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I. FOIA EXEMPTIONS NOT WAIVED WHEN PUBLIC BODY FAILS TO RESPOND TO WRITTEN REQUESTS

In *Litchfield Plantation Co. v. Georgetown County Water and Sewer District*[1] the South Carolina Supreme Court held that the disclosure exemptions enumerated in South Carolina's Freedom of Information Act (FOIA)[2] are not waived by a public body's failure to respond to a written request for information within the required fifteen-day period.[3] According to the court, the disclosure exemptions provided by the FOIA are available to a public body even after a request has been deemed approved by operation of the statute.[4] This was a case of first impression in South Carolina.

The dispute between Georgetown County Water and Sewer District (District) and Litchfield Plantation Co. (Litchfield) began in 1989, when the District attempted to install a sewer line on Litchfield's property. Although the District held a water and sewer easement on the property, Litchfield objected to the installation. The District subsequently brought a declaratory judgement action and an action for injunctive relief. The following month, Litchfield made the first of five requests to the District under the FOIA. After more than three weeks, the District responded to the first request by giving Litchfield permission to copy and inspect records three weeks hence. Further communications and delays followed. Litchfield then brought an action against the District seeking to enjoin it from violating the FOIA and requesting attorney fees.[5]

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1. ___ S.C. ___, 443 S.E.2d 574 (1994).

2. S.C. CODE ANN. §§ 30-4-10 to -110 (Law. Co-op. 1991 & Supp. 1994). *See generally* DAVID E. SHIPLEY, SOUTH CAROLINA ADMINISTRATIVE LAW ch. VIII (2d ed. 1989) (providing a guide to South Carolina's Freedom of Information Act).

3. *Litchfield Plantation Co.*, ___ S.C. at ___, 443 S.E.2d at 575.

4. *Id.* at ___, 443 S.E.2d at 575. South Carolina Code § 30-4-30(c) provides: "If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved." S.C. CODE ANN. § 30-4-30(c) (Law. Co-op. 1991).

5. *Litchfield Plantation Co.*, ___ S.C. at ___, 443 S.E.2d at 574-75.

A special referee found the District guilty of violating the FOIA and ordered it to comply with any requests not exempt under the statute. No attorney fees were awarded. Litchfield appealed the special referee's findings to the South Carolina Supreme Court, where the decision was affirmed; a petition for rehearing was denied.[6]

The South Carolina Supreme Court recognized that, under South Carolina Code section 30-4-30(a),[7] "[a]ny person has a right to inspect or copy any public record of a public body except as otherwise provided by section 30-4-40."[8] However, the court ruled that regardless of whether an agency responds to a request as required by section 30-4-30(c),[9] the agency may still claim the exemption benefits of section 30-4-40. According to the court, approval by default is not approval of an entire request. Rather, it is an approval only of the time and place of access for any nonexempt material within a request.[10] In so holding, the majority reasoned that allowing agencies to waive exemptions by failing to respond within fifteen days could result in "the disclosure of investigative records of law enforcement agencies and personal information . . . through no fault of an interested party which the exemptions were enacted to protect."[11]

Justice Toal, alone in dissent, took issue with the court's interpretation of South Carolina Code sections 30-4-30(a), 30-4-30(c), and 30-4-40.[12] In examining the plain meaning of the statute, she concluded that section 30-4-30(a) uses "except as otherwise provided by [section] 30-4-40 'to describe the normal' implementation of the statute."[13] That is, if the response is made within the allotted fifteen-day period, then the exemptions of section 30-4-40 apply. However, section 30-4-30(c) then provides that if the request is not answered within fifteen days it is "considered approved." Because no special provision relating to exemptions is provided for in that section, the plain meaning of section 30-4-30(c) should dictate that requests be approved upon agency failure to respond within fifteen days.[14]

In addition to the plain wording of the statute, the dissent relied upon the legislative intent and underlying policy of the FOIA in reaching its conclusion. The legislature, in enacting the FOIA, found that "it is vital in a democratic

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6. *Id.* at ___, 443 S.E.2d at 574-75.

7. S.C. CODE ANN. § 30-4-30(a) (Law. Co-op. 1991).

8. *Id.; see Litchfield Plantation Co.*, ___ S.C. at ___, 443 S.E.2d at 575. Section 30-4-40 provides a list of those records exempt from disclosure under the FOIA. S.C. CODE ANN. § 30-4-40 (Law. Co-op. 1991 & Supp. 1994).

9. S.C. CODE ANN. § 30-4-30(c) (Law. Co-op. 1991).

10. *Litchfield Plantation Co.*, ___ S.C. at ___, 443 S.E.2d at 575.

11. *Id.* at ___ n.1, 443 S.E.2d at 575 n.1.

12. *Id.* at ___, 443 S.E.2d at 576 (Toal, J., dissenting).

13. *Id.* at ___, 443 S.E.2d at 576.

14. *Id.* at ___, 443 S.E.2d at 576.

society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy."[15] Section 30-4-15 instructs courts to construe the FOIA "so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings."[16] Justice Toal concluded that finding exemptions not claimed during the appropriate time period to have been waived would be consistent with the General Assembly's intended policy of maximum access with minimum delay. Thus, agencies would not be able to procrastinate and still take advantage of the full exemptions, thereby circumventing the purpose of the FOIA and the intent of the legislature.[17]

In addition to the criticism expressed by the dissent, the court's decision may be viewed as inconsistent with other FOIA cases decided by the court. The court has consistently held that exemptions from disclosure allow a public body the discretion to withhold certain materials from public disclosure.[18] Because the exemptions are discretionary, an agency must determine whether requested information could be considered exempt; then, the agency must decide whether it will attempt to claim the protection provided by section 30-4-40.

In *Bellamy v. Brown*[19] the South Carolina Supreme Court ruled that sections 30-4-40 and 30-4-70 do not create a duty to keep information confidential simply because such information is included under the exemptions of the FOIA.[20] The *Bellamy* court viewed the exemption provisions as optional, not as a mandatory bar to agency disclusure of information.[21] Similarly, in *South Carolina Tax Commission v. Gaston Copper Recycling Corp.*,[22] decided only months after *Litchfield Plantation Co.*, the supreme court again ruled that exemptions are not mandatory but, rather, are discretionary and require agency determination of whether they should be invoked.[23]

If *Bellamy* and *Gaston Copper* stand for the proposition that FOIA exemptions are, in effect, optional and may be consciously waived by an agency that decides not to invoke them, then arguably the plain language of section 30-4-30(c) should be given effect and exemptions should be waived by

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15. S.C. CODE ANN. § 30-4-15 (Law. Co-op. 1991).
16. *Id.*
17. *Litchfield Plantation Co.*, ___ S.C. at ___, 443 S.E.2d at 576 (Toal, J., dissenting).
18. South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., ___ S.C. ___, ___, 447 S.E.2d 843, 846 (1994); Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991).
19. 305 S.C. 291, 408 S.E.2d 219 (1991).
20. *Id.* at 295, 408 S.E.2d at 221.
21. *Id.*
22. ___ S.C. ___, 447 S.E.2d 843 (1994).
23. *Id.* at ___, 447 S.E.2d at 846.

operation of the notification provisions enumerated in that section. Put somewhat differently, by enacting section 30-4-30(c), the General Assembly arguably intended that agency failure to respond within the requisite time frame be treated as the functional equivalent of an agency determination that the request does not fall within an exemption, or, if it does, that the agency does not intend to invoke the exception. Moreover, the South Carolina FOIA is the only state statute of its kind with a default approval mechanism like section 30-4-30(c).[24] The express inclusion of this unique mechanism in the Act further suggests that the legislature did not intend to provide administrative agencies with an avenue to avoid public accountability by ignoring FOIA requests while retaining the benefit of the statutory exemptions.

