issuance of a de-

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155. *Id.* § 150A-17.

156. ATTORNEY GENERAL’S REPORT, *supra* note 7, at 35.

157. 1 F. COOPER, *supra* note 8, at 239.

158. *Id.*

159. N.C. GEN. STAT. § 150A-17 (Supp. 1974).

160. *Id.*

claratory ruling.<sup>161</sup>

Declaratory rulings are not available to the public at large and, accordingly, cannot be regarded as mere advisory opinions. Instead they are the administrative counterpart of judicial declaratory judgments.<sup>162</sup> The NC APA provides that the agency shall issue a declaratory ruling upon the request of a "person aggrieved."<sup>163</sup> This is a traditional administrative law phrase, but for additional clarity it is defined in section 2(6) as any person, firm, corporation or group of persons who are "directly or indirectly" affected "substantially" in their person, property, public office, or employment by an agency decision.<sup>164</sup> This definition is substantively identical to interpretations reached by the North Carolina Supreme Court for similar purposes under prior statutes.<sup>165</sup>

In a declaratory ruling an agency is given an opportunity to reassess the validity of a rule in the face of arguments advanced against it. Also it is provided an opportunity to state its interpretation of a statute it administers, or the applicability of its rule, to a particular set of facts. Conversely, a person is allowed to seek an advance determination of how the agency views a contemplated course of conduct or set of circumstances, without risking an after-the-fact determination that such conduct would be treated by the agency as impermissible.<sup>166</sup>

However, this procedure is not without its troublesome aspects. A regulated party, instead of good faith compliance attempts, may well desire to push an activity or course of conduct to dubious extremes without crossing the legally permissible line, and, in effect, wishes the agency to aid him in this process, by advising him about a purely hypothetical set of facts. Also a sufficiently large number of requests for declaratory rulings might well overburden agency staff or take them away from other important activities. Moreover, in some instances, the agency may not wish to state its position or its position may not be yet

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161. See 1 F. COOPER, *supra* note 8, at 242. It is noted that in section 8 of the Revised Model State APA the drafters modified the original state APA "to eliminate the provisions that denied binding effect to declaratory rulings unless issued after [oral] argument . . . [That] condition seemed to impose undue formality: there is no reason why the agency's ruling should not be binding if based on written submissions or conference, rather than oral argument." *Id.*

162. See 1 DAVIS, *TREATISE*, *supra* note 67, § 4.10.

163. N.C. GEN. STAT. § 150A-17 (Supp. 1974).

164. *Id.* § 150A-2(6). See also text accompanying notes 307-10 *infra*.

165. See *In re Halifax Paper Co.*, 259 N.C. 589, 131 S.E.2d 441 (1963); *Albemarle Elec. Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E.2d 811 (1972).

166. With respect to judicial review see text accompanying notes 360-411 *infra*. See also 1 F. COOPER, *supra* note 8, at 250-63.

fully formulated. In recognition of such instances, section 17 permits an agency to decline to issue a declaratory ruling "when the agency for good cause finds the issuance of a ruling undesirable." When issued, a ruling is binding on both the person requesting it and the agency, except that, of course, the rule may be changed prospectively.<sup>167</sup>

If the agency issues a declaratory ruling, attempts to state good cause for refusing a ruling, or fails to issue any ruling on the merits within sixty days, the decision is subject to judicial review. The scope of review is determined under section 43.<sup>168</sup> In connection with rule-making, while an action for a declaratory judgment outside the Act may be available to challenge a rule, it would appear that in the absence of a request for a declaratory ruling, a party would not have met the general requirement of exhaustion of administrative remedies.<sup>169</sup> It should be emphasized that the declaratory ruling procedure is the only mechanism under the Act for seeking direct judicial review of agency rules.<sup>170</sup>

#### IV. ADMINISTRATIVE ADJUDICATION: THE JUDICIAL ANALOGY

##### A. *Characteristics of the Adjudicatory Function*

As in the case of administrative rulemaking,<sup>171</sup> a precise definition of "administrative adjudication" is very difficult. Perhaps the most useful statement is that in performing this function administrative agencies are engaged in a process that very much resembles what courts do.<sup>172</sup> The touchstone for distinguishing adjudication from rulemaking is that adjudication involves a specifically named party and a determination of particularized legal issues and facts with respect to that party. Rulemaking, by contrast, involves general categories or classes of parties and facts and policies of general applicability.<sup>173</sup>

The procedural protections applicable to the adjudicatory function

167. N.C. GEN. STAT. § 150A-17 (Supp. 1974).

168. The declaratory ruling provision provides for general judicial review "in the same manner" as a contested case. With respect to scope of review of rulemaking see text accompanying note 407 *infra*.

169. See text accompanying notes 322-45 *infra*.

170. This is so since section 43 provides for judicial review only in connection with contested cases.

171. See text accompanying notes 69-78 *supra*.

172. 1 DAVIS, TREATISE, *supra* note 67, § 5.01, at 285-88.

173. The distinction is sometimes spoken of as involving "adjudicatory facts" in the case of determinations involving specific, named parties; and "legislative facts" in the case of determinations of general applicability. See generally *id.* § 7.02.

are determined by the Act's definition of "contested case." "Contested case" is defined by section 2(2) as "any agency proceeding, by whatever name called, wherein the legal rights, duties or privileges of specific parties are to be determined."<sup>174</sup> By its terms the definition specifically includes "rate making, price fixing, and licensing," and excludes "rule making" and "declaratory rulings." This means that the agency adjudicatory procedures required in contested cases do not limit procedures for rulemaking and issuing declaratory rulings.<sup>175</sup>

Under the vast majority of state APA's and the Federal APA, the right to invoke the adjudication procedures is not provided by the APA's themselves. Instead, the right under most APA's arises only when rights, duties or privileges "are required by law to be determined by an agency after an opportunity for hearing" or a like formulation.<sup>176</sup> Unlike this majority, the NC APA does not limit the procedural protections governing adjudications to instances when the constitution or statutes require a right to an evidentiary hearing.

The NC APA's formulation is a distinct improvement since, when there is no statute that requires a hearing, constitutional due process issues are not involved in determining the applicability of its adjudication provisions.<sup>177</sup> But the Act does present significant statutory interpretive problems, as distinguished from constitutional ones, in determining the applicability of the procedural requirements of the Act when an arguable determination of the "legal rights, duties or privileges" of specific parties is involved.

In resolving this issue the need to balance the competing considerations involved in interpreting and properly applying the Act should be

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174. N.C. GEN. STAT. § 150A-2(2) (Supp. 1974).

175. *Id.*

176. This is the formulation of section 1(2) of the Model State APA. A survey reveals that this formulation has been adopted in some eighteen states, including Arkansas, Connecticut, Georgia, Hawaii, Idaho, Michigan, Missouri, Montana, Nevada, Rhode Island, South Dakota, Vermont, Virginia, Wisconsin and Wyoming. Additionally a formulation in which the adjudication provisions apply when a hearing is required by "law or constitution" may be found in Maine, Maryland, Minnesota, Washington, West Virginia and the District of Columbia; by "constitution or statute," in Iowa, Louisiana, Massachusetts, New Jersey and Oregon. The Federal APA adopts the "by statute" formulation. 5 U.S.C. § 554 (1970).

177. For example, under the majority of APA's, in any instance where a statutory right to hearing does not exist, an issue of whether a constitutional due process right requires a hearing is necessarily presented in order to determine the applicability of the APA. This constitutional issue will often be difficult of resolution even for courts, and in some instances therefore imposes an impossible prediction problem for an agency in attempting to determine whether it must accord a person the protections specified in the APA. See 1 F. COOPER, *supra* note 8, at 135.

kept in mind. An interest in procedural fairness, which mandates some degree of formality at the expense of speed and efficiency, must be balanced against an interest in not overburdening agencies with procedural requirements. The broadest interpretation of the language, "proceeding . . . wherein the legal rights, duties or privileges of specific parties are to be determined" could conceivably include all agency action involving specifically identified parties except instances expressly excluded in the definition. An essential task in connection with the adjudication provisions of the Act then is to interpret the definition so that it will be neither unduly expansive nor unnecessarily restrictive.

### (1) The NC APA Requires a "Proceeding"

A critical word in the contested case definition is "proceeding." The term connotes the conduct of business related to juridical matters.<sup>178</sup> It implies formality and specific statutory authorization to act upon the matter at hand. In using the term "proceeding" it seems clear that the legislature intended to encompass within the definition of "contested case" all those instances in which an evidentiary hearing would be required by either statute or constitution. Equally, however, the Act clearly applies, without regard to constitutional or statutory requirements, to other instances in which there is an administrative "proceeding" determining legal rights, duties or privileges of specific parties.<sup>179</sup>

A "proceeding" is any instance in which an administrative agency makes a formal determination of a specifically named person's or party's individual legal rights, duties or privileges. Such a statement, of course, is not self-executing and does not provide an answer in particular cases. It is doubtful that definite answers can be provided except upon a case-by-case analysis. In resolving individual cases, however, the following general rule should be used as a guide: the procedural protections of the contested case provisions should be applied in those instances in which observance of the procedural requirements will increase fairness, enhance the likelihood of both rational and correct decisions, facilitate administrative acquisition of necessary data and facts, improve administrative accountability, and lead to better reasoned administrative decisions. Even when some of these purposes are furthered, observance of the procedures may prove to be

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178. BLACK'S LAW DICTIONARY 1368 (rev. 4th ed. 1968).

179. Otherwise the definition would almost certainly have been limited to such instances as is done in the overwhelming majority of APA's. See note 176 *supra*.

unnecessary or unwise in light of considerations of cost, efficiency, the insubstantiality of the interest affected, or the insubstantiality of the effect upon the interest. For example, in connection with an agency function in which the agency performs merely a ministerial task, not requiring the exercise of discretion, the holding of an evidentiary hearing would be meaningless. Examples of such situations might include instances of the issuance of applications, or directions for the forms necessary to initiate an administrative determination of some right, duty, or privilege.<sup>180</sup> When a factual determination is necessary, however, an oral hearing might enhance the likelihood of a fair and correct decision. This logic would seem to apply even if the end product of the administrative action was, for example, a non-discretionary grant or denial of a benefit or privilege.

## (2) The NC APA Requires a "Determination"

Not all administrative decisions will constitute a "determination." The terms "determine" and "determination" imply "coming to an end" or "settling,"<sup>181</sup> although not necessarily in the sense of "a final agency decision" for judicial review purposes,<sup>182</sup> nor must the decision necessarily be rendered "at the final or highest level within the agency."<sup>183</sup> Accordingly, agency decisions that are preliminary, or prerequisite to a conclusion of whether to initiate a "proceeding" would not constitute a "determination."

Under the Massachusetts APA it has been held that the conducting of an investigation in the form of a preliminary inquiry, characterized by the court as being in the nature of a determination of probable cause, is not an "adjudicatory proceeding." The court's reasoning, in part, was that the decision made was not one in which the legal rights, duties, or privileges of specifically named persons were "determined."<sup>184</sup>

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180. See, e.g., 1 F. COOPER, *supra* note 8, at 125-26.

181. BLACK'S LAW DICTIONARY 536 (rev. 4th ed. 1968).

182. See Part V *infra*.

183. The Ohio APA uses the term "adjudication" to perform the function that the NC APA uses "contested case" to perform. OHIO REV. CODE ANN. § 119.01(D) (Page Supp. 1973). This section defines adjudication as "the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person . . ." The Ohio statute, with certain exceptions, requires an opportunity for hearing in an "adjudication." *Id.* § 119.06 (Page 1969).

184. *Miller v. Alcoholic Beverages Control Comm'n*, 340 Mass. 33, 162 N.E.2d 656 (1959). It should be noted that the court's reasoning, in addition, rested on the Massachusetts provision which defined adjudication to include instances when a hearing was "required by constitutional right or by any provision of the General Laws." *Id.* at 35, 162 N.E.2d at 657.

## (3) A Final Problem with Contested Cases

Under the predecessor to the present Florida APA, which contained, in substance, a broad definition similar to the NC APA,<sup>185</sup> it was held that the section governing administrative hearings pertained solely to an administrative agency's performance of a "quasi-judicial function."<sup>186</sup> While the approach of the Florida court certainly helps to confine the hearing right to manageable boundaries, the use of phrases such as "quasi-judicial" may obscure careful reasoning about the elements involved.<sup>187</sup>

## B. Performance of the Adjudicatory Function

## (1) Right to Notice and Hearing

Section 23(a) provides quite simply that "the parties in a contested case shall be given an opportunity for a hearing without undue delay."<sup>188</sup> Section 23(b) in turn, deals with the three elements of notice adequacy: the time in which notice must be given, the manner in which it is to be given, and the content of the notice.<sup>189</sup>

185. "(2) Adjudication means agency proceeding for the formulation of an order. (3) Order means the whole or any part of the final decision (whether affirmative, negative, injunctive or declaratory in form) of any agency in any matter other than rulemaking but including licensing." FLA. STAT. ANN. § 120.21 (Supp. 1973), *as amended* FLA. STAT. ANN. § 120-32 (Cum. Supp. 1974).

186. *Bay Nat'l Bank & Trust Co. v. Dickinson*, 229 So. 2d 302 (Fla. Dist. Ct. App. 1969). In holding that the issuance of a banking license was a quasi-executive or quasi-legislative function the court reached an arguably erroneous result. It would appear that the holding might better have been grounded on a competitor banker's lack of standing to complain of the failure to hold a hearing on an application for a banking license with respect to a competing banking location. Had the banking license application been denied, it would appear that a different result might be warranted *if the applicant*, as opposed to a competitor, were the complainant.

187. The North Carolina Supreme Court, in a different context, has used the phrase "quasi-judicial" to describe instances in which agency action "might result in a loss by a specific party of some legal right, duty or privilege." *In re Filing by Automobile Rate Office*, 278 N.C. 302, 180 S.E.2d 155 (1971). In that case the issue before the court was whether, in a ratemaking proceeding before the Commissioner of Insurance, compliance with N.C. GEN. STAT. §§ 143-317 to -318 (1974) (governing evidence in administrative proceedings) was required. The court held that the act applied to a "judicial or quasi-judicial proceeding" and that ratemaking for the future was "an act legislative, not judicial, in kind." *Id.* at 319, 180 S.E.2d at 319, *citing* *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908). Since the NC APA repeals these provisions, *see* note 16 *supra*, and defines "contested case" specifically to include ratemaking, N.C. GEN. STAT. § 150A-2(2) (Supp. 1974), the holding regarding the nature of a ratemaking proceeding, of course, would be changed.

188. N.C. GEN. STAT. § 150A-23(a) (Supp. 1974).

189. (b) The parties shall be given a reasonable notice of the hearing, which notice shall include: (1) A statement of the date, hour, place, and nature of the hearing; (2) A reference to the particular sections of the statutes and rules

There may be some difficulty in defining "undue delay" under section 23. No definitive answer in the abstract can be provided, since the nature and effect of any delay must necessarily depend upon all the facts and circumstances in the particular case. At a minimum, the right to a hearing requires notice reasonably in advance of the taking of administrative action. This means that the person affected must be given a reasonable opportunity to prepare a response between the giving of notice and the holding of the hearing. Conversely at a minimum, "without undue delay" certainly means that the notice must precede the action that may affect the subject interest.<sup>190</sup>

Failure to give reasonable advance notice has been described by one court in a non-APA context as a "jurisdictional defect."<sup>191</sup> Several courts have invalidated agency orders where adequate notice had not been given,<sup>192</sup> including the North Carolina Supreme Court.<sup>193</sup>

It is doubtful that a party may be heard to complain of an agency's failure to give the required statutory notice, when actual notice has been received or the party has participated in a proceeding.<sup>194</sup> It has been held, however, that a mere failure of a party to allege the existence of a meritorious defense to the claims asserted by an agency is not a sufficient ground for justifying a lack of notice by the agency.<sup>195</sup>

Section 23(c) provides that notice shall be given "personally or by registered mail." Where giving of notice in person or by registered mail cannot be accomplished however, notice may then be given in a manner prescribed in the North Carolina Rules of Civil Procedure, Rule 4(j).<sup>196</sup>

Section 23(c) requires that the notice contain: "(1) A statement

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involved; and (3) A short and plain statement of the factual allegations.

*Id.* § 150A-23(b). Section 23(e) is an open meeting or "sunshine" provision. *Id.* § 150A-23(e). See also *id.* §§ 143-318.1-5 (1974).

190. Cf. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

191. *Bartlett v. Joint County School Comm.*, 11 Wis. 2d 588, 590, 106 N.W.2d 295, 296 (1960). See also *State ex rel. Wilson Chevrolet, Inc. v. Wilson*, 332 S.W.2d 867 (Mo. 1960).

