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ADMINISTRATIVE LAW

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INTRODUCTION

This year's survey of administrative law follows the pattern established by its four predecessors.[1] The appellate cases decided during the survey year[2] are organized and presented in three major divisions which track the three recognized areas of administrative law study—the authority of agencies to act, the exercise of administrative authority, and judicial review of agency decisions. Appendices which index the cases by agency and topic also are included.[3]

It is hard to call this a banner year for the development of administrative law in New Mexico, but there were a few significant developments in each of the three major areas covered by this Article. Under the first topic—authority of agencies to act—the supreme court dealt with the difficult interplay between the zoning function of a local elected body and the referendum power of the people.[4] The second major topic — exercise of agency authority—is highlighted this year by some significant treatment of the decisionmaking process, including a marked expansion of the legal residuum rule.[5] Finally, the major highlight of the year came in the area of judicial review, where the supreme court adopted the "whole record" substantial evidence standard for use in the review of factual findings by administrative bodies.[6]

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1. *See* Kelly & O'Leary, *Administrative Law,* 14 N.M.L. Rev. 1 (1984) [hereinafter cited as *1982-83 Administrative Law Survey*]; Shapiro & Jacobvitz, *Administrative Law,* 13 N.M.L. Rev. 235 (1983) [hereinafter cited as *1981-82 Administrative Law Survey*]; Browde, *Administrative Law,* 12 N.M.L. Rev. 1 (1982) [hereinafter cited as *1980-81 Administrative Law Survey*]; Browde, *Administrative Law,* 11 N.M.L. Rev. 1 (1979-80) [hereinafter cited as *1979-80 Administrative Law Survey*].

2. This survey covers cases decided during the year beginning April 1, 1983 and ending March 31, 1984.

3. Appendix A indexes the cases by government agency, and Appendix B indexes them topically in accordance with the outline used in the body of the Article.

4. *See infra* text accompanying notes 7-28.

5. *See infra* text accompanying notes 29-149.

6. *See infra* text accompanying notes 150-207.

I. AUTHORITY OF AGENCY TO ACT—STATUTORY AUTHORITY

In discussing the authority of an agency to act, previous survey articles primarily focused on appellate cases dealing with the *ultra vires* doctrine, which embodies the most common challenge to administrative action under legislative direction. In addition, some earlier surveys included a number of cases which raised questions under the nondelegation doctrine,[7] as well as those which highlighted the unique authority questions surrounding state administration of federal programs.[8] During this survey year, however, only two cases raised issues involving the authority of administrative agencies to act, and both cases dealt with the *ultra vires* doctrine. Although this year's *ultra vires* cases add little to existing law, one in particular is noteworthy because it is rooted in a theory of representative government which could have broad implications beyond the scope of administrative law.

In *Westgate Families v. County Clerk*,[9] the supreme court faced a challenge to a June, 1981 special referendum authorized by the Los Alamos County Clerk which voided three zoning ordinances adopted by the county council.[10] Westgate is a general partnership which had benefited from the council's adoption of ordinances that changed the existing zoning in the "Sawyer's Hill" area of the county "from a recreational wilderness district to a combined residential zoning district."[11] The subsequent referendum on the ordinances[12] resulted in voter disapproval of all three ordinances. Westgate, therefore, was unable to carry out its development plan for "Sawyer's Hill."

Westgate brought an action seeking a declaratory judgment voiding the county's authorization of the special referendum in an attempt to invalidate the results of the referendum and to reinstate the county council's zoning change. The district court granted summary judgment for Westgate, concluding that, although the referendum provisions in the county's home rule charter are valid, they do not apply to zoning actions of the

7. *See 1982-83 Administrative Law Survey, supra* note 1, at 1 n.2; *1980-81 Administrative Law Survey, supra* note 1, at 2-8.

8. *See 1980-81 Administrative Law Survey, supra* note 1, at 17-21; *1979-80 Administrative Law Survey, supra* note 1, at 5-7.

9. 100 N.M. 146, 667 P.2d 453 (1983).

10. In March 1981, the county council adopted three ordinances which changed the existing zoning of "Sawyer's Hill" from a recreational wilderness district to a combined residential zoning district, consisting of residential-agricultural and planned development. *Id.* at 147, 667 P.2d at 454.

11. *Id.*

12. The New Mexico Constitution specifically provides that "[t]he people reserve the power [with certain enumerated exceptions] to disapprove, suspend and annul any law enacted by the legislature." N.M. Const. art IV, § 1. That provision of the constitution also confers on the legislature the authority to enact laws to carry out the referendum power created. The New Mexico Constitution does not provide for the exercise of initiative authority by the people.

N.M. Stat. Ann. § 4-37-6 (Repl. Pamp. 1984) extends the referendum procedure to ordinances or resolutions adopted by class H counties.

county council. "Rather, zoning is governed by the Zoning Enabling Act . . . and is not subject to referendum."[13]

The supreme court affirmed the district court, applying traditional *ultra vires* principles. The court properly began its analysis with the statements that county zoning authority stems from enabling legislation and, consequently, that the exercise of that power "must be authorized by statute."[14] The court noted that, irrespective of the home rule status of Los Alamos,[15] the county derived its zoning power solely from the Zoning Enabling Act. The court then applied well-settled rules of statutory construction[16] to determine whether the Zoning Act precluded the exercise of zoning power by referendum. The court found that the Act contains "both procedural and substantive limitations . . . upon . . . County . . . zoning power" and that "the Act also *expressly provides* for zoning by representative bodies."[17] The court then concluded that the county "is precluded by the Act from claiming the power to zone by referendum because the Act expressly provides for zoning by representative bodies."[18]

Although the court's reasoning is rooted in traditional *ultra vires* doctrine, *ultra vires* does not support the court's conclusion because the Zoning Enabling Act does not contain an express prohibition against the application of a referendum procedure. Instead, the court went beyond the bounds of conventional *ultra vires* doctrine and found within the express affirmative grant of authority to the elected county council a negative implication prohibiting the use of referenda. It found support

13. 100 N.M. at 148, 667 P.2d at 455 (citing the Zoning Enabling Act, N.M. Stat. Ann. §§ 3-21-1 to -26 (Orig. Pamp. and Cum. Supp. 1982)).

14. 100 N.M. at 148, 667 P.2d at 455 (citing Burroughs v. Board of County Comm'rs, 88 N.M. 303, 540 P.2d 233 (1975)).

15. N.M. Const. art X, § 6 was designed to provide for maximum local self government, and any municipality adopting a charter under that provision "may exercise all legislative powers and perform all functions not expressly denied by general law or charter." *See generally* Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

16. In normal ultra vires contexts the critical question involves the limits of legislative direction as contained in the relevant statute. The court, therefore, must apply principles of statutory construction to determine the intent of the legislature. In *Westgate Families*, the court fell back on two settled principles: (1) that it must read the statute as a whole, construing the parts in conjunction with one another; and (2) that it will not read language into the act if the act makes sense as written. 100 N.M. at 148, 667 P.2d at 455.

Of course, the *Westgate Families* court was really faced with the interaction of two laws—the Zoning Enabling Act and the referendum provision in the county's home rule charter, which is also authorized by state law. The real issue was whether the zoning law was intended to preclude the use of otherwise sanctioned referendum procedures, and the Zoning Enabling Act just does not speak to that question. *See infra* text accompanying notes 17-19.

17. 100 N.M. at 148, 667 P.2d at 455 (emphasis in the original). N.M. Stat. Ann. § 3-21-14(C) (Cum. Supp. 1984) provides: "A proposed ordinance shall be passed only by a majority vote of all the members of the board of county commissioners, and an existing ordinance shall be repealed by the same vote."

18. 100 N.M. at 148, 667 P.2d at 455.

for this implication in a number of cases from other jurisdictions.[19] Although not articulated by the court, this construction of both the Zoning Enabling Act and the *ultra vires* doctrine is rooted in a theory of representative government which deprives the electorate of certain decisions once they have chosen elected officials.

This theory bars the application of initiative and referendum provisions to zoning changes because, except for the adoption of a master plan,[20] the act of zoning is more an administrative adjudication than it is a legislative act.[21] Because the referendum mechanism only operates to reserve to the people a larger share of legislative power,[22] it does not apply to merely administrative, or quasi-judicial, acts of a body of local government.[23]

This principle underlies the decision in *Westgate Families,* and should have been articulated by the court because it may extend beyond the narrow area of zoning law to preclude the application of referendum procedures in other areas of public concern. Even without a clear articulation of the theoretical limitation on the referendum authority, *Westgate*

19. *See, e.g.*, City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968); West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974).

20. The original passage of a comprehensive zoning plan is more "legislative" in nature because such a plan is an expression of general policy, applicable to the whole community, and not focused on individual property owners or particular parcels of land. *See* Freilich, *Fasano v. Board of County Commissioners of Washington County: Is Rezoning an Administrative or Legislative Function?*, 6 Urban Lawyer vii, ix (1974). *See also* 2 Rathkopf, The Law of Zoning and Planning ch. 27, at 3 (1984).

21. Zoning actions, although carried out by passage or amendment of an ordinance, usually involve a determination concerning the permissible use of a specific piece of property at the behest of a particular individual. They are characterized as "the exercise of judicial authority," Fasano v. Board of County Comm'rs, 264 Or. 574, 581, 507 P.2d 23, 26 (1973), or perhaps more appropriately, as "quasi-judicial or administrative." Freilich, *supra* note 20, at vii n.2.

As adjudicative acts, zoning changes normally require notice and an opportunity to be heard under the provisions of state statutes, if not as a matter of constitutional due process. *See, e.g.*, San Pedro North, Ltd. v. City of San Antonio, 562 S.W.2d 260, 262 (Tex. Civ. App.), *cert. denied*, 439 U.S. 1004 (1978).

22. *See* N.M. Const. art IV, § 1; N.M. Stat. Ann. § 4-37-6(B) (Repl. Pamp. 1984). *See also In re* Pfahler, 150 Cal. 71, 76, 88 P. 270, 273 (1906); Kadderly v. Portland, 44 Or. 118, 74 P. 710, 720 (1903).

23. *E.g.*, West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974) (opinion of Levin, J.). There is, however, a substantial body of authority which would preclude initiatives on quasi-legislative or administrative decisions, but would not bar a referendum in the same circumstances. In the latter instance it has been argued that a referendum is not inconsistent with a zoning enabling act, because all of the quasi-judicial procedures required by the zoning act have been accomplished and the aim of the referendum is merely the "retention of the status quo existing prior to legislative adoption of the amendatory zoning ordinance. . . . As a result, [the] referendum's aim of retention of the status quo does not conflict with the Zoning Enabling Act's aim of guaranteeing certain procedural steps prior to the passage of new zoning legislation." *Id.* at ___, 221 N.W.2d at 312. (Williams, J., dissenting). The supreme court in *Westgate Families* avoided the import of that argument by concluding that the provisions of the zoning act which require action by representative bodies "expressly denies an exercise of zoning power by referendum." 100 N.M. at 148, 667 P.2d at 455. *See supra* text accompanying notes 16-18.

Families and the cases upon which it is based establish that the retention of authority in the people by way of referendum is limited in application to the legislative acts of elected representatives.

The only other *ultra vires* case, *City of Albuquerque v. Paradise Hills Special Zoning District Commission,*[24] also involved zoning. *Paradise Hills* represents a straightforward application of the principle, established in *Board of County Commissioners v. City of Las Vegas,*[25] that the actions of municipal and county zoning authorities must be consistent with the comprehensive plan for the area.

In *Paradise Hills,* the city challenged an action of the Special Zoning District Commission,[26] claiming that the commission's action in rezoning a plot of land within its jurisdiction violated the master plan adopted by the city and county for the area which encompassed the particular plot of land.[27] Under the master plan, the land was classified M-1 (Industrial and Commercial Uses); the zoning commission merely changed the designation on some of the property to R-2 (Apartment Zone) and C-1 (Commercial Zone).[28] The court properly found, therefore, that the commission's action was not inconsistent with the master plan and did not violate the commands of the *ultra vires* doctrine.

II. EXERCISE OF ADMINISTRATIVE POWER

A. Rules and Rulemaking

The rulemaking power has been characterized as "an outstanding feature of the modern administrative agency," that "has brought about a shift in the center of gravity of lawmaking" from the legislative to the administrative arena.[29] Rulemaking is the legislative-like function of agen-

24. 99 N.M. 630, 661 P.2d 1329 (1983).

25. 95 N.M. 387, 622 P.2d 695 (1980). For a discussion of *Board of County Commissioners,* see *1980-81 Administrative Law Survey, supra* note 1, at 13-15.

26. The Paradise Hills Special Zoning District Commission was formed in 1979 pursuant to N.M. Stat. Ann. §§ 3-21-15 to -26 (1978). It was agreed by the parties that the district commission had authority over the land involved. 99 N.M. at 631, 661 P.2d at 1330.

27. The real dispute involved whether the city and county could maintain its planning authority over the area even though zoning authority had passed to the zoning commission. The court never had to reach that question because it concluded that the action of the commission did not violate the city and county master plan.

28. The zoning district commission had previously subdivided the property into three tracts from M-1 to CN (Neighborhood Commercial) and R-2 (Apartment Zone). In 1981, the commission rezoned the CN parcel to C-1 and R-2. It is that latter action which the city and county challenged. 99 N.M. at 631, 661 P.2d at 1330.