The impact of this decision is not yet apparent. Because, however, less incentive exists for an agency to respond to requests for information in a timely fashion, there is the potential for agencies increasingly to ignore FOIA requests, frustrating efforts to access public records and creating the potential for additional litigation and, ultimately, either judicial reconsideration of the issue or legislative amendment of the act.

Pamela Dawn Baker

II. COURT RULES ON DISCOVERY AND EX PARTE COMMUNICATIONS FOR CASES ARISING UNDER THE APA

In *Ross v. Medical University of South Carolina*[1] the South Carolina Supreme Court reversed the court of appeals and held that a circuit court may, at its discretion, order discovery when reviewing cases arising under the South Carolina Administrative Procedures Act (APA)[2] if irregularities in the agency proceeding are alleged.[3] The court also held that ex parte communications between an agency member serving in an adjudicative role and an agency attorney serving in a prosecutorial role violate the APA and are not protected by attorney-client privilege.[4]

Paul Ross, M.D., a tenured professor at the Medical University of South Carolina (MUSC), was fired by the president of MUSC for alleged abuse of

24. Some state statutes do not state a specific time period. *See, e.g.*, MINN. STAT. ANN. § 13.03 (West 1988 & Supp. 1995); WYO. STAT. §§ 16-4-202, 16-4-203 (1990 & Supp. 1995). Other state statutes, as well as the federal FOIA, deem the failure to respond a denial. *See, e.g.*, 5 U.S.C. § 552(a)(6)(C) (1988); IDAHO CODE § 9-339(1) & (2) (1990); MICH. COMP. LAWS ANN. § 15.235(1) (West 1994).

1. ___ S.C. ___, 453 S.E.2d 880 (1994).
2. S.C. CODE ANN. §§ 1-23-310 to -400 (Law. Co-op. 1986 & Supp. 1993).
3. *Ross*, ___ S.C. at ___, 453 S.E.2d at 883.
4. *Id.* at ___, 453 S.E.2d at 885.

his official position for personal financial gain.[5] Utilizing MUSC's three-step grievance process, Ross lodged a complaint, which the vice president for academic affairs referred to a faculty hearing committee (Committee).[6] The Committee upheld the termination. The vice president reviewed and concurred in the Committee's decision. Finally, Ross appealed to the MUSC board of trustees, which reviewed the case and upheld the termination.[7] Ross then sought review in circuit court as allowed under the APA.[8] His challenge to the procedure was based upon the vice president's dual role as a prosecutor and judge,[9] improper communications between the vice president and MUSC's general counsel, and the intentional failure of MUSC to give the final page of the faculty report to Ross or his counsel.[10]

When Ross served requests for admissions on MUSC, MUSC moved for a protective order on two grounds. First, it argued that discovery was not proper because the court's review was limited to the agency record. Second, because the requests related to communications between the vice president and the MUSC general counsel, MUSC alleged that the information was protected by the attorney-client privilege.[11]

The circuit court rejected both arguments, and after MUSC still refused to answer, the court deemed the requests admitted. Further, the judge held MUSC in contempt and imposed sanctions.[12] The South Carolina Court of Appeals, however, agreed with MUSC that the circuit court lacked the power to order discovery.[13] The South Carolina Supreme Court reversed, upholding the circuit court's order and imposition of sanctions. It further held that the

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5. *Id.* at ___, 453 S.E.2d at 881.

6. *Id.* at ___, 453 S.E.2d at 883.

7. *Id.* at ___, 453 S.E.2d at 881.

8. *Ross*, ___ S.C. at ___, 453 S.E.2d at 881-82; *see* S.C. CODE ANN. § 1-23-380(A) (Law. Co-op. Supp. 1994). Ross originally filed suit in circuit court for violation of due process, breach of contract, accord and satisfaction, and review under the APA. The suit was removed to federal court, which remanded the APA review back to the circuit court. The federal court retained jurisdiction over the other causes of action. *Ross*, ___ S.C. at ___, 453 S.E.2d at 881-82.

9. Ross alleged that the vice president conducted the initial investigation and recommended to the president that Ross be terminated. Brief of Petitioner at 2.

10. *Ross*, ___ S.C. at ___, 453 S.E.2d at 883. MUSC did not dispute that one page was intentionally kept from Ross, but contended that the page was a separate confidential document that was not part of the Committee's report. *See* Brief of Respondent at 8.

11. *Ross*, ___ S.C. at ___, 453 S.E.2d at 882.

12. *Id.* at ___, 453 S.E.2d at 882.

13. Ross v. Medical Univ. of South Carolina, ___ S.C. ___, ___, 435 S.E.2d 877, 879 (Ct. App. 1993), *rev'd*, ___ S.C. ___, 453 S.E.2d 880 (1994). Because the court of appeals vacated the circuit court's order compelling MUSC to answer the requests for admission, it did not need to reach the issue of whether the information was protected by attorney-client privilege.

attorney-client privilege did not protect the communications between MUSC's vice president and general counsel.[14]

The authority of the circuit court to review the action of the MUSC Board of Directors is provided by the APA, which requires that "[t]he review . . . shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court."[15] In holding that the circuit court could not order discovery, the court of appeals stressed that "under the Administrative Procedures Act, the circuit court is not a trial court of original jurisdiction, but a reviewing court with jurisdiction only to affirm, reverse, or modify the agency's decision on those grounds expressly authorized by the Act."[16] In a footnote, the court of appeals made reference to the statutory provision allowing additional proof "[i]n the limited case of alleged irregularity in procedure before the agency not shown in the record,"[17] but did not explain why it found the provision inapplicable. Instead, the court of appeals reasoned that review of an agency decision does not constitute an "action" within the meaning of the South Carolina Rules of Civil Procedure, and that discovery devices provided by the Rules were therefore unavailable.[18]

The supreme court, however, noting that allegations of procedural irregularity had been made, concluded that the "plain and ordinary meaning" of the statute is that a circuit court may, at its discretion, "take proof" itself.[19] Therefore, the court reasoned, a lower court may order discovery. MUSC argued that allowing proof to be taken in court is not the same as a grant of authority to order discovery.[20] Indeed, none of the cases cited by the supreme court to support its conclusion involved discovery. One case involved the proffer of testimony to prove irregularities;[21] another involved holding an evidentiary hearing to investigate an alleged conflict of interest.[22] It is possible, then, that the court has given a more expansive interpretation than the plain meaning of the statute demands.[23] Nevertheless, the holding

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14. *Ross*, ___ S.C. at ___, 453 S.E.2d at 885.

