South Carolina Law Review

Volume 51
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*
Article 3

Summer 2000

Ogburn-Matthews v. Loblolly Partners: Procedural Due Process And an Individual's Right to an Adjudicatory Hearing

Pamela A. Baker

OGBURN-MATTHEWS V. LOBLOLLY PARTNERS: PROCEDURAL DUE PROCESS AND AN INDIVIDUAL'S RIGHT TO AN ADJUDICATORY HEARING

I. INTRODUCTION

The fundamental purposes of due process are to ensure the individual a timely and meaningful opportunity to be heard and to provide her access to judicial review.[1] These are separate and distinct requirements. As a result, when a person has an interest in life, liberty or property that is directly affected by the decision of an administrative agency, that person generally has a right not only to judicial review of the agency's decision, but also to an opportunity to be heard by the agency itself prior to judicial review. Debate continues about what the opportunity to be heard entails in cases involving South Carolina agencies. In a recent case, *Ogburn-Matthews v. Loblolly Partners*,[2] the South Carolina Court of Appeals held that (1) due process does not entitle a person whose land adjoins a wetland to have an agency affirmatively respond to an objection that the filling of the wetland was inconsistent with the state's Coastal Zone Management Plan; and (2) due process does not entitle that landowner to a trial-type hearing in which she could cross-examine witnesses.[3] In addition, the court also discussed the applicability of the "contested case" provision of the South Carolina Administrative Procedures Act (APA)[4] to adjudications in which due process requires notice and opportunity to be heard, but no state statute or regulation requires a hearing.[5] This Note analyzes the court's decision in *Ogburn-Matthews*, its implications on noncontested-case decisions, and its effect, if any, on the procedural safeguards required to satisfy due

1. The United States Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. South Carolina has adopted a similar provision in its Constitution that states: "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law . . . ." S.C. CONST. art. I, § 3. In general, these provisions provide certain rights for individuals affected by government actions. Such rights are referred to as "due process rights" and include those "rights (as to life, liberty, and property) so fundamentally important as to require compliance with due-process standards of fairness and justice." BLACK'S LAW DICTIONARY 517 (7th ed. 1999).

2. 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998).

3. *Id.* at 562-63, 569, 505 S.E.2d at 604, 607.

4. S.C. CODE ANN. § 1-23-310(3) (West Supp. 1999) (previously §1-23-310(2)).

5. *Ogburn-Matthews*, 332 S.C. at 570-71, 505 S.E.2d at 607-08.

process in administrative proceedings.

Part II of this Note provides background information and summarizes the facts, reasoning, and holding in the *Ogburn-Matthews* case. This section also summarizes prior South Carolina cases dealing with program certifications and issues similar to those raised in the *Ogburn-Matthews* case and the relationship of these cases to *Ogburn-Matthews*. Part II also provides background on the evolution of the three-factor test in *Mathews v. Eldridge* for determining what procedural safeguards are necessary to satisfy due process. The *Ogburn-Matthews* court employed the three-factor test in rendering part of its decision. Part III analyzes the court's use of the *Eldridge* test and its bearing on the facts in *Ogburn-Matthews*. Part IV discusses whether any basis exists for the argument that a hearing required by law, in the absence of a statutory requirement, would trigger the contested-case provision requiring formal adjudication.

II. BACKGROUND

A. Ogburn-Matthews v. Loblolly Partners[6]

Ogburn-Matthews involves the State's side of a complicated regulatory scheme for issuing consistency certifications, which allow developers to obtain permits to proceed with the development of property within South Carolina's coastal zone area. The program is based on cooperative federalism.[7] Thus, the certification and permitting process is the result of a corroboration between state and federal agencies.[8] In order to understand how the state agency's decision affected the private interest involved in *Ogburn-Matthews*, it is important to comprehend how the program operates.

In *Ogburn-Matthews*, a developer applied for a Nationwide 26 permit[9] to

---

6. 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998).

7. *See* S.C. CODE ANN. § 48-39-20(C) (West Supp. 1999).

8. S.C. CODE ANN. § 48-39-80(b)(7) describes the State's role in the federal permitting process. The State's obligations are as follows:

> In devising the management program the department shall consider all lands and waters in the coastal zone for planning purposes. In addition, the department shall:
>
> . . .
>
> (7) Provide for consideration of whether a proposed activity of an applicant for a federal license or permit complies with the State's coastal zone program and for the issuance of notice to any concerned federal agency as to whether the State concurs with or objects to the proposed activity.

9. Nationwide permits (NWP) are described as:

> [A] type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts. The NWPs are proposed, issued, modified, reissued (extended), and revoked from time to time after an opportunity for public notice and

fill a wetland[10] next to Ogburn-Matthews's property.[11] Nationwide 26 is a federal regulatory program that issues permits for a variety of federal activities impacting the environment.[12] South Carolina's Coastal Zone Management Program was likewise adopted to establish state policy on such environmental impacts within the State's coastal zone areas.[13] The Nationwide 26 permit is issued by the federal government.[14] Under the Nationwide 26 permit program, the petitioner receives a consistency certification from the South Carolina Environmental Control Office of Ocean and Coastal Resource Management (Agency) certifying that the proposed activity is consistent with South Carolina's coastal environmental policies.[15] The authority to issue consistency

---

> comment. Proposed NWPs or modifications to or reissuance of existing NWPs will be adopted only after the Corps gives notice and allows the public an opportunity to comment on and request a public hearing regarding the proposals. The Corps will give full consideration to all comments received prior to reaching a final decision. 33 C.F.R. § 330.1(b) (1999).

10. *Ogburn-Matthews,* 332 S.C. at 558, 505 S.E.2d at 601. Wetlands are areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 33 C.F.R. § 328.3(b) (1999).

11. *Id.* at 555, 505 S.E.2d at 600.

12. *Id.*

13. *Id.* at 557, 505 S.E.2d at 601.