192. E.g., *Furniture Capital Truck Lines v. Public Serv. Comm'n*, 340 Mich. 173, 65 N.W.2d 303 (1954); *In re Richling*, 154 Neb. 108, 47 N.W.2d 413 (1951); *State ex rel. Red Jacket Coal Corp. v. Stokes*, 142 W. Va. 126, 94 S.E.2d 634 (1956).

193. *Brauff v. Commissioner of Revenue*, 251 N.C. 452, 111 S.E.2d 620 (1959) (constitution, in the absence of statute, requires notice to those whose rights are adversely affected). It should be noted that this case is unaffected by the NC APA since it involves the Department of Revenue, which is excluded *inter alia* from the adjudication provisions of the Act. N.C. GEN. STAT. § 150A-1 (Supp. 1974).

194. 1 F. COOPER, *supra* note 8, at 276.

195. *Cash v. Rocket Mfg. Co.*, 223 Ark. 561, 267 S.W.2d 318 (1954).

196. N.C.R. CIV. P. 24.

of the date, hour, place, and nature of the hearing; (2) A reference to the particular sections of the statutes and rules involved; and (3) A short and plain statement of the factual allegations."<sup>197</sup>

Section 23(d) regulates who may participate in a hearing other than a named party. "Basic" intervention under section 23(d) is governed by rule 24 of the North Carolina Rules of Civil Procedure, which provides for intervention "as of right" and "permissive intervention."<sup>198</sup> In addition, section 23(d) provides for "discretionary intervention" by providing that the agency may permit any interested person to intervene "and participate in [the] proceeding to the extent deemed appropriate."<sup>199</sup>

### (2) Place of Hearing

Section 24 contains the venue provision of the Act. The venue provision, in effect, presumes that the ends of justice and the convenience of witnesses will be promoted (a) by holding the hearing in any county in the state "in which any person whose property or rights are the subject matter of the hearing maintains his residence" if the hearing is being conducted by a hearing officer or less than a majority of the agency, or (b) by holding the hearing in the county where the agency maintains its principle office if the hearing is conducted by a majority of the agency.<sup>200</sup> Notwithstanding these presumptions, in furtherance of the ends of justice and the convenience of witnesses, the agency is authorized by the Act "in its discretion" to designate another county. Moreover the affected person may agree to holding the hearing "in some other county."<sup>201</sup>

### (3) Conducting the Hearing

#### (a) *Rights of parties*

##### (i) Right to participate in the hearing

Section 25 of the Act governs the manner and extent of participation by parties in an adjudicatory hearing. Section 25(a) provides

197. N.C. GEN. STAT. § 150A-23(c) (Supp. 1974).

198. See N.C.R. CIV. P. 24.

199. The discretionary intervention is without limitation, and thus, in appropriate instances, can be broader than permissive intervention under rule 24, since section 24(b) contains specified requirements that limit intervention.

200. N.C. GEN. STAT. § 150A-24 (Supp. 1974). Notwithstanding that this provision uses the mandatory language "shall," it should be clear from the following textual discussion that the mandatory language applies only when the agency does not choose to exercise its discretion to designate another county to "promote the ends of justice or better serve the convenience of witnesses."

201. *Id.*

that if a party fails to appear after proper notice the agency may either grant an adjournment or proceed with the hearing and "make its decision in the absence of the party." The section does not directly authorize the granting of adjournments, but implicitly recognizes an agency's power in its discretion to grant an adjournment. In the absence of an adjournment the agency is authorized to proceed to a decision without a party.<sup>202</sup>

Under this provision, it might be asked whether a judgment in the nature of a default may be rendered. Read in conjunction with section 36<sup>203</sup> the conclusion is that default judgments in the traditional sense<sup>204</sup> may not be taken by an agency in a contested case hearing. Accordingly, notwithstanding the failure of a party to appear, the agency's decision is required to be rendered in a manner stated in section 36.<sup>205</sup>

Section 25(b) permits a party to file a written answer before the date set for hearing. Since this section uses the permissive term "may" it would appear that the Act does not require a party to file an answer.<sup>206</sup> However, it does appear that the agency may have a discretionary latitude (under the rulemaking provisions<sup>207</sup>) to promulgate reasonable rules governing the filing of a written answer, and even perhaps, requiring it.<sup>208</sup>

Section 25(c) governs the essential elements of the hearing. It provides that the parties "shall be given an opportunity to present arguments on issues of law and policy." In this provision there is some ambiguity about whether the arguments may be oral or written. With respect to issues of law and policy the same basic considerations discussed in connection with the rulemaking hearing<sup>209</sup> would seem to apply. In short, based upon reasonable grounds, it would appear that such arguments, in the agency's discretion, might be either written or oral. However, the further provision of section 25(c)—that the parties shall be given an opportunity "to present evidence on issues of fact"—seems, almost certainly, to contemplate the offering of oral testimony. It should be noted that with respect to factual issues, a trial-type proceeding is generally the best manner of proving facts. Insofar as the judicial

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202. *Id.* § 150A-25.

203. See text accompanying notes 269-71 *infra*.

204. See N.C.R. CIV. P. 55. See also *id.* 31 governing "stipulations."

205. For the elements of an agency decision see discussion of section 36 in text accompanying notes 269-71 *infra*.

206. N.C. GEN. STAT. § 150A-25(b) (Supp. 1974).

207. For a discussion of rulemaking see Part III *supra*.

208. See notes 257-58 and accompanying text *infra*.

209. See text accompanying notes 110-30 *supra*.

analogy is applicable, the norm in trial courts is the presentation of oral evidence to establish or refute issues of fact.

The above conclusion is strengthened by section 25(d) that provides that a party may "cross-examine any witness." Under the Act, a party also must be permitted to cross-examine a witness (which necessarily means oral testimony) who has prepared a document, if the document is "prepared by, on behalf of, or for use of the agency and offered in evidence." Section 25, of course, permits the offering of rebuttal evidence.<sup>210</sup>

### (ii) Consolidation

Section 26 permits an agency to consolidate "contested cases involving a common question of law or fact or multiple proceedings involving the same or related parties." It is designed to increase agency efficiency and avoid unnecessary cost or delay. This section grants the agency a broad discretion to order a joint hearing of an entire matter or any part of it, to order all the cases consolidated, or to make "such other orders concerning proceedings therein" as may tend to avoid unnecessary cost or delay.<sup>211</sup> Here again reference to the practice of consolidation in court cases may be helpful. Moreover, since the agency clearly seems to be delegated a substantial discretion, a review of a consolidation order would seem to be limited to whether the agency has abused its discretion.

### (iii) Subpoenas

Section 27, which governs the issuance of subpoenas, is directed to the problem of the agency's and the party's rights in a contested case hearing to have compulsory process for the acquisition of facts and data.<sup>212</sup> The subpoena provision in the NC APA differs in two respects

210. N.C. GEN. STAT. § 150A-25(d) (Supp. 1974).

211. *Id.* § 150A-26.

212. **Subpoena.**—An agency is hereby authorized to issue subpoenas upon its own motion or upon a written request. When such written request is made by a party in a contested case, an agency shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence, and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if, upon a hearing the agency finds that the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid by the party requesting the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314.

*Id.* § 150A-27. The Model State APA is silent on the question of subpoena power, as are many state APA's. 1 F. COOPER, *supra* note 8, at 295. A survey reveals that at

from a significant number of state APA's. First, the Act itself empowers agencies to issue subpoenas. Second, the Act does not contain a specific provision regarding enforcement of agency subpoenas (nor conversely does it expressly provide that agencies themselves have subpoena enforcement power).<sup>213</sup>

It has been stated to be the general rule that agencies have no inherent power to issue subpoenas<sup>214</sup> and that generally there is a legislative reluctance to grant agencies a power to impose contempt penalties for refusal to comply with administrative subpoenas.<sup>215</sup>

The NC APA, section 27, provides that "[a]n agency is hereby authorized to issue subpoenas upon its own motion or upon a written

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least ten state administrative procedure acts do not contain subpoena provisions. These states include Hawaii, Idaho, Maryland, Minnesota, Nevada, New Jersey, Pennsylvania, Rhode Island, South Dakota, and Vermont.

213. A survey reveals that some twenty state administrative procedure acts do contain specific provisions with respect to subpoenas. The majority of these (fourteen) specifically require applications to the courts (generally a lower court of general jurisdiction) for an enforcement order if a subpoena is not obeyed. These states include Georgia, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Missouri, Montana, North Dakota, Oklahoma, Oregon, Virginia, Washington, and Wyoming. Only two states have been found with provisions that appear to be similar to the NC APA. ME. REV. STAT. ANN. tit. 5, § 2406 (1964); OHIO REV. CODE ANN. § 119.09 (Page 1969). Virginia's provision may be similar in effect, but is difficult to classify. VA. CODE ANN. § 9-6.10 (d) (1973).

214. 1 F. COOPER, *supra* note 8, at 295. But the North Carolina Supreme Court has held that an agency with a legislative grant of power to issue subpoenas has inherent power to adjudge in contempt and punish a duly sworn witness for refusal to testify at a statutorily authorized hearing. *In re Hayes*, 200 N.C. 133, 156 S.E. 791 (1931). The agency involved in *Hayes* was the Utilities Commission (exempted from the NC APA) which was acting under its enabling act. A distinction might be drawn between that situation and a situation involving a general conferral of subpoena power in a broad statute such as the NC APA. It must be noted, however, that the holding in *Hayes* was made even in face of a subpoena enforcement scheme substantially identical to that established in the NC APA, in which application for enforcement could be made to the court. The case is arguably erroneous.

See generally 1 DAVIS, TREATISE, *supra* note 67, § 3.11, at 215; L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 115-20 (abr. student ed. 1965).

215. 1 F. COOPER, *supra* note 8, at 297. Some state courts have invalidated statutes, on state constitutional grounds, which vested agencies with power to impose contempt penalties for refusal to comply with agency orders. *People v. Swena*, 88 Colo. 337, 296 P. 271 (1931) (statute purporting to authorize Public Utilities Commission to punish by contempt for violating commission's order held unconstitutional since to punish for contempt is a judicial power under Colorado constitution and the commission is not a court); *Langenberg v. Decker*, 131 Ind. 471, 31 N.E. 190 (1892) (statute empowering state board of tax commissioners to enforce subpoena by fine or commitment for contempt held unconstitutional under Indiana constitution since the board is an executive department of state, and punishment for contempt is a power that belongs exclusively to the courts); cf. *In re Sims*, 54 Kan. 1, 37 P. 135 (1894); *Roberts v. Hackney*, 109 Ky. 265, 58 S.W. 810 (1900). But see N.C. CONST. art. 4, § 3, discussed in note 287 *infra*; *State ex rel. Lanier v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968). A number of state courts have upheld agency power to punish for contempt. See cases cited in 1 DAVIS, TREATISE, *supra* note 67, § 3.11, at 215 nn.15 & 16.

request." Under the Act an agency upon written request by a party in a contested case "shall issue subpoenas forthwith." The subpoena may require the attendance and testimony of witnesses, as well as the production of evidence, including books, records, correspondence, and documents.

Under section 27 a person wishing to challenge a subpoena before the agency must make a written objection. Upon such an objection this section requires the holding of a hearing to determine whether the subpoena should be revoked. The hearing is to decide whether the items requested relate to a matter in issue, whether the subpoena describes with sufficient particularity the items to be produced, and whether any other reasons exist for which the subpoena is invalid.<sup>216</sup>

As to the enforcement of subpoenas, section 27, read in conjunction with sections 33(2) and (6),<sup>217</sup> provides a clear inference that agencies do not have power to punish for contempt. It is not clear, however, whether a person subpoenaed must risk contempt in order to get a judicial determination of the validity of the subpoena. This problem arises because the Act does not provide for a pre-enforcement judicial determination of the validity of the subpoena. Accordingly, if upon objection a subpoena is sustained by the agency and a party does not then comply, it appears that the agency may under section 33(6) apply to the superior court for a contempt proceeding. This problem, however, may be more apparent than real for three reasons. First, a party might seek a declaratory judgment as to the validity of a subpoena after it is sustained by the agency and prior to the termination of the agency hearing.<sup>218</sup> Second, in a case in which the validity of the subpoena appeared to be a close question, the agency might stay its compliance order, provided that the person subject to the subpoena expeditiously undertakes to secure a judicial determination of the subpoena's validity. Third, since ordinarily it would appear that failure to comply with an agency subpoena would involve civil contempt only, even assuming that a party was incorrect in urging a subpoena's invalidity, and assum-

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216. Under this provision, a compendium of reasons that might be advanced in objecting to a subpoena include the following: (1) lack of relevancy; (2) undue burden or cost of compliance; (3) the matter under inquiry is not within the agency's jurisdiction; (4) the matters sought are described too generally and, in effect, the subpoena is in furtherance of a "fishing expedition"; and (5) the matter sought is privileged under legally recognized doctrines. See 1 F. COOPER, *supra* note 8, at 299-311.

217. See notes 257-58 and accompanying text *infra*.

218. See N.C.R. Civ. P. 57, 65. Rule 57 provides that: "The court may order a prompt hearing of an action for a declaratory judgment and may advance it on the calendar." However, this would be a cumbersome procedure.

ing further that a party would be in contempt of an agency if the subpoena should be judicially upheld, it would appear to be a relatively simple matter for the person *at that point* to purge the "technical" contempt by complying.

Finally, the Act provides that fees shall be paid to witnesses according to the uniform fees for witnesses provision of the General Statutes.<sup>219</sup>

#### (iv) Depositions and discovery

Section 28 provides for the use of depositions and for a party to a contested case to be able to make discovery of identifiable agency records.<sup>220</sup> When taken in compliance with the Rules of Civil Procedure,<sup>221</sup> a deposition may be used in lieu of other evidence in a contested case proceeding. The section also authorizes agencies to adopt rules (under the rulemaking provisions of the Act) for discovery under the Rules of Civil Procedure. The statute contains an exception for records related solely to the internal procedures of the agency or records which are exempt from disclosure by law. These are not subject to discovery.

#### (v) Evidence

The question of the receipt of evidence in agency adjudications has been a subject of some controversy.<sup>222</sup> In North Carolina, prior to the NC APA, the issue was the subject of two legislative acts<sup>223</sup> as well as comment.<sup>224</sup>

Section 29 governing administrative agency receipt of evidence deals with one of two aspects<sup>225</sup> of the evidentiary problem in admin-

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219. N.C. GEN. STAT. § 150A-27 (Supp. 1974). The uniform fees for witnesses provision is *id.* § 7A-314.

220. *Id.* § 150A-28.

221. N.C.R. CIV. P. 26-37.

222. See generally ATTORNEY GENERAL'S REPORT, *supra* note 7, at 70-71; R. BENJAMIN, *supra* note 8, at 170-94; 2 DAVIS, TREATISE, *supra* note 67, §§ 14.01-.07.

223. N.C. GEN. STAT. §§ 143-317 to -318 (1974) (entitled "Rules of Evidence in Administrative Proceeding before State Agencies"); *id.* § 150-16 (rules of evidence contained in the Uniform Revocation of Licenses Act). Both of these acts are repealed by the NC APA. See note 16 *supra*.

224. Professor Hanft has made a thorough and detailed analysis of the evidence issues, and no attempt will be made herein to duplicate his work. Hanft, *Some Aspects of Evidence in Adjudication by Administrative Agencies in North Carolina*, 49 N.C.L. REV. 635 (1971). See also Comment, *Administrative Law—Evidence Before North Carolina Tribunals*, 19 N.C.L. REV. 568 (1941).

225. The other aspect of evidence is concerned with the quantum of evidentiary sup-

istrative adjudication. Section 29 contains, in substance, three evidence provisions. First, the Act contains a mandatory requirement that "irrelevant, immaterial, and unduly repetitious evidence shall be excluded." Second, as a general rule, the rules of evidence as applied in the trial division of the General Court of Justice "shall be followed." Third, as an exception to the general rule, the Act provides that "when evidence is not reasonably available" under the general rule, facts "may be shown by the most reliable and substantial evidence available."<sup>226</sup>

These provisions present a variety of problems. Before analyzing each of the provisions, however, it should be noted that the formulation of section 29 represents, in effect, a middle ground between a "strict" rule of evidence<sup>227</sup> and a "liberal" rule of evidence.<sup>228</sup> Section 29 differs from North Carolina's 1967 restrictive statute since it does *not* require that hearsay or other "incompetent" evidence be excluded.<sup>229</sup>

On the other hand, section 29 is not as unrestrictive as the formulation found in the Uniform Revocation of Licenses Act which permitted certain licensing boards to admit "any evidence" and to "give probative effect to evidence that is of a kind commonly relied on by reasonably prudent men in the conduct of serious affairs."<sup>230</sup>

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port required to sustain an agency decision upon judicial review. This question is governed by section 51(5) and is discussed in Part V *infra*.