29. B. Schwartz, Administrative Law § 4.3, at 149 (2d ed. 1984). Much of the recent academic commentary on rulemaking is collected in DeLong, *Informal Rulemaking and the Integration of Law and Policy,* 65 Va. L. Rev. 257, 260 n.22 (1979). Some of the better general treatments of this subject are Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform,* 118 U. Pa. L. Rev. 485 (1970), and Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 Harv. L. Rev. 921 (1965).

cies used to formulate policies which are general in nature, prospective in application, and applicable to broad classes of individuals.[30] Rulemaking increasingly has been substituted for adjudication as the preferred regulatory technique for the establishment of agency policy, in large measure because "[n]on-evidentiary rulemaking permits broad participation in the administrative process and permits an agency to develop integrated plans in important policy areas."[31]

In *Community Public Service Co. v. New Mexico Public Service Commission*,[32] the supreme court had an opportunity to resolve the questions surrounding the choice between rulemaking and adjudication as the primary tool of policy formulation in one of the major regulatory agencies in the state. The court, however, failed to articulate clearly guiding principles to resolve these issues. Instead, it left this area in a state of unnecessary confusion.

During 1978, the Public Service Commission (PSC) considered setting a general policy on the treatment of public utility advertising expenditures for purposes of setting rates.[33] The PSC did so by way of a notice of proposed rulemaking with respect to a proposed General Order (G.O.).[34]

30. *See 1979-80 Administrative Law Survey, supra* note 1, at 11 n.58. The rulemaking function is distinguished from the adjudicatory function, which involves the application of agency rules and regulations to particular parties who come before the agency. *See 1980-81 Administrative Law Survey, supra* note 1, at 33-34.

31. B. Schwartz, *supra* note 29, § 4.3, at 149. Of course, not all policy questions are uniquely suited for resolution in the context of rulemaking. Adjudicatory matters may raise serious questions concerning public policy, and the adjudicatory process may be well suited for the resolution of some of these policy questions. For example, the agency may require further case-by-case analysis of the problem before it is ready to formulate a general policy, or the nature of the regulation may be so case specific that general policies are not particularly helpful. Indeed, the National Labor Relations Board is an example of one agency which, by structure and function, may be better suited to set policy by adjudication rather than rulemaking. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). *See* also Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedures Act*, 79 Yale L.J. 571, 587-98 (1970) (comparing advantages and disadvantages of adjudication and rulemaking in the context of the National Labor Relations Board).

There is a longstanding debate among the commentators as to which method of policy setting is best. *Compare* K. Davis, Discretionary Justice: A Preliminary Inquiry 52-96 (1979) (extolling virtues of adjudicatory policy setting), *with* H. Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards (1962) *and* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485 (1970) (favoring the use of rulemaking for policy setting).

32. 99 N.M. 493, 660 P.2d 583 (1983).

33. This effort by the PSC was initiated under the compulsion of the Public Utility Regulatory Policy Act (PURPA), *see* 16 U.S.C. §§ 2601-2645 (1982), which was part of the Congressional package of responses to the energy crisis suffered in the wake of the Iranian oil cutoff and the OPEC embargo in the early 1970's. This effort by the PSC is an example of "generic rulemaking"—a procedure which allows for resolution of a general question which may affect several different regulatory proceedings or industries. It is precisely the kind of "innovative procedure" which the United States Supreme Court approved in The Permian Basin Area Rate Cases, 390 U.S. 747 (1968), as an effective means to allow agencies to resolve efficiently issues which frequently appear in every adjudication.

34. The PC refers to decisions in particular adjudications as "Orders," and to its rules or regulations as "General Orders." This is but one example of the confusion that often attends the terminology

The commission requested all gas and electric utilities to provide relevant information and, in May, 1978, "held a non-adversarial public hearing regarding the General Order."[35] Subsequently, the PSC approved and issued G.O. 31, which provided for consistent treatment for all utilities seeking to include advertising expenses in their rate formulae.

Several utilities petitioned for review of the PSC's action in the district court, but the court dismissed for lack of jurisdiction on the ground that the utilities were not "parties" to the proceeding before the commission and, therefore, lacked standing to challenge the ruling.[36] On appeal by the utilities, the supreme court reversed and remanded the case for a hearing on the merits of the utilities' complaints against G.O. 31.[37]

In addition to their dispute on the standing point, the parties were sharply divided over whether the appeal was timely filed. The commission urged that the utilities were, in effect, challenging the validity of G.O. 29, which set up the procedure for rulemaking decisions.[38] The utilities responded by arguing that G.O. 31 was not a "rule" promulgated pursuant to G.O. 29, but rather, was an order "affecting rates" which required full compliance with the adjudicatory procedures provided by statute.

In a confusing ruling on those two arguments,[39] the court agreed with the commission that if the utilities' argument was a collateral attack on G.O. 29 it would be time-barred by the statute of limitations imposed for challenging PSC orders.[40] The court also agreed with the utilities, however, that their argument was not a collateral attack on G.O. 29, but instead, was a challenge to PSC's adoption of G.O. 31 without an ade-

in this area, where the relevant statutory definitions of "rules," *see* 5 U.S.C. § 551(4) (1982); N.M. Stat. Ann. § 12-8-2(G) (1978), and "orders," *see* 5 U.S.C. § 551(6) (1982); N.M. Stat. Ann. § 12-8-2(I) (1978), are formulated in terms of the process necessary to reach those distinctly different decisional results. As aptly put by Professor Schwartz, "Today the administrative law student too often feels like Alice after going through her looking glass; he yearns for that other room where chairs are actually chairs and tables, tables—and rules and regulations are rules and regulations and orders, orders." B. Schwartz, *supra* note 29, § 4.01, at 144.

35. 99 N.M. at 497, 660 P.2d at 584.

36. *Id.* This aspect of the *Community Public Service* opinion is addressed *infra* notes 201-07 and accompanying text.

37. *Id.* at 499, 660 P.2d at 587.

38. G.O. 29 was adopted by the PSC in June 1977. It established a rulemaking procedure which enables the PSC "to secure the views and statements of all interested persons concerning rules and regulations adopted under the Public Utilities Act, N.M. Stat. Ann. § 68-5-1 (1953)." PSC General Order 29 (June 1977). As described by the court, "G.O. 29 requires the PSC to give advance notice of proposed action in order to afford all interested persons reasonable opportunity to submit data and arguments relating to a proposed rule, and to adopt any rule or regulation by issuing a General Order." 99 N.M. at 494, 660 P.2d at 584.

The timing issue is also addressed *infra* notes 150-57 and accompanying text.

39. The main confusion stems from the wording the court uses. It claimed to "hold" that "any attack on G.O. 31 is time-barred because no challenge to G.O. 29 was brought within the 30-day period set out in Section 62-10-1." At the same time, it found that "the challenge [was] directed to the PSC's failure to hold a hearing and not to G.O. 29" and, therefore, was not time-barred. 99 N.M. at 496, 660 P.2d at 586.

40. 99 N.M. at 496, 660 P.2d at 586.

quate hearing in conformity with the requirements of N.M. Stat. Ann. section 62-10-1 (1978).[41] The court concluded that this challenge to the PSC's failure to hold the statutorily mandated hearing was not a collateral attack on G.O. 29 and, therefore, was not time-barred.

The court sidestepped the critical question—"whether G.O. 29 applies to the adoption of orders like G.O. 31"—by holding instead "that G.O. 29 hearings will satisfy the requirements of Section 62-10-1."[42] The court noted that the statute does not specify the minimum requirements of a hearing. It then sketched the rulemaking procedure provided by G.O. 29 which includes the appointment of a hearing officer, the making of a record of the hearing, and the opportunity for all interested persons to be heard.[43] Although the court recognized that this procedure was not complete,[44] the court concluded that "[n]o authority has been cited which would require more extensive procedural requirements than those outlined in G.O. 29. Thus we hold that G.O. 29 hearings will satisfy the requirements of Section 62-10-1."[45] The problem, however, is that a fair reading of section 62-10-1 and related statutory provisions makes clear that, with respect to matters "affecting rates," more formal adjudicatory hearings are required than was provided in this case or authorized by G.O. 29.[46]

41. *Id.* at 495, 660 P.2d at 585. N.M. Stat. Ann. § 62-10-1 (1978) provides in pertinent part:

> Upon a complaint made and filed . . . that any rate . . . is in any respect unfair, unreasonable, unjust or inadequate, the commission may proceed . . . to hold such hearing as it may deem necessary or appropriate; but no such hearing shall be had without notice, and no order affecting such rates . . . shall be entered by the commission without a hearing and notice thereof. . . .

42. 99 N.M. at 496, 660 P.2d at 586.

43. *Id.*

44. Specifically, the court noted that "the rules of civil procedure and evidence are not enforced at such hearings." *Id.*

45. *Id.*

46. The court was technically correct in noting that "§ 62-10-1 does not specify the minimum requirements of a 'hearing,'" 99 N.M. at 496, 660 P.2d at 586, but that subsequent sections of the act make clear that, with respect to § 62-10-1 hearings, certain procedures are required. Those statutory procedural requirements include several normal adjudicatory components not followed in G.O. 29 proceedings: the right to be heard in person or through counsel, N.M. Stat. Ann. § 62-10-5 (1978); commission administering of oaths, the examination of witnesses, and the use of compulsory process to force the attendance of witnesses, *id.* §§ 62-10-7, -9; and a complete record which forms the basis of findings and a final order. *Id.* § 62-10-15.

These applicable procedures in § 62-10-1 hearings are the devices used for the resolution of adversarial disputes which are adjudicatory in nature, *see* K. Davis, Administrative Law Text 139-40, 196-212 (1972), and are markedly different from the "notice and comment" procedure envisioned by G.O. 29 for the purpose of informing the agency of policy choices.

Rather than the adjudicatory model envisioned by the statute, G.O. 29 was designed to encompass the "notice and comment" procedures which emulate a legislative hearing. That process has been appropriately described, in contrast to an adjudicatory hearing, as follows:

> The purpose of the procedure is to enlighten the decisionmaker by exposure of the view points of interested persons, and to enable them to have a say. Following

By dodging the key issue—whether the PSC has informal rulemaking authority to adopt generic rules which may in an indirect fashion "affect rates" when applied to particular ratemaking proceedings—the court failed to provide needed guidance in this important area. On the other hand, by holding that G.O. 29 hearings meet the requirements of section 62-10-1, the court seems to have given the PSC backhanded approval to conduct generic rulemaking, even if the promulgated rules will indirectly "affect rates."

Ultimately, what is necessary in this area is a forthright acknowledgment of the generic rulemaking authority of the PSC and other similar agencies, even when policies established thereby will naturally affect subsequent adjudicatory decisions.[47] Such a result is compelled by consideration of three important factors: (1) the recognition of the essential distinction between the rulemaking function envisioned by G.O. 29 and the adjudicatory functions contemplated by section 62-10-1;[48] (2) the proper deference which ought to be afforded to an agency's choice of procedures for the establishment of agency policy;[49] and (3) the legitimate concern articulated by the court that ways be sought to reduce "the length and expense of rate cases."[50] Unfortunately, *Community Public Service* does not represent that unequivocal adoption of modern rulemaking procedures. Even in its confusion, however, it represents a tentative step in the right direction.

> the analogy to legislative practice the courts adhered to the traditional notion that in making its final decision, an agency is not required to base its decision on the written comments submitted or whatever materials might be included in the notice of the proposed rulemaking. . . . Notice and comment rulemaking was thus not "on the record."

S. Breyer & R. Stewart, Administrative Law And Regulatory Policy 478-79 (1979).

47. In fact, any generic rulemaking which will establish a policy of the agency applicable in later adjudications will, by definition, "affect" the adjudicatory decisions of that agency. When the primary adjudicatory function of the agency is ratemaking, any substantive rule is bound to "affect such rates." That necessary affect can never be a bar to rulemaking. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 546 (1978) (rulemaking decision on importance of waste disposal applied in subsequent nuclear plant licensing proceeding). If it were, the primary adjudicatory function of an agency would preclude the use of rulemaking for virtually all policy decisions of importance to the agency.

48. Had the court focused on the total context of § 62-10-1, instead of narrowly focusing on whether the subject of this particular hearing "affected rates," it could well have determined that § 62-10-1 applied only to complaints which sought to challenge rates as unjust and unreasonable, and not rules which are general in nature but impact collaterally on the rate setting process. Under such an approach, the procedures of § 62-10-1 would be applicable only to the adjudicative functions of the commission, and inapplicable to the process of informal rulemaking which is general in scope and applicability. *But see* N.M. Stat. Ann. § 12-8-2(B) (1978) (erroneously defining ratemaking as rulemaking).

49. *See supra* note 47 and accompanying text.

50. 99 N.M. at 494, 660 P.2d at 584.

B. Orders and Adjudications

The most distinctive feature of administrative adjudications involving individual liberty and property interests[51] is the applicability of the tenets of procedural due process.[52] Central to this constitutionally protected right is an opportunity to be heard before the deprivation of liberty or property occurs. The necessary precurser to the opportunity to be heard is "[n]otice reasonably calculated to apprise parties of the pendency of the proceeding and afford them an opportunity to present their case."[53] The right of procedural due process includes the right to "timely" notice,[54] and in addition, the notice must include adequate information about both the procedural rights afforded and the substantive issues involved.[55]

With respect to the requirement of adequate notice, due process requires notice sufficient "to appraise the affected individual of, and permit adequate preparation for, an impending 'hearing,'"[56] including "the matters of fact and law asserted."[57] The test in determining the adequacy of an agency notice is whether it reasonably informs the individual of the matters to be addressed at the hearing.[58]

Two cases decided during the survey year demonstrate how firmly the "reasonably informs" standard is rooted in our law. These cases illustrate that the standard is not a rigid, formalistic one, but rather one which looks to the facts and circumstances of the particular case, measured by notions of reasonableness. Both cases upheld administrative decisions against claims of lack of notice and suggest that, if the agency takes reasonable steps to provide adequate notice, the affected individual has a heavy burden when attempting to show inadequacy of notice as grounds for voiding an agency action.

