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ADMINISTRATIVE LAW

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Two years ago, for the first time, this journal published an article surveying New Mexico administrative law.[1] The intent of the article, among other things, was to present an administrative law survey in a format that could be updated on a regular basis. This article follows that format and reviews the more significant New Mexico administrative law cases decided from April 1981 through March 1982. The discussion and analysis are organized into three major administrative law topics: (1) the authority of agencies to act; (2) the proper exercise of the authority conferred; and (3) the scope and timing of judicial review of agency action.

Among the cases decided during this Survey year, several addressed significant and interesting issues in the area of the proper exercise of agency authority. These cases concerned fair and impartial hearings on proposed agency rules and proper subdelegation of authority. In addition, several important cases set new precedent, addressed questions related to the proper authority of agencies to act, and also raised some difficult problems of appropriate judicial review of these questions.

I. STATUTORY AUTHORITY OF THE AGENCY TO ACT

Agency authority originates in an enabling statute in which the legislature makes an express delegation of power to the agency. If the agency acts inside the statutory limits, or *vires,* its action is valid; if it acts outside of those limits, or *ultra vires,* its action is void. The issue of whether agency action is *ultra vires* is an issue of whether the agency had jurisdiction to act.[2] Courts presented with an attack on agency action as *ultra vires* therefore logically look to the enabling statute. During this Survey year, several significant appellate cases considered whether agency action was *ultra vires*. In these cases the New Mexico courts focused on the legislative intent of the enabling statutes, the grant of authority in light

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1. Browde, *Administrative Law, Survey of New Mexico Law: 1979-1980,* 11 N.M.L. Rev. 1 (1980-81) [hereinafter cited as Browde].

2. B. Schwartz, Administrative Law 151 (1976) [hereinafter cited as Schwartz].

of the statutory purposes, and the scope of authority that could be exercised in order to accomplish the legislative intent.[3]

Often, enabling statutes will set forth procedures that the agency must follow. The legislature chooses to specify some of the procedures instead of permitting the agency to promulgate all of its own procedural rules. A failure to follow the statutory procedures will render agency action void because the legislature has expressly limited not only what the agency can do but also how it can be done. The New Mexico Court of Appeals decided one such case during the Survey year. In *La Jara Land Developers, Inc. v. Bernalillo County Assessor*,[4] the plaintiff appealed a decision and order of the Bernalillo County Evaluation Protest Board which had upheld the County Assessor's evaluation of the plaintiff's improved tract of land. The court of appeals found that the Assessor had failed to use the comparative sales approach in evaluating the market value of the plaintiff's land for tax purposes. The Assessor's failure to use this method, which was required by statute,[5] and his failure to substantiate grounds for the use of another method as the statute might have allowed,[6] rendered his evaluation void. His failure to use the proper method also overcame any presumption of correctness in his favor.[7] The court of appeals therefore reversed and remanded the case.

During the Survey year, one case addressed the issue of *ultra vires* action in agency rulemaking. The case specifically addressed the extent to which a licensing board could promulgate a rule allowing professionals to delegate certain powers to assistants. In *New Mexico Board of Pharmacy v. New Mexico Board of Osteopathic Medical Examiners*,[8] the court of appeals set aside a rule of the Board of Osteopathic Medical Examiners that allowed physicians to delegate to physician's assistants the authority to prescribe controlled substances. The court reviewed the enabling stat-

3. *See generally* Browde, *supra* note 1, at 2–4.

4. 97 N.M. 318, 639 P.2d 605 (Ct. App. 1982).

5. N.M. Stat. Ann. § 7-36-15(B) (Repl. Pamp. 1982) provides:

> B. Unless a method or methods of valuation are authorized in Sections 7-36-20 through 7-36-33 NMSA 1978, the value of property for property taxation purposes shall be its market value as determined by sales of comparable property or, if that method cannot be used due to the lack of comparable sales data for the property being valued, then its value shall be determined using an income method or cost methods of valuation. In using any of the methods of valuation authorized by this subsection the valuation authority shall apply generally accepted appraisal techniques.