14. *Id.* at 556, 505 S.E.2d at 600; *see* Nationwide Permit Program, 33 C.F.R. § 330 (1999). In South Carolina, Nationwide 26 permits are issued through the Department of the Army, Charleston District Corps of Engineers. *Id.*

15. *Ogburn-Matthews*, 332 S.C. at 557-58, 505 S.E.2d at 601. S.C. CODE ANN. § 48-39-80 (West Supp. 1999) provides:

> The department shall develop a comprehensive coastal management program, and thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of this chapter and any rules and regulations promulgated under this chapter. In developing the program the department shall:
> (A) Provide a regulatory system which the department shall use in providing for the orderly and beneficial use of the critical areas.
> (B) In devising the management program the department shall consider all lands and waters in the coastal zone for planning purposes . . . .
> (C) Provide for a review process of the management program and alterations that involve interested citizens as well as local, regional, state and federal agencies.
> (D) Consider the planning and review of existing water quality standards and classifications in the coastal zone.
> (E) Provide consideration for nature related uses of critical areas, such as aquaculture, mariculture, waterfowl and wading bird management, game and nongame habitat protection projects and endangered flora and fauna.

certifications lies with the Agency.[16] In the event the Agency fails to act on a permitee's request within six months, its concurrence is presumed by the Corps and the permit will be issued.[17] If the Agency decides to reject a request for certification, the Corps may still issue a Nationwide 26 permit if "'the activity is consistent with the objectives of [the federal Coastal Zone Management Act] or is otherwise necessary in the interest of national security.'"[18] Thus, a request for certification of consistency with the State Coastal Zone Management Program is merely a preliminary step in the Nationwide 26 permitting process and may not control whether a Nationwide 26 permit will ultimately be issued.

When a request for certification is submitted to the Agency, its staff must evaluate the project to determine consistency with the State's Coastal Zone Management program. If Agency staff determine the project is consistent with the program, they must then issue a public notice of the proposed certification and review any objections to the certification.[19] Decisions by Agency staff to issue a certification despite objections are also subject to review by the Coastal Council pursuant to procedures adopted in the Program refinements of 1993.[20] These refinements stipulate that (1) agency staff decisions are deemed final agency decisions unless three Council members[21] make a written request to hear oral arguments before the full Council; and (2) upon such written demand, oral arguments will be heard after the ten-day comment period. The order of the Council, whether affirming, reversing, or modifying the staff decision, shall be the final agency action in the matter.[22]

Loblolly submitted plans to fill the wetland next to the Ogburn-Matthews's property.[23] Loblolly's first attempts to obtain a certification of consistency from the Agency were unsuccessful. The Agency's staff environmental reviews failed to conclude that Loblolly's activity would meet the criteria of the state's coastal environmental policies.[24] However, based on a third environmental review conducted by an Agency biologist, the Agency issued a "Notice of Intent" to certify that filling the wetland was consistent with the Agency's

16. S.C. CODE ANN. § 48-39-80 (West Supp. 1999).

17. *Ogburn-Matthews*, 332 S.C. at 556, 505 S.E.2d. at 600; 33 C.F.R. § 330.4(d)(6) (1999).

18. *Ogburn-Matthews*, 332 S.C. at 557, 505 S.E.2d at 600 (quoting 16 U.S.C. § 1456(c)(3)(A) 1985 & Supp. 1997)) (brackets in original).

19. *Id.* at 557, 505 S.E.2d at 601.

20. *Id.*

21. The Council serves as an advisory council to the South Carolina Department of Health and Environmental Control. The full Council is composed of a total of fourteen members, chosen from the following: eight (8) members, one from each coastal zone county and another six (6) members, one from each state Congressional district. As of 1994, the South Carolina Coastal Council became the South Carolina Coastal Zone Appellate Panel. S.C. CODE ANN. § 48-39-40(A) & (C) (West Supp. 1999).

22. *Ogburn-Matthews*, 332 S.C. at 557-58, 505 S.E.2d at 601 (citing 1993 Coastal Zone Management Program Final Refinements p. 20).

23. *Id.* at 558, 505 S.E.2d at 601.

24. *Id.* at 558-59, 505 S.E.2d at 601-02.

program.[25] Upon receipt of this notice, Ogburn-Matthews submitted a written objection to the Agency's issuance of the certificate of consistency.[26]

As previously mentioned, the Agency's certification procedures require that all consistency certification objections be reviewed by the Agency.[27] Unless three members of the full Council request in writing that oral arguments be held before them, the decision to issue the certification will be deemed a final agency decision by default.[28] Because no request for oral argument was ever made, the staff recommendation to issue Loblolly's request for certification of consistency became a final agency action, and the certificate was issued without any further notice to Ogburn-Matthews.[29]

Consequently, Ogburn-Matthews filed a complaint requesting that the circuit court review the Agency's decision either under South Carolina's Administrative Procedures Act (APA) or, in the alternative, upon a writ of certiorari.[30] She complained that the Agency's procedures in issuing the certification denied her due process of law.[31] First, she complained that the review process had no procedure to notify her that the Agency had received her objections.[32] Second, she contended the review process did not ensure that Agency staff or the Council had considered her objections before issuing the consistency certification.[33] Upon review, the special referee concluded that the Agency's review procedures "complied with the minimum standards of due process and the Agency had applied its policies correctly."[34]

In a unanimous decision, the South Carolina Court of Appeals agreed that the Agency's procedures satisfied the minimum standards of due process.[35] The court rejected Ogburn-Matthews's contentions that due process required that she be afforded an affirmative response or action from the Agency pursuant to her objection.[36] The court identified two problems with Ogburn-Matthews's contentions. First, Ogburn-Matthews failed to show that the Council did not perform its function.[37] Second, because she failed to identify "any fundamental right at stake which can *only* be protected by imposing an additional procedure to verify that a contestant's arguments have actually been reviewed and considered," she could not establish substantial prejudice resulting from the