In *Jones v. New Mexico State Racing Commission*,[59] the owners of a race horse challenged its disqualification as the winner of the 1982 World's

51. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

52. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

53. B. Schwartz, *supra* note 29, § 6.4, at 280.

54. Notice given a few hours or days before the hearing is clearly insufficient, although the Court in *Goldberg* indicated that the seven day notice provided in welfare termination proceedings would be adequate, absent special circumstances. 397 U.S. at 268. Statutory time limits for notice are presumptively adequate, and it is not uncommon for state Administrative Procedures Acts to set minimum requirements. B. Schwartz, *supra* note 29, § 6.4, at 282-83.

55. B. Schwartz, *supra* note 29, § 6.4, at 283.

56. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1978).

57. 5 U.S.C. § 554(b) (1982). This provision of the federal Administrative Procedures Act codifies the notions of due process; it is mirrored in the New Mexico Administrative Procedures Act. *See* N.M. Stat. Ann. § 12-8-10 (1978).

58. The test is one of reasonableness in relation to the facts. The individual must be given such notice of the issues involved at the hearing as will reasonably enable him to prepare his case. B. Schwartz, *supra* note 29, § 6.5, at 283.

59. 100 N.M. 434, 671 P.2d 1145 (1983).

Championship Quarter Horse Classic on the basis of an infraction of the rules during the running of the race. In addition to other claims,[60] the Jones' argued that they were not advised of the specific regulation of the State Racing Commission which warranted disqualification and that the commission's failure to specify the particular rule infraction at the beginning of the hearing prevented them from preparing a defense.[61]

The court found, however, that the Jones' had received a copy of the stewards' ruling, which recited the ruling made at the track, and a letter specifying the general grounds on which the stewards' ruling was based.[62] Based on this evidence, the court held that the requirements of both the Rules Governing Horse Racing in New Mexico[63] and due process were satisfied by the notice given to the Jones'.[64]

In holding that the notice in *Jones* met the "reasonably informs" standard of due process, the court also noted that "appellants' claim is not supported by any factual showing of prejudice."[65] This language suggests that for a party to establish that he was not afforded adequate notice, the party must show both the inadequacy of that notice in terms of its failure reasonably to inform him of the issue to be considered and that such inadequate notice prejudiced him in presenting his claim or defense. *Jones* implies that, unless both these elements are established, notice will be considered sufficient to withstand due process scrutiny.

This latter point was reiterated in *Wolfley v. Real Estate Commission*,[66] where a real estate salesman challenged the sufficiency of the notice he received in an action by the Real Estate Commission which resulted in the temporary suspension of his realtor's license. The notice quoted several sections of the statute governing real estate brokers and salesmen as the legal basis of the charge against him and specified the conduct by Wolfley alleged to be in violation of those provisions of law.[67]

The court rejected Wolfley's argument that he had insufficient notice of the charges against him to allow him to prepare a defense. The court

60. The Jones' challenge to the impartiality of the decisionmaker is covered *infra* notes 114-22 and accompanying text, and their claim of lack of substantial evidence to support the decision is touched upon *infra* note 189.

61. 100 N.M. at 436, 671 P.2d at 1147.

62. *Id.*

63. Rule 422.05 of the Rules Governing Horse Racing in New Mexico (1981) provides: "[A]ny License Holder aggrieved by any penalty imposed by the Stewards may request specification of charges and ground on which the Order, Regulation, Rule or Ruling was based. . . ."

64. 100 N.M. at 436, 671 P.2d at 1147.

65. *Id.*

66. 100 N.M. 187, 668 P.2d 303 (1983).

67. The allegations included charges of untrustworthiness, impropriety, and dishonesty, which the court found were adequately noticed by the charge asserting "various misrepresentations or untrustworthy statements to the [buyers], that he knew or should have known were such." *Id.* at 188, 668 P.2d at 304.

also considered that Wolfley was represented by counsel and that he had failed to raise any of these objections prior to the hearing or before the district court.[68] Finding "no evidence of prejudice or extraordinary circumstances,"[69] the court refused to ignore the settled doctrine that it should not consider points on appeal which are not raised in the administrative proceeding.[70]

Neither of these cases are extraordinary. They do illustrate, however, the fundamental principles which govern notice in the adjudicatory context. First, adequate notice is to be judged by a "reasonableness" standard. Second, if the notice passes that standard, the complaining party must establish some special "prejudice" or "extraordinary circumstances" which ought to relieve him from the consequences of what would otherwise be reasonable notice. Third, *Wolfley* makes clear that, because inadequate notice may be cured prior to the hearing, the affected party has a responsibility to make timely objection "or request that a more definite statement be issued."[71] Absent that precaution, the appellate courts are not wont to look favorably on claims of lack of adequate notice.

C. *Process of Proof*

A critical concern in the context of adjudicatory proceedings is "the process by which information is assembled to form the record upon which a final administrative decision must rest."[72] As the Supreme Court made clear in *Goldberg v. Kelly*,[73] "the decision maker's conclusion . . . [in an adjudication] must rest solely on the . . . evidence adduced at the hearing."[74] Thus, the creation of a record is critical to adjudicatory decisions and is of grave concern to the litigant at the stage of the proceeding when he seeks to present his evidence.

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68. *Id.* at 189, 668 P.2d at 305.

69. *Id.*

70. *See, e.g.*, Kaiser Steel Corp. v. Revenue Div., Taxation & Revenue Dep't, 85 N.M. 718, 628 P.2d 686 (Ct. App.), *cert. denied*, 96 N.M. 116, 628 P.2d 686 (1981). *But* see, *e.g.*, Tiffany Constr. Co. v. Bureau of Revenue, 96 N.M. 296, 629 P.2d 1225 (1981) (appellate court may consider issues not raised below which are of general public importance or which must be determined to protect fundamental rights).

71. 100 N.M. at 189, 668 P.2d at 305.

72. *1979-80 Administrative Law Survey, supra* note 1, at 13.

73. 397 U.S. 254 (1970).

74. *Id.* at 271. This requirement lies at the very heart of the due process right to be heard. As explained by Chief Justice Vanderbilt of the New Jersey Supreme Court:

> Unless the principle is observed, the right to a hearing itself becomes meaningless. Of what real worth is the right to present evidence and to argue its significance at a formal hearing, if the one who decides the case may stray at will from the record in reaching his decision?

Mazza v. Cavicchia, 15 N.J. 498, ___, 105 A.2d 545, 554 (1954). The requirement, therefore, is linked to the due process requirement of an opportunity to confront and to cross-examine adverse witnesses. *See, e.g., Goldberg*, 397 U.S. at 269; Greene v. McElroy, 360 U.S. 474, 496-97 (1959). Indeed, if the evidence which is relied on by the decisionmaker is not disclosed to the individual,

In *Cruz v. New Mexico Department of Human Services*,[75] the court considered what evidence a welfare recipient could properly submit for a hearing officer to consider in reviewing a caseworker's decision to terminate assistance. Cruz began receiving assistance in 1974 under the Aid to Families with Dependent Children program. In 1982, as part of a "quality assurance review," the Department of Human Services discovered that Cruz' mother had deeded two tracts of real property to Cruz in 1976. Cruz subsequently executed deeds conveying the properties to her brother without receiving a monetary return. Based on department regulations that make possession of such a resource and its subsequent transfer without compensation proper grounds for termination of aid,[76] the department ruled that Cruz was ineligible for continued benefits. At the hearing, Cruz presented evidence that she never was aware of the 1976 transfer from her mother until notified by the department, and that when she became aware of the conveyance, she transferred the property to her brother in lieu of returning it to her parents.[77]

On appeal from the denial of assistance, the court of appeals first had to contend with the department's argument that the court's review should be limited "to whether the [d]epartment's representative proceeded properly on the basis of information known prior to the 'fair hearing'."[78] The court properly brushed this argument aside as "frivolous" and "contrary to [N.M. Stat. Ann.] §27-3-3(C) and [Income Support Division Program

that amounts to a violation of due process. *See* Hillman v. Health & Social Servs. Dep't, 92 N.M. 480, 590 P.2d 179 (Ct. App. 1979); *1979-80 Administrative Law Survey, supra* note 1, at 14-15.

These due process protections are built into adjudicatory proceedings affecting individual rights and entitlements in part because of the importance of the rights and entitlements involved. In addition, however, the importance of the decision being confined to the record—and the correlative notions of confrontation and cross-examination—are also rooted in the nature of adjudicatory decisionmaking. Because adjudications, unlike rulemaking proceedings, are normally designed to determine past facts and to apply legal principles to resolve a specific dispute between particular individuals, the theory of confining the decisionmaker to the record also serves other important functions. It helps ensure that the agency has an adequate basis in fact for its decision, and it also ensures that a reviewing court will have a full opportunity to evaluate the basis for the initial decision. B. Schwartz, *supra* note 29, §7.13, at 368.

75. 100 N.M. 133, 666 P.2d 1280 (Ct. App. 1983).

76. Under the department's regulations, possession of "excess real property" is a resource which must be counted against the resource limitation for eligibility. Furthermore, a subsequent transfer of such a resource without compensation (which then would be added to available resources) constitutes grounds for the termination of benefits. N.M. Dep't of Human Servs., Income Support Div. Manual §272.2 (1982).

At the time the county office gave Cruz notice of the proposed termination, the department had Cruz' statement that she had never wanted the property, that she had failed to report the transfer, and that she had transferred the property to her brother. The department thus had a sufficient basis to take the action to suspend benefits. 100 N.M. at 133, 666 P.2d at 1282.

77. The evidence presented at the hearing established that Cruz' mother continued to pay the taxes on the property; that Cruz' parents continued to reside on the property; that the transfer was intended to convey no present interest; and that "the deeds were 'more or less' like a will." 100 N.M. at 136-37, 666 P.2d at 1283-84.

78. *Id.* at 135, 666 P.2d at 1282.

Manual] § 275.1."[79] In so doing, the court implicitly held, in accordance with well-established principles,[80] that the adjudicatory nature of the welfare "fair hearing" requires a full opportunity on the part of the recipient to confront and to counter the evidence relied on by the department.

By requiring that the agency consider the evidence presented on the record, and not merely the evidence considered by the caseworker before the hearing, the court of appeals conformed to the dictates of due process as established by *Goldberg v. Kelly.* The court also gave its support to the idea that the primary focus of the "fair hearing" is the accuracy of the initial decision—to ensure that an eligible recipient is not wrongfully deprived of "the bare necessities" on the basis of caseworker error.[81] The court thereby prevented a hearing on the merits of an individual's claim from revolving solely around an evaluation of the caseworker's good faith reliance on the evidence brought to his attention prior to the hearing.[82]

The court also held that the evidence of record did not support the department's conclusion that Cruz had transferred the property to retain her eligibility.[83] The court found that "no present beneficial interest in the two properties was conveyed to Cruz: therefore, she had no property resource to transfer and could receive no monetary return."[84] As a result, the court concluded that "the two tracts were not an available resource in determining Cruz' eligibility."[85]

This analysis is also of general importance because it confirms an important point about administrative adjudications: evidence in administrative hearings must be evaluated in relation to the relevant legal standard being administered by the particular agency. Although the transfer

79. The statutory requirement, mirrored in the regulation, requires the opportunity for cross examination. Furthermore, department regulations specifically require that "information utilized at the hearing must be available to the claimant and that only information available to the claimant may be a part of the hearing record or used in making a decision." *See* 100 N.M. at 133, 666 P.2d at 1282 (quoting N.M. Dep't of Human Servs., Income Support Div. Manual § 275.472 (1982)).

80. *See, e.g.*, Hillman v. Health and Social Servs. Dep't, 92 N.M. 480, 590 P.2d 179 (Ct. App. 1979) (termination of benefits cannot be based upon any information other than that contained in the record).

81. *Goldberg* clearly presumes accurate fact-finding and law-applying as important due process goals in the welfare area. 397 U.S. at 264. The studies conducted since *Goldberg*, however, suggest that there is little evidence that court decisions imposing more procedural formalities have led to significantly more accurate decisions in the welfare context. *See, e.g.*, Mashaw, *The Management Side of Due Process: Accuracy, Fairness and Timeliness in Adjudication of Social Welfare Claims*, 59 Cornell L. Rev. 772 (1974).

82. The court was correct in labeling this argument "frivolous," 100 N.M. at 135, 666 P.2d at 1282, because acceptance of such an argument would destroy the basis for the hearing and fly in the face of the constitutional doctrine enunciated in *Goldberg*. Such an approach would function as a prophylactic measure to monitor the motivation of caseworkers, rather than the check on accuracy, irrespective of motive, which *Goldberg* and its progeny seek to protect.

83. *See supra* note 76.

84. 100 N.M. at 137, 666 P.2d at 1284.