15. S.C. CODE ANN. § 1-23-380(A)(5) (Law. Co-op. Supp. 1994).

16. Ross v. Medical Univ. of South Carolina, ___ S.C. at ___, 435 S.E.2d at 879 (citing S.C. CODE ANN. § 1-23-380(g) (Law. Co-op. 1986) (current version at S.C. CODE ANN. § 1-23-380(A)(6) (Law. Co-op. Supp. 1994))).

17. *Id.* at ___ n.4, 435 S.E.2d at 879 n.4 (citing S.C. CODE ANN. § 1-23-380(f) (current version at S.C. CODE ANN. § 1-23-380(A)(5) (Law. Co-op. Supp. 1994))).

18. *Id.* at ___, 435 S.E.2d at 878-79.

19. *Ross*, ___ S.C. at ___, 453 S.E.2d at 882.

20. *See* Brief of Respondent at 13.

21. *See* Adriani v. Commission on Human Rights & Opportunities, 596 A.2d 426, 431 (Conn. 1991).

22. *See* Brunswick v. Inland Wetlands Comm'n, 617 A.2d 466, 468 (Conn. App. Ct. 1992).

23. The court acknowledged that it had not previously interpreted the phrase "proof thereon may be taken in the court." *Ross*, ___ S.C. at ___, 453 S.E.2d at 882. For the general rule that

of the court is consistent with a court's inherent power to ensure the fair and orderly disposition of matters before it.[24] If parties are allowed to present new evidence, it follows that they should be allowed the tools to uncover that evidence.

The second issue decided by the supreme court was whether the information sought through the discovery request was protected by the attorney-client privilege. As a foundation for its decision on this issue, the court considered Ross's allegations of improper communications between the vice president and general counsel, which included the accusation that the general counsel prepared the vice president's written concurrence in the Committee report. The requests for admission served by Ross on MUSC were an attempt to substantiate these allegations.[25]

Before deciding the attorney-client privilege issue, the court considered the propriety of the agency's actions under section 1-23-360 of the APA:[26]

> Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An agency member:
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> (1) May communicate with other members of the agency; and

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discovery is limited in the review of agency decisions, see 2 AM. JUR. 2D *Administrative Law* § 584 (1994). *See also* Fisher v. Iowa Bd. of Optometry Examiners, 478 N.W.2d 609, 611 (Iowa 1991) (noting that a court in an appellate capacity normally has no authority to order discovery).

24. *See* Greenfield v. Greenfield, 245 S.C. 604, 610, 141 S.E.2d 920, 923 (1965).

25. *Ross*, ___ S.C. at ___, 453 S.E.2d at 884. The requests to admit that MUSC refused to answer on the grounds of attorney-client privilege were as follows:

> 5. When [Vice President] consulted with [General Counsel] concerning the recommendation of the Faculty Hearing Committee, [Vice President] requested that [General Counsel] prepare a document stating his agreement with the Faculty Hearing Committee's recommendation. [General Counsel] did prepare that document.
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> 7. In consultation and discussion between [Vice President] and [General Counsel] following the receipt by [Vice President] of the Faculty Hearing Committee's recommendation of November 29, 1989, and before [Vice Prescient] signed the document evidencing his approval of the Faculty Hearing Committee's recommendation, there was discussion between [Vice President] and [General Counsel] with respect to page 5, entitled "Comments," of the submission of the Faculty Hearing Committee.

Id. at ___, 453 S.E.2d at 884 (alterations in original).

26. *Id.* at ___, 453 S.E.2d at 884.

(2) May have the aid and advice of one or more personal assistants.[27]

The supreme court regarded the vice president as a person assigned to render a decision because of his role as intermediate judge in the three-step process. The court held, therefore, that he "was prohibited from discussing the case ex parte with MUSC's General Counsel," who represented MUSC in prosecuting the case before the Committee.[28] Having determined that the communication itself was improper, the court concluded that the attorney-client privilege provides no protection. "Not every communication within the attorney and client relationship is privileged. The public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice."[29] Furthermore, "whether the privilege applies is within the sound discretion of the trial judge and his decision will not be reversed absent an abuse of that discretion."[30]

MUSC argued that because the statute allows an agency member to communicate with other members of the agency, the communications between its vice president and general counsel were not improper.[31] But the supreme court ruled that MUSC's argument "ignore[d] the plain language of the statute which proscribes ex parte communications relating to a contested case between the agency 'judge' and a party's counsel."[32]

The court's interpretation of the statute is supported, but not necessarily compelled by the plain language of the provision. The statute could be read as proscribing communication between the decision maker and a person, party, or representative *except that* the decision maker may communicate with other agency members. Thus, under this interpretation, an agency member could never be a person, party, or a party's representative. Or, as the supreme court read it, the statute might proscribe communication between the decision maker and a person, party, or party's representative, but allow communication between the decision maker and agency members other than those who are parties or representatives.

A statutory exception to a rule prohibiting ex parte communications that allows communication with other agency members would not be unusual. For

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27. S.C. CODE ANN. § 1-23-360 (Law. Co-op. 1986).

28. *Ross*, ___ S.C. at ___, 453 S.E.2d at 884.

29. *Id.* at ___, 453 S.E.2d at 884 (quoting State v. Doster, 276 S.C. 647, 651, 284 S.E.2d 218, 220, *cert. denied*, 454 U.S. 1030 (1981)).

30. *Id.* at ___, 453 S.E.2d at 885 (citing State v. Love, 275 S.C. 55, 271 S.E.2d 110, *cert. denied*, 449 U.S. 901 (1980)).

31. *Id.* at ___, 453 S.E.2d at 884.

32. *Id.* at ___, 453 S.E.2d at 884.

example, a similar provision in the Federal Administrative Procedure Act[33] states:

> [N]o member of the body comprising the agency . . . who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person *outside the agency* an ex parte communication relevant to the merits of the proceeding.[34]

Another provision of the federal law prevents those who perform investigative or prosecutorial functions from participating or advising in decision-making, but states that the provision "does not apply . . . to the agency or a member or members of the body comprising the agency."[35] Such statutory exceptions are consistent with the United States Supreme Court's view that the dual roles performed by agency members who investigate and adjudicate are not inherently unfair.[36]

The supreme court, however, indicated that an agency member acting in a judicial capacity was not entitled to confer with an agency member acting as a prosecutor.[37] The court also noted that violators of the statute are subject to criminal sanctions[38] and reinstated the order of the circuit court holding MUSC in contempt.[39]

By finding a clear violation of the statutory prohibition against ex parte communications, the supreme court easily dispensed with the claim of attorney-client privilege. Therefore, *Ross* in no way limits the existing scope of the privilege. By deciding the issue on statutory grounds, the court provided no discussion on whether the performance of a dual role as investigator and adjudicator by the MUSC vice president was itself improper. After *Ross*, however, administrative agencies may be facing two stricter rules when their decisions are subject to judicial review. First, a court's broad discretion in determining the manner in which it will receive evidence has been affirmed. Second, a court may strictly construe any communication

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33. 5 U.S.C. §§ 551-559 (1994).