25. *Id.* at 559, 505 S.E.2d at 601-02.
26. *Id.* at 559, 505 S.E.2d at 602.
27. *See supra* note 19 and accompanying text.
28. *See supra* text accompanying note 17.
29. *Ogburn-Matthews*, 332 S.C. at 559, 505 S.E.2d at 602.
30. *Id.*
31. *Id.*
32. *Id.* at 559-60, 505 S.E.2d at 602.
33. *Id.* at 561, S.E.2d at 603.
34. *Id.*
35. *Id.* at 563, 505 S.E.2d at 604.
36. *Id.* at 563, 505 S.E.2d at 604.
37. *Id.* at 562-63, 505 S.E.2d at 603-04

Agency's procedures.[38] Accordingly, the court concluded that no trial-type hearing or other procedure requiring some sort of response by the Agency was necessary to satisfy due process in the consistency certification scheme.[39]

In addition to the due process argument, Ogburn-Matthews argued that consistency certifications are governed by the APA.[40] She contended that the APA requires that certification decisions be supported by "substantial evidence" and that the certification at issue was not so supported.[41] Further, if the APA governs consistency certifications, that statute mandates an adjudicatory hearing be held in all contested cases.[42] On the other hand, if the APA does not apply, the Agency action could still be reviewed on a writ of certiorari, but such review would be governed by an "any evidence" standard, an easier burden for the Agency to meet. The court discussed the applicability of the APA without resolving the issue,[43] explaining that the Agency's decision failed the "any evidence" standard of review.[44] Accordingly, the court reversed the lower court's ruling.[45]

B. Due Process and Consistency Certifications in South Carolina

Ogburn-Matthews is not the first case in South Carolina to hold that due process does not entitle an individual to a trial-type hearing for challenges to a certification issued by a state agency. Three cases decided before *Ogburn-Matthews* dealt with certifications issued pursuant to environmental permitting programs.[46] Although these cases hold that challenges to certifications are not contested cases, they do establish the existence of a right to due process distinct from the procedural rights available in contested cases under the APA.[47]

---

38. *Id.* ("[T]he failure to implement a procedure requiring affirmative action by the council to finalize the Agency's decision does not offend due process, absent a showing of substantial prejudice.").

39. *Id.* at 563-69, 505 S.E.2d at 604-07.

40. *Id.* at 570, 505 S.E.2d at 607.

41. *Id.*

42. *Id.*

43. *Id.* at 571, 505 S.E.2d at 608.

44. *Id.*

45. *Id.* at 571-75, 505 S.E.2d at 608-10. The Agency must determine that a proposed project is consistent with the policies of the Coastal Zone Management Program. The policies apply to isolated wetlands only. Therefore, if the wetland does not meet the criteria of an "isolated wetland" the program's policies are inapplicable. The Agency's final review merely stated that the wetland was isolated and gave no factual explanation for this statement. *Id.* at 572, 505 S.E.2d at 608-09.

46. *See* League of Women Voters v. Litchfield-by-the-Sea, 305 S.C. 424, 409 S.E.2d 378 (1991); Stono River Envtl. Protection Ass'n v. South Carolina Dep't of Health & Envtl. Control, 305 S.C. 90, 406 S.E.2d 340 (1991); Triska v. Dep't of Health & Envtl. Control, 292 S.C. 190, 355 S.E.2d 531 (1987).

47. *See League of Women Voters*, 305 S.C. at 426-27, 409 S.E.2d at 380 (holding that despite the fact that DHEC's action was not a contested case, article I, section 22 of the South Carolina Constitution imposes a separate requirement for notice and opportunity to be heard

Further, the cases establish that this right to due process is available to individuals claiming certain kinds of interests in the environment, even when the claim does not constitute a contested case.[48]

The South Carolina Supreme Court first addressed the issue in *Triska v. Department of Health and Environmental Control.*[49] *Triska* involved a challenge to the South Carolina Department of Health and Environmental Control's (DHEC) authority to revoke a 401 Certification that it had previously issued.[50] After issuing the certification, DHEC suspended the certification to conduct an internal review.[51] After further investigation, DHEC decided that no further review was necessary and reinstated the certification.[52] DHEC granted a local citizens group's request for an adjudicatory hearing to challenge DHEC's reinstatement of the 401 certification.[53] The South Carolina Supreme Court held that DHEC lacked the authority to revoke the 401 certification, as 401 Certifications are not contested cases as defined by DHEC regulations.[54] Therefore, DHEC had no authority to grant an adjudicatory hearing to the citizens' group.[55]

The court addressed this issue again in *Stono River Environmental Protection Ass'n. v. South Carolina Department of Health & Environmental Control.*[56] In *Stono River* the court addressed whether DHEC denied Stono River an opportunity to contest the issuance of a 401 Certification in an adjudicatory proceeding.[57] Affirming its ruling in *Triska* that 401 Certifications are not contested cases as defined by the APA, the court stated "the key consideration in determining whether a case is 'contested' is whether 'the legal rights, duties or privileges of a party are *required by law* to be determined by an agency *after an opportunity for a hearing.*'"[58] Because no state or federal statute required an adjudicatory hearing on certification determinations, the proceeding leading to that determination was not a contested case.[59] However,

---

outside of the APA).

48. *See* Rowe v. City of West Columbia, 334 S.C. 400, 407, 513 S.E.2d 379, 382-03 (S.C. Ct. App. 1999) (quoting Ross v. Medical Univ. of South Carolina, 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997)). "We have interpreted [article I, section 22 of the South Carolina Constitution] as specifically guaranteeing persons the right to notice and opportunity to be heard by an administrative agency, even when a contested case under the APA is not involved." *Id.* (citation omitted) (brackets in original).

49. 292 S.C. 190, 355 S.E.2d 531 (1987).

50. *Id.* at 192, 355 S.E.2d at 532.

51. *Id.* at 193, 355 S.E.2d at 532-33.

52. *Id.*

53. *Id.* at 193, 355 S.E.2d at 533.

54. *Id.* at 196-97, 355 S.E.2d at 534-35.

55. *Id.* at 197, 355 S.E.2d at 535.

56. 305 S.C. 90, 406 S.E.2d 340 (1991).

57. *Id.* at 92, 406 S.E.2d at 341.