85. *Id.*

of deeds from Cruz' mother to Cruz may have been a technical transfer of legal title,[86] the relevant welfare law standard is based on whether the property in question amounted to a resource available to meet the current needs of the recipient.[87] In this instance, therefore, the department focused too closely on legal questions of "title" and lost sight of the administrative standard —"available resources"—which it is required to administer.

Cruz, therefore, highlights two important principles involving the process of proof in adjudicatory proceedings. First, principles of due process require that an individual being deprived of a benefit or entitlement by an agency must be afforded a reasonable opportunity to confront and to overcome the evidence put forward by the agency. Second, the evidence presented in adjudicatory proceedings is only relevant in the context of the legal standard which the agency has been delegated to administer.

D. Decisionmaking Process

During the survey year there were four cases which dealt with three different aspects of the adjudicative decisionmaking process. Two dealt with the due process requirement of an impartial decisionmaker. A third dealt with the nature of the evidence on which the decisionmaker may rely in rendering his decision. The fourth case involved the requirement that a statement of reasons accompany a decision.

1. Impartial Decisionmaker

An impartial decisionmaker is a constitutionally required component of the right to a fair hearing in the adjudicatory context. The due process clause of the fourteenth amendment mandates that a state cannot deprive an individual of liberty or property interests without a hearing before a fair and impartial tribunal.[88] Issues concerning the fairness of a tribunal normally arise in the context of efforts to disqualify adjudicatory decisionmakers for bias or prejudice. Hearing officer bias falls into one of

86. Even focusing on the property law aspects of the transactions, the court found that there were conflicting interpretations on whether delivery ever took place. The court also concluded that if there was delivery, "the evidence shows a resulting trust." *Id.* at 136, 666 N.M. at 1283.

87. In particular, the court limited its inquiry to whether the property transferred to Cruz constituted a "property resource" within the meaning of Manual § 221.831 which must be considered in determining her continued eligibility. Since Manual § 221.83 specifies that only "available resources" are to be used in the eligibility determination, and the court concluded that Cruz had no present interest in the property, the court necessarily held that the two tracts were not an available property resource for eligibility purposes. *See also* Russell v. New Mexico Human Servs. Dep't, 99 N.M. 78, 653 P.2d 1224 (Ct. App. 1982); Baca v. Health & Social Servs. Dep't, 83 N.M. 703, 496 P.2d 1099 (Ct. App. 1972).

88. A fair and impartial hearing officer is as much an essential ingredient of due process in the administrative context as it is in the judicial context. *See, e.g.,* Gibson v. Berryhill, 411 U.S. 564 (1973); Goldberg v. Kelly, 397 U.S. 254 (1970).

three categories:[89] personal or pecuniary interest;[90] personal prejudice;[91] and prejudgment bias.[92] Two cases decided during the survey year gave expression to the legal principles which control in the latter two categories.

In *Lujan v. New Mexico State Police Board,*[93] the court was confronted with a disqualification claim based on personal prejudice.[94] The New Mexico State Police terminated George Lujan from his job as a civilian supply agent. Before the termination hearing, Lujan moved to disqualify the chairman of the State Police Board from participating on the ground that "he was biased and incapable of rendering an impartial decision."[95] Lujan's claim of bias was based on two incidents which occurred between

89. For further treatment of the differences among the three types of bias, see *1982-83 Administrative Law Survey, supra* note 1, at 46-48.

90. Interest bias stems from "the ancient tenet of Anglo-American justice that 'no man shall be a judge in his own cause.'" B. Schwartz, *supra* note 29, § 6.16, at 315. As explained by one group of commentators, "A financial interest in the outcome of a proceeding produces a distortion of judgment not readily correctable by persuasive evidence in the hearing. The bias . . . is produced by external circumstances that cannot be modified by the present proceedings." W. Gellhorn, C. Byse & P. Strauss, Administrative Law 765 n.6 (1979).

Given these considerations, the appearance of impartiality may be a particularly appropriate consideration to counter problems with interest bias. Where the regulatory body is comprised of people drawn from the businesses and professions being regulated, however, there is, by definition, some level of pecuniary interest in the disciplining of one's peers. If all such agency members are subject to disqualification by virtue of some *potential* pecuniary interest, then the ability of the agency to function would be seriously impaired. *See* Friedman v. Rogers, 440 U.S. 1 (1979).

Of course the "doctrine of necessity" protects against extensive disqualifications which would destroy the ability of the only body competent to decide necessary questions. *See, e.g.,* United States v. Will, 449 U.S. 200, 213-14 (1980) (the doctrine of necessity requires that federal judges are not barred from hearing challenge to federal statute governing federal pay raises); *see also 1980-81 Administrative Law Survey, supra* note 1, at 47 n.282; *infra* note 122.

91. As described by one court:

> The words "personal bias or prejudice" carry with them the idea of such personal dislike of a litigant as an individual or party to the suit, or such personal favoritism or regard for some opposite party to the suit, that the mind of the judge will be swayed or prevented by the one or the other from an impartial consideration of the merits of the controversy.

Tele-Trip Co. v. NLRB, 340 F.2d 575 (4th Cir. 1965). In order to prevent party manipulation of disqualification during the hearing, the personal antagonism must arise outside the hearing process. *See 1980-81 Administrative Law Survey, supra* note 1, at 46 n.279.

92. Prejudgment bias arises when the hearing officer has prejudged adjudicative facts such that the hearing is designed to reach a pre-determined result. *See* B. Schwartz, *supra* note 29, § 6.18, at 320-21. A party must show more than fixed views on the law; disqualification on this ground requires preferred opinions as to the facts. *See 1980-81 Administrative Law Survey, supra* note 1, at 46 n.279.

93. 100 N.M. 149, 667 P.2d 456 (1983).

94. Neither the appellant nor the court ever identified the kind of bias being alleged, but the nature of the charge, *see infra* note 96, makes clear that Lujan was claiming that the chairman of the board was personally prejudiced against him because of the alleged "confrontations." Although there could be an element of prejudgment bias here, nowhere in the opinion does the court tie the events surrounding the "two incidents" of alleged bias to the charges against Lujan.

95. 100 N.M. at 150, 667 P.2d at 457.

Lujan and the chairman.[96] The motion was denied, and the chairman presided at the hearing, but did not participate in the vote upholding the administrative decision to terminate Lujan.[97]

The district court upheld the decision of the board, and on appeal, a divided supreme court affirmed. The majority borrowed the test articulated in a prejudgment bias case, *Reid v. New Mexico Board of Examiners*.[98] The *Reid* test focuses on "whether there is any indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him."[99] Finding that the first incident between the chairman and Lujan lacked "the negative confrontation alleged by Lujan"[100] and that the second incident lacked "any conduct or harsh language on the part of [the chairman] that would indicate a 'possible temptation or bias,'"[101] the court held that Lujan's due process rights were not violated.[102]

The dissenting justice agreed with the majority that the case was controlled by *Reid,* but construed *Reid* as mandating disqualification based on the principle that "our system of justice requires that the appearance of complete fairness be present."[103] The dissent tacitly conceded that no bias was established, but would have held "that because there was an appearance of impropriety, [the chairman's] failure to recuse himself constituted reversible error."[104]

96. The incidents occurred within the two years preceding the termination hearing. The first took place when the chairman made a request for certain supplies. Lujan refused the request and informed the chairman that the request required the approval of a third party. *Id.* When the chairman returned with the approval, Lujan filled the request. *Id.* The second involved a similar incident—initial refusal by Lujan to fill the chairman's request, followed by compliance with the request after presentment of an authorized request. At the time of the second incident, the chairman commented "I guess [Lujan] doesn't understand. The Chief has told him thirteen or fourteen times that I am the boss." *Id.*

97. 100 N.M. at 151-52, 667 P.2d at 458-59 (Sosa, J., dissenting).

98. 92 N.M. 414, 589 P.2d 198 (1979). *Reid* involved claims of prejudgment bias and pecuniary interest lodged against a board member. On appeal, however, the essential bias claim was limited to the fact that principles of prejudgment bias required the disqualification of the board member because of a conversation he admitted having with Reid's secretary. In that conversation, the board member said, "Dr. Reid would be losing his license soon anyway, or wouldn't be practicing soon anyway. . . ." *Id.* at 415, 589 P.2d at 199. The court held that this statement demonstrated that the board member had prejudged the case. *Id.*

99. *Id.* at 416, 589 P.2d at 200.

100. 100 N.M. at 150-51, 667 P.2d at 457-58.

101. *Id.* at 151, 667 P.2d at 458.

102. *Id.*

103. *Id.* at 151, 667 N.M. at 458 (Sosa, J., dissenting) (quoting *Reid,* 92 N.M. at 416, 589 P.2d at 200).

104. 100 N.M. at 152, 667 P.2d at 459 (Sosa, J., dissenting). The dissent was persuaded by Lujan's argument that the appearance of impropriety standard which governs judicial officers, N.M. Code of Judicial Conduct Canon 3(C), applied to bar the chairman from presiding in this case. *But see infra* note 111.

Although both the majority and the dissent agree that due process requires an unbiased tribunal, neither opinion identified the nature of the bias being alleged in this case, and no effort was made to formulate an appropriate standard given the nature of the bias. Moreover, neither opinion focused on the nature of the adjudication in this particular case. Instead, both the majority and the dissent found the case governed by *Reid,* a prejudgment bias case, and then merely chose different strains in that case to support their disparate conclusions.

The "average man sitting as a judge" standard used by the majority implies that a reasonableness criterion is the proper measure for determining whether a trier of fact can render a fair and impartial decision.[105] This standard is particularly appropriate in deciding allegations of personal interest[106] and prejudgment[107] in cases involving professional review boards

105. *See Reid,* 92 N.M. at 416, 589 P.2d at 200.

106. Most personal interest cases present situations where the decisionmaker or a member of his immediate family stands to benefit directly from the given result in a case. *See, e.g.,* Tumey v. Ohio, 273 U.S. 510 (1927) (mayor's court system held unconstitutional where mayor shared in fees and costs assessed against violators). Where the agency is composed of members drawn from those being regulated, however, as in all of the state professional licensing boards, it has been argued "[t]hey all have a financial interest . . . in cases before them." B. Schwartz, *supra* note 29, § 6.16, at 317. The problem, of course, is to find a proper balance between the need to draw on the expertise of members of the given profession and the danger that those chosen members will focus on the interests of themselves and the profession, rather than on the "public interest."

The United States Supreme Court has struck the balance in favor of professional expertise in holding that the mere fact that the board regulating a given profession is made up of members of that profession does not, in and of itself, pose constitutional problems. *See* Friedman v. Rogers, 440 U.S. 1 (1979). The real constitutional question arises, then, only when the degree of personal or pecuniary interest rises to a certain level that is likely to affect the decision. The "reasonable person" standard, therefore, is particularly appropriate here.

An added dimension exists when, as in the optometric profession, there is a war between two factions in the profession (private optometrists and commercial optometrists) and the regulating board is dominated by one group. Personal interest bias in that context raises serious constitutional problems when the dominant group disciplines members of the less-represented group. *See* Gibson v Berryhill, 411 U.S. 564 (1973). As Professor Schwartz accurately points out, "A licensing law such as [that] . . . enables the dominant group in an occupation to set up a present-day version of the guild system, with the licensing requirement a euphemism for a guild-type monopoly." B. Schwartz, *supra* note 29, § 6.16, at 317.

107. Legally sufficient bias to warrant disqualification in the prejudgment context is narrowly confined. It does not extend to fixed views on law or policy, because "[t]he judicial mind is no blank piece of paper; the judge or administrative adjudicator starts with inevitable preconceptions." B. Schwartz, *supra* note 29, § 6.18, at 320. Also, with respect to administrative agencies, the basic legislative policies which underlie their creation often carry with it a necessary policy bias. "In this sense, an agency established to protect the rights of labor is bound to be pro-labor or anti-employer." *Id.*

Rather, prejudgment bias is limited to fixed and preconceived opinions as to the facts, such that it can be said that the agency has completely closed its mind before the proceeding. *See, e.g.,* Federal Trade Comm'n v. Cement Inst., 333 U.S. 683 (1948). Here again, a "reasonable person" standard might be helpful to the determination which must be made to avoid allowing any allegation of factual closed-mindedness to serve as a basis of disqualification. In applying this standard to the facts in *Reid,* there was sufficient evidence to support the disqualification on prejudgment grounds.

made up of members of the profession. In those cases, there is always some element of personal interest and prejudgment, and the "average man sitting as a judge" standard provides some means of necessary line-drawing.

Claims of personal bias, however, call for a more subjective standard tailored to the strength of feeling of the particular decisionmaker under the special facts and circumstances of the case before him.[108] Such an approach requires a case-by-case determination and makes the "reasonableness" standard used in personal interest and prejudgment cases inappropriate to judge claims of personal bias. It is questionable, therefore, whether the court in *Lujan* should have looked to *Reid* for the appropriate standard.

The dissent, on the other hand, focused on the dicta of *Reid*,[109] which puts forward an "appearance of bias" standard rather than an objective standard to determine disqualification. Such a standard may, in fact, be appropriate in peer review or professional discipline cases because of the importance of the personal rights involved and the purely judicial nature of the proceeding.[110] These cases involve determinations of wrongdoing with grave personal and professional consequences and merit traditional judicial protections, including judicial standards governing appearance

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108. Personal bias sufficient to require disqualification of an adjudicatory decisionmaker has been described as:

> [S]uch personal dislike of a litigant as an individual or party to the suit, or such personal favoritism or regard for some opposite party to the suit, as that the mind of the judge will be swayed or prevented by the one or the other from an impartial consideration of the merits of the controversy.

