I. SOUTH CAROLINA ADMINISTRATIVE PROCEDURE ACT

A. Introduction

A notable occurrence in South Carolina administrative law is the enactment of the State Administrative Procedure Act (the Act).\(^1\) Initially approved by the General Assembly during the 1976 session,\(^2\) the statute was revised and completely reenacted on June 13, 1977.\(^3\) The Act is largely patterned after the Revised Model State Administrative Procedure Act (Model State Act).\(^4\) The Act also parallels the Federal Administrative Procedure Act (Federal Act),\(^5\) which, because of its more extensive legislative and case-law history, should provide guidance to officials and the South Carolina Supreme Court in interpreting and applying similar provisions of the South Carolina Act.\(^6\) A growing body of case law that interprets the various state enactments of versions of the Model State Act also can guide the courts and agencies in applying the Act.

While no meaningful written legislative history of the Act and no statement of findings or purpose was incorporated into the Act by the state legislature, the intent of the Act is clearly to provide "reasonable uniformity of practice and fair procedural methods for the benefit of all persons affected by state administrative action."\(^7\)

---

6. As of this writing, the South Carolina Supreme Court has not applied the Act. According to the South Carolina Attorney General's Office, questions concerning the Act have arisen in several circuit court cases, but no appeal to the supreme court has yet occurred.
Like the Model State Act, the South Carolina statute embraces a number of fundamental principles of administrative procedure, including: (1) a requirement that each state agency, except in emergencies, follow uniform rulemaking procedures that give interested persons adequate notice and an opportunity to be heard before rules are promulgated; (2) provisions for advance determination, by the respective agency, the court, or both, of the validity or applicability of administrative rules to particular cases; (3) assurance that in individual cases and administrative adjudications fundamental fairness is accorded through notice, and an opportunity to present evidence and to be protected by the rules of evidence; (4) assurance that the agency official(s) making the final decision in a contested case will be personally familiar with the evidence; and (5) provision for appropriate judicial review of administrative orders to correct any significant administrative errors.  

B. Regulation-Making

Prior to the advent of the State Administrative Procedure Act, South Carolina statutes required only that official rules and regulations of state agencies adopted under general and permanent law be certified for substance by the promulgating agency, certified for form by the Code Commissioner, and filed in the office of the Secretary of State. No uniform procedures governing publication of proposed regulations, opportunity for public input, or testing of the validity or applicability of regulations prior to enforcement were in effect. The 1977 Act repeals the previous procedure governing filing of regulations and provides for uniform methods of regulation-making, filing and publication of regulations, and General Assembly review.

From the public’s viewpoint, one of the most important provisions of the Act is article I, section 14, which requires that virtually every written agency pronouncement be made available for public inspection. Each agency is required to adopt and make available for public inspection: (1) an organization and operations description that tells the public how to obtain information about the agency and how to request agency action on particular

8. See id.
matters; (2) a policy statement describing all formal and informal procedures available before the agency, as well as all forms and instructions used by the agency; and (3) all final orders of the agency, unless otherwise provided by law. The section adds a strong sanction against secretive agency action by providing that no rule or decision is valid until made available for public inspection.

While these public information requirements closely parallel those in the Model State Act\(^{12}\) and the Federal Act,\(^{13}\) the South Carolina Act is less stringent than these because it does not expressly require the descriptions of agency organization and procedures in article I, sections 14(a)(1) and (a)(2)\(^{14}\) to be adopted and published as formal rules. The practical effect is to put on members of the public the burden of seeking this information from state agencies. The Act serves to ensure, however, that the information is freely available to those who inquire.

In a manner parallel to the publication and codification of federal agency regulations, the Act provides in article I for the publication of state agency documents in a State Register,\(^ {15}\) and for the periodic collection of currently effective regulations in a Code of State Regulations.\(^ {16}\)

Knowledge of the definitions of terminology used in the Act is necessary for a complete understanding of the regulation-making scheme. The term "document" is defined as: "a regulation, notice or similar instrument issued or promulgated pursuant to law by a State agency."\(^ {17}\) The definition of "regulation" is: "each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency."\(^ {18}\) The scope of the two terms "document" and

---

12. See Model State Act § 2. Section 14 of the 1976 S.C. Act was identical to the Model State Act in this regard.
15. Id. § 1-23-20.
16. Id. § 1-23-90.
17. Id. § 1-23-10(2). Compare this section with § 1(1) of the 1976 Act. The earlier version also included agency orders, rules, certificates, codes of fair competition, and licenses within the definition of "document." The reason for the change may be twofold. First, under the 1977 Act, these types of agency pronouncements are more pertinent to the adjudicatory procedures of article II. Second, in the new Act, the General Assembly may have desired to reduce the number and kind of agency pronouncements subject to the formal filing and consideration procedures of article I.
18. S.C. Code Ann. § 1-23-10(4) (Cum. Supp. 1977). The term "regulation" is further defined to include "the amendment or repeal of a prior regulation," but the legislature restricted the scope of the term by excepting a number of kinds of agency pronouncements.
“regulation” is crucial to the procedures provided in the Act. As a starting point for determining whether the regulation-making provisions of article I are applicable, state agencies and practitioners should examine agency pronouncements in light of the meaning of these two key terms.

Another important preliminary question on coverage of the Act’s regulation-making provisions is which governmental entities are required to promulgate and file documents in compliance with article I. The simple answer to this question is: all “state agencies.” That term means “each state board, commission, department, executive department or officer, other than the legislature or the courts, authorized by law to make regulations or to determine contested cases.”

This definition is taken almost verbatim from the Model State Act, and, as the Commissioners’ Comment to the Model Act points out, is intended to be all inclusive. The South Carolina Act, however, retreats from all-inclusive coverage by narrowing the scope of the term regulation, which exempts a number of state agency statements from the regulation-making provisions of the Act. The meaning of the term agency has been the subject of substantial litigation in other states that have adopted similar state administrative procedure acts. Because of the multitude of state governmental entities in this state, and the wide variety of their pronouncements, litigation in South Carolina disputing the interpretation of the terms “agency,” “regulation,” and “document” is likely.

---

Id. The intent apparently was to cut back on the breadth of the 1976 Act, as well as to make agency actions relating only to specified individuals subject only to the procedural protections of article II. For example, the legislature apparently did not intend for ratesetting decisions of the Public Service Commission or price-fixing orders of the Dairy Commission to be subject to the regulation-making procedures of article I, but the administrative procedures of article II apply to these agency functions.