34. 5 U.S.C. § 557(d)(1)(B) (1994) (emphasis added).

35. 5 U.S.C. § 554(d), (C) (1994).

36. For a summary of the Court's view, see Withrow v. Larkin, 421 U.S. 35, 456-55 (1975). For a discussion on the separation of functions in administrative agencies, see generally 2 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.9 (1994).

37. *Ross*, ___ S.C. at ___, 453 S.E.2d at 884.

38. S.C. CODE ANN. § 1-23-360 (Law. Co-op. 1986) (providing that "[a]ny person who violates the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than two hundred fifty dollars or imprisoned for not more than six months").

39. *Ross*, ___ S.C. at ___, 453 S.E.2d at 885.

between an agency decision maker and an agency attorney representing the agency as a violation of the APA.

Jerry H. Evans

III. COURT REINFORCES WIDE DISCRETION AFFORDED SCHOOL DISTRICT BOARDS OF TRUSTEES

In *Redmond v. Lexington County School District No. Four*[1] the South Carolina Supreme Court once again recognized the broad decision-making powers vested in school district boards of trustees. The court held that the Board of Trustees for Lexington County School District No. Four (Board) did not abuse its discretion when it approved a lease-purchase agreement to construct a new school even though the agreement effectively nullified an earlier referendum in which voters rejected a bond issue for construction of the school. The court also held that the Board did not abuse its discretion in selecting a site for the school that opponents claimed contained environmental hazards.[2] Finally, the court interpreted a state regulation[3] requiring school boards to maintain school buildings as discretionary rather than ministerial, and thus refused to issue a writ of mandamus forcing the repair of existing schools.[4] *Redmond* is in harmony with the court's prior rulings, as well as the weight of authority in other jurisdictions.

The Board put forth a bond referendum to the voters of Lexington County School District No. Four (District) to approve funds for the construction of a new middle school.[5] Voter approval of the bonds was required because the funding would have exceeded debt limitations established by Article X, Section 15 of the South Carolina Constitution.[6] The bond referendum was defeated. According to the appellants, owners of property in the District (Property Owners), the Board indicated that if the bond referendum was defeated it would consider other options, such as doubling the sessions at the high school, merging the eighth grade into high school, or raising taxes to repair existing facilities.[7] However, instead of enacting these options after the voters rejected the bond referendum, the Board approved a lease-purchase agreement to finance construction of the new school.[8]

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1. ___ S.C. ___, 445 S.E.2d 441 (1994).
2. *Redmond*, ___ S.C. at ___, 445 S.E.2d at 445.
3. S.C. CODE REGS. 43-180 (1992).
4. *Redmond*, ___ S.C. at ___, 445 S.E.2d at 445.
5. *Id.* at ___, 445 S.E.2d at 442.
6. S.C. CONST. art. X, § 15.
7. Brief of Appellants at 11.
8. *Id.*

The Property Owners filed a class action suit against the Board and the District to block the lease-purchase agreement, asserting that this method of financing was an abuse of the Board's discretion because it nullified the earlier vote of the District's electors.[9] They also argued that the Board abused its discretion because the lease-purchase agreement was more expensive than bonded indebtedness, and that had the Board informed the voters that it was contemplating the lease-purchase alternative, the voters would have approved the bonds.[10]

The Property Owners maintained that the District's tax base was insufficient to support the expansion, that per pupil expenditures for instruction were second lowest in the state, and that construction costs would further decrease per pupil expenditures.[11] They also claimed that, due to a present shortage of funding, existing schools in the district were not being maintained.[12] Lastly, the Property Owners alleged that the site selected for the new school was near an area cited by the South Carolina Department of Health and Environmental Control for environmental infractions.[13]

The Property Owners requested a temporary injunction order to prevent the Board from entering into the lease-purchase agreement until the tax base became adequate to finance the new school.[14] In addition, they asked for a writ of mandamus to compel the District to repair existing schools and to reopen another school.[15]

On appeal, the supreme court affirmed the trial court's decision granting the District's motion to dismiss for failure to state a cause of action.[16] The court began by reaffirming the use of lease-purchase agreements even though they effectively circumvent Article X, Section 15, which specifies that a school district may not incur general obligation debt over eight percent of the district's assessed property value without voter approval.[17] General obligation debt is defined as "any indebtedness of the school district which shall be secured in whole or in part by a pledge of its full faith, credit and taxing power."[18] In *Caddell v. Lexington County School District No. 1*[19] the court previously held that lease-purchase agreements do not constitute general obligation debt.

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9. *Redmond*, ___ S.C. at ___, 445 S.E.2d at 442-43.
10. *Id.* at ___, 445 S.E.2d at 444.
11. Brief of Appellants at 3-5.
12. *Redmond*, ___ S.C. at ___, 445 S.E.2d at 443.
13. Brief of Appellants at 4.
14. *Redmond*, ___ S.C. at ___, 445 S.E.2d at 443.
15. *Id.* at ___, 445 S.E.2d at 443.
16. *Id.* at ___, 445 S.E.2d at 442.
17. S.C. CONST. art. X, § 15(6).
18. S.C. CONST. art. X, § 15(2).
19. 296 S.C. 397, 373 S.E.2d 598 (1988).

Justice Finney dissented in both *Caddell* and *Redmond*. In *Caddell* he concluded that "the test should be whether the indebtedness of the school district is 'secured in whole or in part by a pledge of its full faith, credit and taxing power.'"[20] According to Justice Finney, because lease-purchase agreements "show that the indebtedness is secured *in part* by the school district's property, which was acquired by its taxing powers,"[21] lease-purchase agreements are a general obligation debt and thus "violate the letter and the spirit of Article X, Section 15."[22] Justice Finney noted in *Redmond* that the Property Owners had not questioned the constitutionality of the arrangement, but had questioned the Board's use of it under the circumstances.[23]

Nevertheless, the supreme court reaffirmed the constitutionality of lease-purchase agreements in *Redmond*, concluding that it was for the legislature to decide whether to classify lease-purchase agreements as general obligation debt.[24] The court noted that the South Carolina General Assembly had a bill before it that would require amounts expended for lease-purchase agreements to be counted toward general obligation debt, but determined that until such legislation is passed, the court was obligated to follow precedent.[25] In fact, the Governor recently signed a bill which provides that lease-purchase agreements entered into by school districts after December 31, 1995, must be approved through a bond referendum if the principal balance of the lease-purchase agreement plus any other outstanding indebtedness of the school district not approved through a bond referendum exceeds eight percent of the assessed value of taxable property in the school district.[26] The bond referendum requirement also covers any renewals or extensions of lease-purchase agreements.[27] Regardless, the court's decision is in accord with the majority of jurisdictions that have considered the issue.[28]

The court relied on *Gamble v. Williamsburg County School District*[29] to hold that the Board's decision to finance the construction of the school through

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20. *Id.* at 403, 373 S.E.2d at 601 (Finney, J., dissenting) (quoting City of Beaufort v. Griffin, 275 S.C. 603, 605, 274 S.E.2d 301, 303 (1981)).