58. *Id.* at 93, 406 S.E.2d at 342 (quoting S.C. CODE ANN. § 1-23-310(3) (West Supp. 1999) (previously §1-23-310(2)).

59. Hearing procedures are now mandated in 401 certification cases pursuant to regulations adopted by the General Assembly. *See* 25A S.C. CODE ANN. REGS. 61-101 (West Supp. 1999).

the court added that although an adjudicatory hearing was not required by statute, "[a]dministrative agencies are required to meet minimum standards of due process."[60] The court observed that these standards are flexible and should be fashioned to meet the demands of the particular situation.[61]

In *League of Women Voters v. Litchfield-by-the-Sea*,[62] the court addressed whether certifications of consistency for state-issued permits under the Agency's Coastal Zone Management Program can be challenged in an adjudicatory hearing pursuant to the APA.[63] Relying on the rulings in *Stono River* and *Triska*, the court again held that consistency certifications issued by the Council are not contested cases subject to review under the APA.[64] Therefore, no requirement for an adjudicatory hearing exists.[65] However, the court also stated the following regarding the requirements of due process:

> We are cognizant of the fact that Council's certification determination is not binding upon DHEC, the permitting agency. However, we are constrained to safeguard the interests of the parties at all stages of the application process since Council's certification determination may be accorded significant weight by the permitting agency in deciding whether or not to grant a permit. Hence Council, as an administrative agency, must comport with standards of due process established by Article I, Section 22, of the South Carolina Constitution.[66]

The development of the law in these cases suggests that, even when a property owner does not have a right to a contested case hearing under the APA, the owner may be entitled to additional procedural safeguards in order to satisfy the minimum standards of due process required by the South Carolina Constitution and the United States Constitution.[67] These cases stop short, however, of delineating exactly what those safeguards are in state agency decisions regarding noncontested cases. Further, the *Ogburn-Matthews* court noted that no South Carolina case has squarely decided whether the contested-case provisions of the APA are triggered when an opportunity to be heard by

60. *Stono River Envtl. Protection Ass'n*, 305 S.C. at 93-94, 406 S.E.2d at 342 (citations omitted).

61. *Id.*; *see* Morrissey v. Brewer, 408 U.S. 471 (1972) ("Due process is flexible and calls for such procedural protections as the particular situation demands.").

62. 305 S.C. 424, 409 S.E.2d 378 (1991).

63. *Id.* at 425-26, 409 S.E.2d at 379-80.

64. *Id.* at 426, 409 S.E.2d at 380.

65. *Id.*

66. *Id.* at 427, 409 S.E.2d at 380.

67. *See supra* notes 1, 46-48 and accompanying text.

the agency is required by due process.[68]

The APA defines a contested case as one in which private rights "are required by law to be determined by an agency after an opportunity for hearing."[69] The unanswered question is whether this definition is satisfied when due process requires an agency to afford a contestant an opportunity to be heard; is due process a "law" for purposes of this definition? Although South Carolina has not answered this question, the United States Supreme Court has established precedent that may bear upon how an answer to this question could be framed. Thus the next Section provides a discussion of this case law.

C. *What Process is Due: The Evolution and Application of the* Eldridge *Test*

The Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ."[70] The South Carolina Constitution provides the same due process protection to its citizens.[71] One of the fundamental premises behind due process is that persons are given an opportunity to be heard and that such opportunity "must be granted at a meaningful time and in a meaningful manner."[72] Exactly what form or type of procedure is required to afford an individual a meaningful opportunity to be heard has been debated in the courts for years, and, as *Ogburn-Matthews* demonstrates, the question continues to pervade the courts today.

In addition to an opportunity to be heard, the individual is entitled to judicial review of decisions affecting their rights.[73] The general rule is that, when a vested property right or constitutional right of an individual is adversely affected by a governmental decision, judicial review is required as a matter of

---

68. Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 571, 505 S.E.2d 598, 608 (Ct. App. 1998).

69. S.C. CODE ANN. § 1-23-310(3) (West Supp. 1999).

70. U.S. CONST. amend. XIV, § 1.

71. S.C. CONST. art. I, § 3.

72. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

73. Ogburn-Matthews sought review of her case either as a contested case under the APA or upon a writ of certiorari. If judicial review is constitutionally mandated, a writ of certiorari may be the only avenue to provide for such review. *See* Rowe v. City of West Columbia, 334 S.C. 400, 407, 513 S.E.2d 379, 382 (Ct. App.1999).

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and opportunity to be heard; . . . nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

S.C. CONST. art I, § 22.

due process.[74] This is so even when there is a statutory provision that appears to preclude review: "Such a provision does not affect the right 'to an administrative proceeding uncontaminated by a violation of the Constitution.'"[75] Thus, where the right to an adjudicatory hearing is not provided by statute, the protections of due process are embodied in the Constitution and its principles of "fundamental fairness which may require that an opportunity for a hearing be provided . . . ."[76]

Although the concepts of fundamental fairness and due process require notice and an opportunity to be heard, the requirement that this procedure be in the form of an adjudicatory hearing is not mandated. In *Walters v. National Ass'n of Radiation Survivors*,[77] the United States Supreme Court adhered to precedent establishing that due process is a flexible concept.[78] The Court stated: "In defining the process necessary to ensure 'fundamental fairness' we have recognized that the [Due Process Clause] does not require that 'the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error. . . .'"[79] A review of prior rulings by the Supreme Court will provide insight as to how this theory of "flexible due process" developed, and what it means in terms of an opportunity for hearing and judicial review.

In *Goldberg v. Kelly*[80] the Court decided whether the termination of public assistance payments to a recipient without first affording her the opportunity for an evidentiary hearing denied the recipient due process of law.[81] Holding that such hearings are necessary to satisfy due process, the Court based its decision on two factors: the nature of the governmental function involved and

---

74. *See* Bernard Schwartz, *Administrative Law Cases During 1996*, 49 ADMIN. L. REV. 519, 536-37 (1997) (quoting Justice Brandeis: "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly." St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring)).