20. Model State Act § 1(1).
21. Id.
22. See, e.g., Smith v. Gunn, 263 La. 599, 268 So. 2d 670 (1972); Riggins v. Housing Auth. of Seattle, 87 Wash. 2d 97, 549 P.2d 480 (1976); Pritchard v. State, 87 Wyo. 2d 97, 540 P.2d 523 (1976). In determining whether the administrative procedure act should apply, a principle evident from these cases is that the focus should be on the precise function performed by the entity.
23. At least 28 jurisdictions, including South Carolina, have adopted versions of the Model State Act. Commissioners’ Prefatory Note, Model State Act.
24. See, e.g., 1977 Op. S.C. Att’y Gen. 96, advising that the S.C. State Employee Grievance Committee is a “state agency” within the meaning of the 1976 Act. Noninclusion of the word “committee” in the definition of “agency” is immaterial, because the
A state agency whose pronouncements are subject to the formal regulation-making procedures of the Act must follow the Act's public notice requirements set forth in article I, sections 11 and 17. These sections apply at the initiation of the regulation-making process and must be construed together because of their overlapping requirements and terminological disparity. Section 11 expressly applies only to the promulgation of regulations, and section 17 applies "to the adoption, amendment, or repeal of any rule," a term that is not defined in article I of the 1977 Act. To further complicate the construction of these sections, section 17(c) states that its provisions are inapplicable to an agency that has a different and specific regulation-making procedure prescribed by separate statutes. Of the two sections, section 11 is the more basic, because it applies to all state agency regulation-making, and section 17 applies when an agency does not have

name of the body is not the controlling factor. Id. This also seems to be a correct interpretation under the 1977 Act.

See also Informal Opinion of Asst. Atty. Gen. Woodington (March 11, 1977) to the State Development Board, advising that in extending the jurisdiction of a regional housing authority the Board must comply with the regulation-making provisions of the 1976 Act. The Board is a "state agency," and its action in extending the territorial jurisdiction of a city housing authority is in the form of a written document that has general applicability and legal effect. Id. The result would probably be the same under the 1977 Act, if it is broadly construed. But compare this with 1976 Op. S.C. ATT'Y GEN. 4505, advising that the State Board of Education is an "agency" under the 1976 Act and that the Board's "South Carolina State Plan," required as a prerequisite to receipt of federal funds, must be prepared in compliance with the regulation-making provisions of the 1976 Act. The result might be different under the 1977 Act because of the narrower scope of the term "regulation" and because the 1977 Act deleted from the list of documents required to be filed with the Legislative Council the phrase "policy statements" relating to state agency expenditures of federal funds. No. 671, § 5(3), 1976 S.C. Acts 1768 (repealed 1977).


27. Id. § 1-23-110. This section was a new addition in the 1977 Act, although some of its language is similar to that of § 12 of the 1976 Act.


29. This is one of the potentially serious ambiguities in the terminology of article I. The term "rule," rather than "regulation," was used almost exclusively in the 1976 Act, in keeping with the Model State Act's terminology. In the 1977 re-enactment of the South Carolina Act, the General Assembly omitted "rule" from the list of terms defined in article I of the Act and may have intended to substitute the term "regulation," giving that term a narrower meaning than the term "rule" carried in the 1976 Act. The legislature, however, apparently failed to effect a complete substitution, with the result that §§ 14, 17, 18, 19, and 20 (all of which closely parallel the Model State Act) use the term "rule," rather than "regulation." A logical assumption is that the General Assembly intended for the two terms to carry identical meanings when used in article I, but the term "rule" also has a distinctly different meaning in article II of the Act dealing with contested cases. See notes 65-67 and accompanying text infra.
notice and public participation requirements set out in statutes specifically applicable to it.

The purpose of the notice requirements in sections 11 and 17 of the Act is to ensure that interested persons are given sufficient advance notice of proposed agency regulation-making so that they can participate in the process. A conjunctive reading of sections 11 and 17 shows that three methods of notice are generally required. First, the agency must file with the Legislative Council a notice of a proposed regulation. The proposed regulation must then be published in the State Register at least two weeks prior to promulgation of the regulation, unless all persons who will be subject to the regulation are personally served or have actual notice. The notice in the Register must specify when and where the public hearing for consideration of the proposed regulation will occur, the statutes that provide the legal authority for the proposed regulation, and either the provisions of the proposed regulation or a synopsis of it. Second, the agency must also give notice in two newspapers of general circulation in the State at least thirty days prior to adoption of the regulation. The newspaper notice must state the time and place of the public hearing and must include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved. Third, the agency must mail notice to all persons who have made timely requests for advance notice of its regulation-making proceedings. The exclusion contained in section 17(c) eliminates the newspaper and personal mailing forms of notice for state agencies which have different notice and public input requirements specifically prescribed by statute. Publication in the State Register, however, applies to all state agency regulation-making.

These notice provisions are comparable to those in section 4 of the Federal Act that requires appropriate notice of proposed regulation-making to be published in the Federal Register. The 1977 South Carolina Act is narrower in scope than the Model State Act, which requires notice before promulgation of "interpretative rules, general statements of policy, [and] rules of agency organization, procedure or practice." These pro-

---

30. See Commissioners' Comment, MODEL STATE ACT § 3.
32. MODEL STATE ACT § 3(a) uses the term "rule," as broadly defined in § 1(7) of the Model State Act, to include interpretative rules, policy statements, and rules of procedure. The Federal Act (§ 4(a)) expressly excluded these types of regulation-making from
nouncements are not rules or regulations as defined in the Act, though, and are not subject to formal regulation-making procedures.

One purpose of requiring advance notice of agency regulation-making is to allow interested members of the public sufficient time to prepare and submit information and recommendations concerning proposed rules. Sections 11 and 17 of the 1977 Act further protect the privilege of public input by guaranteeing interested persons at least a limited opportunity to be heard by the agency proposing regulations. Again, as with the matter of notice, the two sections should be read together to ascertain the procedures governing public participation.

Section 11(c) of the Act prescribes the public input requirements that apply to all state agency regulation promulgations. The section generally requires the promulgating agency to "give interested persons an opportunity to be heard through submission of written data, views or arguments with or without opportunity for oral presentation."

Section 17, which does not apply to agencies that have regulation-making procedures prescribed in statutes other than the Act, has more rigorous, specific requirements. An opportunity for oral hearing must be granted if requested by twenty-five persons, an association having at least twenty-five members, or a governmental subdivision or agency. The promulgating agency must consider all written and oral submissions on the proposed regulation. After a regulation has been adopted by the agency, if any interested person has previously requested, or does so within thirty days, the agency must concisely state the principal reasons for and against adoption of the regulation and incorporate its reasons for overruling objections to the regulation.