21. *Id.*

22. *Id.* For a thorough analysis of *Caddell*, see 2 JAMES L. UNDERWOOD, THE CONSTITUTION OF SOUTH CAROLINA: THE JOURNEY TOWARD LOCAL SELF-GOVERNMENT 144-45 (1989).

23. *Redmond*, ___ S.C. at ___, 441 S.E.2d at 445 (Finney, J., dissenting).

24. *Id.* at ___, 445 S.E.2d at 443.

25. *Id.* at ___, 445 S.E.2d at 443.

26. Act of June 7, 1995, S. 48 (to be codified at S.C. CODE ANN. § 11-27-110).

27. *Id.*

28. *See* Susan A. Fretwell, Case Note, *Court Holds Use of Lease/Purchase Agreements To Finance Building of Public School Not Violative of Constitutional Limit on Long Term Debt*, 41 S.C. L. REV. 11, 13 n.19 (1989).

29. 305 S.C. 288, 408 S.E.2d 217 (1991).

a lease-purchase agreement was not an abuse of discretion.[30] The court reasoned that because the Board was charged with managing the school district,[31] the question of whether a board properly exercises its power[32] is "whether the action measures up to any fair test of reason, and that a clear abuse of discretion is required to justify judicial interference."[33]

In *Gamble* the supreme court considered whether a board's decision to close a high school and transfer its students to other schools while closing an elementary school and transferring those students to the vacated high school building was an abuse of discretion.[34] Although some parents claimed that their children would have to travel farther under the new design, the court used the "fair test of reason analysis" and refused to interfere with the board's decision because there was no clear abuse of discretion.[35] The court noted that the elementary school building needed repairs, which the board could not afford, and that the consolidation of schools would result in savings due to reductions in salaries and fringe benefits. Furthermore, the students would benefit from the wider curriculums offered at the larger high schools.[36]

The court also rejected the Property Owners' argument that the Board's failure to disclose that they were considering the lease-purchase alternative was an abuse of discretion. The Property Owners claimed that the District would

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30. *Redmond*, ___ S.C. at ___, 445 S.E.2d at 444.

31. South Carolina Code § 59-19-10 provides that school districts "shall be under the management and control of the board of trustees provided for in this article, subject to the supervision and orders of the county board of education." S.C. CODE ANN. § 59-19-10 (Law. Co-op. 1990).

32. South Carolina Code § 59-19-90 provides that school boards shall:

> (1) *Provide schoolhouses.* Provide suitable schoolhouses in its district and make them comfortable, paying due regard to any schoolhouse already built or site procured, as well as to all other circumstances proper to be considered so as best to promote the educational interest of the districts;
>
> . . . .
>
> (5) *Control school property.* Take care of, manage and control the school property of the district;
>
> . . . .
>
> (7) *Control educational interest of district.* Manage and control local educational interests of its district, with the exclusive authority to operate or not to operate any public school or schools.

S.C. CODE ANN. § 59-19-90 (Law. Co-op. 1990).

33. *Redmond*, ___ S.C. at ___, 445 S.E.2d at 444 (citing *Gamble*, 305 S.C. at 290, 408 S.E.2d at 218).

34. *Gamble*, 305 S.C. at 289-90, 408 S.E.2d at 218.

35. *Id.* at 290, 408 S.E.2d at 218 (citing Sarratt v. Cash, 103 S.C. 531, 88 S.E. 256 (1916)); *see also* Singleton v. Horry County Sch. Dist., 289 S.C. 223, 227-28, 345 S.E.2d 751, 753-54 (Ct. App. 1986) (per curiam) (holding that courts will not interfere with a school board's judgment unless "there is clear evidence that the board has acted corruptly, in bad faith, or in clear abuse of its powers") (citing Coggins v. Board of Educ., 28 S.E.2d 527 (N.C. 1944)).

36. *Gamble*, 305 S.C. at 290, 408 S.E.2d at 218.

not have incurred as high a financial burden had the Board actually selected the options it allegedly claimed it would select if the bond referendum was defeated.[37] In reaching its conclusion on this issue, the court relied heavily on *Sarratt v. Cash*.[38]

In *Sarratt* the plaintiffs sought an injunction to prevent the board from building a school on a certain site because they claimed that when the board solicited voter approval it represented that the school would be built at another location.[39] The court held that it was against public policy to permit board members to bind themselves by "promise or representation to . . . electors of . . . the district so that they could not, at all times, act freely and impartially . . . ."[40] Therefore, the *Sarratt* court concluded that the plaintiffs could not legally rely on the alleged representations.[41]

In *Redmond* the Property Owners claimed that the Board's failure to disclose that it would consider a lease-purchase agreement was an abuse of discretion. That is, the *Redmond* Property Owners, in effect, advanced an alternative argument: that the Board had a duty to inform the voters that the lease-purchase alternative would be pursued if the voters rejected the bond referendum. The court could have supplemented its reliance on *Sarratt* by stating that the Board had no affirmative duty to disclose its alternatives in the event the bond referendum was rejected. Under the South Carolina statutory and constitutional scheme,[42] the Board clearly was not required to disclose the alternatives it would consider if a bond referendum was rejected.

The fair test of reason analysis used in *Redmond* and *Gamble* to determine whether a school board properly exercises its discretion is similar to the ample basis test used by other courts.[43] Under that test, a court will not interfere with a board's decision unless a plaintiff can prove that the board did not have an ample basis for the decision. For example, in *Browning v. Board of Education*[44] the Kentucky Court of Appeals dismissed the appellants' contentions that the board abused its discretion in choosing a school site even though the appellants cited specific reasons why other sites were better. The

37. Brief of Appellants at 11.

38. 103 S.C. 531, 88 S.E. 256 (1916).

39. *Id.* at 533, 88 S.E. at 257.

40. *Redmond*, ___ S.C. at ___, 445 S.E.2d at 444 (quoting *Sarratt*, 103 S.C. at 536, 88 S.E. at 258).

41. *Sarratt*, 103 S.C. at 536, 88 S.E. at 258.

42. *See* S.C. CONST., art. X, § 15; S.C. CODE ANN. §§ 59-19-10 to -340 (Law. Co-op. 1990).

43. Browning v. Board of Educ., 291 S.W.2d 17, 19 (Ky. Ct. App. 1956); *see* Espinal v. Salt Lake City Bd. of Educ., 797 P.2d 412 (Utah 1990); PHILIP K. PIELE & JAMES R. FORSBERG, SCHOOL PROPERTY: THE LEGALITY OF ITS USE AND DISPOSITION 6 (1974).