226. N.C. GEN. STAT. § 150A-29(a) (Supp. 1974).

227. An example of a "strict" rule is *id.* § 143-318(1) (1974) (repealed by the NC APA, *see* note 16 *supra*), which provides in pertinent part that: "Incompetent, irrelevant, immaterial, unduly repetitious, and hearsay evidence shall be excluded."

228. An example of a "liberal" rule is N.C. GEN. STAT. § 150-18 (1974) (repealed by the NC APA, *see* note 16 *supra*), which provides:

Rules of evidence.—In proceedings held pursuant to this Chapter, boards may admit any evidence and may give probative effect to evidence that is of a kind commonly relied on by reasonably prudent men in the conduct of serious affairs. Boards may in their discretion exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence. In proceedings involving the suspension, revocation, or the withholding of the renewal of a license, rules of privilege shall be applicable to the same extent as in proceedings before the courts of this State.

229. The need to eliminate these two requirements was among the principal reasons Professor Hanft concluded that the strict evidence provision should be replaced. Hanft, *supra* note 224, at 680. This conclusion was based *inter alia* on the fact that such a restrictive provision "threw into reverse the trend of the law concerning rules of evidence before administrative agencies," *id.* at 636, so that enforcement of evidence rules should be relaxed in cases involving administrative proceedings. *Id.* at 659.

230. *See* note 228 *supra*. Professor Hanft noted that this formulation constituted "an uncertain guide" because one federal court applying the formula held that under it hearsay evidence could support a finding, while another federal court stated that responsible persons were not accustomed to relying on hearsay in serious affairs. Hanft, *supra* note 224, at 641.

Beyond the mandatory exclusion, the NC APA contains a basic requirement that the rules of evidence "as applied" in the trial courts<sup>231</sup> shall be followed. The Act does not indicate whether this is intended to mean the rules as applied in jury trial cases or in cases tried before a judge. The drafters of the NC APA thus adroitly skirted an acute dilemma. If jury trial rules were required the drafters would have to confront the challenge that those rules are "a misfit for the administrative process"<sup>232</sup> since a great many agencies are manned by persons untrained in law with the consequence that it can "hardly . . . be expected that they [the agency personnel] will be conspicuously successful in applying the technical, difficult, and often confused rules of evidence."<sup>233</sup> Requiring nonjury rules merely shifts the criticism to the persuasive argument that in cases tried before a judge without a jury exclusionary rules simply are not "applied."<sup>234</sup> Thus are dilemmas made. A practical solution would be to construe the "as applied in trial courts" requirement to mean the evidence which could be *relied upon* by a judge (as opposed to received) in nonjury cases. Such a solution would avoid problems of jury trial exclusionary rules but would still mean at least that only evidence with some probative value could be relied upon by an agency, even if other evidence had been admitted.<sup>235</sup>

The next problem is determining the scope and extent to which the rules applied in the trial courts (whatever they are) may be foregone under the Act. As an exception to the basic rule, when evidence is not "reasonably available" under trial court rules to show relevant facts, such facts may be shown by "the most reliable and substantial evidence available." The quoted phrases raise two critical inquiries: first, when is evidence not reasonably available, and second, what evidence constitutes the most reliable and substantial available?

It is doubtful that a determination of "reasonably available" can be made except upon a balancing in a particular proceeding of the

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231. The appellate division includes the court of appeals and the supreme court, N.C. CONST. art. 4, §§ 2, 5; thus leaving the superior and district court divisions as the Trial Division. The strict evidence act specifically referred to the "superior and district court divisions of the General Court of Justice." N.C. GEN. STAT. § 143-318(1) (1974), *repealed*, Act of April 12, 1974, ch. 1331, § 2, [1973] N.C. Sess. Laws 691, 703.

232. 2 DAVIS, *TREATISE*, *supra* note 67, § 14.03.

233. Hanft, *supra* note 224, at 637.

234. 1 J. WIGMORE, *EVIDENCE* § 4(b), at 34-35 (3d ed. 1940). *See also* 2 DAVIS, *TREATISE*, *supra* note 67, at 14.04.

235. *See* text accompanying notes 391-404 *infra*.

importance of and need for the evidence against the cost and burden of acquiring or producing it.<sup>236</sup> Naturally, the amount that a party can be expected to spend to procure evidence certainly will vary depending upon the value of the matter in controversy, as well as the importance of establishing a particular fact to the resolution of an overall controversy.

Assuming that evidence is not reasonably available under the basic rule, the type of evidence that might be deemed the "most reliable and substantial available" cannot be evaluated except with respect to particular facts and circumstances. This generally seems to address the trustworthiness of the available evidence, its probative value and the available methods for testing its likely truthfulness. In connection with these factors, evidence may be seen as existing along a spectrum: from utterly worthless (of no probative value with respect to establishing a fact) to highly reliable and trustworthy (strongly supporting the existence of an asserted fact). It is impossible that utterly worthless evidence could be shown to be the "most reliable and substantial evidence available." Beyond such a statement, it is doubtful that a general rule can be formulated. However, a distinction should be drawn between the most reliable and substantial evidence that a party will be allowed to introduce (assuming evidence meeting the basic rule is not available) and the quantum of evidence necessary to sustain an agency finding of fact, when the agency's decision is before the court upon judicial review.<sup>237</sup>

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236. Virginia's APA contains an evidence rule that provides a statutory balancing formulation:

Rules of evidence in contested cases.—In contested cases:

(a) All relevant and material evidence shall be received, except that:

(1) the rules relating to privileged communications and privileged topics shall be observed; (2) hearsay evidence shall be received only if the declarant is not readily available as a witness; and (3) secondary evidence of the contents of the document shall be received only if the original is not readily available. *In deciding whether a witness or document is readily available the agency shall balance the importance of the evidence against the difficulty of obtaining it, and the more important the evidence is, the more effort should be made to produce the eyewitness or the original document.*

VA. CODE ANN. § 9-6.11 (1973) (emphasis added).

237. The evidence that an agency may receive and may rely upon, of course, is closely related to the evidentiary support that must be found in the record of an agency decision to sustain a decision on judicial review. See text accompanying notes 385-404 *infra*. But the judicial review problem is distinguishable from the question of what evidence parties may offer or agencies may receive. For example, in an agency hearing a question may arise as to the existence of a particular historical event. Testimony by the eyewitness ("Witness A") to the occurrence might be the best method of proving the fact. However, if Witness A is out of the country, this might make testimonial evidence by Witness A "not reasonably available." Assuming that Witness A had relayed his observations to a person available to testify ("Witness B"), can Witness B's testi-

Some APA's specifically address the question of testimonial privileges. The NC APA provides for the recognition of privileges through its basic requirement that the rules of evidence as applied in trial courts be observed. This conclusion follows since the exception to the evidence rules applied in trial courts is concerned with instances in which evidence meeting the basic rules is not available, and not with disregarding court-recognized privileges. Section 29(b) requires that all evidence in a contested case be made a part of the record. Moreover, factual information or evidence not in the record may not be considered in the determination of the contested case (except matters officially noticed under section 30). Documentary evidence may be received in the form of copies or excerpts, or may be incorporated by reference if such incorporated documents are available for examination by the parties. If a timely request is made, a party shall be given "an opportunity to compare the copy with the original if available."<sup>238</sup>

#### (vi) Official notice

Section 30 provides for two instances in which evidentiary proof of facts may be foregone in a contested case proceeding. First, an agency may take official notice of "all facts of which judicial notice may be taken." Secondly, official notice may be taken of "other facts within the specialized knowledge of the agency."<sup>239</sup> The latter formulation is addressed to those instances in which the agency through its operation has developed a special competence. This refers to factual knowledge developed through the agency's execution of its statutorily prescribed functions. It appears that the factual knowledge must be peculiar to the agency holding the contested case hearing since section 30 employs the term "the agency." This would appear to mean that one agency may not take official notice of facts within the specialized knowledge of some other agency.

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mony constitute the "most reliable and substantial evidence available"? It would appear that Witness B's testimony might meet the test, notwithstanding that it constitutes hearsay. On judicial review, however, unless Witness B's testimony is corroborated by other evidence (for example, circumstantial evidence), or if when weighed against other evidence the testimony is significantly undercut, a court might be justified in finding that the hearsay evidence is insufficient to sustain a finding that the event occurred. This would seem possible even though Witness B's testimony was, *for admission purposes*, the most reliable and substantial evidence available to the party presenting it.

238. N.C. GEN. STAT. § 150A-29(b) (Supp. 1974).

239. *Id.* § 150A-30.

When an agency wishes to notice a fact, the noticed fact and its source must be stated and made known to affected parties "at the earliest practicable time." Any party upon timely request "shall" be afforded an opportunity to dispute that fact through submission of evidence and argument.<sup>240</sup> Finally, section 30 provides that "an agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it." It is unclear whether this provision refers only to evidence presented to dispute a noticed fact, or evidence presented during the entire course of a contested case hearing. Since many agencies are created specifically for the purpose of institutionalizing certain experience (technical competence and specialized knowledge), a reasonable argument can be made that such experience may be used in the evaluation of any evidence presented at any time during a hearing. An agency would be unreasonably restricted if it could not employ its experience, competence, or knowledge gained in its work. The use of special experience, competence, or knowledge is safeguarded when section 30 is read in connection with section 36.<sup>241</sup>

#### (vii) Stipulations

The Act's provisions regarding stipulations are designed to permit agencies in contested cases to expedite determinations. The Act allows the omission of proof of designated facts by agreement and, except when otherwise provided by law, disposition of an entire contested case by stipulation, agreed settlement, consent order, waiver, default, or other methods agreed upon by the parties.

The Act requires that a stipulation involving facts in a controversy be in writing and filed with the agency.<sup>242</sup> The requirement of a writing precludes the possibility of a party's becoming bound by a tacit admission or failure to controvert facts.

For purposes of the definition of the term "parties" in section 31, section 2(5) defines "party" to include the agency. Accordingly, the provision that "parties" should agree upon facts when practicable is an encouragement to both outside parties and the agency itself to agree to facts which are not genuinely controverted.<sup>243</sup>

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240. *Id.*

241. See text accompanying notes 269-71 *infra*.

242. N.C. GEN. STAT. § 150A-31 (Supp. 1974).

243. Cf. N.C.R. CIV. P. 37(c).

Section 31(b) permits the disposition of an entire contested case by methods other than hearing and decision based on evidence introduced. The omission from section 31(b) of the requirement that the various forms of agreed settlements be "in writing," as required by section 31(a) with respect to stipulations of facts, permits the inference that agreed settlements need not necessarily be written except when an "agreed settlement" is made by stipulating facts. The Missouri Court of Appeals reached the conclusion under that state's APA that an agreed settlement might come about by a course of conduct of the parties.<sup>244</sup>

A second issue that might arise is whether an agency's acceptance of an agreed settlement constitutes a "decision" under section 36 of the Act, which requires the agency to state findings of fact and conclusions of law.<sup>245</sup> The section permitting, in effect, informal disposition of contested cases could not achieve its purpose if it were subjected to the requirements of section 36, so long as evidence of the agreed settlement or consent order is available. Nevertheless, it may be good practice for agencies when engaging in this informal mode of settling contested cases to make an adequate record so that the reason for dispensing with the requirements of section 36 will clearly appear. Similarly, this will protect parties to contested cases, other than the agency, by memorializing for them the basis of the agency's decision.<sup>246</sup>

### (b) *Hearing officers and powers*

Section 32 governs the persons who may be designated to conduct a contested case hearing. Section 32(a) provides that an agency, one or more members of the agency, a person or group of persons designated by statute, or one or more hearing officers desig-

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244. *Davis v. Long*, 360 S.W.2d 307 (Mo. Ct. App. 1962).

245. See notes 269-71 and accompanying text *infra*.

246. A counterargument to this conclusion may be based on the proposition that section 36 does not contain an exception to the findings-and-conclusions requirement for dispositions under section 31(b). This could be buttressed by citation of a provision like that of Missouri which contains an express exception for cases "disposed of by stipulation, consent order or agreed settlement." MO. STAT. ANN. § 536.090 (Vernon Supp. 1975).

A contrary proposition is that the essential purpose of the provision is to permit *informal* dispositions to dispense with the requirements of formal decisions. If this is correct, the language used in other acts to accomplish this purpose would be relevant, particularly the Revised Model State APA, which uses the term "informal disposition" to refer to agreed dispositions. MODEL STATE APA § 9(d), *quoted in* 1961 HANDBOOK, *supra* note 18, at 214.

nated and authorized by the agency to handle contested cases, shall be hearing officers. This section provides generally that hearings shall be conducted in an impartial manner.<sup>247</sup> Tying into the requirement of impartial hearings, section 32(b) provides that a party may file, in good faith, "a timely and sufficient affidavit of personal bias or disqualification of a hearing officer." Upon such a filing "the agency" shall determine the matter as part of the record in the contested case, with its determination being subject to judicial review "at the conclusion of the proceeding."<sup>248</sup>

Section 32 is not a standard provision in the state APA's<sup>249</sup> and appears clearly to be modeled after the Federal APA.<sup>250</sup> Procedurally, it appears that the Act contemplates that an affidavit of bias or disqualification may be filed with the hearing officer at the initiation of a hearing or prior to initiation. Since the Act requires, however, that "the agency" make a determination of asserted bias or disqualification, the affidavit apparently must be transmitted by the hearing officer to the "agency" itself. It seems reasonably clear that a hearing officer may not make a determination concerning his own alleged bias or disqualification.<sup>251</sup> The Act further makes it clear that if the agency's decision is that the hearing officer is not disqualified, judicial review may be had of that decision, but "at the conclusion of the proceeding."

247. N.C. GEN. STAT. § 150A-32(a) (Supp. 1974).

248. *Id.* § 150A-32(b).

249. The Revised Model State APA does not contain an analogous provision. See 1 F. COOPER, *supra* note 8, at 331.

250. The federal provision is contained in the section commonly referred to as section 7(a), 5 U.S.C. § 556(b) (1970), and contains language that is substantially similar to the NC APA as follows:

- (b) There shall preside at the taking of evidence—
- (1) the agency;
  - (2) one or more members of the body which comprises the agency;  
or
  - (3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matters as a part of the record and decision in the case.

251. 2 DAVIS, TREATISE, *supra* note 67, § 12.05, at 167. The cited reference is with respect to the Federal APA, after which the NC APA appears to be modeled. See note 250 and accompanying text *supra*.

The Act does not contain a definition of "personal bias" nor does it provide the standards for disqualification of an administrative hearing officer. Accordingly, the standards must be determined by reference to other law.<sup>252</sup> It may be noted however, that the term "personal bias" is a term of art. It has been held that a substantial showing of bias is necessary to disqualify a hearing officer,<sup>253</sup> that a strong conviction on questions of law and policy does not disqualify,<sup>254</sup> and that even upon a showing of bias or disqualifying factors "the rule of necessity" may permit the officer or agency to hear the case when no available alternative method exists.<sup>255</sup>

Section 32(c) is addressed to those instances in which a hearing officer is disqualified or "it is impracticable for him to continue the hearing." In such an instance another hearing officer "shall be assigned to continue with the case unless it is shown that substantial prejudice to any party will result therefrom, in which event a new hearing shall be held or the case dismissed without prejudice."<sup>256</sup> In determining whether a new hearing shall be held, the Act requires a party to show "that substantial prejudice" will result if a successor is permitted to continue the hearing. Instances will perhaps occur when the prejudice will be so substantial that a new hearing must be held. However, the Act appears to permit balancing the effect of any prejudice from continuing the hearing against the burden of holding a new one. Accordingly, if a hearing officer becomes unavailable at the outset of a lengthy hearing the prejudice of continuing the hearing, if

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252. See generally 1 F. COOPER, *supra* note 8, at 338-50; 2 DAVIS, TREATISE, *supra* note 67, §§ 12.01-.06, at 163-66.

253. *United States ex rel. De Luca v. O'Rourke*, 213 F.2d 759 (8th Cir. 1954).

254. See generally 2 DAVIS, TREATISE, *supra* note 67, § 12.01.

255. See generally 1 F. COOPER, *supra* note 8, at 348-50; 2 DAVIS, TREATISE, *supra* note 67, § 12.04. The rule is subject to numerous practical solutions, e.g., if one hearing officer is involved, a temporary or special one may substitute; if only some members of an agency are involved, the unbiased members may be allowed to act; and, when going forward under the so-called rule is permitted, court scrutiny upon judicial review may be broader and more intensive. *Id.* § 12.04, at 163-66. As a matter of policy, agencies should explore all feasible alternatives to avoid going forward with a hearing conducted by either a biased officer, agency member, or agency. Indeed in some circumstances due process may limit the extent to which the rule of necessity may be invoked. *Id.* § 12.04, at 165.