6. *See id.*

7. The Evaluation Protest Board contended in *La Jara* that there was a statutory presumption that the values of property as determined by the county assessor were correct. *See* N.M. Stat Ann. § 7-38-6 (Repl. Pamp. 1982). The taxpayer therefore had the burden of going forward with the evidence. *See also* Peterson Properties v. Valencia County Valuation Protests Bd., 89 N.M. 239, 549 P.2d 1074 (Ct. App. 1976).

8. 95 N.M. 780, 626 P.2d 854 (Ct. App. 1981).

utes and found that the rule violated the Controlled Substances Act because the Act permitted only licensed physicians to prescribe the drugs.[9] The court held that the Board rule was therefore *ultra vires* and void.

The New Mexico Supreme Court, in reviewing the action of a city zoning authority, addressed the more subtle question of whether the power assumed by an agency was rationally related to its enabling statute. In *Mechem v. City of Santa Fe*,[10] the court invalidated a condition attached to a zoning exception which provided that the exception would terminate when the ownership of the land changed. The court held that the agency's power to attach conditions to special exceptions[11] had to be reasonably related to the objectives of zoning. Because the zoning statute had objectives that concerned the uses of property and not the ownership of property, the court held that a condition that tied an exception to specific ownership of land was invalid. The action of the city authority in imposing the condition of personal ownership on the special exception was therefore not rationally related to the zoning statute, was *ultra vires*, and void.

The issues raised in *Mechem* regarding the rational relationship of the zoning agency's actions to the purposes of the zoning statute raise an interesting problem about certain grey areas in the application of the *ultra vires* doctrine. Courts often consider the reasonableness of an agency's action to be a different legal problem from whether that action is *ultra vires*.[12] Attacks on the reasonableness or the rational relationship of agency action may raise claims that the action is unconstitutional, arbitrary, or not based on substantial evidence. Nevertheless, where the exercise of power is attacked because the power assumed is not rationally derived from the enabling statute, the court should deem that assumption of undelegated power to be *ultra vires*.

The supreme court decided one case during the Survey year which the court could have characterized as raising an *ultra vires* issue. *Singleterry v. City of Albuquerque*[13] concerned the power of the Albuquerque zoning authority to grant a variance from zoning limitations which violated private restrictive covenants. The plaintiff had applied for and the city had granted a variance from a zoning height restriction in spite of the fact that the variance violated certain private restrictive covenants which governed the property. The district court gave conclusive weight to the private restrictive covenants and reversed the city zoning authority. The supreme court, in turn, reversed the district court and held that the city zoning

9. N.M. Stat. Ann § 30-31-18 (Repl. Pamp. 1980).

10. 96 N.M. 668, 634 P.2d 690 (1981). For a discussion of *Mechem* in a different context, see *infra* text accompanying notes 68 and 81.

11. N.M. Stat. Ann. § 3-21-8 (Cum. Supp. 1982).

12. Schwartz, *supra* note 2, at 152.

13. 96 N.M. 468, 632 P.2d 345 (1981).

authority was not limited by private restrictive covenants in granting variances. The court reasoned that because the city's zoning authority derives from public and not private rights, the city could ignore the private rights created by the restrictive covenants and could impose a variance that violated the restrictive covenants. The remedies of the private parties lay in a private lawsuit in the courts, and did not involve the authority of the zoning agency.

In reaching this conclusion, the supreme court engaged in a comprehensive analysis of the statutory powers of the zoning authority. The court based its decision on the implicit conclusion that contractual restrictions upon private property rights are not rationally related to an imposition of a zoning condition by the zoning agency. In fact, the court engaged in the sort of analysis one would expect for an *ultra vires* issue, and its conclusion was almost indistinguishable from its decision in *Mechem*. Nevertheless, the court did not characterize the problem as an *ultra vires* issue, but rather as an issue of whether the agency was arbitrary or capricious in its consideration of an item of evidence.