Saunders v. Piggly Wiggly Corp., 1 F.2d 582, 584 (W.D. Tenn. 1924). This standard so speaks to the particular feelings of the individual decisionmaker under the special facts and circumstances of the case before him that it may render inappropriate the use of the "reasonable person" standard used in interest and prejudgment bias. *See supra* notes 90, 92.

109. The *Reid* court held that there was a violation of procedural due process because the board member "admitted making a statement indicating his bias and prejudgment of the issues." 92 N.M. at 416, 589 P.2d at 200. The record, therefore, demonstrated a violation of the "average man sitting as a judge" standard. It is that which formed the basis for the court's decision, rather than the "appearance of complete fairness" test upon which the dissent relied.

The "appearance of fairness" language in *Reid* was inserted between the court's articulation of the need for a disinterested trier of fact and its statement of the "average man sitting as a judge" standard. *See id.* In addition, because there was sufficient evidence to establish a violation of the average man standard, the reference to the appearance of impropriety was not necessary to the decision in the case.

110. Indeed, the *Reid* court understood the need to "judicialize" such proceedings: "When government agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." 92 N.M. at 416, 589 P.2d at 200. It is perfectly appropriate to consider a tougher standard of impartiality for administrative decisionmakers who are engaged in adjudications which have judicial-like consequences, and a lesser one for those engaged in hearing cases which have less of an impact on individual liberty and property interests.

of impropriety.[111] The "appearance of impropriety" standard, however, if applicable at all, should be limited to adjudications of professional wrongdoing,[112] for if applied generally, this criterion would seriously impede administrative processes in the disciplinary context.[113]

In *Jones v. New Mexico State Racing Commission*,[114] the court dealt directly with a claim of prejudgment bias. *Jones* involved the disqualification of a winning race horse. In addition to claiming a lack of notice of the wrongdoing and the applicable standards governing the conduct,[115] the appellants also alleged predisposition amounting to impermissible prejudgment bias on the basis that "four of the five commissioners believed that their primary function was to uphold the Stewards."[116]

The supreme court accepted the principle that prejudgment invalidates administrative decisions,[117] but found no "evidence of any commissioner expressing an opinion that his duty, or that the Commission's duty is to uphold the Board of Stewards."[118] Finding no such evidence, the court fell back on the "presumption of honesty and integrity in those serving as [administrative] adjudicators"[119] to deny the claim of prejudgment bias.

111. The dissent's reliance on the Code of Judicial Conduct may be somewhat misplaced. First, the rule speaks to disqualifications in proceedings in which the judge's "impartiality might reasonably be questioned," N.M. Code of Judicial Conduct, Canon 3(C). The rule, therefore, is more akin to the "average man sitting as a judge" standard, rather than the appearance of impropriety standard. Second, Canon 3(C) does little more than codify, for professional ethics purposes, the well-established grounds for disqualification: personal bias or prejudice, *id.* Canon 3(C)(1)(a); personal or pecuniary interest, *id.* Canon 3(C)(1)(c), (d); and prejudgment, *id.* Canon 3(C)(a)(2).

112. *Reid* can be read as imposing a tougher standard of disqualification in the context of hearings on professional wrongdoing. *See supra* note 110. That might have been a more persuasive basis upon which to argue for the appearance of impropriety standard.

113. If a showing of "the appearance of impropriety" were all that were required to disqualify an administrative or judicial decisionmaker, then any good faith allegation of bias or prejudice ought to be sufficient. But it is clear that suspicion of bias or prejudice is not enough to warrant judicial disqualification. *See* Roybal v. Morris, 100 N.M. 305, 669 P.2d 1100 (Ct. App. 1983). Furthermore, the recent decision invalidating peremptory challenges, State ex rel. Gesswein v. Galvan, 100 N.M. 769, 676 P.2d 1334 (1984), and the contemporaneously adopted rules requiring sufficient cause for disqualification, *see* N.M. R. Civ. P. 88, 88.1; N.M. R. Crim. P. 34.1, 34.2, make clear that more than a mere good faith allegation of cause is required to invoke the right of disqualification.

114. 100 N.M. 434, 671 P.2d 1145 (1983).

115. *See supra* notes 59-65 and accompanying text.

116. 100 N.M. at 436, 671 P.2d at 1147.

117. The court properly stated the principle articulated in *Reid:* "At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias of predisposition regarding the outcome of the case." *Id.* at 437, 671 P.2d at 1148 (quoting *Reid*, 92 N.M. at 416, 589 P.2d at 200).

118. *Id.*

119. *Id.* (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)). *Withrow* involved a constitutional challenge to a state disciplinary board's exposure to investigative facts in the complaint stage, when its members also served as the final decisionmakers at the hearing on the complaint. The Supreme Court held that "[t]he mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing." *Withrow*, 421 U.S. at 55. Thus, the requirement of separation of functions does not generally present constitutional problems, but it continues to cause fairness problems which have often been the subject of legislation. *See generally* B. Schwartz, *supra* note 29, § 6.22.

The separation of functions problem was also raised in *Jones*, based on the fact that counsel for the commission advised the commission and prosecuted the case for the stewards. 100 N.M. at

Jones demonstrates that the presumption of administrative regularity may place a heavy burden on one seeking to attack the validity of an adjudicatory decision[120] on prejudgment grounds, especially when there is no extrinsic evidence available suggesting that the decisionmaker had a preconceived view of the facts of the case. *Jones* also shows, however, that the court neither has articulated a standard as to what a party must demonstrate to meet that burden, nor developed any criteria for evaluating the sufficiency of the evidence presented. Thus, if adjudicatory decisionmakers are circumspect in speaking about the cases which are or may come before them,[121] they are virtually immune from attack on prejudgment bias grounds.[122]

2. Evidence upon Which a Decision May Rest

As aptly put by Professor Schwartz, "[t]here is a fundamental distinction between the admission of incompetent evidence and reliance upon

437, 671 P.2d at 1148. The court dismissed this argument on two grounds. First, appellants made no formal motion to disqualify counsel prior to the hearing; they thus waived the matter. *Id.* Second, the court found that the stewards were not a party and, therefore, counsel was not representing them. *Id.*

Both the claims and the rulings made on this point in *Jones* miss the essential issue. Instead of a claim of bias, the problem is one of separation of functions. As *Withrow* makes clear, there is no constitutional problem with the conduct of counsel. Also, viewed in that light, it is irrelevant whether the stewards were a party to the action.

120. The distinction between rulemaking and adjudicatory functions makes it even more difficult to disqualify a hearing official in a rulemaking procedure. Given the legislative nature of this task, the rulemaking decisionmaker is not, in the absence of statutory compulsion, precluded from considering matters outside the record, and as a result, strict standards of bias are not enforced. *See* Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1174 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) (in rulemaking one must "make a clear and convincing showing that the [decisionmaker] has an unalterably closed mind on matters critical to the . . . proceeding.").

121. The impropriety of commissioners making public statements about cases pending before them was addressed last year in Mountain States Tel. & Tel. Co. v. Corporation Comm'n, 99 N.M. 1, 653 P.2d 501 (1982). *See 1982-83 Administrative Law Survey, supra* note 1, at 8.

122. Indeed, the supreme court has firmly expressed its displeasure with pre-hearing comments made by members of the State Corporation Commission and has threatened dire consequences from such actions in the future. In Mountain States Tel. & Tel. Co. v. Corporation Comm'n, 99 N.M. 1, 653 P.2d 501 (1982), the court declared:

> [C]omments by a Commissioner which constitute prejudgment may constitutionally taint any subsequent hearing so as to invalidate the ensuing order of the Commission. Should this occur, the company would be entitled to put its proposed rates into effect after the expiration of the six-month period as if the Commission had not acted.

Id. at 7, 653 P.2d at 507. For a discussion of *Mountain States*, see *1982-83 Administrative Law Survey, supra* note 1, at 8.

Wholesale prejudgment bias disqualification of the kind sought in *Jones* runs into the doctrine of necessity prohibition against disqualifications which destroy the only tribunal competent to decide the case. The doctrine, or "rule" of necessity has been formulated as follows:

> When the disqualification removes the only tribunal that has jurisdiction over the case, that tribunal may continue to sit, even though its members would otherwise be disqualified by bias; in such a case the right of the individual gives way to the public interest in having the law enforced.

B. Schwartz, *supra* note 29, § 6.19, at 327. For a discussion of recent statutory provisions which may help alleviate problems with the doctrine of necessity in New Mexico, see *1980-81 Administrative Law Survey, supra* note 1, at 48-49.

it in reaching a decision."[123] That distinction holds true in New Mexico under the legal residuum rule, which requires reversal of an agency decision unless it is supported by at least a "residuum" of competent evidence under the exclusionary rules.[124] During this survey year, in *Duke City Lumber Co. v. New Mexico Environmental Improvement Division (Duke City II)*,[125] the supreme court addressed a question concerning the applicability of the legal residuum rule and the quality of evidence which is necessary to support an administrative decision.

In 1979, the Environmental Improvement Board denied Duke City's application for a variance from the air quality control standards at its Española saw mill. The court of appeals reversed the denial and remanded the case to the agency for a further determination of whether the wood smoke emanating from the smoke stack at the mill "is injurious to health and safety."[126] After further consideration of that question, the agency again denied the variance, and the case found its way to the appellate courts for the second time. This time the court of appeals upheld the denial, finding adequate evidence in the record to support the administrative action.[127]

The court of appeals found it troublesome that the critical question of actual harm to health could not "be answered with absolute certainty."[128] As a result, the court of appeals resolved the burden of proof problem by resort to the purposes of the Environmental Improvement Act and the Air Quality Control Act. Finding those acts to be precautionary and preventive in nature, the court held that "while the Board may not rely on guesswork in making a finding as to injury to health or safety, neither must it base its finding on proof of actual harm."[129]

The court of appeals found that Duke City had met its burden of making a prima facie showing that the variance would not result in injury to health or safety. It also determined, however, that the board had overcome the prima facie case and met its burden of establishing sufficient harm to

123. B. Schwartz, *supra* note 29, § 7.4, at 349.

124. *See, e.g.*, Young v. Board of Pharmacy, 81 N.M. 5, 462 P.2d 139 (1969).

125. 101 N.M. 291, 681 P.2d 717 (1984), *rev'g* 101 N.M. 301, 681 P.2d 727 (Ct. App.). *Duke City II* is particularly significant for its adoption of the whole record standard in applying the substantial evidence test of judicial review. For a discussion of that aspect of the opinion, see *infra* notes 174-88 and accompanying text.

126. Duke City Lumber Co. v. Environmental Improvement Bd., 95 N.M. 401, 407, 622 P.2d 709, 715 (Ct. App. 1980), *cert. denied*, 95 N.M. 462, 622 P.2d 1307 (1981) (*Duke City I*). For a more extensive discussion of *Duke City I*, see *1980-81 Administrative Law Survey, supra* note 1, at 40-43.

127. Duke City Lumber Co. v. New Mexico Environmental Improvement Div., 101 N.M. 301, 681 P.2d 727 (Ct. App.), *rev'd*, 101 N.M. 291, 681 P.2d 717 (1984).

128. *Id.* at 305, 681 P.2d at 731.

129. *Id.* The court reached that result because it realized that "[t]o hold that a party must establish actual injury to health or safety would, under the circumstances of this case, not only thwart the purposes of the act in question, but would relegate the agencies charged with its enforcement to reacting to catastrophes after the fact." *Id.*

health by citizen testimony[130] and by establishing that emissions from the mill violated National Ambient Air Quality Standards.[131] The court of appeals held it was sufficient that the board had established that granting the variance "may tend to cause exacerbations of respiratory conditions."[132]

The supreme court reversed both the court of appeals and the agency and remanded the case for further action.[133] In doing so, the court ruled on the burden of proof required under the variance statute which permits a variance to be granted when it "will not result in a condition injurious to health or safety."[134] In reversing the board and the court of appeals, the supreme court: (1) rejected the "tend to cause harm" standard, and required proof that the granting of the variance "would with 'reasonable probability' injure health";[135] (2) rejected all of the citizen testimony without ruling on whether it had probative value;[136] and (3) applied the legal residuum rule in a fashion which prohibited basing the decision on any of the testimony which would not have been admissible in a court of law.[137] In so doing, the supreme court sidestepped a serious waiver problem raised by the court of appeals[138] and expanded the legal residuum

130. The unsworn citizen testimony included personal experiences with coughing spells and eye irritation caused by smoke from the mill and the conclusions of a local doctor drawn from texts and resolutions from medical societies regarding air pollution. *Id.* at 307-08, 681 P.2d at 733-34.

131. Although the parties had marked disagreements about the consequences, it was established that ambient air particulate concentrations resulting from Duke City's wood smoke emissions would on occasion exceed the National Ambient Air Quality Standard (NAAQS) standards by almost 100%. *Id.* at 309, 681 P.2d at 735.

132. *Id.* at 310, 681 P.2d at 736.

133. On remand, the court of appeals found substantial evidence to support the board's finding that the output from the mill violated the NAAQS for particulate matter. The court then took up the question—left open in its *Duke City II* decision—whether "violation of the NAAQS constitutes per se a condition injurious to health or safety." Duke City Lumber Co. v. New Mexico Environmental Improvement Bd., 102 N.M. 8, 10, 690 P.2d 451, 453 (Ct. App.), *cert. quashed*, 101 N.M. 741, 688 P.2d 778 (1984) (*Duke City III*). The court rejected Duke City's arguments that Congress contemplated occasional violations of the standards and that certain margins of safety are built into the standards. Following the authority of Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1154 (D.C. Cir. 1980) (margin of safety protects against uncovered effects and uncertain effects), the court held that violation of the standards "not only justified but mandated denial of Duke City's application for a variance." 102 N.M. at 11, 690 P.2d at 454.