When article I, section 17 is applied to agency regulation-making, the promulgating agency must adhere substantially to its notice and public participation requirements for the regulation to be valid. If a proceeding to contest a promulgation is brought within two years from the effective date of a regulation, the courts may invalidate the regulation if it was not adopted in its notice and hearing requirements. The 1976 South Carolina Act (§ 12b(1)) followed the lead of the Federal Act. The 1977 Act probably achieves the same result, not by expressly excluding these types of regulation-making (indeed, they are not mentioned in the 1977 Act), but rather through its more restrictive definition of the term "regulation" in article I, § 1(4). This assumes that the General Assembly did in fact mean to use the terms "rule" and "regulation" interchangeably in article I of the 1977 Act.
"substantial compliance" with the requirements of article I, section 17 of the Act.\textsuperscript{33} Section 11 of the article I does not contain an express sanction, nor does it impose a time limit on a suit contesting the validity of a regulation for failure to comply with the section's notice and public input requirements.\textsuperscript{34}

An important facet of the Act not found in either the Federal Act or the Model State Act is the requirement of General Assembly approval of agency regulations before they can become effective. The Act essentially gives the state legislature power to review and veto any agency regulation by affirmative action within ninety days after promulgation.\textsuperscript{35} The agency initiates the process of legislative review by filing a copy of a promulgated regulation and a request for review with the President of the Senate and the Speaker of the House. They submit the request to the standing committees of the Senate and House that are concerned with the function of the promulgating agency. A regulation may become effective in two ways. First, if within ninety days of its filing, the General Assembly approves the regulation by joint resolution, it becomes effective as soon as it is published in the State Register. Second, if the legislature takes no action on it, the regulation automatically becomes effective after ninety days. The regulation is voided only if the General Assembly disapproves the regulation by joint resolution within ninety days of its filing.\textsuperscript{36}

If a state agency finds that "an imminent peril to the public health, safety or welfare requires immediate promulagation of an emergency regulation," it can, under article I, section 13 of the

\textsuperscript{33} The requirement of "substantial compliance" is sufficiently indefinite to give the courts opportunity to uphold agency regulation-making procedures that may vary from the § 17 guidelines, so long as the procedures are basically fair. See, e.g., Hotel Ass'n of Washington, D.C. v. District of Columbia Minimum Wage and Indus. Safety Bd., 318 A.2d 294 (D.C. App. 1974). But compare that case with Junghans v. Dep't of Human Resources, 289 A.2d 17 (D.C. App. 1972), and Adams v. Professional Practices Comm'n, 524 P.2d 932 (Okla. 1974).

\textsuperscript{34} The implications of these differences between article I, §§ 11 and 17 are open to speculation and may need clarification by the courts or General Assembly. The state supreme court might read a "substantial compliance" requirement into § 11, like that expressly stated in § 17. Because § 11 is the more basic of the two sections, is applicable to the promulgation of all agency regulations, and is already fairly general in its language, the § 11 requirements should arguably be strictly applied to ensure basic fairness in the regulation-making process. In other words, § 11 arguably sets out the minimum that should be required, and failure to meet its requirements should invalidate a particular regulation promulgated under a deficient procedure.


\textsuperscript{36} Sine die adjournment of the General Assembly tolls the running of the ninety day period for review. Id.
Act, avoid the usual regulation-making procedures and exert its delegated authority immediately.\textsuperscript{37} For an emergency regulation to become effective, only filing in the office of the Legislative Council is required, along with a statement of the need for immediate promulgation. The emergency regulation becomes effective at the time of filing, is valid for a maximum of ninety days if promulgated while the General Assembly is in session, and is not renewable.

Should an emergency situation arise while the legislature is not in session, the promulgating agency must, prior to promulgation, give a minimum of one week's notice by publication of a notice of promulgation in two newspapers of general circulation in the state. In this situation, a regulation is valid for ninety days and may be renewed if the General Assembly is not in regular session at the end of the ninety-day period.\textsuperscript{38} Emergency regulations can be made permanent by complying with the normal regulation-making procedures.

The acts of filing with the Legislative Council and publication in the Register carry legal significance for any person affected by an agency regulation.\textsuperscript{39} First, except for emergency regulations,\textsuperscript{40} until a regulation is filed, published, and furnished by the Legislative Council and the promulgating agency for public inspection,\textsuperscript{41} it is not valid against any person lacking actual notice of it. Second, the publication of a document filed with the Legislative Council creates a rebuttable presumption: (1) that it was properly "promulgated subject to further action required under this article;"\textsuperscript{42} (2) that it was filed and made available for

\textsuperscript{37} Id. § 1-23-130.
\textsuperscript{38} Id. § 1-23-120. To understand the procedures governing promulgation of emergency regulations, article I, §§ 12 and 13 should be read together. Section 13 provides the authority for the promulgation, and § 12 governs legislative review. Apparently the General Assembly felt that it could serve as a check on the use of emergency regulation-making authority by state agencies so long as the legislature was in session; hence, the one week advance notice and newspaper publication are not required when the legislature is in session. See generally, Model State Act §§ 3-4; 5 U.S.C. § 553(b)(B), (d)(3) (1970) for comparable emergency provisions.
\textsuperscript{40} Id. § 1-23-130.
\textsuperscript{41} Id. § 1-23-30. This requires the Legislative Council to make filed documents available for public inspection. Agencies are required to make regulations, orders, and decisions available for public inspection if they are to be valid. Id. § 1-23-140.
\textsuperscript{42} Id. § 1-23-60(1). Why this phrase, not in the 1976 Act (see § 7(1) of the 1976 Act) was added is unclear. Perhaps the language refers to General Assembly approval, but § 4(1) of the 1977 Act (§ 1-23-40(1)) directs that final regulations be published in the State Register only after General Assembly approval. Thus, if the presumption is not meant to
public inspection at the time noted on the face of the regulation; and (3) that the copy on file with the Legislative Council is a true copy of the original. Third, courts are required to notice judicially the contents of filed documents.\textsuperscript{43}

An objective of the Act is to make state agencies more accessible and responsive to the public. To further this objective, article I, section 18 of the Act\textsuperscript{44} allows any interested person to petition an agency for the promulgation, amendment, or repeal of a regulation. Each agency must adopt a formal regulation that tells the public how to petition the agency for this action. The Act also requires the agency, within thirty days either to deny the petition in writing, stating the reasons, or to initiate the normal regulation-making procedures.