256. N.C. GEN. STAT. § 150A-32(c) (Supp. 1974). Debilitating illness of the hearing officer is a good situation for application of this subsection. Instances exist, for example, when a trial judge after trial, but before decision, becomes unavailable by reason of his death and the parties agree to permit a successor judge to decide the case based on the trial court record and oral argument before the successor. *E.g.*, *Coffey v. Romney*, P-H EQUAL OPPORTUNITY IN HOUSING REP. ¶ 13,588 (M.D.N.C., Nov. 11, 1972).

any, would appear less substantial than in the hearing's later stages. However, a lesser showing of prejudice in the early stages may require undertaking a new hearing. Conversely, when a lengthy hearing has reached its later stage it would appear that the prejudice would have to outweigh the burden of holding a new hearing.

Section 33 sets forth a list of specific powers that a hearing officer may exercise.<sup>257</sup> This section is applicable when the hearing officer is someone other than the agency itself (or all the agency members). When the agency or its members are conducting a hearing the powers which they may exercise are those of the agency. Section 33 uses the permissive term "may" inasmuch as the hearing officer's exercise of the powers enumerated would depend on the agency's subdelegation to him of those powers.<sup>258</sup> To the extent that an agency has subdelegated such power to the hearing officer, that officer may administer oaths and affirmations, sign and issue subpoenas in the name of the agency, provide for the taking of testimony by deposition, regulate the course of the hearing, direct the parties to appear and confer to consider simplification of the issues upon consent of the parties, and apply to the superior court for proceedings to enforce agency subpoenas.

It may be recalled that section 27 authorizes issuance of subpoenas and provides that "the agency shall revoke a subpoena" on the grounds stated in section 27. Section 33(2) speaks only of signing and issuing subpoenas. It does not indicate whether a hearing officer, as opposed to the agency, may rule on a request that a subpoena be revoked. But it would appear that a revocation decision would be made in the same manner that a decision on the issues in the con-

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257. Powers of hearing officer.—A hearing officer may:

- (1) Administer oaths and affirmations;
- (2) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence;
- (3) Provide for the taking of testimony by deposition;
- (4) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;
- (5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties; and
- (6) Apply to the General Court of Justice, Superior Court Division, during or subsequent to a hearing for an order to show cause why any person should not be held in contempt of the agency and its processes, and the Court shall have the power to impose punishment as for contempt for acts which would constitute direct or indirect contempt if the acts occurred in an action pending in superior court.

N.C. GEN. STAT. § 150A-33 (Supp. 1974).

258. See generally 1 DAVIS, TREATISE, *supra* note 67, §§ 9.01-07.

tested case would be made. This means that the agency's decision-making process in contested cases will determine whether the hearing officer initially may rule upon a revocation request.

(c) *Decisionmaking in contested cases*

Sections 34, 35, 36, and 37 of the Act govern the decisionmaking process, the form and content of decisions, and the manner of record making in the adjudication of contested cases.

(i) Proposed decision

Section 34 provides explicitly for those instances in which the agency decisionmaker is not the hearing officer and, implicitly, for those instances in which the decision is to be rendered by the hearing officer. Section 34(a) provides that when the official or a majority of the officials of the agency who make the final decision are not the persons who have heard a contested case, a proposal for decision must be served on the parties prior to a decision, and the parties given an opportunity to file exceptions, to propose findings of fact, and to present oral and written arguments to the final decisionmaker.<sup>259</sup>

The proposal for decision must set forth proposed findings of fact and proposed conclusions of law, and be prepared by the hearing officer unless the hearing officer becomes unavailable to the agency. If the hearing was conducted by more than one person, any one of the persons who conducted the hearing may prepare the proposed decision. Under section 34(b), however, if no person who has conducted the hearing is available, findings may be prepared by one who has read the record, except in those instances in which "demeanor of witnesses is a factor." If demeanor is a factor in the hearing, and the person who conducted the hearing is not available, that portion of the hearing involving demeanor must be reheard, or the case dismissed without prejudice.<sup>260</sup> But section 34(c) provides additionally that the parties may, by a written stipulation or orally at the hearing, waive the requirement for a proposed decision as well as the other requirements of section 34.<sup>261</sup> Determining when demeanor of witnesses is a factor may present problems. Demeanor will likely not be a fac-

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259. N.C. GEN. STAT. § 150A-34(a) (Supp. 1974).

260. *Id.* § 150A-34(b).

261. *Id.* § 150A-34(c).

tor when the proof is by documentary evidence, the evidence is other than oral testimony, or the credibility of a witness can be evaluated without observing the witness. Instances of the latter situation might occur when (1) testimony is uncontroverted, (2) testimony without regard to demeanor is unbelievable<sup>262</sup> or (3) testimony relates to matters of which official notice may be taken.<sup>263</sup>

Another problem involves the application of section 34 when the person who conducted the hearing is unavailable and demeanor of witnesses is a factor. A hearing officer would seem to have a considerable latitude to require, for example, a party asserting that demeanor of witnesses is a factor to designate those portions of the hearing to be held again. It should be emphasized that the entire hearing need not be held again but merely "the portions of the hearing involving demeanor." Accordingly a hearing officer might well be alert for dilatory tactics (for example, a party refuses to designate reasonably narrow portions of a hearing but, instead insists on a broad-ranging rehearing). Such tactics could, of course, be devastating for the conduct of hearings and, if the hearing officer did not have such discretion, could cause unnecessary delay.

(ii) Communication with respect to the proposed decision

Section 35 is addressed to the decisionmaker's communications with respect to the decision prior to its rendering. This section prohibits communication by the agency decisionmaker or the person who is to make findings of fact and conclusions of law in a contested case with respect to "any issue of fact," with any *person* or party (or party's representative). This section further prohibits direct and indirect communication with any party or party's representative with respect to "any issue of law" except upon notice and opportunity for all parties to participate.<sup>264</sup> Both of the above prohibitions are subject to an exception when communication is "required for deposition of an *ex parte*<sup>265</sup> matter authorized by law."<sup>266</sup> Prohibitions contained

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262. Such testimony is sometimes referred to as "inherently incredible." Testimony of a fact that is contrary to the laws of nature or physical facts would be examples.

263. For a discussion of official notice see text accompanying notes 239-41 *supra*.

264. N.C. GEN. STAT. § 150A-35 (Supp. 1974).

265. BLACK'S LAW DICTIONARY 661 (4th ed. 1951) defines "*ex parte*" as "[o]n one side only; by or for one party; done for, in behalf of, or on application of, one party only."

266. N.C. GEN. STAT. § 150A-35 (Supp. 1974). The best illustration of an *ex parte* court proceeding is one in which a temporary restraining order is issued on application of one party, against another party when the party against whom the order runs has

in section 35 begin at the time of the notice of the hearing.

It should be noted that the provisions regarding communication with respect to facts prohibits communications with "any person," whereas the prohibition with respect to issues of law prohibits communicating "with any party or his representative." The purpose for this is well-settled. With issues of law it is common that decisionmakers go beyond communication with the parties and do not limit themselves to the evidence and argument put into the record at the hearing.<sup>267</sup>

Neither of the section 35 prohibitions, however, applies to members or staff of the agency "other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case." Finally section 35 "does not apply" to an agency employee, or party representative "with professional training in accounting, actuarial science, economics, financial analysis, or rate making in a contested case insofar as the case involves rate making or financial practices or conditions."<sup>268</sup>

### (iii) Rendering the decision

Section 36 governs the manner and form in which decisions must be rendered. The basic purposes of section 36 are generally that the

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not been heard prior to issuance of the order. See N.C.R. Civ. P. 65(b). In an agency context, a summary suspension of a license under section 3(c) might be an ex parte proceeding.

267. See, e.g., Hanft, *supra* note 224, at 643, in which during a discussion of whether in determining a rule or policy an agency is limited to the record, it is noted that "judges may even informally consult law professors, specialists in their fields, seeking light on law in connection with cases before them." Section 35, in drawing a distinction between communication with respect to facts and law, follows the precedent of section 13 of the Revised Model State APA. In the Model APA, the drafter's comment to section 13 states that "[t]his section is intended to preclude *litigious facts* reaching the deciding minds without getting into the record. Also precluded is ex parte discussion of the law with the party or his representative. No objection is interposed to discussion of the law with other persons, e.g., the attorney general, or an outside expert." 1961 HANDBOOK, *supra* note 18, at 219 (emphasis added). See also *Mazza v. Cavicchia*, 15 N.J. 498, 514-16, 105 A.2d 545, 554-55 (1954), discussed in 2 F. COOPER, *supra* note 8, at 439-40 ("[I]t is a basic requirement of fair procedure as applicable to administrative adjudication as to proceedings in the courts—that nothing should be taken into account in arriving at a decision on a contested issue of fact that has not been introduced into the record and exposed to refutation or explanation by the parties."). This principle has not been strictly enforced in North Carolina case law. For example, in *State ex rel. Utilities Comm'n v. Town of Scotland Neck*, 243 N.C. 193, 90 S.E.2d 519 (1955), the court held that private consultations, following a ratemaking hearing, by the decisionmaker with representatives of a power company that was a party to the proceeding, while unfortunate, did not result in prejudicial error.

268. N.C. GEN. STAT. § 150A-35 (Supp. 1974).

decisionmaker be personally familiar with the record,<sup>269</sup> the factual findings be based exclusively upon the evidence and matters officially noticed, the entire record be considered, the decision be supported by substantial evidence as defined in the Act, and the decision be tendered to the party, and his attorney of record, if any.<sup>270</sup>

In substance, section 36 is a follow-up provision to section 35. It will be recalled that section 35, in general, provides that matters not in the record may not affect the decision. Section 36 expands upon this by requiring that the decision be based upon the record evidence (or evidentiary substitutes, for example, stipulations under section 31). It should be emphasized that when the ultimate decisionmaker is someone other than the person or persons who have heard the evidence, section 36 is particularly important. It requires a review "of the official record." By requiring not merely that the evidence be the exclusive basis for findings of fact, section 36 is further designated to limit the possibility of unfair or arbitrary decisions, by requiring that the decisionmaker articulate the findings of fact, that these be based upon the evidence, and be supported by substantial evidence. Furthermore by requiring that decisions be served upon the parties, decisionmakers are on notice that not merely the decision, but the basis for the decision is likely to be scrutinized by affected parties. This inherently reduces the possibility for administrative arbitrariness.<sup>271</sup>

#### (iv) Record of the hearing

Section 37 sets forth a detailed list of items that shall be prepared by an agency in connection with a hearing, which together shall constitute the official record.<sup>272</sup> Section 37(b) provides for the

269. The requirements respecting the content of the record are set forth in section 37 and are discussed in note 272 and accompanying text *infra*.

270. N.C. GEN. STAT. § 150A-36 (Supp. 1974).

271. The reasons underlying requirements like those of section 36 have been stated elsewhere as follows:

The obligation to formulate findings, rather than simply to announce a result, tends to assure considered action by the administrative deciding officer. As a corollary, the findings themselves offer some assurance to the parties that the decision has been arrived at rationally, on the evidence; and the findings at least enable the parties to judge for themselves the soundness of the decision, and afford them assistance in deciding whether or not to seek to reverse it on rehearing or judicial review.

R. BENJAMIN, *supra* note 8, at 253.

272. Official record.—(a) An agency shall prepare an official record of a hearing which shall include:

- (1) Notices, pleadings, motions, and intermediate rulings;
- (2) Questions and offers of proof, objections, and rulings thereon;
- (3) Evidence presented;

recording of oral testimony. It appears that the requirement that proceedings "shall be recorded" refers to recording in the generic sense of "to make a record of." Accordingly, it would seem that stenographic notetaking, as well as mechanical recording by electronic means, would satisfy the recordation requirement. Such record of oral evidence need not be transcribed unless requested by a party, with the requesting party bearing the cost of the transcript or portion thereof requested.

The requirement of an official record is deemed to serve the useful function of preserving the items that have a bearing on an agency decision. This requirement, in particular, is necessary in order that judicial review of the decision may be had.

#### (4) Special Provisions on Licensing

##### (a) *Licensing is a contested case*

License is defined broadly by section 2(3) so as to include any evidence of a right or privilege to engage in a trade, occupation, or other activity.<sup>273</sup> Licensing is defined as "any administrative action issuing, failing to issue, suspending or revoking a license."<sup>274</sup> Contested case, in turn, is defined specifically to include "licensing."<sup>275</sup> Accordingly, administrative action issuing, failing to issue, suspending, or revoking a license is subject to all of the procedural safeguards outlined in connection with the administrative function of determining contested cases.<sup>276</sup>

The Act in section 2(3) does contain two exceptions to the definition of license. The exceptions are licenses issued under chapter 20 (motor vehicles)<sup>277</sup> and subchapter 1 of chapter 105 (taxation)<sup>278</sup>

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(4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose;

(5) Proposed findings and exceptions; and

(6) Any decision, opinion, order, or report by the officer presiding at the hearing and by the agency.

(b) Proceedings at which oral evidence is presented shall be recorded, but need not be transcribed unless requested by a party. Each party shall bear the cost of the transcript or part thereof or copy of said transcript or part thereof which said party requests.

N.C. GEN. STAT. § 150A-37 (Supp. 1974).

273. *Id.* § 150A-2(3).

274. *Id.* § 150A-2(4).

275. *Id.* § 105A-2(2).

276. The expansive definition contained in the NC APA of contested case—"any agency proceeding . . . wherein the legal rights, duties or privileges of specific parties are to be determined"—would in itself include administrative action defined by the act as "licensing." See *id.* § 150A-2(2).

277. *Id.* §§ 20-1 to -319.2 (Cum. Supp. 1974).

278. *Id.* §§ 105-2 to -270.

of the general statutes. The logic of the exemptions for automobile licenses and revenue franchise licenses is that, when an application is filed in appropriate form, or alternatively a test has been passed to which answer correction does not involve discretion, the license must be issued as a ministerial function, upon payment of the appropriate fee. In such cases neither hearings nor the other procedural protections could serve any useful function.<sup>279</sup>

(b) *Effect of special licensing provisions*

Since licensing (with the exceptions noted) is subject to the procedural protections governing administrative adjudications, the essential inquiry here concerns the effect of the special provisions of section 3.<sup>280</sup> The special provisions on licensing *add to* the requirements governing contested cases in three situations: (1) the renewal or replacement of existing licenses, (2) the termination, modification or suspension of licenses, and (3) the suspension of licenses required by an emergency.

(i) *Renewal or replacement of existing licenses*

When a licensee makes "timely and sufficient application" for the renewal of an existing license or a new license to replace an existing license, providing any required fee has been paid *and* the activity

279. See 1 F. COOPER, *supra* note 8, at 132; cf. *Poole v. Board of Cosmetic Art Examiners*, 221 N.C. 199, 19 S.E.2d 635 (1942).

280. *Special provisions on licensing.*—(a) When a licensee makes timely and sufficient application for renewal of a license or a new license (including the payment of any required license fee) with reference to activity of a continuing nature, the existing license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license are limited, until the last day for applying for judicial review of the agency order. This subsection does not affect agency action summarily suspending such license under subsections (b) and (c) of this section.

(b) Before the commencement of proceedings for suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license, an agency shall give notice to the licensee, pursuant to the provisions of G.S. 150A-23(c), of alleged facts or alleged conduct which warrant the intended action. The licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license.

(c) If the agency finds that the public health, safety, or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license may be ordered effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

Nothing in this subsection shall be construed as amending or repealing any special statutes, in effect prior to July 1, 1975, which provide for the summary suspension of a license.

N.C. GEN. STAT. § 150A-3 (Supp. 1974).

for which the existing license is held is "of a continuing nature," two special rules apply: first, the existing license does not expire until the agency renders a final decision; and second, if the application is denied or the terms of the new license are limited, the existing license does not expire until the expiration of the period for applying for judicial review of the agency order.<sup>281</sup>

This provision is addressed to instances in which, for example, a person holding an existing license may have made a substantial investment in the activity permitted by the license and a temporary absence of a license would require the activity licensed to cease. Accordingly, the section is designed to preclude hardship upon an applicant that would be caused by a lapse of a license between the expiration of one license, assuming application has been timely made and is otherwise sufficient, until judicial review is had of the agency decision regarding the issuance of a renewal or replacement license.<sup>282</sup>

#### (ii) Termination, modification, or suspension

Section 3(b) provides that "before the commencement of proceedings for suspension, revocation, annulment, withdrawal, recall, cancellation or amendment" of a license an agency must take two actions: the agency must give notice to the licensee under section 23(c) of the NC APA,<sup>283</sup> of alleged facts or alleged conduct which warrant the proceedings being contemplated by the agency; and the agency must give the licensee an opportunity to show compliance with all lawful requirements for retention of the license.