134. *See* N.M. Stat. Ann. § 74-2-8 (Repl. Pamp. 1983). The statute also requires findings on whether the denial would be an arbitrary taking of property and whether it would impose an undue economic burden on the applicant, *id.*, but neither of those portions of the statute were at issue in this case.

135. 101 N.M. at 295, 681 P.2d at 721. Rather than focus on the section of the statute governing variances, as the court of appeals did, the supreme court read into that section the "as may with reasonable probability injure human health" standard found in the act's definition of air pollution. *See id.* at 294-95, 681 P.2d at 720-21 (quoting N.M. Stat. Ann. § 74-2-2(B) (Repl. Pamp. 1983)).

136. 101 N.M. at 295, 681 P.2d at 721.

137. *Id.*

138. The court of appeals made a persuasive argument that Duke City had waived any objection to the competency of the citizen testimony by failing to object to the procedure for taking the testimony when the opportunity was offered. *See* 101 N.M. 301, 307-08, 681 P.2d 727, 733-34. The supreme court did not even acknowledge the problem in ruling that the evidence did not meet the legal residuum rule.

rule beyond the bounds recently established for its use in *Trujillo v. Employment Security Commission*.[139]

The supreme court in *Trujillo* embraced the criticism of administrative law commentators that the legal residuum rule stifles administrative flexibility and undermines the evidentiary principle that administrative agencies ought to be more concerned with probativeness of evidence rather than legal admissibility.[140] The court expressly retained the rule, however, for "those administrative proceedings where a substantial right, such as one's ability to earn a livelihood, is at stake."[141]

The principle of *Trujillo* makes sense when applied to professional disciplinary proceedings and other adjudications involving important governmental entitlements which run to individuals. In *Duke City II*, however, no such individual rights were involved. Despite the court's recitation of the "substantial right" language from *Trujillo, Duke City II* involved mere economic regulation. If the legal residuum rule of *Trujillo* applies in this context, then the "important right such as one's ability to earn a livelihood" language of *Trujillo* is no limitation at all, and the court has implicitly rejected the criticisms of the rule and reinstated the rule in full force for all cases.[142]

3. Statement of Reasons

In the adjudicatory context, where liberty and property interests are at stake, due process requires that the decisionmaker state the reasons for his determinations and indicate the evidence upon which he relied.[143] In *New Mexico Board of Pharmacy v. Reece*,[144] the supreme court strictly construed a codification of this requirement contained in the Criminal Offender Employment Act.[145]

Reece, a pharmacist, lost his license as a result of a conviction in federal court for the transportation of morphine in interstate commerce.

139. 94 N.M. 343, 610 P.2d 747 (1980). For a further discussion of *Trujillo*, see *1980-81 Administrative Law Survey, supra* note 1, at 43-45.

140. 94 N.M. at 344, 610 P.2d at 748.

141. *Id.*

142. The commentators are not unanimous in their criticism of the legal residuum rule. Professor Schwartz, for one, argues in support of an effective legal residuum rule:

> The criticisms referred to ignore the tendency of agencies to exercise little or no control over the admission of evidence, which contributes to the elephantine record in so may agency proceedings. Fear that the legal residuum rule may be invoked leads agencies to insist on more careful presentation and examination of evidence.

B. Schwartz, *supra* note 29, § 7.4, at 351. *But see* K. Davis, Administrative Law Treatise § 14.10 (1958); Utton, *The Use of the Substantial Evidence Rule To Review Administrative Findings of Fact in New Mexico*, 10 N.M.L. Rev. 103, 109-17 (1979-80).

143. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

144. 100 N.M. 339, 670 P.2d 950 (1983).

145. N.M. Stat. Ann. § 28-2-1 to -6 (Repl. Pamp. 1983).

He later applied for reinstatement. The reinstatement petition was governed by the provisions of the Criminal Offender Employment Act.

The main dispute in *Reece* involved the interpretation of the provision of the Criminal Offender Employment Act governing the process of deciding on petitions where the conviction "directly relates to the particular employment, trade, business or profession."[146] The board denied Reece's petition, arguing that it had full discretion to grant or to deny reinstatement when convictions were directly related to the employment. The supreme court disagreed. It held that the relevant provision of the act, as well as a provision governing convictions not directly related to the particular employment, required consideration of rehabilitation.[147]

The court based its reversal of the board's decision on the provision of the Act which requires a statement of reasons for the board decision.[148] The court went further, however, and required the board: (1) to detail its reasons why the conviction directly relates to the given employment; (2) to state why the applicant has not been rehabilitated; and (3) to explain why the applicant should be prevented from practicing his profession.[149]

Reece demonstrates how the requirement of a statement of reasons, in addition to serving the values of due process, can also help foster compliance with statutory goals. In this case, the statutory requirement of a statement of reasons was used by the court to insure that the agency met its specific responsibilities under a given statute and to provide an adequate basis for judicial review as the ultimate check against *ultra vires* activity by the agency.

III. JUDICIAL CONTROL OF ADMINISTRATIVE POWER

A. Timing of Judicial Review

The timing of judicial review is normally a matter specifically provided by statute, and as a result, disputes over timing often devolve into questions concerning whether a party has complied with the letter of the statute.[150] In *Community Public Service Co. v. Public Service Commission,*[151] a more complex facet of a timing question emerged in an appeal from the promulgation of a final regulation by the Public Service Commission.

146. *Id.* § 28-2-4(A)(1).

147. A literal reading of § 28-2-4 supports the argument of the board, but the court read that section of the act in conjunction with the ameliorative purposes of the act, *see* N.M. Stat. Ann. § 28-2-2 (Repl. Pamp. 1983), and concluded that the intention of the legislature was not to create automatic bars to offender employment. 100 N.M. at 341, 670 P.2d at 952.

148. *See* N.M. Stat. Ann. § 28-2-4 (Repl. Pamp. 1983).

149. 100 N.M. at 341-42, 670 P.2d at 952-53.

150. *See 1980-81 Administrative Law Survey, supra* note 1, at 52-55.

151. 99 N.M. 493, 660 P.2d 583 (1983).

The Community Public Service Company and other utilities appealed from the commission's adoption of a generic rule establishing standards relating to rate-setting treatment of utility expenditures for advertising (G.O. 31).[152] After dismissal of their appeal in the district court, the companies sought and obtained reversal in the supreme court. In holding that the utilities could maintain the appeal and that the district court must consider their complaint against the regulation on the merits, the court grappled with a difficult timeliness issue. The commission argued that the appeal was not timely under the thirty-day statutory provision[153] because the utility complaint against the final regulation (G.O. 31) was, in reality, an attack on the procedures outlined in a prior regulation (G.O. 29) providing for generic rulemaking,[154] which the commission adopted a full year before the G.O. 31 proceedings.

The court avoided that issue by finding that the appellants' claims were not based on a challenge to the G.O. 29 procedures.[155] The court did make clear, however, that if the attack on G.O. 31 was in fact a challenge to the G.O. 29 procedures, it would have been time-barred.[156] This conclusion graphically highlights the importance of challenging the substance of rules on direct appeal after they are promulgated. If a party affected by such rules waits until they are applied in a subsequent proceeding, the attack on the substance, as opposed to the applicability, of the rules is untimely and will be barred.[157]

B. Scope of Review

Each year, the area of judicial review is the most widely litigated topic in administrative law.[158] This survey year is no exception. Past surveys were critical of several aspects of the way New Mexico appellate courts

152. The rulemaking aspect of this decision is discussed *supra* notes 32-50 and accompanying text. The standing aspect of the case is discussed *infra* notes 201-07 and accompanying text.

153. N.M. Stat. Ann. § 62-11-1 (Cum. Supp. 1982) provides that, in order to be heard, "a petition for review must be filed within thirty days after the entry of the commission's order."

154. G.O. 29 establishes a rulemaking procedure which enables the commission "to secure the views and statements of all interested persons concerning rules and regulations adopted pursuant to the Public Utility Act, § 68-5-1, N.M.S.A. 1953." Preamble, PSC G.O. 29 (June 1977).

155. Thus, we find that the challenge is directed to the PSC's failure to hold a hearing and not to G.O. 29. Because G.O. 29 fulfills the statutory requirement of Section 62-10-1 that a hearing be held, we need not reach the question whether G.O. 29 applies to the adoption of orders like G.O. 31.

99 N.M. at 496, 660 P.2d at 586.

156. *Id.*

157. Failure to appeal from final action on an agency regulation does not, of course, preclude argument about the applicability of the regulation in a subsequent adjudicatory proceeding in which the agency seeks to apply the regulation. *See, e.g.*, American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir.)(en banc), *cert. denied*, 385 U.S. 843 (1966). Of course, mechanisms for pre-enforcement review of agency regulations provide incentives to regulated industries to participate in rulemaking proceedings and to test the validity of those regulations before the application stage. *See, e.g.*, Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407 (1942).

158. *See, e.g., 1981-82 Administrative Law Survey, supra* note 1, at 244.

have handled the often difficult chore of reviewing agency action. Those criticisms focused primarily on two areas: the confusion of applicable standards under which review takes place,[159] and a similar confusion between the "traditional" and the "whole record" versions of the substantial evidence standard used to review agency factfinding.[160]

This survey year saw a continuation of the confusion among standards of review. With respect to the substantial evidence standard, however, the supreme court put an end to some of the difficulty in that area by adopting the whole record standard of review for agency factual determinations. In addition, the barrage of substantial evidence cases which find their way to the supreme court continued unabated. This phenomenon demonstrates the need for further consideration of a diminished level of scrutiny for second-tier judicial review of administrative fact finding.[161]

1. The Appropriate Standard of Review[162]

Although there are three generally accepted standards for review of administrative decisions—substantial evidence, arbitrary and capricious, and "otherwise not in accordance with law"[163]—the determination of which standard should apply is often unclear.[164] In such cases, a court's

159. It has been suggested that the confusion of the substantial evidence standard of review with the arbitrary and capricious standard of review and their inconsistent application has led to uncertainty about the deference properly afforded to agency decisions in given contexts. *1979-80 Administrative Law Survey, supra* note 1, at 19. *See also 1980-81 Administrative Law Survey, supra* note 1, at 57.

160. *See, e.g., 1982-83 Administrative Law Survey, supra* note 1, at 10-11; *1980-81 Administrative Law Survey, supra* note 1, at 68-73. *See also* Utton, *supra* note 142.

161. *See 1980-81 Administrative Law Survey, supra* note 1, at 72-73.

162. This portion of the Article is derived primarily from an unpublished administrative law seminar paper written by James M. Hudson, J.D., University of New Mexico, 1984, while a third-year law student. The authors thank Mr. Hudson both for his insights and his permission to utilize his paper here. The paper, entitled "Judicial Review of Administrative Decisions: *Frazier v. New Mexico Department of Human Services,*" is on file at the New Mexico Law Review.

Although *Frazier* was decided during the survey year preceding the current one, it is being presented here because it was not treated in last year's survey and it well illustrates a point which continues to surface in our appellate decisions.

163. *See, e.g.*, N.M. Stat. Ann. § 12-8-22 (Cum. Supp. 1982) (New Mexico Administrative Procedures Act); N.M. Stat. Ann. § 27-3-4 (Repl. Pamp. 1982) (Public Assistance Appeals Act). *See generally 1979-80 Administrative Law Survey, supra* note 1, at 19-20. These same standards of review are applicable to judicial control over administrative decisions under the federal Administrative Procedures Act. *See* 5 U.S.C. § 706 (1976).

164. The substantial evidence standard is the dominant standard used to review agency factual determinations. S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 196 (1979). The arbitrary and capricious standard is designed to test agency conclusions of law and policy to determine whether they are rational and reasonable. *Id.* The arbitrary and capricious standard has been used in conjunction with the substantial evidence standard to reverse agency action based on insufficient evidence, *see, e.g.*, New Mexico Human Servs. Dep't v. Garcia, 94 N.M. 175, 177, 608 P.2d 151, 153 (1980) (because decision was supported by substantial evidence, it was not arbitrary or capricious), although the commentators disagree on whether the substantial evidence standard ought to remain separate and distinct from the arbitrary and capricious standard. *1980-81 Administrative Law Survey, supra* note 1, at 57. The "otherwise not in accordance with law" standard serves as a mechanism to give force and effect to the *ultra vires* doctrine by allowing review when an agency action exceeds or contradicts the power conferred on the agency by law.

choice of a standard may reflect an implicit determination of how much deference the court wants to give the administrative decision.[165] Even after the court selects the appropriate standard, the application of that standard in a given case also involves a balance between the proper roles of the court and the agency with respect to the particular substantive question being decided.[166]

In *Frazier v. New Mexico Department of Human Services,*[167] the court of appeals confronted a problem requiring the interpretation of an agency regulation. The situation obviously called for the application of the "otherwise not in accordance with law" standard of review. The court properly interpreted the regulation according to this standard. It then, by resort to a substantial evidence approach, went on to apply the regulation to the particular facts in the case to mandate an award of benefits to the recipient. Although the court acted in a manner which furthered substantial justice, it confused two distinct standards of review. It thereby unduly injected itself into the province of agency decisionmaking.