44. 291 S.W.2d 17 (Ky. Ct. App. 1956).

court refused to interfere with the board's judgment because the board relied on experts, thus providing it with an ample basis for its decision.[45]

Similarly, in *Espinal v. Salt Lake City Board of Education*[46] the Supreme Court of Utah concluded that a board's decision to realign high school boundaries was neither arbitrary nor capricious. Rather, the court held that the board's action was thoughtful and deliberate[47] because it hired outside consultants and made its decision after months of study and public input.[48]

The *Redmond* court also held that the Board did not abuse its discretion in choosing a new school site[49] even though the Property Owners claimed that the site was not suitable due to environmental problems.[50] The court, following cases from neighboring jurisdictions,[51] concluded that because the selection of school sites is in the discretion of local authorities, unless the Board violated some law or grossly abused its discretion, the court will not interfere with the Board's judgment.[52] Whether the Board's decision would have satisfied a thorough application of an ample basis test or a fair test of reason analysis is unclear. Either of the tests would have forced the court to consider why the Board's selection of the site was justified and, thus, address the Property Owners' allegations that the site was ill-suited because of alleged environmental problems. Although the court did not indicate any basis for the Board's decision, such as reliance on expert opinions or a thorough study of the site's suitability, its decision is in accord with the weight of authority elsewhere.[53]

The court refused to issue a writ of mandamus[54] to compel the Board to

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45. *Id.* at 19.

46. 797 P.2d 412 (Utah 1990).

47. *Id.* at 414.

48. *Id.* at 415 (citing Allen v. Board of Educ., 236 P.2d 756, 759 (Utah 1951) (holding that a board's decision to close a school was appropriate because it was made "after a careful survey of the educational needs of the district")).

49. *Redmond*, ___ S.C. at ___, 445 S.E.2d at 444-45.

50. *Id.* at ___, 445 S.E.2d at 443.

51. *See* Smith v. Ouzts, 103 S.E.2d 567, 569 (Ga. 1958); McKenzie v. Walker, 78 S.E.2d 486, 487 (Ga. 1953); Wayne County Bd. of Educ. v. Lewis, 58 S.E.2d 725, 727 (N.C. 1950).

52. *Redmond*, ___ S.C. at ___, 445 S.E.2d at 444-45.

53. *See* Arthur v. Oceanside-Carlsbad Junior College Dist., 31 Cal. Rptr. 177, 179 (Dist. Ct. App. 1963); Board of Directors v. Jeffrey, 370 P.2d 447, 448-49 (Colo. 1962); Smith v. Ouzts, 103 S.E.2d 567, 569 (Ga. 1958); Baker v. Unified Sch. Dist. No. 346, 480 P.2d 409, 412 (Kan. 1971); Brown v. Hardin County Bd. of Educ., 358 S.W.2d 488, 490 (Ky. Ct. App. 1962); Orleans Parish Sch. Bd. v. City of New Orleans, 468 So. 2d 709, 711-12 (La. Ct. App.), *cert. denied*, 472 So. 2d 593 (La. 1985); Educational Fin. Comm'n v. Jackson County Sch. Dist., 415 So. 2d 680, 685-86 (Miss. 1982); Painter v. Wake County Bd. of Educ., 217 S.E.2d 650, 657 (N.C. 1975); Mid Valley Taxpayers Ass'n v. Mid Valley Sch. Dist., 416 A.2d 590, 594 (Pa. 1980); Sticklen v. Kittle, 287 S.E.2d 148, 159 (W. Va. 1981); LEROY J. PETERSON ET AL., THE LAW AND PUBLIC SCHOOL OPERATION § 9.3c at 205 (2d ed. 1978); 1 WILLIAM D. VALENTE, EDUCATION LAW: PUBLIC AND PRIVATE § 4.2 at 78 (1985).

54. For South Carolina courts to issue a writ of mandamus, applicants must show that (1)

repair existing schools or to reopen another.[55] The Property Owners claimed that the Board violated a South Carolina regulation[56] which provides that school buildings shall be maintained, safe, and attractive and shall be kept clean and comfortable.[57]

Considering the propriety of a writ of mandamus, the court set out the differences between an act that is ministerial and one that is discretionary or quasi-judicial. An act "is ministerial if it is defined by law with such precision as to leave nothing to the exercise of discretion."[58] Conversely, a quasi-judicial or discretionary act "requires the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued."[59]

Although the regulation used the word "shall," the court concluded that the act was discretionary or quasi-judicial because the Board would have to exercise its discretion in selecting which repairs should be made based on priority and budget restraints.[60] Therefore, the court refused to issue a writ of mandamus because it would not replace the Board's discretionary judgment with its own in deciding which repairs were appropriate.[61]

Similar conclusions have been reached in other jurisdictions. For example, in *Meyer v. Carman*[62] the Supreme Court of Wisconsin held that a statute requiring the school board to keep school grounds safe was discretionary. The court aptly stated that "[a]t first blush it might appear that the duty to keep the school grounds 'safe' is ministerial in character, but it is apparent on closer analysis that a great many circumstances may need to be considered in deciding what action is necessary . . . ."[63] As a result, such decisions by the board "involve the exercise of . . . discretion rather than the mere performance of a prescribed task."[64]

The court's conclusions in *Redmond* give school boards wide latitude in their decision-making. South Carolina is not alone in this respect; courts have

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respondent had a duty to perform the act; (2) the act is ministerial in nature; (3) they have a specific legal right for which the discharge of the duty is necessary; and (4) they have no other legal remedy available. Willimon v. City of Greenville, 243 S.C. 82, 87, 132 S.E.2d 169, 171 (1963).

55. *Redmond*, ___ S.C. at ___, 445 S.E.2d at 445.

56. *See* S.C. CODE REGS. 43-180 (1992).

57. *Redmond*, ___ S.C. at ___, 445 S.E.2d at 445.

58. *Id.* at ___, 445 S.E.2d at 445 (citing Jensen v. Anderson County Dep't of Social Servs., 304 S.C. 195, 403 S.E.2d 615 (1991); Long v. Seabrook, 260 S.C. 562, 197 S.E.2d 659 (1973)(per curiam); and Godwin v. Carrigan, 227 S.C. 216, 87 S.E.2d 471 (1955)).

59. *Id.* at ___, 445 S.E.2d at 445.

60. *Id.* at ___, 445 S.E.2d at 445.

61. *Id.* at ___, 445 S.E.2d at 445.

62. 73 N.W.2d 514 (Wis. 1955).

63. *Id.* at 515.