The Act also provides several different ways in which persons adversely affected, or likely to be adversely affected, by agency regulations can seek relief from the agency and in the courts. First, article I, section 15\textsuperscript{45} requires each agency to establish by regulation a procedure under which any aggrieved party can contest the authority of the agency to promulgate a particular regulation. This procedure operates before the act of final promulgation, and it must comply with the provisions of article II of the Act governing administrative adjudications; in other words, it operates like the procedures for handling a contested case. In addition to this administrative remedy, section 15 allows an aggrieved person, after final promulgation of a regulation, to go to the circuit court and petition for injunctive relief on the grounds that the regulation exceeds the regulatory authority of the promulgating agency.\textsuperscript{46}

\footnotesize

\textsuperscript{44}Id. § 1-23-180. This section of the 1977 S.C. Act is identical to § 15 of the 1976 S.C. Act and § 6 of the Model State Act. Section 4(d) of the Federal Act, 5 U.S.C. § 553(e) (1970), is similar.
\textsuperscript{45}S.C. Code Ann. § 1-23-150 (Cum. Supp. 1977). The origin of this particular section is puzzling, for there is no comparable provision in the 1976 Act, the Model State Act, or the Federal Act.
\textsuperscript{46}The administrative remedy in § 15 should be particularly useful, because it allows persons who might be affected by a proposed regulation to contest the agency's authority to adopt the regulation prior to the regulation's being finalized. The injunctive relief provision, however, seems to duplicate the declaratory judgment remedy in § 19, because for a regulation to be valid, the agency must have acted within its statutory authority, and either a declaratory judgment of invalidity or an injunction would have the effect of
Second, article I, section 20 of the Act gives any person who may be affected by an agency regulation the right to petition the agency for a declaratory ruling on "the applicability of any statutory provision or of any rule or order of the agency." As under section 15, the agency's ruling has the same status as an agency decision in a contested case so that the provisions of article II apply.

Third, article I, section 19 allows any aggrieved person, upon proper allegation of injury or threatened injury, to petition a circuit court for a declaratory judgment regarding the validity or applicability of a particular agency regulation. Exhaustion of administrative remedies is not required, and a declaratory judgment may be rendered regardless of whether the plaintiff has first asked the agency to pass upon the validity or applicability of the regulation in question. The Act imposes no statute of limitations on any of these remedies, but a proceeding to contest any regulation on the ground of noncompliance with the procedural requirements of section 17 must be initiated within two years from the effective date of the regulation.

halting agency enforcement of the particular regulation. Section 15 also leaves open the question of whether a person who disagrees with an agency decision regarding its authority to promulgate a regulation must wait until after the regulation has been finally promulgated before taking the issue of agency authority to the courts. Clearly, the injunctive relief cannot be had in court until after final promulgation, but the language of the section does not expressly preclude a direct appeal from an agency decision in accordance with article II of the Act.


48. S.C. CODE ANN. § 1-23-200 (Cum. Supp. 1977). The section also requires that the agency adopt a formal regulation the procedure for handling petitions for declaratory rulings. There is some case law, however, to the effect that the rendering of such declaratory rulings is within the discretion of the agency. See, e.g., Wisconsin Fertilizer Ass'n v. Kains, 39 Wis. 2d 95, 158 N.W.2d 294 (1968). By its express language, the comparable provision in the Federal Act is discretionary.


50. Id. § 1-23-190. The section is identical to § 7 of the Model State Act. As stated in the Commissioners' Comment to § 7 of the Model State Act, there is no comparable provision in the Federal Act, because regulation-making is reviewable under the provisions of that Act dealing with judicial review of administrative orders.

51. Interesting questions may arise regarding the appropriate scope of judicial review under § 19. Article I of the Act says nothing about scope of review, and whether the General Assembly intended for the courts to look to the provisions of article II, § 380 as the proper standards is unclear. Decisions by courts in other states that have adopted a version of the Model State Act may provide some guidance. See, e.g., Shell Oil Co. v. Illinois Pollution Control Bd., 37 Ill. App. 3d 264, 346 N.E.2d 212 (1976), HM Distributors of Milwaukee, Inc. v. Department of Agriculture, 55 Wis. 2d 261, 198 N.W.2d 598 (1972).
C. Administrative Adjudications

Prior to January 1, 1977,\textsuperscript{52} no uniform procedures for administrative adjudications applied to every state agency in South Carolina. Only the general contours of procedural due process and any additional requirements imposed by statute on particular agency determinations, or voluntarily adopted by the agency, governed the decision-making process in individual contested cases, such as licensing, price- and rate-fixing, and other agency orders. The Act radically changes the law covering state agency administrative adjudications in South Carolina and provides uniform procedural protections covering all state agencies.\textsuperscript{53}

The second substantive article in the Act deals with administrative procedures in individual contested cases. As with article I of the Act, the key terms define the scope of the provisions. The term “contested case” is defined as “a proceeding, including but not restricted to rate making, price fixing, and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.”\textsuperscript{54} This definition is identical to that in the Model State Act, which uses the term “contested case” in lieu of the Federal Act’s term “adjudication.”\textsuperscript{55} Significantly, South Carolina includes price-fixing hearings within the scope of contested cases, whereas the Model State Act makes inclusion of these proceedings optional.\textsuperscript{56}

As might be expected, the scope of the term contested case has spawned much litigation in other states that have enacted

---


\textsuperscript{53} But see S.C. CODE ANN. § 1-23-400 (Cum. Supp. 1977), which makes the provisions governing ex parte communications by agency personnel (§ 1-23-360) and licensing (§ 1-23-370) inapplicable “to any agency which under existing statutes has established and follows notice and hearing procedures which are in compliance with such sections.”


\textsuperscript{55} Compare Model State Act § 1(2) with the Federal Act § 2(d), 5 U.S.C. § 551(7) (1970). As explained in the Commissioners’ Comment to § 1 of the Model State Act, the change in terminology was made to avoid possible confusion from classification of rate-making under the Federal Act as regulation-making, with the regulation-making procedures applicable to it; however, under the Model State Act, the provisions for contested cases govern ratemaking.