In *Frazier,* the department denied benefits under the Aid to Families with Dependent Children program based on a regulation which placed a maximum value of $750 on the "readily negotiable assets" an applicant could own and still qualify for benefits.[168] Frazier owned a real estate contract valued at more than $750. On the basis of this value alone, the

165. A court is generally more deferential to agency action in applying the substantial evidence standard than when it applies the "otherwise not in accordance with law" standard. *Compare* Rinker v. State Corp. Comm'n, 84 N.M. 626, 506 P.2d 783 (1972) (substantial evidence), *with* New Mexico State Bd. of Educ. v. Board of Educ., 95 N.M. 588, 624 P.2d 530 (1981) (question of compliance with law).

166. In one case decided during the survey year, Gas Co. v. New Mexico Public Serv. Comm'n, 100 N.M. 740, 676 P.2d 817 (1984), the court properly applied the applicable standards. The utility challenged the decision of the PSC imputing as income to the utility 75% of its affiliate's gross revenue from the sale of condensed liquid gas, thereby reducing the rate paid by utility customers. The court first dealt with the question of whether the PSC had employed the correct legal standard. *Id.* at 741-43, 676 P.2d at 818-20. Finding that the contract was evaluated under the appropriate legal standard, the court then proceeded to evaluate whether there was substantial evidence, on the record as a whole, to support the decision of the PSC. *Id.* at 743-45, 676 P.2d at 820-22. Finding that there was sufficient evidence, the court necessarily affirmed the decision of the PSC. Thus, *Gas Co.* demonstrates the clarity which can result when the particular judicial tasks under the various standards are segregated into their component parts and addressed separately.

167. 98 N.M. 98, 645 P.2d 454 (Ct. App. 1982).

168. The regulation provides in pertinent part:

> The total value of cash, bank accounts, and other readily negotiable assets belonging to or available to members of the budget group may not exceed $750.
>
> Other readily negotiable assets include stocks, bonds, negotiable notes, purchase contracts, and other similar assets. For purposes of financial eligibility, the value of such assets is their current market value, which can be determined by contacting a local bank, savings and loan association, responsible real estate agent, stock or commodity broker, or other potential buyer of the asset as appropriate.

N.M. Dep't of Human Servs., Income Support Division Manual § 221.831(C)(2)(b).

department refused assistance. The department regulation in question lists examples of assets and provides means for determining their value. It does not, however, define "readily negotiable." At the hearing, the department limited its inquiry to whether the asset was similar to those listed in its regulation and whether the asset's value exceeded the prescribed maximum.[169] Finding affirmative answers to both questions, the department denied Frazier benefits. It did so, however, without inquiring into the issue of "ready negotiability."

On appeal, Frazier challenged the department's decision, claiming that the department failed to establish the negotiability of the contract. The court of appeals agreed with Frazier and reversed the denial of assistance, holding that the department failed to follow the requirement of the regulation which necessitated a determination of negotiability.[170]

The *Frazier* court's determination that the department did not properly follow its own regulation involved a review of a question of law. Although the court properly performed that function by interpreting the regulation, the court also went further and reviewed the facts in the record under a substantial evidence approach.[171] Applying its interpretation of the regulation to its substantial evidence review of the facts, the court found itself compelled not only to reverse the department's decision, but to remand with instructions to grant benefits to Frazier.[172]

The remand with instructions to grant benefits, instead of a remand for proper application of the regulation, was an error that resulted from a confusion of the two standards of judicial review. *Frazier* called for a straightforward application of the "otherwise not in accordance with law" standard to constrain the erroneous interpretation of the regulation by the agency. Having corrected the error of law, the court should have remanded the case to the agency to allow it to perform its essential function: the application of the proper legal standard to the facts of the particular case. The application of the law to the facts would then be subject to substantial evidence review at the behest of an aggrieved party, but only after the agency had an opportunity to perform that function.[173]

The *Frazier* court's approach is too often followed by our appellate

169. *See* 98 N.M. at 100, 645 P.2d at 456.

170. "[W]e hold that the Department did not properly follow its own regulation." *Id.*

171. It is not our duty to weigh evidence. However, where there is no evidence to support a finding, we cannot sustain it. On the record before us we find that the plaintiff produced evidence that the contract was not readily negotiable, and that the Department produced no evidence that the contract was readily negotiable.

Id.

172. *Id.*

173. "Where the error of law has been corrected by the reviewing court, and the only issues remaining in the case are questions which have not yet been considered by the administrative agency, the appropriate action is a remand to the agency so that it may exercise its authority." Presbyterian

courts. The general application of this approach only frustrates the administrative process by inhibiting agencies from properly performing their tasks. Agencies become less concerned with the quality of their own actions when confronted with the fact that whatever they do will be second-guessed by the reviewing courts. When that occurs, the administrative process breaks down—agencies begin to perform less rather than more responsibly, and the reviewing courts then find more reason to overturn agency actions. Despite the seeming inefficiency in remanding for yet another hearing in cases like *Frazier,* the court must at times eschew efficiency to allow the agencies to perform their essential fact-finding functions, for fear that to do otherwise will undermine agency processes.

2. Substantial Evidence

Duke City Lumber Co. v. New Mexico Environmental Improvement Board (Duke City II)[174] resolved a major confusion in the law governing the substantial evidence standard used in judicial review of administrative fact finding, even though the substantial evidence ruling was not necessary to the result.[175] Before *Duke City II,* two levels of confusion existed with respect to the substantial evidence standard. First, several statutes provide for traditional "substantial evidence" review of agency fact finding,[176] while others require a determination of whether there is "substantial evidence based on the record as a whole."[177] These two variations of the substantial evidence standard[178] carry with them significant differences, with the former, traditional standard, being somewhat more deferential

Hosp. v. Harris, 638 F.2d 1381, 1389 (5th Cir. 1981). *See also* Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980).

In *Frazier,* for example, the department produced no evidence on whether the contract was "readily negotiable," because in its view that was not a relevant question under the regulation. Once the court determined that the regulation required that inquiry, the department should have been given the opportunity to make the inquiry in the first instance.

174. 101 N.M. 291, 681 P.2d 717 (1984).

175. The rationale for the court's decision did not rest on the adoption of the whole record substantial evidence standard, but was grounded instead on the court's determination of the burden of proof under the statute in question and the application of the legal residuum rule. For a discussion of that portion of the opinion, see *supra* notes 123-42 and accompanying text.

176. *E.g.,* N.M. Stat. Ann. § 74-2-9 (Repl. Pamp. 1983) (Air Quality Control Act).

177. *E.g.,* N.M. Stat. Ann. § 27-3-4(F) (1978) (Public Assistance Appeals Act); *see* N.M. Stat. Ann. § 61-1-20 (1978) (Uniform Licensing Act). The New Mexico Administrative Procedures Act also adopts the "whole record" standard. *See* N.M. Stat. Ann. § 12-8-22(A) (1978).

178. A third variation comes into play when the legislature fails to provide any standard. In such instances, the courts usually impose the traditional substantial evidence standard, *see* Rinker v. State Corp. Comm'n, 84 N.M. 626, 506 P.2d 783 (1973), although it is often unclear whether the court is really applying the "whole record" standard in the guise of the traditional test. *See, e.g.,* Ribera v. Employment Sec. Comm'n, 92 N.M. 694, 594 P.2d 742 (1979). *See generally 1979-80 Administrative Law Survey, supra* note 1, at 28-29.

to agency decisions.[179] Second, even when the standard of review was clearly articulated in the statute, the courts often applied the wrong one.[180]

The court in *Duke City II* recognized the confusion which resulted from different statutory standards, and from its own prior opinions, which confused the two standards. In forthright terms, the court stated: "[F]or administrative appeals we now expressly modify the substantial evidence rule as heretofore adopted by this Court and supplement it with the whole record standard for judicial review of findings of fact made by administrative agencies."[181] Prodded by the court of appeals' criticism of the traditional standard,[182] the supreme court concluded that the traditional substantial evidence standard "is not only outdated, but contrary to the rule followed by a majority of other jurisdictions and by the federal courts."[183] The court agreed with the court of appeals' review of the shortcomings of the traditional standard.[184] It added for itself the fact that the old standard "shroud[s] the judgment of the reviewing courts with imposed ignorance of enlightening evidence, [and] it also causes uneven treatment among those who seek review of the actions of various administrative boards and agencies."[185]

179. The traditional standard requires that evidence be viewed in the light most favorable to the agency and that contrary evidence be ignored; the standard is satisfied by such relevant evidence "as a reasonable person might accept as sufficient to support a conclusion." *E.g.*, Wilson v. Employment Sec. Comm'n, 74 N.M. 3, 8, 389 P.2d 855, 858 (1963). The whole record standard, on the other hand, expressly requires consideration of contrary evidence, although it does not allow the court to reweigh the evidence. *Duke City II*, 101 N.M. at 294, 681 P.2d at 720. *See generally 1979-80 Administrative Law Survey, supra* note 1, at 26-28.

180. *See 1979-80 Administrative Law Survey, supra* note 1, at 28-29.

181. 101 N.M. at 294, 681 P.2d at 720.

182. The court of appeals upheld the board's decision under the traditional substantial evidence standard, which it was bound to follow, *see* Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973). In the process, however, the court criticized that standard as outmoded, detrimental to uniformity when it stands together with statutory whole record standards, and particularly inappropriate where the administrative agency serves as both fact finder and prosecutor—a circumstance which requires special assurance that the agency in its decisionmaking capacity does not lose sight of its statutory duty. Duke City Lumber Co. v. New Mexico Environmental Improvement Div., 101 N.M. 301, 304, 681 P.2d 727, 730 (Ct. App.), *rev'd*, 101 N.M. 291, 681 P.2d 717 (1984).

183. 101 N.M. at 293, 681 P.2d at 719.

184. *Id. See supra* note 182.

185. 101 N.M. at 293, 681 P.2d at 719. It is interesting that both the court of appeals and the supreme court focused on the discrepancies among the various statutes, such that some agency decisions were subject to review under the traditional standard, while others were subject to review under the "whole record" standard. Both courts found the disparate treatment unjustifiable. 101 N.M. at 293, 681 P.2d at 719 (supreme court); 101 N.M at 304, 681 P.2d at 730 (court of appeals) ("It is not clear, however, why the legislature requires different standards of review for different administrative agencies.")

In practice, it may in fact be that there is no sufficient legislative reason for the choice of one substantial evidence standard over the other. In theory, however, the legislature is certainly justified in making a choice as to which standard should govern the review of factual determinations made by agencies it creates. Even in light of *Duke City II*, if the legislature were to express its intent clearly enough, it ought to be able to narrow or expand the substantial evidence review for a given agency or for certain determinations by a given agency.

In adopting the "whole record" test of substantial evidence, however, the court indicated that that the newly adopted standard is but a "minor departure from the customary substantial evidence rule."[186] The court also indicated that in applying the new test it will not reweigh the evidence; the evidence will still be viewed in the light most favorable to the agency.[187]

The adoption of the whole record standard for use in applying the substantial evidence test is the truly significant aspect of *Duke City II*. Concern remains, however, about how that new standard will be applied.[188] Nonetheless, the adoption of the whole record standard and the reduction of the confusion which previously existed are to be applauded.

3. Second-Tier Judicial Review

Each year there are a significant number of administrative law cases in our appellate courts which require a substantial evidence review after a lower court has already reviewed the action of the agency under that same standard.[189] This situation leads to a legitimate query about the

186. 101 N.M. at 294, 681 P.2d at 720. The court relied on its prior decision in New Mexico Human Servs. Dep't v. Garcia, 94 N.M. 175, 608 P.2d 151 (1980) (decided under a "whole record" statute), to explain the parameters of the whole record standard. For a critique of *Garcia*, see *1979-80 Administrative Law Survey, supra* note 1, at 28-29.

187. It is this latter point—whether the new standard required deference to the agency decision—that the court changed in its final opinion on rehearing. In its prior opinion, withdrawn after rehearing, the court had taken the contrary view: "[I]nstead of mandating a review of the evidence only in the light most favorable to support the findings, the Court will review the whole record to determine whether there is substantial evidence to support the findings made by the agency." 22 N.M. Bar Bull. 1365 (Dec. 22, 1983). It was the portion of the earlier opinion which was withdrawn in the final opinion that the authors of last year's survey had thought was ill advised. *See 1982-83 Administrative Law Survey, supra* note 1, at 11.

188. Indeed, the dissenting justice expressed a concern that "the new standard announced allows this Court to substitute its judgment for the . . . [judgment of the] administrative body with impunity." 101 N.M. at 295, 681 P.2d at 721. Although that is a legitimate concern, the experience of the federal courts and other jurisdictions which have functioned with the "whole record" standard suggests that it is not so much the standard as the discipline of reviewing judges in applying the standard which is most important in this area.

189. This survey year is no exception. *See, e.g.*, Viking Petroleum, Inc. v. Oil Conservation Comm'n, 100 N.M. 451, 672 P.2d 280 (1983); Jones v. New Mexico State Racing Comm'n, 100 N.M. 434, 671 P.2d 1145 (1983); Phelps Dodge Corp. v. New Mexico Employment Sec. Dep't, 100 N.M. 246; 669 P.2d 255 (1983); Lujan v. State Police Bd., 100 N.M. 149, 667 P.2d 456 (1983).