Since the proceedings of the character identified in section 3(b) would seem plainly, *when initiated*, to constitute a contested case<sup>284</sup> and thus would be subject to the procedural safeguards governing adjudication, it appears that the purpose of section 3(b) is not to replace those basic adjudication requirements, but to specify *added* pro-

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281. *Id.* § 150A-3(a). This section, by its terms, does not affect summary suspensions under sections 3(b) and (c). It should be noted that the Act's language provides for an existing license to continue "until the last day" for applying for judicial review. The only construction that makes sense is the "expiration of the last day."

282. See 2 F. COOPER, *supra* note 8, at 490-91.

283. For a discussion of the requirements of section 23(c) see text accompanying notes 196-97 *supra*.

284. See notes 174-75 and accompanying text *supra*. It may be recalled that a preliminary investigation to determine whether to initiate a proceeding is not a contested case; thus the need for this special provision.

cedural protections *prior to* the institution of the proceeding specified in 3(b).<sup>285</sup>

(iii) Suspension required by emergency

Section 3(c) addresses those instances in which the public health, safety, or welfare requires emergency action. In such instances, if the agency finds (and incorporates the findings in its order) that the public health, safety, or welfare so requires, summary suspension of a license may be undertaken. The summary suspension may be effective on a date specified in the order or upon service of a certified copy of the order at the last known address of the licensee, whichever is *later*. This suspension may be effective while proceedings for a termination (or other disposition) are taking place. It should be noted especially that the Act requires that such proceedings shall be "promptly" commenced and determined.<sup>286</sup>

V. JUDICIAL REVIEW: THE ROLES OF AGENCIES AND COURTS

A. *The Premise of Judicial Review*

Judicial review is based on the premise that courts are the final

285. A question might be raised regarding the significance, if any, or the difference between the actions listed in section 3(b) and the definition of "licensing" contained in section 2(4). See note 46 *supra*. While the reason for this difference does not readily appear, one reason might be that the greater detail in specifying the list of actions in section 3(b) was to call attention to the special opportunity given to holders of licenses to attempt to show their retention rights *prior to the initiation of such actions* to effect one of the ends identified. The greater specificity of section 3(b) appears to be only a more detailed way of saying "issuing, . . . suspending or revoking" a license. Manifestly, an "annulment, withdrawal, recall or cancellation" would be in substance and effect, a "revocation," and the substance and effect is controlling and not the label placed on the administrative action. Otherwise, by the simple device of failing to use the words "issuing, suspending or revoking," and the substitution therefor of novel terms ("termination," "modification," "retrieval"—the list is endless), agencies could render the licensing provisions nugatory. Similarly, action "amending" a license constitutes a "revocation" to the extent that, and the particulars in which, a "right or privilege to engage in a trade, occupation, or other activity," N.C. GEN. STAT. § 150A-2(3) (Supp. 1974), is diminished, and conversely constitutes "action issuing" a license to the extent that, and the particulars in which, the right or privilege is increased.

Action of an agency which neither diminished nor increased the right or privilege under a license would not seem to be subject to the requirements of section 3. Examples would include correction of clerical errors; correcting the identity, *e.g.*, corporate name and the like, of the licensee.

286. By its terms, section 3(c) does not repeal any special statutes that provide for summary suspension. This savings clause, however, does not apply to chapter 150 of the North Carolina General Statutes (in existence prior to the effective date of the NC APA), since the purpose of the Act is in effect to repeal chapter 150. Act of April 12, 1974, ch. 1331, § 1, [1973] N.C. Sess. Laws 691.

arbiters of governmental determinations affecting the legal rights, duties, or privileges of specifically named persons.<sup>287</sup> The judicial review provisions of the NC APA determine the relationships that are to exist between agencies and courts, specify the respective roles of courts and agencies in the execution of governmental business, circumscribe the persons who may invoke court process as a check on agency action, and set out the procedures applicable for invoking court process.<sup>288</sup> The issue of proper allocation of functions and roles is difficult. Nevertheless, for purposes of analysis, it is possible conceptually to separate the basic problems into three general areas: (1) the availability of judicial process to control agency action; (2) the manner in which court control may be sought, and (3) the nature of judicial control, the manner in which it is exercised, and the limitations upon it.

### B. Availability of Judicial Review

The NC APA contains two provisions regarding the availability of

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287. This generalization is a substantial oversimplification of this very difficult topic and is subject to many exceptions. See generally L. JAFFE, *supra* note 214, at 87-120. The general conclusion stated derives from limitations expressed in article III of the United States Constitution and in state constitutions, e.g., N.C. CONST. art. 4, § 1, that the judicial power is vested in courts. However, the North Carolina constitution also specifically contemplates that administrative agencies, in certain instances, may be vested with judicial powers, without thus constituting them constituent parts of the judiciary. *Utilities Comm'n v. Old Fort Finishing Plant*, 264 N.C. 416, 142 S.E.2d 8 (1964). N.C. CONST. art. 4, § 3, provides: "Judicial powers of administrative agencies. The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice." See also note 215 *supra*.

288. The judicial review provisions contained in the NC APA are to a large extent a reenactment of, and in some instances in substance identical to, the North Carolina judicial review provisions first enacted in 1953. N.C. GEN. STAT. §§ 143-306 to -316 (1974), *repealed*, Act of April 12, 1974, ch. 1331, § 2, [1973] N.C. Sess. Laws 691, 703. Accordingly, since courts, lawyers, and agencies will be familiar with many judicial review concepts and problems, the discussion of judicial review herein will contain less detailed analysis than the preceding discussion. In addition, several authors have already examined aspects of the judicial review question in North Carolina. No attempt will be made to examine general problems sufficiently examined elsewhere. See Hanft, *supra* note 224; *A Survey of Statutory Changes in North Carolina in 1953*, 31 N.C.L. REV. 375, 378 (1953); Note, *Procedural Due Process in Student Disciplinary Proceedings*, 43 N.C.L. REV. 152 (1964); Note, 42 N.C.L. REV. 601 (1964).

Also it should be noted that in the early 1950's a Special Commission was created by the General Assembly to study state administrative procedure. In 1953 that Commission issued a report that, among other things, proposed the judicial review provisions contained in N.C. GEN. STAT. §§ 143-306 to -316 (1974), *repealed*, Act of April 12, 1974, ch. 1331, [1973] N.C. Sess. Laws 691, 703. REPORT OF THE SPECIAL COMMISSION TO STUDY PRACTICES AND PROCEDURES BEFORE STATE ADMINISTRATIVE AGENCIES 20-24 (1953).

the judicial process as a control upon action of administrative agencies. Section 43 governs the availability of general judicial review of agency decisions on their merits.<sup>289</sup> Since general judicial review under section 43 is available only with respect to a "final agency decision,"<sup>290</sup> it can be imagined that, in the absence of some provision whereby the prompt rendering of a final decision could be required, general judicial review could be forestalled simply by an agency's delay in making a final decision or refusal to render it. Section 44 is addressed to such an eventuality. This section provides that a person whose rights, duties or privileges are adversely affected by an agency's unreasonable delay in reaching a final decision may seek a court order compelling action by the agency.<sup>291</sup>

Turning now to general judicial review, a petitioner must satisfy five requirements specified in section 43 in order to obtain judicial review under the NC APA: (1) the petitioner must be a "person aggrieved;" (2) the decision of which review is sought must be a "final agency decision;" (3) the decision must have been made "in a contested case;"<sup>292</sup> (4) the petitioner must have "exhausted all adminis-

289. Right to judicial review.—Any person who is aggrieved by a final agency decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this Article, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.

N.C. GEN. STAT. § 150A-43 (Supp. 1974).

290. For a discussion of the import of this limitation see text accompanying notes 311-14 *infra*.

291. N.C. GEN. STAT. § 150A-44 (Supp. 1974). With the exception of the deletion of the word "administrative" between "final" and "decision," which effects no substantive change, the quoted provision is identical to the provision contained in N.C. GEN. STAT. § 143-308 (1974), *repealed*, Act of April 12, 1974, ch. 1331, [1973] N.C. Sess. Laws 691, 703. Although this provision does not, in terms, contain an authorization for the court to act, it appears that a party seeking an order compelling a decision when it is unreasonably withheld should not need to cite any specific authorization for court action outside of section 44 itself. It does contain a manageable standard—"unreasonable" delay—that a court can employ, and since the action appears to sound in equity the court should be deemed empowered to grant appropriate relief—generally an order requiring the agency to reach a decision. This interpretation will avoid the vagaries of mandamus practice. See generally 2 F. COOPER, *supra* note 8, at 653-59; 3 DAVIS, TREATISE, *supra* note 76, § 24.03. It also avoids the limitations on injunction practice. See generally D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.10, at 108-12 (1973). Even if, however, the court should refer to mandamus or mandatory injunction precedents, it seems reasonably clear that the making of a final decision—some decision—can be compelled as a clear duty imposed on the agency by law, *cf.* Board of Managers of Walker Memorial Hosp. v. City of Wilmington, 235 N.C. 597, 70 S.E.2d 833 (1952); Ornoff v. City of Durham, 221 N.C. 457, 20 S.E.2d 380 (1942), even if the compelling of a particular decision would not be possible.

292. This provision must be read in conformity with other specific provisions. It

trative remedies made available to him by statute or agency rule;" and (5) there must *not* be "adequate" judicial review provided by "some other statute."<sup>293</sup>

### (1) Adequacy of Judicial Review Under Other Statutes

Considering the last requirement first, since it represents a threshold to the availability of judicial review under the Act, it must be noted that one of the major shortcomings of the NC APA, as well as its predecessor, is the limitation of judicial review under the Act to those instances in which "adequate" procedure of judicial review is *not* available under some other statute and the affirmative requirement that if adequate judicial review is available under another statute, it must be sought under the other statute.<sup>294</sup> It has been noted elsewhere that North Carolina statutes contain a "needless variety" of judicial review statutes.<sup>295</sup> Unfortunately, the NC APA perpetuates this needless variety<sup>296</sup> with its serious adverse effect upon uniformity.<sup>297</sup>

Excessive lack of uniformity requires members of the bar to become familiar with an agency's individual judicial review provisions, at least in order to ascertain that an agency's enabling act does not contain any judicial review provisions<sup>298</sup> or to make the more difficult determination of whether an agency's judicial review provisions are

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will be recalled that section 16 provides for judicial review of the denial of a petition for adoption, amendment or repeal of a rule, *see* text accompanying notes 152-54 *supra*; and that section 17 provides for judicial review in connection with declaratory rulings, *see* text accompanying notes 168-70 *supra*.

293. N.C. GEN. STAT. § 150A-43 (Supp. 1974).

294. The only other statute to which the requirement could reasonably refer is the particular agency's enabling act or other organic statute specifying the particular agency's powers, duties, or responsibilities when a decision has been rendered respecting the powers specified in such organic act.

295. Hanft, *supra* note 224, at 819.

296. *E.g.*, N.C. GEN. STAT. § 58-9.3 (Cum. Supp. 1974) (Commissioner of Insurance); *id.* § 84-28 (1965) (Board of Law Examiners); *id.* §§ 90-14.1 to .12 (Board of Medical Examiners); *id.* § 136-29 (1974) (Board of Transportation); *id.* §§ 143-214.4, .5 (Board of Water and Air Resources). *See also id.* § 18A-44 (Supp. 1974) (ABC Board); *id.* § 53-92 (1965) (Banking Commission).

297. Some differences, based upon individual agency needs, might be warranted, although it is not easy to imagine many such instances. A detailed agency-by-agency study is needed to determine agency requirements as to judicial review with an eye toward providing a basis for determining when, in respect to a particular agency, special, nonuniform requirements are warranted.

298. The absence of judicial review provisions in an agency's enabling legislation entitles an aggrieved person to review under the NC APA, notwithstanding that alternative nonstatutory (or "common law") review might be available. This is so since, by its terms, section 43 entitles one to judicial review under the NC APA unless adequate procedure for judicial review is provided by some other "statute."

"adequate."<sup>299</sup> Individual judicial review provisions are contained in scattered sections of the General Statutes.<sup>300</sup> The applicability of judicial precedents interpreting an individual statute to other individual statutes is problematic, thus adding to uncertainty as to individual rights and duties as well as agency responsibilities.<sup>301</sup>

What is the test for determining whether "adequate procedures for judicial review is provided by some other statute?" In *Jarrell v. Board of Adjustment*<sup>302</sup> the North Carolina Supreme Court held, under the predecessor general judicial review statute,<sup>303</sup> that judicial review provided by another statute is adequate "only if the scope of review is equal to that under" the general statute. This holding has been seen as meaning that "the general judicial review statute provides the minimum scope of judicial review."<sup>304</sup> However, the proposition should not be understood as limited to "scope of judicial review" in its restricted sense, but as applicable generally to *issues* of judicial review in the broader sense.<sup>305</sup> Accordingly, the NC APA should be regarded as setting the minimum standards and requirements with respect to judicial review generally.<sup>306</sup>

299. See text accompanying notes 302-06 *infra*.

300. See provisions cited in note 296 *supra*.

301. Fortunately the problem can be easily remedied in the future by legislation repealing judicial review provisions contained in individual statutes. This is strongly recommended.

302. 258 N.C. 476, 128 S.E.2d 879 (1963).

303. See note 288 *supra*. This holding seems applicable by analogy to the NC APA.

304. Hanft, *supra* note 224, at 819.

305. Professor Hanft's later formulation of the proposition seems to have reached this conclusion. "Put otherwise, this [general judicial review] statute provides the minimum judicial review for decisions of state . . . administrative agencies." *Id.* at 644. It should be noted that *Jarrell v. Board of Adjustment*, 258 N.C. 476, 128 S.E.2d 879 (1963), held the predecessor general judicial review statute applicable to a municipal agency. The prior statute did not contain an exemption from its coverage for municipal (or other local) bodies, whereas the NC APA, in section 2(1), expressly exempts, *inter alia*, municipal corporations from coverage. For a discussion of the exemptions from coverage of the NC APA see note 44 and accompanying text *supra*.

306. One problem which merits further attention is whether all the provisions of the NC APA replace another judicial review statute even though the other statute is inadequate only in one or more particular aspects and not in its entirety. Put differently, can another judicial review statute be "partially inadequate" or, conversely, if one aspect of another statute is inadequate, do the adequate parts continue to be applicable or may one proceed entirely under the NC APA? It would be infinitely preferable to conclude as a policy judgment that if another statute is inadequate in any aspect, judicial review may be had under the NC APA in its entirety. Cf. *Jarrell v. Board of Adjustment*, 258 N.C. 476, 128 S.E.2d 879 (1963). This would greatly simplify matters. On the other hand, it is not unreasonable to argue that the NC APA's provisions are applicable only to the extent that another statute is inadequate. On balance the better interpretation of the NC APA's language, and analysis of the policies, leads this writer to conclude that inadequacy in any respect (determined by reference to NC APA's provisions as the

## (2) Person Aggrieved

Turning now to the minimum provisions for judicial review, the first requirement of the NC APA is that a petitioner for judicial review of an agency decision be a "person who is aggrieved" by the decision of which review is sought. This is the provision that determines the "standing" of a person to invoke judicial review.<sup>307</sup>

Section 2(6) provides that a "person aggrieved" is "any person, firm, corporation, or group of persons of common interest who are directly or indirectly affected substantially in their person, property, or public office or employment by an agency decision."

Under the predecessor judicial review statute, which employed the identical phrase "person who is aggrieved," but unlike the NC APA, did not contain a definition of it, the North Carolina Supreme Court gave an expansive and sensitive interpretation to the requirement. In *In re Halifax Paper Co.*<sup>308</sup> the court stated:

The expression "person aggrieved" has no technical meaning. What it means depends on the circumstances involved. It has been variously defined: "adversely or injuriously affected; damaged, having a grievance, having suffered a loss or injury, or injured; also having cause for complaint. More specifically the word(s) may be employed meaning adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights."<sup>309</sup>

This interpretation does not seem in substance at variance with the later statutory definition. Thus, the NC APA's definition should be seen as simply a different way of stating the substance and effect of a formulation reached by the courts prior to its enactment.<sup>310</sup>

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minimum standards) should lead to the applicability of the general statute and the inapplicability of the other statute.

At this point, however, a problem arises as to individual judicial review statutes that provide "specific provisions to the contrary of the NC APA," see text accompanying notes 35-39 *supra*, in which case the NC APA itself does not apply. To effectuate all parts of the Act it will be necessary to distinguish between a statute which is "inadequate," and one that provides "a specific provision to the contrary." An individual statute that does not contain provisions on one or more aspects of judicial review would be inadequate. But a statute that contained a provision in conflict with the NC APA, and that was otherwise adequate, would be applicable, and the NC APA would not apply to the extent the provisions were in conflict.

307. See generally 2 F. COOPER, *supra* note 8, at 535-59; 3 DAVIS, TREATISE, *supra* note 67, §§ 22.01-18.

308. 259 N.C. 589, 131 S.E.2d 441 (1963).