75. *Id.* at 537 (citing Czerkies v. Dep't of Labor, 73 F.3d 1435, 1438 (7th Cir. 1996)).

76. 2 AM. JUR. 2D *Administrative Law* § 294 (1994). Section 294 states, in part:

> [I]f no such right is granted by statute or ordinance or administrative regulation, the right [to a hearing] is embodied in due process and the principles of fundamental fairness which may require that an opportunity for a hearing be provided . . . . The administrative procedure acts do not create a substantive right to a hearing; they merely delineate the procedure to be followed when a hearing is required by statute or constitutional law.

Id.; *see also* League of Women Voters v. Litchfield-by-the-Sea, 305 S.C. 424, 426-27, 409 S.E.2d 378, 380 (1991) (restating the court's holding in *Stono River* that "superseding constitutional provisions confer the right to notice and the opportunity to be heard prior to issuance of certification").

77. 473 U.S. 305 (1985).

78. *Id.* at 320.

79. *Id.* (quoting Mackey v. Montrym, 443 U.S. 1, 13 (1979)).

80. 397 U.S. 254 (1970).

81. *Id.* at 255.

the individual interest affected by the government's action.[82] In light of these factors, the Court stated: "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."[83] In this context, the Court also expressed its view that a written submission is inadequate because it is inflexible and does not allow the individual to conform her argument to the thoughts of the decisionmaker.[84]

The Court expanded the concept of "what process is due" in *Morrissey v. Brewer*.[85] In *Morrissey* the Court determined whether due process requires a state to give an individual an opportunity to be heard before revoking parole.[86] Although the Court held that minimum standards of due process did require an inquiry into the nature of a hearing, the Court qualified this requirement by noting that such hearings are not mandated to satisfy due process.[87] The Court stated:

> To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.[88]

This appears to be a slight variation of the rule expressed in *Goldberg* that suggested that evidentiary hearings are required to satisfy due process. However, the issue of how to determine what procedural safeguards are necessary to meet the minimum standards of due process remained unanswered until the Court decided *Mathews v. Eldridge*.[89]

In *Mathews v. Eldridge* the Supreme Court held that an evidentiary hearing is not required before terminating disability payments if agency procedures provide an effective means for the claimant to be heard before termination.[90] Rejecting the standard established in *Goldberg* that such hearings are required before welfare benefits could be terminated, the Court stated that: "'[d]ue process is flexible and calls for such procedural protections as the particular situation demands.' Accordingly, resolution of the issue whether the administrative procedures provided . . . are constitutionally sufficient requires analysis of the governmental and private interests that are affected."[91] The

---

82. *Id.* at 262-263.
83. *Id.* at 268-269.
84. *Id.* at 269.
85. 408 U.S. 471 (1972).
86. *Id.* at 472.
87. *Id.* at 481.
88. *Id.*
89. 424 U.S. 319 (1976).
90. *Id.* at 349.
91. *Id.* at 334 (quoting *Morrissey*, 408 U.S. at 481).

Court set forth three factors to be weighed in the analysis: (1) the nature of the private interest that will be affected by the administrative action; (2) the risk that an erroneous deprivation of the interest may occur through the procedures in place and the value, if any, of implementing an additional procedural safeguard; and (3) the government's interest, fiscally and functionally, in the degree of burden involved in implementing an additional or substitute procedural safeguard.[92]

In addition to these three factors, the Court emphasized that more is involved than simply weighing "fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness."[93] Thus, the Court's test must be viewed with respect to the basic principle of due process, to wit, a person should not suffer a loss without being given a meaningful opportunity to be heard and present her case.[94]

III. ANALYSIS

In resolving the issue of whether due process entitled Ogburn-Matthews to a trial-type hearing in which she could confront and cross-examine witnesses, the court employed the three-factor test established in *Mathews v. Eldridge*.[95] The test is a balancing-type analysis; it weighs the private interest at stake and the risk of erroneous deprivation of that interest against the governmental interest involved.[96]

A. Fiscal Burden Analysis

In concluding that due process did not require a trial-type hearing, the *Ogburn-Matthews* court relied on the fact that (1) there was no fundamental right at stake that could only be protected by an additional safeguard, and (2) Ogburn-Matthews presented no evidence that there was an error in procedure

---

92. *Id.* at 334-35.
93. *Id.* at 348.
94. *Id.* at 348-349.
95. This test states:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.
96. *See supra* note 92 and accompanying text.

or that the Council did not perform its function.[97] Balancing the private interest at stake in *Ogburn-Matthews* against the burden that would be placed on the government in implementing an additional procedural safeguard in the consistency certification program, the court held that the Agency's procedures met minimum due process standards.[98] The court reasoned that, because Ogburn-Matthews failed to establish some type of economic interest that would be adversely affected by the issuance of the consistency certification,[99] the governmental interest "weigh[ed] against requiring a more formal, adversarial hearing."[100] In essence, her individual interest was not great enough to outweigh the cost of providing a formal hearing. In support of its conclusion, the court stated that, because the Agency's action of certification was less critical than the actual issuing of the permit, along with the fact that approximately two thousand consistency reviews are conducted a year, instituting a formalized hearing in the review process would significantly increase the administrative burden on the agency.[101]

Of the reasons stated by the court for denying the need for a trial-type hearing, the most compelling one is the increased burden placed on the Agency by requiring such hearings. The basis for the court's reasoning is analogous to the one stated in *Mathews v. Eldridge* regarding the burden placed on the government by requiring evidentiary hearings before terminating disability benefits. Discussing the increment in cost resulting from the increased number of hearings, the Court stated:

> Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.[102]

As in *Mathews v. Eldridge*, imposing an evidentiary hearing requirement upon demand in all consistency certifications would entail substantial fiscal and administrative burdens on the Agency. Although the court in *Ogburn-Matthews*

---

97. Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 561-69, 505 S.E.2d 598, 603-07 (1998).

98. *Id.* at 569, 505 S.E.2d at 607.

99. *Id.* at 565, 505 S.E.2d at 605.