64. *Id.*

rarely interfered with a school board's judgment unless a plaintiff can show a clear abuse of discretion. Even though school boards "are subject to suit at the whim of a plaintiff, such suits are not successful unless school board members have been guilty of some wrongful conduct, or have failed to follow statutory or other legal requirements or procedures."[65] *Redmond* sends and reinforces an already strong signal to aggrieved parties: unless they can show by clear evidence that a school board violated some law or manifestly abused its discretion, their chance of success is slim. These odds will only improve when the legislature delineates stricter standards for local school districts and school boards, as it recently did with regard to lease-purchase agreements in response to the *Redmond* decision.[66]

Demetri K. Koutrakos

IV. ADMINISTRATIVE REMEDIES MUST BE EXHAUSTED ABSENT CIRCUMSTANCES SUPPORTING AN EXCEPTION TO EXHAUSTION DOCTRINE

Administrative agencies and procedures have a unique relationship with the judiciary. As a general rule, when an adequate administrative procedure exists, individuals must exhaust that remedy before they seek judicial review.[1] But courts have not consistently required compliance with the doctrine of exhaustion of remedies unless exhaustion is statutorily mandated.[2] In *Hyde v. South Carolina Department of Mental Health*[3] the South Carolina Supreme Court considered whether exhaustion is required when a statute is silent on the issue, holding that an employee seeking damages under the state Whistleblower Statute[4] was required to exhaust administrative remedies available under the State Employee Grievance Procedure Act[5] prior to bringing the whistleblower action. In so holding, the court noted that unless the trial judge finds circumstances supporting an exception to the general rule of exhaustion, the party seeking access to the courts must "pursue the administrative remedy or be precluded from relief in the courts."[6]

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65. Marlin M. Volz, *Remedies Against School Boards and School Board Members as to Records and Procedures, in* LEGAL PROBLEMS OF SCHOOL BOARDS § 3.11 at 50 (Arthur A. Rezny ed., 1966).

66. *See supra* notes 26-27 and accompanying text.

1. *See* Thompson v. Springs Mills, Inc., 576 F. Supp. 651 (D.S.C. 1982).
2. *See* United States *ex rel.* Brooks v. Clifford, 412 F.2d 1137 (4th Cir. 1969).
3. ___ S.C. ___, 442 S.E.2d 582 (1994).
4. S.C. CODE ANN. § 8-27-30(A) (Law. Co-op. Supp. 1994).
5. S.C. CODE ANN. §§ 8-17-310 to -380 (Law. Co-op. 1986 & Supp. 1994).
6. *Hyde*, ___ S.C. at ___, 442 S.E.2d at 583.

Dr. Alexander Hyde was employed as a psychiatrist by the South Carolina Department of Mental Health (SCDMH). In November 1991, while working at Bryan Psychiatric Hospital, Dr. Hyde reported alleged violations of department policy and state and federal law.[7] The report alleged that the SCDMH had unlawfully requested that doctors change patient diagnoses so that costs for treatment would be reimbursable. The report also asserted that wealthy patients received more favorable treatment than their poorer counterparts. The report further alleged that an involuntarily committed patient had been wrongfully detained. Finally, Dr. Hyde charged the SCDMH with employing an incompetent physician, failing to supervise, and failing to correct improper patient management.[8]

Dr. Hyde claimed that, as a result of his report, the SCDMH retaliated by imposing harsh restrictions on him, by encouraging colleagues to complain about him, and by threatening him.[9] In addition, the doctor claimed that the SCDMH changed the scope of his duties and stripped him of former positions in a deliberate effort to worsen his working environment. Consequently, Dr. Hyde resigned from the SCDMH.[10]

In March 1992, Dr. Hyde filed a complaint against the SCDMH under South Carolina's "Whistleblower Statute."[11] Under the Whistleblower Statute, a public employee who is fired, demoted, suspended, or who receives a decrease in compensation after reporting alleged wrongdoing may bring an action against the employing public body.[12] Hyde requested $500,000 in actual damages for loss of earnings, earning capacity, and reputation, as well as for physical illness, emotional distress, and attorney's fees. When Hyde filed suit, the Whistleblower Statute did not expressly require employees to exhaust administrative remedies before resorting to the judicial process.

As an affirmative defense, SCDMH pointed out that Hyde failed to resort to South Carolina's employee grievance procedure.[13] SCDMH asserted that Hyde's judicial action was barred by his failure to first file a complaint with the Employee Grievance Committee.[14] The trial judge struck the defense, stating that without an express statutory requirement, exhaustion of administrative remedies was a matter of judicial discretion.[15]

On appeal, the South Carolina Supreme Court reversed the trial court's decision, holding that "[w]here an adequate administrative remedy is available

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7. Record at 4.
8. *Id.*
9. *Id.*
10. *Id.*
11. S.C. CODE ANN. § 8-27-30(A) (Law. Co-op. Supp. 1994).
12. *Id.*
13. S.C. CODE ANN. § 8-17-330 (Law. Co-op. 1986 & Supp. 1994).
14. Record at 10.
15. *Id.*

to determine a question of fact, one must pursue the administrative remedy or be precluded from seeking relief in the courts."[16] Moreover, the court held that a person must first exhaust administrative remedies, even in the absence of an express statutory requirement, unless circumstances justifying an exception excuse the exhaustion requirement. A subsequent amendment to the Whistleblower Statute requiring exhaustion of administrative remedies was found to demonstrate legislative intent to preclude initial appeal to the court system.[17]

Justice Toal dissented, noting that Hyde's suit was filed prior to the 1993 amendment to the Whistleblower Act. She argued that the legislature clearly did not intend for the restriction to apply to claims brought before the amendment.[18] The legislative history shows that the requirement of exhaustion of administrative remedies took effect on June 21, 1993, and applied "with respect to any personnel actions taken after that date."[19] Thus, Justice Toal opined that the majority misread the legislative history and failed to apply the legislature's actual intent. According to the dissent, although subsequent claims were required to exhaust administrative remedies before judicial action, claims brought prior to the amendment's effective date were not.[20]

Although not discussed to any degree in *Hyde,* the exhaustion of remedies doctrine has several important functions. First, the exhaustion doctrine allows factual issues to be determined by agencies that specialize in a particular area. Among others, Justice Douglas has emphasized the role of administrative agencies, stating that "[t]hreshold questions within the peculiar expertise of an administrative agency are appropriately routed to the agency."[21] Second, judicial deference to administrative remedies provides a more uniform approach to issues within an agency's jurisdiction. Requiring first resort to administrative procedures creates "uniformity and consistency in the regulation of business entrusted to a particular agency."[22] Allowing various courts and an agency to concurrently interpret the agency's policies would likely result in conflicting decisions. Requiring exhaustion of administrative procedures reduces the number of authorities involved in the interpretation of policies and thereby increases the predictability of, and reliance on, agency decisions.

The third purpose of the exhaustion of remedies doctrine is to protect administrative agencies. The exhaustion doctrine facilitates more efficient

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16. Hyde v. South Carolina Dep't of Mental Health, ___ S.C. ___, ___, 442 S.E.2d 582, 583 (1994) (citations omitted).

17. *Id.* at ___ n.2, 442 S.E.2d at 583 n.2.

18. *Id.* at ___, 442 S.E.2d at 583 (Toal, J., dissenting).

19. S.C. CODE ANN. § 8-27-30 (Law. Co-op. Supp. 1994) (originally enacted as 1993 S.C. Acts 164, Part II, § 37E).

20. *Hyde,* ___ S.C. at ___, 442 S.E.2d at 584 (Toal, J., dissenting).

21. Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645, 654 (1973).