One can imagine similar problems of characterization in questions of procedure. Clearly, when procedures are part of an enabling statute, a failure to follow them is an *ultra vires* action. What happens, however, when the agency promulgates its own procedural rules and then fails to follow them? Even though the rules are deemed to be the equivalent of law and are binding upon the agency, is the failure to obey them still a question of *ultra vires* action?

It might seem that this problem is only a quibble about labels. When an issue is characterized as a question of *ultra vires* action, however, it is actually a question of proper subject matter jurisdiction which can be raised at any time, even for the first time on appeal, and through collateral attack.[14] A question about whether agency action is arbitrary or capricious, on the other hand, must be preserved for appeal and cannot be raised in a collateral suit.[15]

II. THE EXERCISE OF ADMINISTRATIVE POWER

A. Rules and Rulemaking

In view of the increased importance and impact of administrative regulations on almost every aspect of life, the procedures by which non-elected officials promulgate these regulations have great significance. During the Survey year, New Mexico courts decided two important cases relating to the procedures agencies may follow when promulgating rules. The cases involved a somewhat unusual situation in which statutes vested

14. *See* Schwartz, *supra* note 2, at 151–52.
15. Schwartz, *supra* note 2, at 583–86.

the authority to promulgate and enforce rules in different agencies. In this context the courts considered the extent to which the enforcement agency could propose rules to the rulemaking agency or act as an interested party at rulemaking hearings on its proposed rules. In the first of these cases, the court also considered whether an agency may subdelegate its authority to promulgate rules.

In *Kerr-McGee Nuclear Corp. v. New Mexico Environmental Improvement Board,*[16] the court of appeals examined statutory requirements for promulgation of rules by the Environmental Improvement Board ("EIB") under the Radiation Protection Act.[17] Although the EIB has the authority to promulgate regulations which implement the Act,[18] the Environmental Improvement Division ("EID"), a separate and distinct administrative agency,[19] has the power to enforce such regulations.[20] The EID drafted proposed regulations, and presented data, made arguments, and examined witnesses at rulemaking hearings in support of its proposed regulations.[21] The EIB approved the regulations and Kerr-McGee appealed. The court of appeals invalidated the regulations on the grounds that: (1) the rulemaking hearings had not been fair and impartial because the EIB had unlawfully delegated rulemaking authority to the EID and the EID acted as an interested party at the hearings,[22] and (2) the EIB had not obtained the Radiation Technical Advisory Council's formal approval of the regulations as required by statute.[23]

The court of appeals in *New Mexico Environmental Improvement Board* correctly held that the EIB had unlawfully delegated its authority to the EID.[24] Generally, delegation of authority by administrative agencies has been permitted only in certain cases in which the agency delegated authority to subordinates or to other persons within the same agency, not to persons outside the agency.[25]

The appeals court in *Kerr-McGee Corp. v. New Mexico Water*

16. 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

17. N.M. Stat. Ann. §§ 74-3-1 to -16 (Repl. Pamp. 1981).

18. N.M. Stat. Ann. § 74-3-5 (Repl. Pamp. 1981).

19. *See* N.M. Stat. Ann. § 74-1-6(E) (Supp. 1982).

20. *See* N.M. Stat. Ann. §§ 74-1-3 to -5 (Repl. Pamp. 1981 & Supp. 1982), which created the Environmental Improvement Division and the Environmental Improvement Board.

21. 97 N.M. at 96, 637 P.2d at 46.

22. *Id.* at 96, 637 P.2d at 46. After the court of appeals decided *New Mexico Envtl. Improvement Bd.*, and in apparent response to this decision, the legislature amended § 74-1-6 to provide expressly that the EID may recommend and propose regulations to the EIB and may actively participate in hearings on such proposed regulations. N.M. Stat. Ann. §§ 74-1-6(F),(G) (Supp. 1982).

23. *See* N.M. Stat. Ann. § 74-3-5(A) (Repl. Pamp. 1981). The court rejected the EIB's contention that deferral by the Radiation Technical Advisory Council to the expertise of the EIB constituted "approval" of the regulations as required by statute. 97 N.M. at 94, 637 P.2d at 44.

24. Technically, the delegation in question was a subdelegation. The legislature delegated authority to the EIB which the EIB subdelegated to the EID.