100. *Id.* at 568, 505 S.E.2d at 606.

101. *Id.* at 568-69, 505 S.E.2d at 607.

102. Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

could not state with certainty the number of hearings that would be requested, it concluded "with little fear of contradiction . . . that the formalization of the review process to include an adversarial hearing [would result in] a significantly increased administrative burden."[103]

B. Private Interest Analysis

In applying the three-factor test of *Mathews v. Eldridge*, the *Ogburn-Matthews* court held that the first two factors weighed against requiring a trial-type hearing.[104] While the court found that the private interest—Ogburn-Matthews's loss of use and enjoyment of the wetland—was sufficient to provide standing, the fact that Ogburn-Matthews had no possessory rights or economic interest in the property lessened the potential that she would suffer an individual deprivation, as she would if she had actually owned the affected property.[105] The risk of erroneous deprivation was mitigated by the fact that the Agency's certification process is technical in nature.[106] Because of that characteristic the court concluded that little would be gained by cross-examining the biologist and surveyors who made the certification decisions.[107] The court did indicate, however, that if Ogburn-Matthews had actually owned the property, she may have been entitled to some further procedural safeguard to protect her interest.[108]

The court's valuation of the interest at stake in *Ogburn-Matthews* deserves further consideration. Recently, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,[109] the United States Supreme Court held that citizen-suit plaintiffs alleged sufficient injury in fact by averring loss of enjoyment, aesthetic value and a reduction in value of their nearby property because of Laidlaw's pollution of a nearby river.[110] Thus, *Friends of the Earth* suggests that had Ogburn-Matthews asserted similar injuries, specifically loss in economic and aesthetic value to her adjoining property, the court's decision regarding Ogburn-Matthews may have been different. Historically the United States Supreme Court has recognized that loss of intangible property interests, such as aesthetic value and use and enjoyment, are sufficient to prove injury in fact for Article III standing.[111] In addition to the types of intangible private

103. *Ogburn-Matthews*, 332 S.C. at 569, 505 S.E.2d at 607.
104. *Id.* at 565-68, 505 S.E.2d at 605-06.
105. *Id.* at 565, 505 S.E.2d at 605.
106. *Id.* at 567, 505 S.E.2d at 606.
107. *Id.* at 566-68, 505 S.E.2d at 606.
108. *See id.*
109. 120 S. Ct. 693 (2000).
110. *Id.* at 705; *but cf.* Smiley v. South Carolina Dep't of Health & Envtl. Control, No. 99-ALJ-07-0422-CC (2000) (distinguishing *Friends of the Earth*, and holding that person who used, but did not own, land affected by agency decision lacked standing to seek judicial review under statute authorizing review of agency decisions).
111. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1992); Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

interests discussed in the Supreme Court cases, the individuals in *Stono River, League of Women Voters*, and *Ogburn-Matthews* could quite possibly have alleged tangible economic loss. For example, Ogburn-Matthews could have alleged that filling the wetland would cause a depreciation in value of her property. Clearly, substantial economic loss would warrant greater procedural protection than written submissions to the deciding agency because the private interest at stake is greater.

C. *Affirmative Response Analysis Under the* Mathews *Test*

In *Ogburn-Matthews* the South Carolina Court of Appeals used the *Eldridge* test to determine whether the process due meant that a trial-type hearing should be afforded to a contestant objecting to a consistency certification.[112] The court did not, however, discuss whether Ogburn-Matthews was entitled to some kind of affirmative response by the Council to her objections. The balance between the private interest and governmental interest in this circumstance should weigh on the side of the individual. Although the *Eldridge* test may not mandate a trial-type hearing to satisfy due process as the court concluded, the court's failure to use the test to determine whether some other process was required is shortsighted and unexplained. Because it is questionable whether the Council's review process actually affords the objector the opportunity to be heard in a meaningful way, the utility of an affirmative response by the Council is apparent.

As the review process stands, the only avenue for an opportunity to be heard is for the objector to blindly rely on the agency to adhere to its procedures when evaluating her objection. However, this type of procedural check on government action may be inadequate.[113] Had the Council responded to her objection, the need for judicial review could have been entirely avoided.

As discussed in an article by Robert Rabin, three values are fundamental to due process: (1) the interest in obtaining a rational result; (2) accountability to ensure that decisions are being made impartially; and (3) the assurance of an adequate explanation for the basis of the agency's action.[114] Of particular relevance to the *Ogburn-Matthews* case is the third value. The Council's procedures for affording individuals notice and an opportunity to be heard do not require any type of affirmative action or response on behalf of the Agency.[115] Thus, the claimant has no way of knowing whether the Agency has received and reviewed the objection, nor any means to evaluate whether the Agency reached a rational result. Such procedures hardly comport with the

---

112. *Ogburn-Matthews*, 332 S.C. at 563-69, 505 S.E.2d at 604-07.

113. Robert L. Rabin, *Some Thoughts on the Relationship Between Fundamental Values and Procedural Safeguards in Constitutional Right to Hearing Cases*, 16 SAN DIEGO L. REV. 301 (1979).

114. *Id.* at 302-03.

115. *See Ogburn-Matthews*, 332 S.C. at 561, 505 S.E.2d at 603-04.

requirement that procedures be designed to afford individuals a meaningful opportunity to be heard. The objector is notified of the Agency's decision when the consistency certification is issued. And it is plausible that pursuant to the procedures in place, a written objection could be overlooked and the certification issued by default.

Equally troubling is the fact that Ogburn-Matthews was given no explanation concerning the basis of the Agency's decision in response to her objection.[116] Given the Agency's procedures, it is unlikely that she had the ability to determine whether the Agency properly performed its function.