\textsuperscript{56} The significance of this action by the General Assembly is that price-fixing activities of the South Carolina Dairy Commission are probably brought within the coverage of the Act, because under S.C. CODE ANN. §§ 39-33-410 and -1030 (1976), the Commission must hold a public hearing prior to the establishment of minimum milk sale prices.
similar administrative procedure statutes. Analysis of state supreme court decisions on this issue reveals that at least two key elements must be present before a state agency administrative proceeding becomes a contested case: (1) a hearing must be required by law, and (2) the proceeding must adversely affect the "special" legal interests of a particular person or persons as opposed to the general public interest. In most contested cases, distinctly opposing parties are present, and the agency hearing takes on the character of a civil, trial-like proceeding.

Another key term affecting the scope of article II of the Act is "agency," defined in article II, section 1(1) to mean "each State board, commission, department or officer, other than the legislature or the courts, authorized by law to make rules or to determine contested cases." This definition is virtually identical to the definition of "agency" or "state agency" in article I, section 1(1). The only difference between the two is that article I inserted the word "executive" before "department" and substituted the

---

57. See, e.g., Local 1344, Am. Fed. of State, County and Municipal Employees v. Connecticut State Bd. of Labor Relations, 30 Conn. Supp. 259, 309 A.2d 696 (1973) ( Bd. decision affecting union rights is a contested case); Quick v. Department of Motor Vehicles, 331 A.2d 319 (D.C. App. 1975) (driver's license revocation proceeding is a contested case); Rose Lees Hardy Home and School Ass'n v. District of Columbia Bd. of Zoning Adjustment, 324 A.2d 701 (D.C. App. 1974) (zoning variance proceeding is a contested case); Capitol Hill Restoration Soc'y v. Zoning Comm'r, 287 A.2d 101 (D.C. App. 1972) (proceeding for approval of planned unit development is a contested case); Frazee v. Iowa Bd. of Parole, ___ Iowa ___, 248 N.W.2d 80 (1976) (parole revocation proceeding is a contested case); State ex rel. R.R. v. Schmidt, 63 Wis. 2d 82, 216 N.W.2d 18 (1974) (revocation of juvenile's "after care" supervision not a contested case); Gleason v. Wisconsin Dep't of Transp., 61 Wis. 2d 562, 213 N.W.2d 74 (1973) (driver's license revocation proceeding not a contested case).

58. The hearing referred to in the definition of "contested case" has generally been interpreted to mean a formal, trial-type hearing, rather than an informal conference. See, e.g., McAuliffe v. Carlson, 30 Conn. Supp. 118, 303 A.2d 746 (1973); Chevy Chase Citizens Ass'n v. District of Columbia Council, 327 A.2d 310 (D.C. App. 1974); Daly v. Natural Resources Bd., 60 Wis. 2d 208, 208 N.W.2d 839 (1973), cert. den., 414 U.S. 1137 (1974); 1978 Op. S.C. ATT'Y GEN. ___ (advising that formal employee grievance hearings, if required by agency regulations or statute, are contested case proceedings within the coverage of the Act).


60. If the agency function is "quasi-legislative" in character, directed toward an agency decision having general public applicability, the proceeding most likely will be governed by the regulation-making provisions of article I of the Act, rather than the contested case provisions of article II. See, e.g., Ruppert v. Washington, 366 F. Supp. 686 (D.D.C. 1973), aff'd, 534 F.2d 417 (D.C. Cir. 1976); Environmental Defense Fund, Inc. v. Mayor Commissioner of D.C., 317 A.2d 515 (D.C. App. 1974); State ex rel. City of La Crosse v. Rothwell, 25 Wis. 2d 225, 130 N.W.2d 806 (1964), rehearing denied, 25 Wis. 2d 228, 131 N.W.2d 699 (1964).

term "regulation" in lieu of the term "rule." The first difference is insignificant, but the latter is crucial, because the term "rule" is used in article II of the Act to mean something different from the term "regulation" as used in article I, in which the terms "rule" and "regulation" were apparently employed interchangeably.62

As used in article II of the Act the term "agency" includes all state agencies that render decisions in contested cases. Hence, the General Assembly apparently followed the suggestion of the Model State Act and, unlike some state legislatures, chose not to exempt certain state agencies from the coverage of the administrative adjudications provisions of the Act. Nor did the General Assembly curtail the scope of article II, as it did in article I of the Act, by limiting the definition of other key terms, such as the term "rule." On the other hand, the legislative body did not, as some states have done, broaden the scope of the term "agency" to include certain city, county or regional administrative entities, which may have substantial powers over persons and property.63 Occasion may arise, however, for litigation over the issue of exactly what constitutes an "agency" within the meaning of article II. In resolving these questions, other state courts have emphasized that the function performed by the entity, rather than official positions held by individual members, is determinative.64

Section 1(6) of article II defines "rule" as "each final agency statement, decision or order in a contested case. The term includes the amendment or repeal of a prior rule, but does not include statements concerning only the internal management of any agency and not affecting private rights or procedures available to the public."65 This definition, like several others employed in the Act, can best be described as a confusing hodgepodge of concepts, taken in part from the Model State Act,66 with some apparently original additions by the General Assembly. The essence of the definition is that a "rule" when referred to in article II, is the final decision of a state agency in a contested case or a reversal or modification of such a decision. A "rule," then, equals an "order," as that term is employed in the Federal Act.67

62. See note 29, supra.
63. Commissioners' Comment, Model State Act § 1 (Supp. 1978).
66. Model State Act § 1(7).
An objective of the Act is to ensure that decisions in contested cases be based on evidence considered at a hearing. Article II, section 2 thus mandates that all parties be afforded an opportunity for a hearing after notice of no fewer than thirty days. The notice must adequately inform the parties of the time and place of the hearing, the legal authority under which the agency is exercising its power, the particular statutes or rules involved, and a brief statement of the matters asserted, or at least the issues involved.

Two significant provisions of the Act that are not part of the Model State Act are the right of any party to the proceedings to depose witnesses, and the right of any agency, acting for itself or on behalf of another party, to issue enforceable subpoenas to compel the testimony of witnesses at the hearing and to compel the production of other relevant evidence. Under article II, section 2(c), any party to the proceeding can depose "witnesses within or without the State and, either by commission or de bene esse." The rules governing the taking of depositions in civil actions apply. Under article II, section 2(d), the agency can issue subpoenas on its own motion or at the request of any other party. Upon proper application the circuit court can use its contempt power, if necessary, to enforce subpoenas. The agency is also empowered to issue to the sheriff of the county where the hearing is held a warrant requiring the sheriff to produce any witness who refuses to honor an agency subpoena; but the agency must excuse any witness from appearing on the same grounds that witnesses or jurors are excused from appearing in the state courts.