22. *Id.*

agency actions. An agency can streamline its operations by limiting the appeal and review of an administrative decision.[23] Also, the exhaustion doctrine allows an agency to correct its own errors.[24] Administrative procedures call to scrutiny a mistake made by the agency and afford the opportunity to correct the mistake without resorting to judicial review. The agency may then handle the matter according to its own policies.[25] Moreover, the exhaustion doctrine protects agencies by reducing costs. "Litigation costs and judicial intervention may so stifle a new and unfolding agency program that its fruition . . . is defeated."[26] An agency's allocated funds could be quickly depleted if it were constantly required to appear in court to defend or assert its policies. The exhaustion doctrine reduces the loss of funds to court costs by forcing adherence to statutory procedures or administrative policies. More generally, the exhaustion doctrine protects a legislatively established agency by recognizing and respecting the agency's autonomy.[27]

The fourth purpose of the exhaustion doctrine is to benefit the courts by reducing the docket load, providing a record in case of subsequent judicial review, and allowing the court to draw from an agency's expertise. "[The exhaustion doctrine] prevents having an overworked court consider issues and remedies available through administrative channels."[28] Additionally, initial resort to the administrative process might result in a favorable determination for the claimant, eliminating the need for judicial review of the individual's claim.

As pointed out earlier, the *Hyde* decision held that, absent circumstances supporting an exception, available administrative remedies must be exhausted before seeking judicial review even in the absence of an express statutory exhaustion requirement.[29] Although judges may exercise discretion if there is "a sound basis for excusing the failure to exhaust administrative relief,"[30] the court did not enumerate circumstances that would justify waiver of the exhaustion doctrine. The exhaustion requirement obviously does not apply when no administrative procedure exists.[31] Similarly, once administrative

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23. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 12.9 (1993).

24. Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986).

25. McKart v. United States, 395 U.S. 185, 193 (1969).

26. AMAN & MAYTON, *supra* note 23, at 404-05.

27. *See McKart*, 395 U.S. at 193.

28. Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 397 (1990) (citations omitted).

29. Hyde v. South Carolina Dep't of Mental Health, ___ S.C. ___, ___, 442 S.E.2d 582, 583 (1994).

30. *Id.* at ___, 442 S.E.2d at 583.

31. *See* Fairchild, Arabatzis & Smith, Inc. v. Sackheim, 451 F. Supp. 1181, 1186 (S.D.N.Y. 1978) (holding that judicial review did not violate an agency's autonomy where no administrative procedures existed).

processes have been exhausted, individuals are free to seek judicial review of the final administrative decisions. In addition, compliance with the doctrine is excused in some circumstances even when authorized procedures have not been followed. For example, "[w]here legal questions are presented which are of the type traditionally determined by courts and there is no question involving underlying administrative expertise no exhaustion of administrative remedy is required."[32]

Direct judicial review is also allowed when the agency is a participant in an issue. For instance, a person may appeal directly to the courts with claims that an agency has exceeded its authority. The exhaustion doctrine does not apply when an administrative agency has violated established rights or has breached a legal duty owed to the individual.[33] Also, an individual will not be forced to comply with an administrative procedure if the validity of the remedy itself is challenged.[34]

The goals of the exhaustion doctrine generally do not apply when an administrative agency or remedy is the source of an individual's contention. An agency that is a party in an action would find it difficult to render an impartial decision. Similarly, forcing resort to a challenged remedy is unlikely to produce a favorable outcome to the claimant and may even worsen the injury. Because judicial review certainly will be sought in either situation, administrative efficiency is not increased. Consequently, when an agency or remedy causes the alleged injury, the exhaustion doctrine should be excused to allow the court to act as an impartial decision maker. Tort and fraud claims are examples of traditional issues where courts retain primary jurisdiction when one of the parties is an administrative agency.

Direct judicial action also may be taken when a controversy between an agency and an individual involves only questions of law rather than questions of fact.[35] When questions of fact are not in dispute, a court can resolve the issue without relying on agency expertise or risking encroachment on the agency's autonomy. The Seventh Circuit Court of Appeals concisely explained this form of agency subjection to the court system, noting that the exhaustion doctrine did not apply when: (1) the agency has clearly violated a right secured by statute or agency regulation; (2) the issue involved is a strictly legal one and not involving the agency's expertise or any factual determination; or (3) the issue cannot be raised upon judicial review of a later order of the agency.[36]

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32. Lee County Sch. Dist. Number One v. Gardner, 263 F. Supp. 26, 31 (D.S.C. 1967).

33. Rosenthal & Co. v. Bagley, 581 F.2d 1258, 1261 (7th Cir. 1978).

34. Winterberger v. General Teamsters Auto Truck Drivers and Helpers Local Union 162, 558 F.2d 923, 925 (9th Cir. 1977).

35. *See* W.P. Brown & Sons Lumber Co. v. Louisville & Nashville R.R., 299 U.S. 393 (1937).

36. FTC v. Feldman, 532 F.2d 1092, 1096 (7th Cir. 1976) (citations omitted).

Furthermore, an individual may resort directly to the courts when exhausting administrative remedies would be futile.[37] Several factors may render administrative procedures ineffective. For instance, administrative remedies are inadequate when the agency demonstrates bias or decides an issue before an individual begins the administrative process.[38] The exhaustion requirement also may be excused if the individual will suffer irreversible harm before exhausting administrative remedies.[39] In addition, the goals of the exhaustion doctrine are not served when the agency lacks either the authority to act or the ability to provide adequate relief.[40] Finally, requiring exhaustion of administrative remedies is inappropriate when constitutional rights are violated and administrative recourse can not afford protection.[41]

Courts have generally reserved the right to excuse the exhaustion requirement according to their own judicial discretion, justifying circumvention of the doctrine on various principles such as the interests of justice, the need to correct an emergency, or the existence of undefined exceptional circumstances.[42] Judicial discretion gives courts the flexibility to bypass the exhaustion requirement based on the specific facts of each case. Indeed, at the outset the *Hyde* decision recognizes the need to protect judicial discretion.[43] By requiring, however, that the trial judge have a sound basis for excusing exhaustion *Hyde* may have the effect of limiting the scope of judicial discretion. As the Hyde court put it, because the trial judge "found no exception to excuse the failure to exhaust administrative remedies, his decision striking [the agency defense that administrative remedies had not been exhausted] was controlled by an error of law."[44] Thus, under the *Hyde* standard, when the statute is silent regarding exhaustion, a party seeking access to the courts may be unable to prevail unless that party can point to a specific, well-established exception to the exhaustion doctrine.

Kevin W. Reese

37. Cafferello v. United States Civil Serv. Comm'n, 625 F.2d 285 (9th Cir. 1980).

38. McCarthy v. Madigan, 503 U.S. 140 (1992).

39. Bowen v. City of New York, 476 U.S. 467 (1986) (allowing court action when Social Security procedure would have caused delay and increased illness).

40. NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418 (1968).

41. Reid v. Engen, 765 F.2d 1457, 1461 (9th Cir. 1985).

42. Vaught v. Waites, 300 S.C. 201, 387 S.E.2d 91 (Ct. App. 1989).

43. Hyde v. South Carolina Dep't of Mental Health, ___ S.C. ___, 442 S.E.2d 582 (1994).

44. *Id.* at ___, 442 S.E.2d at 583.