> [W]hen an important determination of individual rights is being made by the government, a citizen . . . has a critical interest in having his status taken seriously. An indispensable element in demonstrating that the state in fact has taken account of the individual's claim to relief—irrespective of whether it has merit—is an adequate explanation of the agency's decision.[117]

Requiring an explanation for the issuance of the certification would also promote accountability. Accountability, Rabin's second stated interest, would assure that there is a factual basis for the Agency's action and lessen the need for judicial review. Accountability also increases the likelihood of an impartial result. Further, by supporting its decision with a factual explanation, the Council not only assures the objector that it reached a rational result, but also serves a kind of "check and balance" on those making these decisions. *Ogburn-Matthews* is a clear illustration of the need for such an additional procedure in the Council's review process because the certification was issued without sufficient evidence to support it. The utility of an affirmative response is apparent if it illuminates errors regarding consistency certifications before they reach the level of review attained in the *Ogburn-Matthews* case.

IV. THE POTENTIAL IMPACT ON THE ADMINISTRATIVE PROCEDURE ACT CONTESTED-CASE PROVISION

In addition to its due process holdings, the *Ogburn-Matthews* court discusses, without deciding, an important question concerning the South Carolina Administrative Procedure Act: If due process requires an opportunity to be heard in a case before an agency, would this due process requirement trigger the contested-case provisions of the APA? No South Carolina case has resolved this issue.

---

116. *See id.* at 559-61, 505 S.E.2d at 602-03. After reviewing the objection, the certification was issued by default without any further notification to Ogburn-Matthews. *Id.* at 559-61, 505 S.E.2d at 602.

117. Rabin, *supra* note 113, at 303.

The issue arises from the APA provision defining a contested case. Under the APA, the term "contested-case" is defined as "a proceeding including, but not restricted to, ratemaking, 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."[118] The question is whether the definition of a contested case is met when the law of due process, rooted in the United States and South Carolina Constitutions, requires an opportunity to be heard.

This issue is important because it determines whether the opportunity to be heard guaranteed by due process must, in every case involving an agency covered by the APA, take the form of the trial-type proceeding required under the APA's contested-case provisions. Thus, when an administrative action involves an important legal interest, and federal and state constitutional standards of due process require an opportunity to be heard before any legal rights affecting that interest are decided, it appears that a hearing would be required by law. Conceivably, the contested-case provision of the South Carolina APA would then be triggered, requiring a formal hearing comporting with its procedures.

Conceivably, it is possible to read the definition of contested case as being triggered when constitutional due process rights mandate an opportunity to be heard. The contested-case provision defines a contested case as one in which the *law* requires an opportunity for a hearing.[119] Thus, the relevant inquiry becomes: Does the term "law" as used in a statute encompass constitutional requirements? The determination of whether this definition is triggered centers on the meaning accorded to "law" and "opportunity to be heard." In a general sense, the term law is defined to mean "[t]hat which is laid down, ordained, or established. A rule or method according to which phenomena or actions co-exist or follow each other. Law . . . is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force."[120] From this general definition, the term law is much broader than just statutes and regulations. Certainly it encompasses rights established under the authority of the Constitution. The Constitution is the most fundamental source of law and indeed a source of the highest magnitude.[121] It is the foundation for various rights and principles, many of which are derived from the common law. However, "[t]he common-law lineage of these rights does not mean they are defeasible by statute or remain mere common-law rights. . . . They are, rather, constitutional rights, and form the *fundamental law* of the land."[122] It is

118. S.C. CODE ANN. § 1-23-310(3) (West Supp. 1999) (emphasis added).

119. *See supra* note 118 and accompanying text.

120. BLACK'S LAW DICTIONARY 884 (6th ed. 1990).

121. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("Certainly all those who have framed written constitutions contemplate them as forming the *fundamental* and *paramount law* of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.") (emphasis added).

122. Alden v. Maine, 119 S. Ct. 2240, 2256 (1999) (emphasis added).

plausible, then, that the term "law" as used in the contested-case definition includes fundamental constitutional rights, such as the right to a hearing. If such a right, being derived from the common law, cannot be abrogated by statute then a fortiori, the existence of that right is not dependent upon the statute giving it effect.

The phrase "an opportunity for hearing" is equally ambiguous. Narrowly read, this hearing right could mean the traditional notion of an in-person hearing before a judicial officer, similar to a trial. In this case, the APA would not be triggered if in a particular circumstance due process required only written submissions. However, equally plausible is that opportunity for hearing be read broadly, so as to be synonymous to *any* opportunity to be heard, including situations in which due process entitles one only to a "paper" hearing. Thus, every case involving individual rights, legal rights and privileges to be determined by an agency and requiring an opportunity for hearing would trigger the APA.

In *Ogburn-Matthews* the court recognized earlier cases indicating that parties may have constitutional rights requiring notice and opportunity to be heard before issuance of certifications, but the court does not interpret these rulings to compel the sort of notice and hearing prescribed by the APA contested case provisions.[123] The *Ogburn-Matthews* court noted that, in *League of Women Voters*, "[it was held] that a consistency determination was not a 'contested-case' because there was no requirement imposed by statute or regulation for a *hearing*, but nevertheless, the court required an *opportunity to be heard* to comply with due process."[124] The *Ogburn-Matthews* court thus read *League of Women Voters* to imply that the law in the APA's contested case definition encompasses statutes and regulations, but not the United States Constitution.

The implication that the court found in *League of Women Voters* is contrary to the United States Supreme Court's decision in *Wong Yang Sung v. McGrath*.[125] In *Wong Yang Sung* the Court addressed the issue of whether administrative hearings in deportation cases had to conform with the formal adjudication requirements of the Federal Administrative Procedure Act of 1946.[126] In reaching the conclusion that these hearings had to conform with formal adjudication requirements, the Court interpreted provisions in section 5 of the APA that made the Act's formal adjudication requirements applicable

123. Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 570-71, 505 S.E.2d 598, 607-08 (1998); *see also* Stono River Envtl. Protection Ass'n v. South Carolina Dep't of Health & Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991) ("In our view, constitutional due process provisions, apart from the APA, are sufficient to confer the rights to notice and for an opportunity to be heard.").

124. *Ogburn-Matthews*, 332 S.C. at 571, 505 S.E.2d at 608.

125. 339 U.S. 33 (1950).