309. *Id.* at 595, 131 S.E.2d at 446, quoting 3 C.J.S. *Aggrieved* (1973).

310. The requirement in the definition of the NC APA that there be "substantial" effect appears to be a manner of providing that no judicial review may be had when

### (3) Final Agency Decision

The requirement that an agency's decision be final, as a prerequisite to judicial review, is an implementation of a general policy against piecemeal judicial involvement in agency processes. This policy is designed to conserve judicial resources, avoid delay that would be occasioned by premature judicial intervention, and prevent judicial intervention when agency action has not "crystalized" into a settled or "ripe" controversy, but remains "hypothetical, intermediate, provisional, or preliminary."

The requirement of finality is not, however, an absolute bar to judicial review prior to an agency's rendering of an ultimate decision on an entire controversy. This is so since an agency's determination of some particular issue within an overall controversy may settle or "fix" the rights of a party with respect to the controverted issue and have a substantial adverse effect on the party pending resolution of ultimate controversy, even though other issues remain outstanding. Accordingly, in some instances, judicial review of an agency order which finally settles an issue should be available to avoid hardship and unnecessary litigation and expense.

For example, an agency may make a determination that an immediate suspension of a person's license is required under section 3(c) on the grounds that "the public health, safety or welfare requires emergency action" with the suspension effective immediately. Thereafter the agency may initiate a contested proceeding to revoke or cancel the license. Although at a time subsequent to a hearing the agency may decide that no revocation or cancellation is warranted,

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an asserted effect is merely *de minimus*. It is difficult to imagine any interest which could be affected in ways which were greater than *de minimus* when in legal contemplation that effect would not be regarded as "substantial." The real test of substantiality, when viewed in this light, is whether the matter presented is worthy of judicial inquiry. If it is not, it is *de minimus* and the effect, if any, is *damnum absque injuria*. Similarly, the requirement that one be affected in his "person" or "property" seems to include every kind of injury that can be experienced which is judicially cognizable, with the terms "public office" or "employment" provided only for emphasis. For example an effect on one's health, well-being, or living environment is an effect on one's "person" in any real sense of the term "person." Thus, an effect on one's person would not seem to be limited to corporal or physical effect, but any effect perceived through the body's sensory organs. For example, the common law of nuisance long has recognized that the emitting of noxious odors, which do no more than provide a sensory assault on the olfactory organs, can be harm worthy of judicial inquiry. Cf. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 88, at 584 n.46 (4th ed. 1971). All nonpersonal "effects" which are judicially cognizable are broadly classifiable as "property." See, e.g., Reich, *The New Property*, 73 YALE L.J. 733 (1964). See also *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973).

the licensee may suffer irreparable harm during the pendency of the revocation proceeding, while the license is suspended. In this circumstance is the agency's suspension determination a "final order," notwithstanding its arguably "provisional" character? It would appear that the order may constitute a final decision with respect to whether the public health, safety, or welfare requires the suspension.<sup>311</sup> In instances in which a party would be substantially or irreparably harmed by the order, when the party asserts a good faith and nonfrivolous claim that the agency is proceeding in excess of its authority, or without jurisdiction, and similar instances, immediate judicial review may be necessary to avoid injustice.<sup>312</sup>

Similarly, immediate judicial review may be necessary when an agency's determination of a question of law or statutory provision in a contested case proceeding is dispositive, for example, of an issue of jurisdiction,<sup>313</sup> power or authority to initiate a contested case proceeding, or when an appellate tribunal of an agency makes such a determination, but remands within the agency (for example, to a hearing officer) for further proceedings. In such cases the order should be treated as final as to the issue raised. However, to avoid unnecessary fragmentation of administrative proceedings, it nevertheless may become necessary to balance the harm, burden, or inconvenience to a party that will be caused by a denial of immediate review against the interests advanced by the finality requirement.<sup>314</sup> Orders that for lack

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311. The test is not easy to apply in particular cases. Compare *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971), with *Nor-Am Agricultural Prods., Inc. v. Hardin*, 435 F.2d 1151 (7th Cir. 1970) (en banc).

312. There are notable exceptions in which finality has not been found even in face of claims of nonjurisdiction, e.g., *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

313. See, e.g., *Airline Ground Serv., Inc. v. Checker Cab Co.*, 151 Neb. 837, 39 N.W.2d 809 (1949).

314. Courts, under various statutory formulations, seem to have been employing such a practical interpretation in the context of a policy analysis, such as above suggested. Under its certiorari procedure, the Florida Supreme Court held that an order of the Industrial Commission remanding a proceeding to a hearing officer possessed "sufficient finality to be entitled to review . . . because if left standing it would conclude one or more elements of the case." *Sterling Equip. Mfg. Corp. v. May*, 144 So. 2d 305 (Fla. 1962). In the absence of some manifest need for immediate review, courts have generally denied review when an appellate tribunal of an agency remands for further proceedings. 2 F. COOPER, *supra* note 8, at 589. The Nebraska Supreme Court, by way of dictum, has quoted with approval the statement made in *CBS v. United States*, 316 U.S. 407, 425 (1942), that "[t]he ultimate test of reviewability is not to be found in any overrefined technique, but in the need to review to protect from irreparable injury threatened in the exceptional case by administrative rulings that attach legal consequences to action taken in advance of other hearings and adjudications that may follow." *Airlines Ground Serv., Inc. v. Checker Cab Co.*, 151 Neb. 837, 840, 39 N.W.2d 809, 811 (1949).

of finality are not immediately reviewable are, of course, reviewable as part of a final order subsequently issued as a product of the proceeding.

#### (4) Contested Cases and Rulemaking

The effect of the limitation on judicial review to a person aggrieved by a final agency decision "in a contested case" is to avoid the confusing problems created by application of the "ripeness doctrine"<sup>316</sup> to pre-enforcement judicial review of agency rules or rulemaking,<sup>310</sup> but without impairing the basic functions of judicial review.

It will be recalled that the Act defines contested case as "any agency proceeding . . . wherein the legal rights, duties or privileges of specific parties are to be determined."<sup>317</sup> The definition thus limits the type of agency determinations that are subject to general judicial review.

The availability of judicial review of rules and rulemaking under the Act is determined in two ways. First, a person aggrieved<sup>318</sup> by an agency's promulgation of a rule must request an agency declaratory ruling under section 17.<sup>319</sup> If a declaratory ruling is issued, or no ruling is issued within sixty days after request, judicial review is available under the Act in the same manner as a final order in a contested case.<sup>320</sup> Second, a person who wishes an agency to adopt, amend, or repeal a rule, may petition the agency for such action. Denial of the petition is subject to judicial review under the Act, but is limited to the issue of whether the denial constitutes an abuse of discretion.<sup>321</sup>

#### (5) Exhaustion of Administrative Remedies

Basic policies are advanced by the exhaustion requirement. They include an interest in orderly procedure generally, efficient allocation between agencies and courts of governmental business, assurance that the agency's opportunity to correct an asserted error is ade-

315. See generally 3 DAVIS, TREATISE, *supra* note 67, §§ 21.01-10.

316. Although "ripeness" issues may arise in contexts other than rulemaking, *id.*, other specific provisions of the Act with respect to judicial review, discussed textually hereinafter, eliminate ripeness determinations as a significant problem under the Act.

317. For a discussion of this definition see text accompanying notes 174-84 *supra*.

318. For a discussion of "person aggrieved" see text accompanying notes 307-10 *supra*.

319. See text accompanying notes 155-70 *supra*.

320. N.C. GEN. STAT. § 150A-17 (Supp. 1974). But see discussion of scope of review in text accompanying notes 406-11 *infra*.

321. N.C. GEN. STAT. § 150A-16 (Supp. 1974).

quate, and an opportunity for agencies to apply any relevant special experience and competence to a matter prior to judicial intervention.<sup>322</sup> The policies are implemented in the NC APA by restriction of judicial review to a petitioner "who has exhausted all administrative remedies made available to him by statute or agency rule."<sup>323</sup> Since the requirement of exhaustion under the Act is limited to remedies made available by "statutes or agency rule," a petitioner need canvass only the agency's relevant enabling statute and published agency rules, and pursue any remedies therein provided.<sup>324</sup>

In view of the blanket statutory command requiring "exhaustion," it should be pointed out that the exhaustion doctrine originated as a court-created rule of self limitation.<sup>325</sup> A subsequent general statutory formulation should be interpreted with reference to its common law background.<sup>326</sup> Moreover, it should be noted that although courts variously refer to exhaustion as "well-established" or a "cardinal principle,"<sup>327</sup> the doctrine as late as 1965 apparently had found statutory expression in general judicial review statutes of only three states.<sup>328</sup>

The original Model State APA did not require exhaustion, with the exhaustion requirement having been added in the Revised Model State APA.<sup>329</sup> In the federal courts the doctrine predates the Federal APA.<sup>330</sup>

322. See generally 2 F. COOPER, *supra* note 8, at 572-74; 3 DAVIS, TREATISE, *supra* note 67, § 20.01-10.

323. N.C. GEN. STAT. § 150A-43 (Supp. 1974).

324. This eliminates pursuing informal procedures, or attempting to ascertain whether avenues exist outside those provided in formal published agency rules.

325. 2 F. COOPER, *supra* note 8, at 573.

326. This is particularly important where, as in the NC APA, the doctrine is generally incorporated, but without any specific reference to the numerous judicially created exceptions, the purpose of which is the avoidance of manifest injustice. See 2 F. COOPER, *supra* note 8, at 577-81.

327. 2 AM. JUR. 2d *Administrative Law* § 595 (1962).

328. 2 F. COOPER, *supra* note 76, at 574. Even at this writing research reveals only twelve states that require exhaustion in general terms in statutes governing judicial review. In addition to the North Carolina statute these statutes are: CONN. GEN. STAT. ANN. § 4-183 (Supp. 1974); GA. CODE ANN. § 3A-120 (Supp. 1974); IDAHO CODE § 67-5215 (1973); IOWA CODE ANN. § 17A-19 (to be effective July 1, 1975); MICH. STAT. ANN. § 3.560(201) (Supp. 1974); MO. ANN. STAT. § 536.100 (Vernon 1953); MONT. REV. CODES ANN. § 82-4216 (Supp. 1974); R.I. GEN. LAWS ANN. § 42-35-15 (1969); S.D. COMPILED LAWS ANN. § 1-26-30 (1974); VT. STAT. ANN. tit. 3, § 815 (Cum. Supp. 1974); WYO. STAT. ANN. § 9-276.32 (Cum. Supp. 1974).

329. REVISED MODEL STATE APA § 15(a) (1970 version); 1961 HANDBOOK, *supra* note 18, at 220.

330. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). The Federal APA, which does not, in terms, contain an exhaustion requirement, was enacted in 1946. Similarly the doctrine in North Carolina was judicially imposed prior to the general judicial review statute (enacted in 1953). See *Warren v. Atlantic Coast Line R.R.*, 223

In view of the foregoing, it is hardly surprising that courts impose the exhaustion requirement as a prerequisite to judicial review under administrative procedure acts, even though the acts are silent on the exhaustion requirement.<sup>331</sup> Conversely at least the Michigan intermediate appellate courts, without mentioning that state's APA, have held that exhaustion of administrative remedies is not required when it would be a "vain and useless"<sup>332</sup> act or require "useless effort"<sup>333</sup> notwithstanding the general requirements of exhaustion imposed by the Michigan APA.<sup>334</sup> This perhaps explains why Professor Davis, in a discussion primarily related to federal requirements of exhaustion, without referring to statutes at all, could assert that "[n]o court requires exhaustion when exhaustion will involve irreparable injury and when the agency is palpably without jurisdiction; probably every court requires exhaustion when the question presented is one within the agency's specialization and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief."<sup>335</sup> Accordingly, the requirement of exhaustion in the NC APA should not be interpreted as absolute or inflexible, either because the concept itself is not absolute, or because a general statutory formulation represents a codification of prior common-law interpretations that contain a number of exceptions designed to avoid manifest injustice.<sup>336</sup>

The cases demonstrate that courts have been employing a practical, flexible formula in deciding exhaustion issues. Although not easy

N.C. 843, 28 S.E.2d 505 (1944); *cf.* *Ballard v. City of Charlotte*, 235 N.C. 484, 70 S.E.2d 575 (1952).

331. CAL. GOV'T CODE § 11523 (West Supp. 1974); *A. Teichert & Son, Inc. v. State*, 238 Cal. App. 2d 736, 48 Cal. Rptr. 225 (3d Dist. Ct. App. 1965); *Woodard v. Broadway Fed. Sav. & Loan Ass'n*, 111 Cal. App. 2d 218, 244 P.2d 467 (2d Dist. Ct. App. 1952); *Weaver v. State Bd. of Medical Examiners*, 54 Cal. App. 2d 777, 129 P.2d 730 (2d Dist. Ct. App. 1942); FLA. STAT. ANN. § 120.30-31 (1974); *Pest Control Comm. v. Ace Pest Control, Inc.*, 214 So. 2d 892 (Fla. 1968).

332. *Sterling Secret Serv. v. Michigan Dep't of State Police*, 20 Mich. App. 502, 174 N.W.2d 298 (1969).

333. *Welfare Employees Union v. Michigan Civil Serv. Comm'n*, 28 Mich. App. 343, 184 N.W.2d 247 (1970).

334. MICH. STAT. ANN. § 3.560(201) (Supp. 1974); *cf.* *Trever v. City of Sterling Heights*, 37 Mich. App. 594, 195 N.W.2d 91 (1972).

335. 3 DAVIS, TREATISE, *supra* note 67, § 20.01, at 56. Professor Davis proposes a balancing formula: "extent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction." *Id.* § 20.03, at 69.

336. The only statutory requirement that has been found as to which the foregoing statement would be unnecessary is that of Iowa, which requires exhaustion of only "adequate" administrative remedies. IOWA CODE ANN. § 17A-19 (effective July 1, 1975).

in application, an exception to the exhaustion requirement has been found if a petitioner makes a compelling showing that the agency has no jurisdiction to act in the matter submitted for review.<sup>337</sup> Careful scrutiny is necessary, however, since much more than a conclusory allegation of lack of jurisdiction is required.<sup>338</sup> Similarly, a failure to exhaust administrative remedies should not bar judicial review if a petitioner makes a good faith, nonfrivolous, facial constitutional challenge to the legislation under which the agency is proceeding. This is so since in the usual case an agency is not empowered to declare its own enabling statute unconstitutional, and hence any proceedings before the agency prior to settling the constitutional issue would necessarily be useless in determining constitutionality.<sup>339</sup>

Finally there exist two related, and very difficult "catchall" exceptions to the exhaustion requirement: (1) that the administrative remedy be inadequate to avoid irreparable injury; and (2) that exhaustion would be a useless or futile act. No rule is discernable from case law.<sup>340</sup> With respect to inadequacy of the administrative remedy and avoidance of irreparable injury, a failure to exhaust may be excused when the agency has no power to grant remedies to which the petitioner would be entitled if it prevailed in court,<sup>341</sup> when exhaustion would raise the spectre of a multiplicity of suits,<sup>342</sup> when the proceeding itself would cause irreparable injury,<sup>343</sup> and when there existed a threat of disclosure of confidential information.<sup>344</sup>

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337. *Los Angeles County v. Department of Social Welfare*, 41 Cal. 2d 455, 260 P.2d 41 (1953); *Ward v. Keenan*, 3 N.J. 298, 70 A.2d 77 (1949). In the federal courts, see, e.g., *Public Util. Comm'n v. United Fuel Gas Co.*, 317 U.S. 456 (1943).

338. See *Miller v. Schrunck*, 232 Ore. 383, 375 P.2d 823 (1962).

339. Authority on the question is sparse, perhaps because the proposition sits on its own bottom of logic. Agencies are creatures for carrying out the legislative will, and a declaration of unconstitutionality of its enabling legislation would represent the ultimate frustration of that will. See 2 F. COOPER, *supra* note 8, at 579; 3 DAVIS, TREATISE, *supra* note 67, § 20.01, at 74.

340. See generally 2 F. COOPER, *supra* note 8, at 579-81; 3 DAVIS, TREATISE, *supra* note 67, §§ 20.05, .07.

341. *Northeast Airlines, Inc. v. Weiss*, 113 So. 2d 884 (Fla. 1959) (complaint to Civil Aeronautics Board not required since the agency would not have power *inter alia* to order a local county airport authority to make reparation of alleged discriminatory rates charged, nor to issue temporary injunction).

342. *Pennsylvania State Chamber of Commerce v. Torquato*, 386 Pa. 306, 125 A.2d 755 (1956).

343. No case has been found in which a court squarely so held, but this proposition was discussed in *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535 (1954) (where it was alleged that the proceeding before the agency would impair bank credit). But see *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) (litigation expenses insufficient to excuse exhaustion requirement).