In conducting a contested case hearing, article II, section 2 requires the agency to afford all parties an opportunity to respond to and present evidence and argument on all issues involved. The section also allows informal disposition of any contested case by stipulation, settlement, consent order, or default. The statute dictates exactly what must be included in the record of a con-

68. S.C. Code Ann. § 1-23-320 (Cum. Supp. 1977). Section 9 of the Model State Act, on which this section of the 1977 S.C. Act is based, was less specific in the timing of the notice, requiring only "reasonable notice" of the hearing. Section 5(a) of the Federal Act, 5 U.S.C. § 554(b) (1970), requires that persons entitled to notice be "timely informed."
70. Id. § 1-23-320(d).
71. Id. Compare, 5 U.S.C. § 555(d) (1970) (the Federal Act does not authorize a federal agency to issue warrants to a U.S. Marshall requiring him to compel the attendance of witnesses. Bypassing the courts in such a procedure may raise due process questions.).
tested case. Finally, article II, section 2 provides for transcribing oral proceedings in a contested case upon request of any party. The section also says that findings of fact must be based exclusively on the evidence and matters officially noticed.

A matter that is not covered in the contested case provisions of the Act, nor in the Model State Act, is the right of a party to be represented by legal counsel or other qualified representative at the hearing. Section 6(a) of the Federal Act explicitly states that a person compelled to appear before an agency can be "accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative."72 The Act’s silence on this subject should not be interpreted as a denial of the right to have legal representation in a contested case hearing, because the aim of this portion of the Act is to ensure due process and fundamental fairness to all parties affected by agency orders in contested cases.

Article II, section 3 of the Act73 provides that the rules of evidence, privilege, cross-examination, and judicial notice applicable in civil court cases must be followed in agency hearings on contested cases. Any evidence can be received in written form to expedite the hearing, provided that this procedure does not substantially prejudice the interests of the parties. Copies of documentary evidence are acceptable if the original is unavailable. The agency may notice not only judicially cognizable facts, but also generally recognized technical or scientific facts within its specialized knowledge, and staff memoranda or data. Parties to the hearing must be told beforehand or during the hearing of all material noticed and given an opportunity to contest it. In evaluating the evidence, the agency may utilize its experience and expertise in the subject area.

The effect of this section of the Act is to make the standards of proof in contested cases before state agencies substantially equivalent to those applicable in the courts. Significantly, the Act goes further than the Model State Act, which contains an "escape clause" in cases of hardship.74 This clause permits the introduction of some evidence that, while relevant and probative, would be inadmissible under the normal rules of evidence.

A major goal of the Act is to ensure that agency officials who make the final decisions in contested cases be personally familiar

74. Model State Act § 10(1).
with the issues and evidence. To effectuate this goal, article II, section 475 requires that if those rendering the final decision have not heard the case or reviewed the record and if the decision is adverse to a nonagency party to the proceeding, a proposal for decision must be served upon the parties. This proposal must contain a statement, prepared by the hearing officer or one who has read the record, justifying the decision and stating each issue of fact or law that forms the basis for the decision. Parties adversely affected by the proposed decision must be given an opportunity to file exceptions and present briefs and oral arguments to the agency officials who will make the final decision. By written stipulation of the parties, however, compliance with this section may be waived.

Once an agency reaches a final decision in a contested case, article II, section 576 requires that it be stated in writing, if adverse to one of the parties. The parties must be notified of the decision either personally or by mail. This section of the Act also requires the final decision to include separately stated findings of fact and conclusions of law. Factual findings merely recapitulating statutory language are insufficient; the section requires a concise, explicit statement of the basic underlying facts supporting the decision and a ruling on each proposed finding of fact if these proposals were submitted to the agency.

This statement of the underlying facts supporting the decision is important for two reasons. First, it explains to the parties the basis for the decision. Second, if a party to whom the decision is adverse later seeks judicial review, the reviewing court will be in a better position to know the facts on which the agency relied and the degree to which the record supports the agency decision. The statement of findings becomes particularly important in cases such as licensing, in which another statute vests a large measure of discretion in the agency.77 Reviewing courts have frequently expressed great displeasure with agencies that do not adequately support their decisions or treat the requirement as a mere technicality, and they have not hesitated to reverse the decision, or at least remand for a proper justification.78 Case law

78. See, e.g., id.; Luther v. Board of Educ. of Alpena and Presque Isle Counties, 62
also reveals that the courts are reluctant to draw inferences from findings not actually made by the agency or to allow the agency to support its decision on appeal with reasons not relied on at the administrative level.\textsuperscript{79}

To avoid unfair influence on agency officials involved in deciding contested cases, article II, section 6 of the Act\textsuperscript{80} precludes \textit{ex parte} consultations with any person, party, or his representative, unless all parties are notified and given an opportunity to participate. Discussion of the case among members of the agency is not prohibited, though. The Act adds a penalty provision making it a misdemeanor to violate these prohibitions, but also provides in article II, section 10\textsuperscript{81} that the provisions of section 6 are inapplicable to any agency that, under existing statutes, has established and follows substantially similar notice and hearing procedures. The purposes of section 6 are to prevent litigious facts from reaching those making the decision without becoming part of the hearing record and to preclude \textit{ex parte} discussion of the law with a party or his representative.\textsuperscript{82} If strictly enforced, this part of the Act may alter traditional methods of operation in some types of administrative adjudications. Furthermore, a definite trade-off is involved, because the gain in prevention of improper influence must be balanced against the loss in flexibility and practicality afforded by informal, \textit{ex parte} discussion.

Article II, section 7 of the Act\textsuperscript{83} expressly brings licensing decisions under the umbrella of contested cases whenever a statute requires that the grant, denial, or renewal of a license be preceded by notice and opportunity for hearing. If renewal of an existing license is involved, and timely application for renewal is made, the Act provides that the existing license will remain valid until the agency renders its decision. Furthermore, if the renewal is denied or the new license limited, the old license is valid until the last day for seeking court review, or a later date fixed by order.


\textsuperscript{82} Commissioners' Comment, \textit{Model State Act} § 13.

of the reviewing court. Unless the public health, safety or welfare requires emergency action, agencies cannot terminate a license without notifying the licensee and giving him a chance to demonstrate compliance. If an emergency exists the agency can simply state the necessity for its action and summarily suspend the license pending prompt institution of proceedings for revocation. Under article II, section 10, the provisions of section 7 are not applicable to agencies that have substantially similar notice and hearing procedures for licensing set forth in separate statutes.