126. *Id.* at 35; Administrative Procedure Act, 5 U.S.C. §§ 1001-1010 (1946) (codified as amended at 5 U.S.C. §§ 551-559 (1994)).

to "adjudication[s] required by statute."[127] In the original bill, section 5 applied to "hearings required by law."[128] The government accordingly argued that a language change in the Act demonstrated that section 5 of the Act was intended to apply only "when explicit statutory words granting a right to adjudication can be pointed out."[129] Because there was no statute requiring deportation hearings, the government argued that those hearings did not have to comply with the Federal APA, even if the hearings were required by due process.[130] That argument, similar to the one made by Ogburn-Matthews, posed the same question: Can a due process hearing requirement trigger the formal adjudication requirements of the Administrative Procedure Act?

The Court in *Wong Yang Sung* held that due process did trigger the APA.[131] The Court reasoned that "[t]he constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body."[132] Further, the Court explained: "We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency."[133] In essence, the Court found that to hold hearings required by the Constitution lower in status than those created by Congress's legislative power, when that power itself is derived from the Constitution, would be absurd.[134] Accordingly, the Court held that hearings compelled by the Constitution trigger the formal adjudication requirements of the Administrative Procedure Act.[135]

Although the outcome in *Wong Yang Sung* has been superseded by statute,[136] the Court's analysis regarding deportation hearings compelled by the

---

127. *Wong Yang Sung*, 339 U.S. at 48.
128. *Id.* at 49.
129. *Id.*
130. *Id.* at 48.
131. *Id.* at 50.
132. *Id.* at 49
133. *Id.* at 50.
134. *Id.*
135. *Id.* at 50-51.
136. *See* 8 U.S.C. § 1252(a)(2) (1994). Section 1252(a)(2)(A) limits jurisdiction of deportation hearings as follows:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review—
> (i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,
> (ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,
> (iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or
> (iv) except as provided in subsection (e) of this section,

Constitution has not been directly overruled. It appears that this analysis could apply to the contested-case provision in the South Carolina Administrative Procedures Act.[137] The language in the Federal APA and South Carolina's APA regarding formal adjudications is similar. The federal provisions make the formal adjudication requirements applicable "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . ."[138] Compare this to the South Carolina provisions that explicitly refer to actions or proceedings required by law to be determined by an agency after an opportunity for a hearing is afforded.[139] In *Wong Yang Sung* the contention was that hearings were only required if expressly stipulated by statute, not by law. The Court, however, held that the formal adjudication provisions of the Federal APA are triggered whenever an adjudicatory hearing is required either by statute or the Constitution.[140] The same holding would seem to follow a fortiori under the South Carolina APA, given its broader references to cases in which the opportunity for a hearing is required, not by "statute," but by "*any law*." It could be argued that a hearing required by law is one which is mandated by state and federal constitutional due process standards, thereby triggering the contested-case provision of the South Carolina APA.

On the other hand, *Mathews v. Eldridge* dismantles this theory somewhat. The fundamental premise of the *Eldridge* test is that not all agency decisions require a trial-type hearing to satisfy due process of law.[141] Whether a particular

---

> procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

137. *See* S.C. CODE ANN. § 1-23-310(3) (West Supp. 1999).

138. 5 U.S.C. § 554 (1994).

139. The South Carolina APA definition provides that a "'[c]ontested case' means a proceeding including, but not restricted to, ratemaking, 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*" S.C. CODE ANN. § 1-23-310(3) (West Supp. 1999) (emphasis added).

The comparable language in the federal APA reads:

> This section applies, according to the provisions thereof, *in every case of adjudication required by statute* to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—
> (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;
> (2) the selection or tenure of an employee, except a [sic] administrative law judge appointed under section 3105 of this title;
> (3) proceedings in which decisions rest solely on inspections, tests, or elections;
> (4) the conduct of military or foreign affairs functions;
> (5) cases in which an agency is acting as an agent for a court; or
> (6) the certification of worker representatives.

5 U.S.C. § 554(a) (1994) (emphasis added).

140. *Wong Yang Sung*, 339 U.S. at 50-51.

141. Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976).

action requires such additional procedures is a function of the three factors set forth in the test.[142] In essence, even when federal or state constitutional provisions mandate that the individual be afforded an opportunity to be heard, an opportunity required by law, this due process requirement may not necessitate a trial-type hearing. However, even if *Eldridge* undermines *Wong Yang Sung*'s interpretation of the Federal APA, it does not foreclose interpreting the more broadly worded South Carolina APA.

VI. CONCLUSION

"Few subjects have generated more inclusive principles of law than attend the question of when a trial-type hearing is required as a condition of administrative action."[143] *Ogburn-Matthews* clearly leaves this question open for debate. The underlying principles of the case are inconclusive. On one hand, the court flatly rejects that a trial-type hearing is mandated to satisfy due process, while on the other hand the court intimates that where certain types of private interests are involved, formal adjudication may be required as a condition of due process. What the case does suggest is that determining what procedural safeguards are necessary to satisfy due process is a factual issue and should be decided on a case-by-case basis. The analysis involves a balancing of the private interest at stake against the governmental interest involved.[144] Understandably, the cost of conducting formal hearings in every challenged certification may be overly burdensome to the Agency; however, in order to protect the private interest involved in these cases, some lesser measure could be implemented. At the very least, the balancing of these interests would support an affirmative response by the Agency. Such a response can assure parties on both sides of the issue that a rational result, factually supported, is reached.

Pamela A. Baker

142. *Id.* at 334-35.

143. Robert H. Stoloff, *The Right To A Hearing: Statutory Rights, Constitutional Rights And 'Fundamental Fairness,'* NEW JERSEY LAW., Oct./Nov. 1996, at 14 (quoting Justice Daniel J. O'Hern).

144. *See id.* at 38. ("[F]or those situations falling outside any well-settled area, the right to a trial-type hearing must be determined based on a review of the nature of the rights involved, the existence of disputed adjudicative facts and the type of hearing necessary to ensure fair process and avoid arbitrary state action.").

*