344. Cf. *Utah Fuel Co. v. National Bituminous Coal Comm'n*, 306 U.S. 56 (1939).

As to futility of exhaustion, although a prior indication of adverse decision is generally not sufficient to excuse the exhaustion requirement, the requirement has not been imposed, principally in zoning cases, when the court was convinced that the exhaustion would be useless because of prior agency decisions or action.<sup>345</sup>

All of the exceptions to exhaustion seem to be based upon balancing the needs for immediate judicial relief to avoid injustice against the interests advanced by requiring the matter to proceed through the full agency process. With these considerations in view, each instance necessarily must turn upon its particular facts, with the petitioner who seeks to avoid the exhaustion requirement, perhaps, under a burden to make a compelling case.

### C. *Petitioning for Judicial Review*

#### (1) The Petition—Time, Place, Manner and Content

Section 45 governs the manner and time of seeking judicial review.<sup>346</sup> It provides that a petition shall be filed in Superior Court of Wake County, except when an original determination in the matter was made by a local agency or local board, and thereafter appealed to the state board, in which case the petition may be filed in the superior court of the county where the original determination was made. A petition for judicial review must be filed within thirty days after a written copy of the decision is served upon the petitioner, by personal service or by registered mail. The Act provides that failure to file a petition within thirty days shall operate as a waiver of a right to judicial review under the Act, but upon a showing of good cause, the superior court may permit judicial review notwithstanding a waiver by reason of a failure to petition timely for review.

Section 46 governs the content of a petition, and provides that the petition "shall explicitly state what exceptions are taken to the decision or procedure of the agency and what relief the petitioner seeks." Thereafter, the petitioner must serve the petition on the agency that rendered the decision as well as all parties of record by personal service or registered mail. A party served may notify the court of an intention to become a party to the judicial review proceeding within ten

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345. *Herman v. Village of Hillside*, 15 Ill. 2d 396, 155 N.E.2d 47 (1958). See also *Trojan v. Township of Taylor*, 352 Mich. 636, 91 N.W.2d 9 (1958); *State ex rel. Killern Realty Co. v. City of East Cleveland*, 169 Ohio St. 375, 160 N.E.2d 1 (1959).

346. N.C. GEN. STAT. § 150A-45 (Supp. 1974).

days after receipt of the petition, and thereby may become a party. Moreover, any person aggrieved may petition to become a party by filing a motion to intervene as provided in rule 24 of the North Carolina Rules of Civil Procedure.<sup>347</sup>

## (2) The Record on Judicial Review

Section 47 provides that “[w]ithin 30 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the agency shall transmit to the reviewing court . . . the entire record of the proceedings under review.”<sup>348</sup> The content of the record is specified in section 37.<sup>349</sup> Under section 47, when the court permits, the parties by stipulation may shorten the record. Any party unreasonably refusing to stipulate to limit the record may be charged by the court for costs occasioned by the refusal.<sup>350</sup>

## (3) Effect of Agency Decision Pending Review

Section 48 provides that at any time before or during a judicial review proceeding, a person aggrieved may apply to the reviewing court for an order staying the operation of the agency decision pending the outcome of the review. The court’s grant or denial of a stay, however, is in its discretion, subject to rule 65 of the North Carolina Rules of Civil Procedure,<sup>351</sup> for which the basic requirements have been judicially developed.<sup>352</sup>

## (4) New Evidence

Section 49 provides for the taking of new evidence after a petition for review has been filed. The party to the review proceeding must satisfy the court of three conditions: (1) that the new evidence is material to the issues, (2) that it is not merely cumulative, and (3) that it could not reasonably have been presented at the hearing before the agency. If the showing is satisfactory the court “may” remand the

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347. *Id.* § 150A-46. For a definition of “any person aggrieved” see text accompanying notes 307-10 *supra*. Rule 24 is discussed in text accompanying note 198 *supra*.

348. N.C. GEN. STAT. § 150A-47 (Supp. 1974).

349. See note 272 and accompanying text *supra*.

350. An analogous provision may be found in the North Carolina Rules of Civil Procedure, which provide for taxing certain expenses against a party who refuses to admit, on discovery, a matter subsequently proved. N.C.R. Civ. P. 37(c).

351. N.C. GEN. STAT. § 150A-48 (Supp. 1974).

352. See generally 7 J. MOORE, FEDERAL PRACTICE ¶ 65.04[2], at 65-47 (2d ed. 1974).

case to the agency for the taking of additional evidence.<sup>353</sup> The use of the permissive term "may" is addressed to the court's discretion to remand, and not to the court's power to take evidence itself.<sup>354</sup> Upon remand and the taking of new evidence, the agency is empowered to affirm or modify its findings of fact and its decision, based on such new evidence. The new findings and decision shall then be filed with the reviewing court as part of the record.

#### D. *The Nature of Judicial Review*

The provisions of the Act governing court review of agency action are the critical provisions that determine the appropriate respective roles of courts and agencies. The overall objective of these provisions is preservation of the vital functions that judicial review serves in our system of laws and government, while simultaneously according proper respect to agencies as organs of government.

##### (1) Review Limited to Administrative Record; Exceptions

Section 50 limits the courts on judicial review of agency action to review of the record made in the agency,<sup>355</sup> with two exceptions.<sup>356</sup> The relationship established between the courts and the agencies, in a judicial review context, is in many ways analogous to that which exists between appellate and lower courts. The reviewing court reviews without a jury and, with the exceptions hereinafter noted, "shall take no evidence not offered at the hearing."<sup>357</sup> The court, however,

353. N.C. GEN. STAT. § 150A-49 (Supp. 1974).

354. When read in conjunction with section 50, this interpretation of section 49 is compelled, since section 50 prohibits the court from taking any evidence not offered at the hearing before the agency, with two exceptions. See text accompanying notes 355-59 *infra*.

355. For discussion of the contents of the record see note 272 and accompanying text *supra*.

356. See text accompanying notes 357-58 *infra*.

357. The phrasing of the prohibition against the taking of evidence is possibly ambiguous, and certainly awkward. The phrase "shall take no evidence not offered at the hearing" could be construed to mean that the reviewing court could "take evidence," in the sense of a hearing *de novo*, that "had been offered" at the hearing, for example, by examining witnesses who testified at the hearing. But this cannot be a proper reading of the phrase: First, read together with the provisions specifying when evidence (*e.g.*, testimony) may be taken, the inference is that review of the record does not include taking any testimony or evidence; second, taking the same testimony on judicial review that had been taken below would do serious violence to the basic premises of review; and, third, such a reading would render senseless other provisions of the Act, most notably section 37(b) which requires that "[p]roceedings at which oral evidence is presented shall be recorded." For these reasons the section really means shall not "review" any evidence not offered at the hearing and thereby made a part of the record.

"shall hear oral arguments and receive written briefs."

The two exceptions in which review is not limited to the record are instances of alleged irregularities in procedure before the agency that do not appear in the record, and cases in which no record was made of the proceeding or the record made is inadequate. In cases of alleged procedural irregularity, the Act provides simply that "testimony may be taken by the court." This therefore grants to the reviewing judge discretion to take testimony.<sup>358</sup> But what factors should guide the exercise of such discretion and what alternatives, if any, are available to the judge? Reading section 50 in light of section 51, which specifies actions a reviewing court may take, at least the alternative of remanding to the agency for the making of a record is available.<sup>359</sup> In exercising discretion the judge should balance the advantages and disadvantages of the alternatives based on the particular facts and circumstances—including delay, consumption of judicial time, and burden on the petitioner of pursuing the alternatives. When, however, the alleged procedural irregularity affects the integrity of the agency factfinding process or vitiates the agency's capacity to make a sufficient record, the reviewing court should take testimony itself.

With respect to a nonexistent or inadequate record, the Act expressly provides that the judge in his discretion may hear all or part of the matter *de novo*. Similar considerations seem applicable here as discussed above in connection with alleged procedural irregularities.

## (2) The Scope of Judicial Review

Of all the problems in administrative law, perhaps none is more difficult of resolution than determining the standards by which judicial control of administrative action is to be exercised. Section 51, which specifies the scope of review, addresses this problem. The Act specifies four dispositions the court may make of an agency decision: affirm, remand for further proceedings, reverse, or modify.<sup>360</sup> The court's power to affirm or remand is not specifically circumscribed. However, this power should be read as an alternative to the power to reverse or modify, which is substantially circumscribed. To reverse or modify the court must find:

- (a) that the petitioner's substantial rights,

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358. N.C. GEN. STAT. § 150A-50 (Supp. 1974).

359. Section 51 is discussed in text accompanying notes 360-61 *infra*.

360. N.C. GEN. STAT. § 150A-51 (Supp. 1974).

- (b) "may have" been prejudiced,
- (c) by agency findings, inferences, conclusions or decisions which are
  - (1) in violation of the constitutional provisions,
  - (2) in excess of the statutory authority or jurisdiction of the agency,
  - (3) made upon unlawful procedure,
  - (4) affected by other error of law,
  - (5) unsupported by substantial evidence admissible under the Act, in view of the entire record submitted, or
  - (6) arbitrary or capricious.<sup>361</sup>

Moreover, if the court reverses or modifies the decision under the above limitations, it must set out in writing the reasons for the action.

Read together, the requirements that there exist "substantial rights" that "may have been prejudiced" mean that court intervention into agency process is not a matter to be taken lightly. Insubstantial and purely technical or formal rights are clearly subject to a "harmless error" construction. However, a petitioner does not have to demonstrate that substantial rights *were* prejudiced, but that the action complained of raises such a significant risk of prejudice to the petitioner that court intrusion into the agency's decisionmaking process is warranted.<sup>362</sup>

We turn now to the six criteria that circumscribe judicial control of agency action.

#### (a) *Violation of the Constitution*

If a petitioner on judicial review alleges that agency action is "in violation of constitutional provisions," the petitioner could be complaining of three different violations: (1) if the complaint concerns action the agency is specifically authorized to take under a statute, the real challenge is to the statute insofar as it authorizes the action; (2) where the agency has taken action under a general grant of power, and the complaint is that the agency has undertaken the action in an

361. *Id.*

362. Contrast the nature of the demonstration necessary under the standard that agency action "may have prejudiced" substantial rights with one that required a demonstration that agency action "has prejudiced" substantial rights. The distinction seems plainly to lie in the difference between a risk or probability as opposed to a certainty or "fact." See generally 2 F. COOPER, *supra* note 8, at 663-64.

unconstitutional way or has unconstitutionally affected the petitioner, the challenge is not to the statute, but to the action itself; (3) if the complaint concerns action the agency has taken, pursuant to a statutory interpretation the petitioner alleges is unconstitutional, the challenge is to the statute as interpreted and applied by the agency.

Although each of the above instances would involve a different degree of intrusion into the agency process, each seems to fall within the criterion authorizing a court to reverse or modify a decision of the agency that violates constitutional rights. Issues that have been raised include deprivation of property without due process of law,<sup>363</sup> violation of equal protection,<sup>364</sup> or violation of specific provisions of a particular state constitution.<sup>365</sup>

In cases of such constitutional challenge, the court is generally viewed as possessing a plenary power to substitute its judgment for that of the agency, at least to the extent that factual determinations are not involved.<sup>366</sup> When factual determinations are involved as a predicate to the resolution of the constitutional issue, a question of the fact/law distinction may be implicated. This problem is reserved for later treatment.<sup>367</sup>

#### (b) *In Excess of Statutory Authority or Jurisdiction*

The second criterion for judicial reversal or modification concerns decisions that are "in excess of statutory authority or jurisdiction of the agency." This statutory formulation has been viewed as a codification of "long established common law principles."<sup>368</sup> Actions

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363. *See id.* at 683, listing condemnation of property without a fair hearing, deprivation of property by prohibiting a lawful use of it or retroactive application of decisions. Other issues which might arise on these grounds would seem to include an unconstitutional taking without compensation and inadequate notice. This could arise because of an express statutory provision authorizing the agency action or because the agency interprets the statute to permit the action.

364. *Id.*

365. *Id.* n.53.

366. *See generally id.* at 664-66; DAVIS, TREATISE, § 30.01-14.

367. *See text accompanying notes 376-84 infra.*

368. 2 F. COOPER, *supra* note 8, at 690. Often when a petitioner complains that the agency is acting in excess of authority or jurisdiction it will be alleged that such agency action violates the petitioner's constitutional rights. *Id.* at 687. In substance such an allegation is no more than an assertion that one has a constitutional right that agencies act within their statutory powers or their statutorily prescribed jurisdiction before they can constitutionally affect one's interest. This claim, while perhaps arguably sound, really risks confusing the real issue, which is one of statutory construction, and not constitutional interpretation. Moreover it adds nothing since agency action in excess of authority or jurisdiction will be set aside on judicial review in any event. *Id.*

challenged as ultra vires, as beyond geographic<sup>369</sup> or subject matter jurisdiction,<sup>370</sup> as imposing requirements not authorized by statute,<sup>371</sup> as refusing to impose requirements statutorily required,<sup>372</sup> or as not falling within time limitations prescribed by statute, have been set aside by courts as being in excess of authority or in excess of jurisdiction.<sup>373</sup>

The extent to which the court should substitute its judgment for the agency's when a statutory authority or jurisdiction issue is raised may present a problem. As a general rule courts are regarded as possessing power freely to substitute their judgment for that of an agency when the question is one of statutory interpretation.<sup>374</sup> This is always involved in resolving authority and jurisdiction issues. But courts, particularly federal courts, accord "weight," "deference," or "respect" to many agency determinations that interpret statutes.<sup>375</sup>

### (c) *Made Upon Unlawful Procedure*

This provision authorizes a court to reverse or modify agency action that is not in accordance with the procedural requirements specified in the NC APA, or with those required under another statute governing agency procedure. Little need be said on this criterion except to emphasize that there must exist "substantial rights" that "may have been prejudiced" by the procedural error.<sup>376</sup>

369. For example, an agency with statewide jurisdiction over corporations operating in North Carolina attempts to regulate a corporation not operating in the state, or an agency of the state with geographic jurisdiction limited to specified counties attempts to act outside those counties.

370. For example, an agency empowered to regulate manufacturers of pesticides attempts to regulate an entity that does not manufacture pesticides.

371. For example, an agency denies a license on a ground not specified in the agency's enabling legislation as a ground for denial.

372. For example, an agency might issue a license without making a finding of fact that is prerequisite to the issuance of the license.

373. See generally 2 F. COOPER, *supra* note 8, at 690-701.

374. See *id.* at 665; 4 DAVIS, TREATISE §§ 30.01, .14.

375. The classic statement on the subject is contained in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944):

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.*

*Id.* at 140 (emphasis added).

376. See text accompanying note 362 *supra*.

(d) *Affected by Error of Law*

This criterion authorizes a court to reverse or modify a decision that is "affected" by an "error of law." The term "affected" means that an agency decision is properly subject to reversal or modification only when an error of law has materially influenced the decision reached. As such the term appears to be a reverse way of emphasizing the harmless error construction that applies to the entire section.<sup>377</sup>

The cases provide scant guidance in defining "error of law." Perhaps only an unhelpful conclusion can be stated—"a question of law" is a matter that the court decides should be subject to plenary or *de novo* consideration, with the court being free to substitute its judgment for that of the agency; "a question of fact" is a matter the court concludes may be subjected to a more restricted review.<sup>378</sup> The difficulty apparently inheres in the nature of questions that are raised in judicial-type proceedings. Such determinations are seldom solely factual, but often contain elements of both "fact" and "law."<sup>379</sup>

The supposed "classical dichotomy" between the fact/law distinction in determining scope of review "is of little use as a working tool"<sup>380</sup> and has been characterized as "often not an illuminating test" that is "never self-executing."<sup>381</sup> One would thus not be surprised that "[w]hat one judge regards as a question of fact another thinks is a question of law."<sup>382</sup>

The real explanation of decisions that turn on the question of whether an administrative determination is one of fact or one of law appears to involve the courts' conceptions of those issues that the agency is better qualified to make a judgment upon, and those that a court is at least equally well-qualified to evaluate. The fact/law dis-

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377. *Id.*

378. 2 F. COOPER, *supra* note 8, at 666.

379. Examples abound. The question of whether a person is an employee, a farmer, a manufacturer or a seller in many cases depends on both the determination of what the person does (or did) as well as a determination of the "law," *i.e.* the legal conclusion which follows upon determination of what a person does (or did). The general problem is by no means limited to scope of review issues. The problem of whether the question "Was the defendant negligent?" is a question of law or fact has never been definitively settled. This is so since its resolution involves a determination of both what the defendant did as well as whether he deviated from a standard of conduct of the "reasonable person."

380. 2 F. COOPER, *supra* note 8, at 665.