To give an opportunity to correct a possibly erroneous agency decision to persons aggrieved by final decisions of administrative agencies in contested cases, article II, section 8 of the Act provides for judicial review by the state circuit courts. The method of obtaining court review and the scope of that review are similar, but not identical, to those available under the Federal Act. The doctrines of exhaustion of administrative remedies and ripeness apply, but the Act states that a preliminary, procedural, or intermediate agency ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. The Act does not repeal other review provisions on the statute books; thus, section 8 is not meant to be the exclusive remedy to a person aggrieved by agency action if other methods of court review or trial de novo are provided by statutes governing the particular agency that rendered the disputed decision.

Aggrieved persons have thirty days after a final agency decision to petition the circuit court for review, but if an agency rehearing is requested, the thirty-day period runs from the time a decision is made denying the request for rehearing. Enforcement of an agency decision is not automatically stayed by filing for court review. Rather, granting a stay is discretionary with the agency or the reviewing court. The entire record of the agency hearing is made available for court review, but the parties may stipulate to shortening it. If a party refuses unreasonably to stipulate to limiting the record, the court may tax the party for the additional cost. Upon a proper showing, the court may also accept additional evidence, or it may order that the additional evidence be taken before the agency, which may modify its findings and decision.

85. Id. § 1-23-380.
Generally, the court will confine its review to the record, but the judge will hear oral argument and receive written briefs if requested by one of the parties. If it is alleged that irregularities were present in the agency procedure, and these are not shown in the record, proof of the irregularities can be made before the court.

Article II, section 8(g) directs that “[t]he court shall not substitute its judgment for that of the agency on the weight of the evidence on questions of fact.” While the court cannot act as another trier of fact, the scope of review in section 8(g) allows it to reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

1. In violation of constitutional or statutory provisions;
2. In excess of the statutory authority of the agency;
3. Made upon unlawful procedure;
4. Affected by other error of law;
5. Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
6. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Sections 8(g)(1) and (2) pertain to the ultra vires doctrine, which requires that the agency not go beyond the jurisdictional grant given it by statutes and the state constitution. Should a state agency act beyond the authority delegated to it, or fail to follow the laws applicable to it in reaching a decision in a contested case, the decision is clearly subject to being reversed by the reviewing court.

Significantly, section 8(g)(5) employs the “clearly erroneous” standard for review of factual findings, rather than the “substantial evidence” test of the Federal Act. The “clearly erroneous” standard gives the reviewing court greater leeway to reverse agency decisions than does the “substantial evidence” test. Under the latter standard, the reviewing tribunal is obligated to affirm the agency action if, upon viewing the record as a whole, the result is a logical one and there is “substantial evi-

88. Id.
dence” to support it. In contrast, under the “clearly erroneous” standard, the court not only must consider all the evidence in the record, but also it must reverse if a clearly superior choice to that of the agency is indicated. The “clearly erroneous” test has been described as a firm conviction by the reviewing court, based on its review of all the evidence, that a mistake was committed by the agency.

In article II, section 8(g)(6) of the Act, the language “clearly unwarranted exercise of discretion” should be interpreted as meaning the same as arbitrary action. If the agency has acted arbitrarily or abused its discretion in reaching its decision, the reviewing court should set aside the decision. This test essentially equals a test of reasonableness and rationality.

The scope of review is often crucial. While the Act sets forth the standards that the reviewing court should follow, the standards are not overly precise and ample room for judicial discretion in applying these general standards to the facts of a given case is still present. If a common theme underlies judicial decisions on the issue of the proper scope of review, however, it is that the actions of administrative agencies must be accorded great respect and presumed to be correct until shown otherwise by a challenging party. Perhaps this “bias” is justifiable in a governmental system in which the doctrine of separation of powers is a tenet. The courts recognize that limited judicial review strengthens the administrative process and that judicial economy requires that administrative agencies be allowed to exercise the various functions in which they have developed expertise and in which they are comparatively better qualified than the courts. On the other hand, court review is necessary as a balancing check on agency action.

As a further complement to a party’s right of judicial review

93. See Commissioners Comment, MODEL STATE ACT § 15.
94. See, e.g., Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975); Town of Pleasant Prairie v. Johnson, 34 Wis. 2d 8, 148 N.W.2d 27 (1967).
of administrative action, article II, section 9 of the Act provides as in other civil cases that an aggrieved party may obtain review of any final judgment of a circuit court by appeal to the supreme court.

D. Conclusion

The Administrative Procedure Act is new in South Carolina, although other states have been operating under similar acts for a number of years. While the Act is yet to be tested before the state supreme court, challenges should soon appear because of the many ambiguities and far-reaching provisions in the new law. The major goals of the Act — bringing greater public input into agency regulation-making and ensuring fundamental fairness in administrative adjudications — are certainly laudable. Major deficiencies, however, are still present in the Act, and many would undoubtedly consider additional statutory protections desirable. In short, there is still plenty of work for the General Assembly and for the courts.

II. Exhaustion of Remedies

During its fall 1977 term, the South Carolina Supreme Court decided two cases largely on the doctrine of failure to exhaust administrative remedies. These two cases provide an interesting contrast between an overly harsh, improper application of the doctrine and a more appropriate, theoretically sound use of it.

In City of Columbia v. Abbott, the court unanimously denied relief to the manager of an adult bookstore who had been convicted of operating a business without first procuring a city license. The court found the manager had not taken advantage of administrative remedies for appealing the denial of the license before his arrest and conviction.

Defendant-appellant was operating the bookstore under a valid business license when it requested a change of its license because it moved to a different location. The City License Inspector denied the request because he determined the business purpose to be a nuisance and unlawful. The store requested an appeal hearing before the city council, but pending the hearing, it filed another license application for a third location and withdrew its earlier appeal. The city inspector denied the alternate applica-

tion for the same reason as the first, and the store did not appeal. Instead, the store opened for business at the latter location. Thereafter, its manager was arrested and convicted for operating without a business license. He appealed to the circuit court, and contended that the licensing ordinance was unconstitutional "because it operates as a prior restraint on free speech and press and because it has a chilling effect on the exercise of rights granted by the first amendment of the United States Constitution."