These cases necessarily result from the confluence of statutory provisions which require resort to the district court as the first level of an on the record review of administrative decisions, *see, e.g.*, N.M. Stat. Ann. § 70-2-25(B) (Cum. Supp. 1984) (appeals from Oil Conservation Commission), and the constitutional provision which allows one appeal of right from the district court, *see* N.M. Const. art. VI, § 2.

Perhaps some change is in the offing, however, with the recent alteration in the jurisdiction of the court of appeals. The prior statute only gave the court of appeals jurisdiction of appeals from administrative agencies "where direct review by the court of appeals is provided by law." 1966 N.M. Laws ch. 28, § 8. The recent amendment removed that language and now provides that the court of appeals "has jurisdiction to review on appeal . . . decisions of administrative agencies of the state." N.M. Stat. Ann. § 34-5-8(A)(6) (Cum. Supp. 1984). If the new provision is given full effect and all administrative cases are reviewed in the court of appeals, that court's administrative law expertise will grow and warrant even greater supreme court deference under a diminished second-tier level of substantial evidence review.

necessity for the appellate court to review in like fashion, and under the same standard, the very substantial evidence question already reviewed by the district court.

One case decided during this survey year graphically highlights the problem. In *Viking Petroleum, Inc. v. Oil Conservation Commission,*[190] an oil company appealed the district court's suspension of an agency order to the supreme court. The court began its analysis by noting that "[w]e are limited to the same review of administrative actions as the district court."[191] Because the substantial evidence standard applied to the district court review of the Oil Conservation Commission order, the supreme court, therefore, was obliged to undertake its own substantial evidence review of the record before the commission.[192]

There are many examples of cases subject to the substantial evidence standard where multi-levels of review merely add to the number of judges disagreeing on the result.[193] These cases raise the question of whether the final court is any more correct —other than because of its finality—than the courts which reviewed the case below. Such circumstances suggest the need to look for alternative forms of review which might serve as an adequate check on the lower courts, while preserving scarce and expensive judicial resources at the appellate level.

As noted in an earlier survey,[194] the United States Supreme Court, when faced with this problem, defers to the substantial evidence decisions of the lower federal courts.[195] It limits its role to a consideration of whether "the standard was misapprehended or grossly misapplied" by the court below.[196] Certainly where the first substantial evidence review occurs in the state court of appeals, and review is sought in the supreme court by way of a petition for certiorari, there is every reason to limit certiorari review to those few cases where the lower court may have misapprehended or grossly misapplied the standard.

Even in those cases which come to the supreme court on direct review from the district court, there is good reason to limit the second-tier substantial evidence review. First, the time and expense of a redundant review is not insignificant. Second, when the question is merely whether there was substantial evidence to support the agency decision, experience in-

190. 100 N.M. 451, 672 P.2d 280 (1983).

191. *Id.* at 453, 672 P.2d at 282.

192. *Id.* The court reversed the district court and affirmed the action of the commission which ordered pooling of multiple zones for resource extraction and which required the reimbursement of costs to the operator, as well as assessed percentage risk charges. *Id.*

193. *See, e.g.,* New Mexico Dep't of Human Servs. v. Garcia, 94 N.M. 175, 608 P.2d 151 (1980). In *Garcia,* the supreme court reversed a court of appeals decision which reversed a department termination of assistance. The supreme court undertook the same substantial evidence review as the court of appeals, but held that the evidence was sufficient to uphold the agency decision.

194. *See 1979-80 Administrative Law Survey, supra* note 1, at 21-22.

195. *See 1980-81 Administrative Law Survey, supra* note 1, at 72-73.

196. *See, e.g.,* American Textile Mfg. Co. v. Donovan, 452 U.S. 490, 523 (1981).

dicates that in the difficult cases there will be significant dispute among judges; this state of affairs removes the assurance that resolution at a second level will result in a "better" determination than found at the first level of review. Finally, a more limited second-tier review in the supreme court would focus the court on what should be its main concern: articulating the correct legal principles for the guidance of the lower courts and potential litigants.

C. Limitations on Judicial Review: Standing

In contrast with the rapidly evolving law of standing at the federal level,[197] the law of standing in New Mexico has remained rather constant. Prior to 1975, New Mexico employed the "legal interest" test of standing, which required an inquiry into "whether [the complainant's] legal rights have been invaded."[198] Although the purpose of the test was to assure that only plaintiffs who had been harmed in fact could bring actions, the legal interest test put too constraining a limitation on those who could sue for an injury or wrong done to them. In *DeVargas Savings and Loan Association v. Campbell,*[199] the supreme court remedied that problem and held that, "to attain standing in a suit arguing the unlawfulness of governmental action, the complainant must allege that he is injured in fact or is imminently threatened with injury, economically or otherwise."[200]

During this survey year, the supreme court decided one case in which it implicitly applied the principles of *DeVargas Savings and Loan* to a related question—whether certain companies were "parties" within the meaning of the statute which authorizes appeals from final orders of the Public Service Commission. In *Community Public Service Co. v. New Mexico Public Service Commission,*[201] the appellants sought to challenge a final rule promulgated by the commission. The district court dismissed the petition, holding that the appellants were not parties within the meaning of the appropriate statute.[202]

The supreme court reversed, and through a line of analysis markedly similar to that in *DeVargas Savings and Loan,* held that the utilities were

197. *Compare* Valley Forge Christian College v. American United, 454 U.S. 464 (1982), *with* United States v. SCRAP, 412 U.S. 669 (1973).

198. *See* Ruidoso State Bank v. Brumlow, 81 N.M. 379, 381, 467 P.2d 395, 397 (1970). *See generally* Utton, *Through a Glass Darkly: The Law of Standing To Challenge Governmental Action in New Mexico,* 2 N.M.L. Rev. 171 (1972).

199. 87 N.M. 469, 535 P.2d 1320 (1975).

200. *Id.* at 473, 535 P.2d at 1324.

201. 99 N.M. 493, 660 P.2d 583 (1983). For a discussion of the rulemaking aspects of this opinion, see *supra* notes 32-50 and accompanying text; for a discussion of that part of the case dealing with the timing of judicial review, see *supra* notes 150-57 and accompanying text.

202. 99 N.M. at 494, 660 P.2d at 584. The governing statute, N.M. Stat. Ann. § 62-11-1 (Cum. Supp. 1982), provides that "any party to any proceeding before the Commission may file" a petition for review.

parties to the proceeding below and, therefore, had standing to proceed with the appeal.[203] In *DeVargas Savings and Loan,* the court noted that the standing doctrine it adopted carried out the purposes of the underlying statute relied on by plaintiffs[204] and was consistent with the intent of the legislature not to preclude judicial review.[205] Similarly, the court in *Community Public Service* found that allowing direct challenges to General Orders emanating from rulemaking proceedings fostered the policy of encouraging rulemaking as a mechanism for streamlining the regulatory process[206] while also ensuring judicial review of those actions as intended by the legislature.[207]

Thus, the issue of who is a "party" for purposes of invoking judicial review of agency action is but another way to frame the issue of standing to seek judicial review. Because *DeVargas Savings and Loan* liberalized the doctrine of standing to allow all those who suffer injury as a result of governmental action to challenge that action, the definition of a "party" for purposes of invoking statutory appellate rights must also be liberally construed.

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203. *Id.*

204. In *DeVargas Savings and Loan,* four Santa Fe financial institutions sought review of an order of the Savings and Loan Supervisor of the New Mexico Department of Banking approving the application of a Los Alamos institution to open a branch in Santa Fe. The statute required the supervisor to base his decision in part on the financial needs of the community and the extent to which those needs were already being met. *See* N.M. Stat. Ann. § 58-10-17(A) (Cum. Supp. 1983). The court concluded that the appellants' claim of undue competitive injury "is explicitly recognized" in that statute. 87 N.M. at 473, 535 P.2d at 1324.

205. *See* 87 N.M. at 473, 535 P.2d at 1324.

206. The PSC had argued on appeal that the appellants were not parties because the proceeding involved was rulemaking. In the PSC's view, because no individual company's rights had yet been affected, the appellants lacked standing to challenge the rule. The supreme court gave that argument the short shrift it deserved:

> If review of a General Order originating from a rulemaking proceeding were unavailable, as would be the case if there were no parties to the proceeding, objections to the policy expressed in the order could be raised only in individual cases. This time-consuming process would defeat the public policy of reducing the length and expense of rate cases.

99 N.M. at 495, 660 P.2d at 585.

207. "In our view, judicial review is the means specified by the Legislature to assure that rates are just and reasonable. It is clear that unnecessary postponement of this review cannot advance the legislative scheme to reduce the length and expense of rate cases." 99 N.M. at 494, 660 P.2d at 584.

APPENDIX A
ADMINISTRATIVE LAW CASES, 1983–84—BY AGENCY

Board of Pharmacy
New Mexico Board of Pharmacy v. Reece, 100 N.M. 339, 670 P.2d 950 (1983).

City of Albuquerque
City of Albuquerque v. Paradise Hills Special Zoning District Commission, 99 N.M. 630, 661 P.2d 1329 (1983).

County of Los Alamos
Westgate Families v. County Clerk, 100 N.M. 146, 667 P.2d 253 (1983).

Department of Human Services
Cruz v. New Mexico Department of Human Services, 100 N.M. 133, 666 P.2d 1280 (Ct. App. 1983).
Frazier v. New Mexico Department of Human Services, 98 N.M. 98, 645 P.2d 454 (Ct. App. 1982).

Employment Security Department
Phelps Dodge Corp. v. New Mexico Employment Security Department, 100 N.M. 246, 669 P.2d 255 (1983).

Environmental Improvement Division
Duke City Lumber Co. v. New Mexico Environmental Improvement Division (*Duke City II*), 101 N.M. 291, 681 P.2d 717 (1984).

Public Service Commission
Community Public Service Co. v. New Mexico Public Service Commission, 99 N.M. 493, 660 P.2d 583 (1983).
Gas Co. v. New Mexico Public Service Commission, 100 N.M. 740, 676 P.2d 817 (1984).

State Police Board
Lujan v. New Mexico State Police Board, 100 N.M. 149, 667 P.2d 456 (1983).

State Racing Commission
Jones v. New Mexico State Racing Commission, 100 N.M. 434, 671 P.2d 1145 (1983).

Oil Conservation Commission
Viking Petroleum, Inc. v. Oil Conservation Commission, 100 N.M. 451, 672 P.2d 280 (1983).

Real Estate Commission
Wolfley v. Real Estate Commission, 100 N.M. 187, 668 P.2d 303 (1983).

APPENDIX B
ADMINISTRATIVE LAW CASES, 1983–84—BY TOPIC

I. AUTHORITY OF AGENCY TO ACT

A. Statutory Authority

City of Albuquerque v. Paradise Hills Special Zoning District Commission, 99 N.M. 630, 661 P.2d 1329 (1983).

Westgate Families v. County Clerk, 100 N.M. 146, 667 P.2d 253 (1983).

B. State Administered Federal Programs

(no cases)

C. The Nondelegation Doctrine

(no cases)

II. EXERCISE OF ADMINISTRATIVE POWER

A. Rules and Rulemaking

Community Public Service Co. v. New Mexico Public Service Commission, 99 N.M. 493, 660 P.2d 583 (1983).

B. Orders and Adjudications

Jones v. New Mexico State Racing Commission, 100 N.M. 434, 671 P.2d 1145 (1983).

Wolfley v. Real Estate Commission, 100 N.M. 187, 668 P.2d 303 (1983).

C. Process of Proof

Cruz v. New Mexico Department of Human Services, 100 N.M. 133, 666 P.2d 1280 (Ct. App. 1983).

D. Decisionmaking Process

Duke City Lumber Co. v. New Mexico Environmental Improvement Division (Duke City II), 101 N.M. 291, 681 P.2d 717 (1984).

Jones v. New Mexico State Racing Commission, 100 N.M. 434, 671 P.2d 1145 (1983).

Lujan v. New Mexico State Police Board, 100 N.M. 149, 667 P.2d 456 (1983).

New Mexico Board of Pharmacy v. Reece, 100 N.M. 339, 670 P.2d 950 (1983).

E. Enforcement of Agency Rules

(no cases)

III. JUDICIAL CONTROL OF ADMINISTRATIVE POWER

A. Timing of Judicial Review

Community Public Service Co. v. New Mexico Public Service Commission, 99 N.M. 493, 660 P.2d 583 (1983).

B. Scope of Review
   1. Standard of Review
      Frazier v. New Mexico Department of Human Services, 98 N.M. 98, 645 P.2d 454 (Ct. App. 1982).
      Gas Co. v. New Mexico Public Service Commission, 100 N.M. 740, 676 P.2d 817 (1984).
   2. Questions of Fact—Substantial Evidence
      Duke City Lumber Co. v. New Mexico Environmental Improvement Division (Duke City II), 101 N.M. 291, 681 P.2d 717 (1984).
   3. Second-Tier Judicial Review
      Lujan v. New Mexico State Police Board, 100 N.M. 149, 667 P.2d 456 (1983).
      Phelps Dodge Corp. v. New Mexico Employment Security Department, 100 N.M. 246, 669 P.2d 255 (1983).
      Viking Petroleum Inc. v. Oil Conservation Commission, 100 N.M. 451, 672 P.2d 280 (1983).

C. Res Judicata and Estoppel
   (no cases)

D. Limitations on Judicial Review
   Community Public Service Co. v. New Mexico Public Service Commission, 99 N.M. 493, 660 P.2d 583 (1983).

E. Non-Statutory Judicial Review
   (no cases)