381. Baumgartner v. United States, 322 U.S. 665, 671 (1944).

382. ATTORNEY GENERAL'S REPORT, *supra* note 7, at 90.

tion thus becomes the cutting edge for a policy decision on the allocation of functions between agencies and courts. Accordingly, on issues that the legislature has created agencies to resolve and when it has provided them with resources to acquire a special competence to evaluate such issues, the court generally will accord a greater degree of room to apply such special competence, *if, in the particular case*, it appears that such special competence is involved in the determination, and that it was in fact applied.<sup>383</sup>

Also other external factors appear to have a direct bearing on the courts' willingness to permit the agency a wider latitude in decision-making under this criterion. These factors, which amount to practical solutions, include the lack of prejudice of the decisionmaker, the experience of the agency, the procedure through which the decision was derived, the thoroughness of the agency's consideration, the relationship of the agency to the parties who might be affected, and other largely intangible factors that cause the reviewing court, in a particular case, to have confidence in the agency's determination.<sup>384</sup>

Perhaps this practical resolution of the problem is satisfactory so long as it is remembered that what is really at stake is the proper relationship between agencies and courts in the overall scheme of carrying out governmental, and ultimately, the citizens', business.

(e) *Unsupported by Substantial Evidence*

This criterion is concerned with agency decisions in which disputed "adjudicative facts" are determined. "Adjudicative facts" are facts about the parties. Generally they answer the questions of "who did what, where, when, how, why, with what motive or intent."<sup>385</sup> The practical distinction for purposes of the NC APA will generally mean that adjudicative facts are those disputed facts that were the subject of the evidentiary hearing in a contested case proceeding.<sup>386</sup> Under this criterion the court is authorized to reverse or modify an agency decision involving adjudicative facts if the findings, inferences, conclusions, or the decision as a whole lacks adequate evidentiary sup-

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383. See generally 4 DAVIS, TREATISE, *supra* note 67, § 30.02, suggesting that the terms "judicial question" and "administrative question" be substituted for the phrases "question of law" and "question of fact," respectively.

384. See generally *id.* § 30.14.

385. 1 *id.* § 7.02, at 413.

386. Factual determinations in agency proceedings are generally classified either "adjudicative" or "legislative." See generally *id.* §§ 7.02, .04.

port in the entire record that was before the agency or that is submitted to the court by the parties in a judicial review proceeding. This provision requires the court on judicial review to consider the evidence appearing in the "whole record" that was admissible under sections 29(a) and 30, and provides that the court may reverse or modify only if the court concludes that the decision is unsupported by substantial evidence.

It can thus be seen that this provision addresses four aspects of evidence: what is the "kind" of evidence to which the court's consideration is limited (or conversely what may not be considered), what "quantum" of such evidence must be found, where must such evidence be found, and what method of evaluating evidence must be employed?

As to the kind of evidence, the court is limited to sustaining a decision on the basis of evidence admissible before the agency under section 29(a) and section 30. Section 29 affirmatively requires exclusion of "irrelevant, immaterial, and unduly repetitious evidence."<sup>387</sup> As a threshold matter then, if the agency has properly discharged its function, no such evidence should appear in the record. If the agency has been remiss in its duty and evidence that should have been excluded does appear, the court nevertheless is not authorized to reverse or modify, so long as other evidence of the right kind appears, unless such excludable evidence "may have prejudiced substantial rights" of the petitioner. Conversely, if the only evidence is that which should have been excluded, the court has no choice but to reverse or modify, since no evidence admissible under section 29 will be in the record.

Going beyond the mandatory exclusion requirement, determining the kind of evidence necessary to sustain a decision becomes much more difficult; however, the NC APA does not require the exclusion of "incompetent" evidence, as did the predecessor statute.<sup>388</sup> Nor does the NC APA, like the predecessor statute, require "competent" evidence to sustain an agency decision.<sup>389</sup> It can be reasonably argued, therefore, that the full scale evidentiary limitations governing jury trials are not applicable on judicial review. It has been suggested that the requirement that "the rules of evidence *as applied* in the trial division"

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387. See text accompanying notes 222-31 *supra*.

388. See note 227 *supra*. See generally Hanft, *supra* note 224.

389. See text accompanying note 229 *supra*.

must mean, at an irreducible minimum, that agency decisions must be based on evidence that a trial judge sitting without a jury would be entitled to *rely upon* in reaching a decision, as opposed to entitled to admit during the course of trial.<sup>390</sup> Finally it has to be noted that the Act permits an agency to admit the "most reliable and substantial evidence available" when evidence under the trial court rules is not reasonably available.<sup>391</sup> The problems with this provision have been noted.<sup>392</sup>

As with all rules governing receipt of and reliance upon evidence, the real concern is that only evidence that has some probative value should affect the decision or sway the mind of the factfinder. Given this concern, one is tempted to depart the verbal thicket, and announce that when a judge reviews an agency decision *with respect to kind of evidence* appearing in the record, the question is, after it is all said and done, "whether there is in the record at least some *probative* (as opposed to simply "competent") evidence which can justify finding the facts found."<sup>393</sup> Stipulations of fact under section 31(a) may be considered in making this inquiry.

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390. See text accompanying notes 231-35 *supra*. The real difference between rules in civil jury trial and in trials without a jury is that a trial judge will not be readily reversed for the admission of evidence which ought to have been excluded. The rule is that notwithstanding a failure to exclude evidence that was not properly admissible, a rebuttable presumption exists that excludable evidence was disregarded. *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E.2d 668, *cert. denied*, 358 U.S. 888 (1958). See also *General Metals, Inc. v. Truitt Mfg. Co.*, 259 N.C. 709, 131 S.E.2d 360 (1963); *Chappell v. Winslow*, 258 N.C. 617, 129 S.E.2d 101 (1963). Although the harmless error rule should be applied, see text accompanying note 362 *supra*, it is doubtful that agency decisions as a general matter should be clothed with a similar presumption.

391. *Cf. G. & C. Merriam Co. v. Syndicate Publishing Co.*, 207 F. 515, 518 (1913), quoting then District Judge Learned Hand, who had been confronted with an offer of hearsay, not apparently within any exception to the exclusionary requirements for such proof: "If this be not evidence I can see no way of getting any better, and the fact cannot be established at all. Surely the law is not so unreasonable as that."

392. See text accompanying notes 235-37 *supra*.

393. This, the writer thinks, is not a formulation of the "residuum rule." That rule is intricately tied to an evaluation of evidence that would be admissible in a jury trial. See generally 2 DAVIS, TREATISE, *supra* note 67, § 14.10. The NC APA takes two important steps away from that rule: (1) it does not require the exclusion of "incompetent" evidence, and (2) when evidence admissible under trial court rules is not reasonably available, it permits admission of the most reliable and substantial evidence available. See text accompanying notes 222-37 *supra*. The residuum rule, first announced by the New York Court of Appeals in *Carroll v. Knickerbocker Ice Co.*, 218 N.Y. 435, 113 N.E. 507 (1916), assumes that only legally "competent" evidence is probative or reliable. The NC APA, however, makes no such assumption, but recognizes (1) that evidence which does not satisfy jury trial admissibility rules, depending upon the circumstances, may be probative and (2) that evidence of a relatively low probative value may nevertheless tend to support a fact when evidence of greater probity is not available. Application of the residuum rule on judicial review would lead to the anomalous result that an agen-

A finding that there is in the record some probative evidence to justify the findings is only the first step, however. The next inquiry is whether there is a sufficient quantum of such evidence supporting the findings, in view of other evidence appearing in the record, to make the findings reasonable. The NC APA provides that the evidence should be substantial in view of the whole record. Accordingly the judge must review all the matters that comprise the record<sup>394</sup> or such parts of the record as the parties by stipulation submit.<sup>395</sup>

With respect to evaluation of the record to determine whether the evidence is substantial, it is clear that the court may not substitute its judgment for the agency's, but must limit itself to the "reasonableness" of the administrative findings by weighing all the evidence.<sup>396</sup>

The substantial evidence rule has been criticized as being unworkable, with courts being better able to understand and apply the "clear error" standard,<sup>397</sup> which is applied by appellate courts on review of trial court findings.<sup>398</sup> But Justice Frankfurter appears to have been right in his classic statement: "[T]he precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. *There are no talismanic words that can avoid the process of judgment.*"<sup>399</sup>

However, some guides to the exercise of judgment can be found. The North Carolina Supreme Court has held that the reviewing court exceeds its scope of review when it finds additional facts the agency had been requested to find but refused, when in so doing the court substituted its evaluation of the evidence for that of the agency.<sup>400</sup> This means that an agency decision that is reasonable from the standpoint of

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cy's decision would be reversed, without looking at the reasonableness of the decision in view of all evidence in the record, but merely because the agency had admitted and based findings upon evidence that did not meet jury trial rules (which, of course, it was authorized to do under section 29!). Accordingly, the kind of evidence inquiry under the NC APA is simply a threshold inquiry that will permit reversal where no probative or reliable evidence supports a decision. Such a decision would have to be unreasonable, without regard to the whole record standard of review, since there would be in the record no evidence tending to support a finding of fact.

394. For a discussion of the content of the record see note 272 and accompanying text *supra*.

395. See text accompanying notes 348-50 *supra*.

396. 4 DAVIS, TREATISE, *supra* note 67, § 29.01, at 115.

397. 2 F. COOPER, *supra* note 8, at 724-29.

398. *Id.* at 726.

399. Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951) (emphasis added).

400. Clark Equip. Co. v. Johnson, 261 N.C. 269, 134 S.E.2d 327 (1964).

the evidence cannot be reversed under the substantial evidence criterion, although the court might have found differently if it were evaluating the evidence as an initial matter. Similarly the North Carolina Supreme Court has recently reiterated that substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>401</sup>

Putting the requirements of right kind, substantial evidence, and whole record together can perhaps best be done by illustration. In the course of a proceeding the existence or the nonexistence of fact *X* must be found by the agency. Witness *A*, who has no first hand knowledge of fact *X*, is offered to testify about what *B* said to witness *A* regarding fact *X*. Plainly witness *A*'s testimony is hearsay, but, depending on the circumstances, witness *A* may be permitted to testify to *B*'s statement either because *A*'s testimony falls within one of exceptions to the hearsay exclusionary rule or because *B* is out of the country or dead, and thus not "reasonably available." For purposes of admission before the agency, depending upon the circumstances, *A*'s testimony may be admissible as the right kind of evidence if it possesses some probative worth.

Suppose further that *B*'s statement tends to support the existence of fact *X*. During the course of the proceeding witness *C* is produced who testifies that he bribed *B* to induce *B* to make the statement to *A*. *C* produces his cancelled check payable to *B* as well as *B*'s letter thanking *C* for the payment and asserting that the statement requested has been made to *A*. The agency finds the existence of fact *X*, crediting *A*'s testimony but none of *C*'s.

On judicial review if one looks only at the part of the record containing *A*'s testimony the agency decision is much more likely to appear to be supported by substantial evidence, than it appears when *C*'s testimony is looked at as well. Furthermore, in other parts of the record suppose there is testimony authenticating *B*'s letter, as well as *C*'s cancelled check. Upon weighing all the evidence the agency's finding of the existence of fact *X* begins to appear unreasonable.

Suppose further, however, that in still other parts of the record there is found testimony of witness *D*, a psychiatrist, to the effect that *C* is a pathological liar,<sup>402</sup> and *E*, a handwriting expert, that *C* is a

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401. *Humble Oil & Ref. Co. v. Board of Aldermen*, 284 N.C. 458, 471, 202 S.E.2d 129, 137 (1974), quoting *Hanft*, *supra* note 224, at 667.

402. This tends to explain why *C* might make the assertions.

master forger,<sup>403</sup> and *F*, a banker, that *B* paid part of the note he co-signed at the bank for *C*.<sup>404</sup> The agency's finding of the existence of fact *X* now begins again to appear reasonable.

(f) *Arbitrary and Capricious*

The criterion "arbitrary and capricious" when applied to contested cases seems to function as a catchall. Frequently it operates to mask the real reason the court deems intrusion into the administrative process to be warranted. As such, it tends to encourage the absence of careful reasoning by the courts. Moreover, it appears that most cases that properly may be reversed or modified as "arbitrary or capricious" will fall under one of the more discrete criteria discussed above.<sup>405</sup> Courts reviewing contested cases should use this criterion only in those rare instances in which reversal or modification is necessary because substantial rights may have been prejudiced, but cannot be justified under the more specific and discrete criteria authorizing judicial intrusion.

In the case of rulemaking under the NC APA, however, the arbitrary and capricious standard seems to hold the best prospect of accommodating the need for agency flexibility and the purposes of judicial review.<sup>406</sup>

It will be recalled that rulemaking under the Act is not subject to the provisions governing contested cases, unless rule adoption by adjudicatory procedures is required by an organic statute.<sup>407</sup> A major impact of the exemption of rulemaking from the procedural requirements governing contested cases is to eliminate a necessity for trial-type proceedings. This may mean, for example, that the "record" of rulemaking proceedings may not contain the characteristic evidence and testimonial transcript. It thus becomes very difficult for courts imbued with a familiarity with trial court record review to understand the meaning of a "substantial evidence" test and its application to rulemaking<sup>408</sup> without at least a risk that the judicial review standard

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403. This tends to explain why the letter could have been authenticated as *B*'s.

404. This tends to provide an explanation of *C*'s payment to *B* on grounds other than bribery.

405. *E.g.*, cases not supported by substantial evidence, or in excess of statutory authority can be broadly described as arbitrary and capricious.

406. See generally Verkuil, *supra* note 53, at 230.

407. See text accompanying note 110 *supra*.

408. The federal courts have tackled this problem without a uniform outcome or notable clarity. See Verkuil, *supra* note 53, at 230-34.

will restrict agency rulemaking to a decisional model that is required of adjudication. If this were to occur the reasons for distinguishing between rulemaking and adjudication at the agency level would be lost.

In applying the arbitrary and capricious standard, however, courts can achieve the purposes judicial review serves without restricting agency rulemaking procedures. The ultimate purpose of rulemaking review is to insure "reasoned decisionmaking" by requiring agencies to "articulate with reasonable clarity . . . reasons for decision, and identify the significance of crucial facts."<sup>400</sup> If the agency does not state reasons that adequately reveal the basis of its action the court may remand for a "concise statement." If the statement in view of the "record" reveals that the decision is "arbitrary or capricious" it may be reversed or modified.<sup>410</sup>

Finally, it should be recalled that apart from review of an agency's denial of a petition to adopt, amend, or repeal a rule (which is limited to the issue of whether the denial constitutes an abuse of discretion), judicial review of rulemaking can occur only in connection with the declaratory ruling mechanism.<sup>411</sup> Accordingly, it will be relatively easy to identify and therefore distinguish between rulemaking review and contested case review.

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409. *Id.* at 230. Other procedures before the agency in rulemaking proceedings do not present problems created in analyzing the Federal APA, because the NC APA contains specific requirements governing other aspects of rulemaking. See text accompanying notes 69-170 *supra*.

410. Unfortunately, courts in applying the "arbitrary or capricious" test have not articulated clearly either those precise factors which cause them to characterize the action as condemnable, nor have they drawn clear distinctions between action that is "arbitrary" and that which is "capricious." See generally 2 F. COOPER, *supra* note 8, at 756-72. However, it has been stated as a general rule that courts, even in the absence of statute, have power to review administrative action under this criterion. *Id.* at 258. Thus the statutory criterion represents to some extent a codification of common law judicial review doctrine. Agency decisions have been regarded as arbitrary or capricious *inter alia* when such decisions are "whimsical" because they indicate a lack of fair and careful consideration; give different treatment to parties in identical circumstances; demonstrate an irrational unfairness which suggests malice or discrimination; fail to indicate "any course of reasoning and the exercise of judgment," Board of Educ. v. Phillips, 264 Ala. 603, 89 So. 2d 96 (1956); are based upon factors unrelated to statutory purposes; impose or omit procedural requirements that result in manifest unfairness in the circumstances though within the letter of statutory requirements; or amount to a wilful disregard of statutory purposes. 2 F. COOPER, *supra* note 8, at 761-69 and cases cited therein. Although most of the cases cited arose in contexts other than rulemaking, the basic legal standard should be applicable.

411. See text accompanying notes 317-21 *supra*.

## VI. CONCLUSION

In implementing the NC APA, problems assuredly will be encountered. Events may prove some of the provisions to be unworkable, thus necessitating various amendments.<sup>412</sup> Neither the drafters nor this writer could anticipate all problems that the wide variety of agencies will experience, and foresee all the problems that will be posed for the State's changing instruments for carrying out the people's business—administrative agencies. The NC APA, however, does represent a bold step in the direction of both fair and efficient government and ought to be given a fair chance to prove its worth.

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412. This should not be surprising. Issues under the Federal APA remain unsettled after nearly three decades.