The City prevailed in the circuit court by arguing that defendant-appellant was precluded from resort to the court because he had failed to exhaust his administrative remedies upon denial of the license application. On review, the supreme court held for the City. The court said that granting a license is an administrative function so that the doctrine of exhaustion of administrative remedies applies. Because the available administrative appeals were not utilized, "it follows that no relief will be granted by the Court." While Justice Littlejohn, speaking for the court, added that the court had also reviewed the constitutional grounds for appeal and found them meritless, the exhaustion requirement was clearly the principal basis for the decision. Statements by the United States Supreme Court and writings by commentators about the doctrine, however, demonstrate that this was not a proper instance in which to apply it.

The exhaustion doctrine concerns the timing of judicial review of administrative action. It is most applicable when a person with additional administrative remedies available seeks to bypass further administrative consideration by taking his case for relief directly to the courts. When this situation occurs, courts usually refuse to hear the controversy until the plaintiff utilizes the entire administrative process.

Abbott does not fit this pattern. Abbott did not attempt to short-circuit the administrative process by taking his controversy directly to the courts. The City took him to court in a criminal action in which he was a defendant. Once the case got

98. Columbia, S.C., Ordinance 74-6, §§ 27.1-.2.
99. 269 S.C. at 506, 238 S.E.2d at 178.
100. Id. at 509, 238 S.E.2d at 179.
to court, the City's decision on the license application had become final, and no administrative remedies were left for Abbott to exhaust. Furthermore, the nature of Abbott's defense - that the city ordinance was unconstitutional - is not a question suited to administrative determination. Deciding the constitutionality of a law is a function peculiarly suited to and reserved for the courts.103

McKart v. United States104 is particularly apropos to the Abbott situation. In that case, the United States Supreme Court held that a person who took no administrative appeal from a reclassification by a selective service board and who was convicted for failure to report for induction was not barred by the exhaustion doctrine from having the courts hear his appeal and determine a question of statutory interpretation. The Court noted that use of the exhaustion doctrine in a criminal case can be exceedingly harsh because it deprives the defendant of his only defense.105 In Abbott, that was precisely the effect of the South Carolina Supreme Court's decision.106

Significantly, the case and commentary law cited by the court in the Abbott opinion do not support its conclusion. The court relied on its earlier decision in DePass v. City of Spartanburg107 to support its reasoning; in that case, however, a plaintiff sued in equity to have the circuit court enjoin the city from enforcing a substandard housing ordinance against her. The court properly refused to take jurisdiction at that stage of the controversy before the plaintiff had availed herself of all administrative remedies. The supreme court affirmed, noting that plaintiff's constitutional rights remained unimpaired pending exhaustion of the administrative proceedings.108 In contrast, Abbott had no available remedies in the administrative process to which he could return, and his only opportunity to press his constitutional

---

103. Public Utilities Comm'n v. United States, 355 U.S. 534, 539 (1958). Had Abbott appealed the denial of the alternate location license to the Columbia City Council, the Council would probably not have considered his constitutional claim.


105. Id. at 197.

106. Of course, the court summarily stated that it had examined Abbott's "other grounds submitted" and found them without merit. The point is that these "other grounds" were the heart of Abbott's defense. Furthermore, since his claim was purely a constitutional one, not involving underlying issues of fact that agency expertise could help resolve (as in McGee v. United States, 402 U.S. 479 (1971)), there was no good reason for the court not to resolve these issues of law on their merits (unless they were entirely frivolous).


108. Id.
claims, before paying a fine or going to jail, was in the undertaken round of court appeals.

_Columbia Developers, Inc. v. Elliott_109 was the second 1977 case in which the South Carolina Supreme Court was faced with an exhaustion of remedies issue. The case arose when the owner of a multistory building in Columbia paid property taxes under protest and sought to recover the amount paid.110 The taxpayer had not availed itself of opportunities to have an additional assessment by the county assessor administratively reviewed, nor had it challenged administratively the Richland County auditor’s later determination that it owed back taxes for the years 1972 and 1973. When the taxpayer paid the additional taxes under protest and sought recovery in the circuit court, it was denied relief because it had failed to exhaust first the available administrative remedies. The circuit court also ruled on the merits that the taxpayer had no valid claim. The supreme court affirmed in a _per curiam_ opinion.

In the supreme court, appellant-taxpayer principally relied on the court’s prior decision in _Andrews Bearing Corporation v. Brady_,111 in which the court held that the doctrine of exhaustion of administrative remedies was “not an invariable rule,” and that exhaustion was not required when “the facts were undisputed and the issue involved was solely one of law.”112 Observing the factual context in the case at bar, the court distinguished it from _Andrews Bearing_ on the ground that the instant case presented “mixed questions of law and fact.”113 The court thus affirmed the lower court’s ruling that the taxpayer could not recover because it had failed to take advantage of available administrative remedies. The court also noted that it believed the trial judge had “reached a conclusion of which the evidence is susceptible” on the substantive issues, and thus the court was bound by that finding.114

Compared to the _Abbott_ decision, the result reached in this case is more logical and more in keeping with the purposes of the doctrine of exhaustion of administrative remedies. The result is

---

110. S.C. CODE ANN. §§ 12-47-210 to -270 contain the statutory provisions pertaining to recovery of local taxes paid under protest.
113. _Id._
114. _Id._
still a rather harsh one, because the taxpayer was deprived of a chance to litigate fully before the supreme court his claim that the county lacked statutory authority to levy in 1974 against property that escaped taxation in 1972 and 1973 because of the county's own administrative error. Apparently, however, the substantive claim was thoroughly aired in the trial court, and the supreme court believed the lower court's conclusion on the merits was supported by the evidence.

Other considerations distinguish and justify Columbia Developers as a correct application of the exhaustion doctrine. First, it was the taxpayer in Columbia Developers who chose to take his claim immediately to court rather than have it considered in the administrative process. In Abbott, the City of Columbia took the defendant to court. Second, Columbia Developers was a civil case, and Abbott involved the appeal of a criminal conviction. While invoking the doctrine of exhaustion of remedies was harsh in both cases, it was exceedingly harsh in Abbott because it deprived the defendant of his principal defense. Third, Columbia Developers involved mixed questions of fact and statutory law, and Abbott presented solely questions of constitutional law. The United States Supreme Court has approved the application of the doctrine of exhaustion of remedies in the former kind of case, but it has disapproved its use to deny judicial review in the latter situation.

In summary, these two decisions show a court that is prone to invoke the doctrine of exhaustion of administrative remedies at every available opportunity. At least when the denial of business licenses or the payment of local property taxes under protest is at issue, the applicant or taxpayer would be well advised to exhaust every available administrative remedy before going to court.

John R. Steer