25. *See generally* K. Davis, Administrative Law Treatise §§ 9.01–.22 (1978).

Quality Control Commission,[26] considered similar issues and arrived at a different result.[27] Although the Water Quality Control Commission ("Commission") has authority to promulgate regulations which implement the Water Quality Act,[28] the EID has the authority to enforce certain of the regulations promulgated by the Commission, including the regulations at issue in the case.[29] As in *New Mexico Environmental Improvement Board*, the EID drafted the proposed regulations and actively participated as an interested party at rulemaking hearings before the Commission. Unlike the court of appeals in *New Mexico Environmental Improvement Board*, however, the supreme court held that the regulations had been lawfully adopted, and rejected Kerr-McGee's contentions that the rulemaking hearings were not fair and impartial and that the Commission unlawfully delegated rulemaking authority to the EID.

The Commission's regulations at issue restrict the use of "toxic pollutants," which the regulations define as any one of a list of water contaminants creating an unreasonable threat to injure human health.[30] The regulations require certain persons to obtain approval from the Director of the EID as a condition to discharge of contaminants into water, unless the Director determines that one of the exemptions to this requirement is applicable.[31] The regulations also permit a discharger to appeal any determination of the Director to the Commission.[32]

The supreme court distinguished this case from *New Mexico Environmental Improvement Board* on the fairness issue because the Commission is comprised of, among others, members of eight state agencies, including the Director of the EID or a member of the EID staff,[33] and because each such agency has express statutory authority to recommend regulations for adoption by the Commission.[34] The court reasoned that because the Commission, unlike the EIB, is comprised of members of various agencies, including the EID, having differing types of technical expertise on complicated matters, the regulated companies were not denied a fair and impartial hearing when the EID proposed regulations to the Commission and acted as an interested party at hearings.[35] This holding is consistent with the applicable statutory scheme.

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26. ___ N.M. ___, 647 P.2d 873 (Ct. App. 1982).

27. The court, upholding the validity of the regulation, also held that in determining whether an administrative regulation is void for vagueness, the court should apply the same standards as are used for statutes. ___ N.M. at ___, 647 P.2d at 878.

28. N.M. Stat. Ann. §§ 74-6-1 to -13 (Repl. Pamp. 1981 & Supp. 1982). The Commission's authority is granted in N.M. Stat. Ann. § 74-6-6 (Supp. 1982).

29. *See* N.M. Stat. Ann. §§ 74-6-2 (J)(l), (8) (1978).

30. Water Quality Control Commission Regulation 1-101.X (1981).

31. *Id.* 3-104, 3-105.

32. *Id.* 3-112.

33. N.M. Stat. Ann. § 74-6-3(A)(1) (Repl. Pamp. 1981).

34. ___ N.M. at ___, 647 P.2d at 879.

35. *Id.*

The court in *Water Quality Control Commission* also held that there was no unlawful delegation of authority by virtue of: (1) the EID's drafting of the proposed regulations[36] or (2) the fact that under Commission regulations the Director of the EID, in the context of deciding whether to approve a proposed discharge plan, could determine what concentration of compounds constituted a "toxic pollutant."[37] In regard to the latter, the court held that no delegation occurred because Commission regulations set adequate standards for determining what constitutes a "toxic pollutant," and the Director merely applied the regulations as permitted by statute.[38] In the alternative, the court held that even if delegation occurred, delegation was permissible because the Commission retained authority to make the ultimate decision on whether a particular concentration of a compound constitutes a "toxic pollutant."

A conceptual diffculty with the court's decision arises from the fact that the court did not expressly distinguish between delegation of rulemaking and delegation of adjudicatory authority. The court in effect held that no delegation of *rulemaking* authority occurred because the Commission promulgated adequate rules and the Director properly *adjudicated* a particular application of the rules as authorized by statute.

The court's alternative holding appears to be that even assuming that delegation of rulemaking authority occurred, such delegation is permissible if the agency head retains authority to make the ultimate decision on promulgation of the rules. Certain administrative functions, such as rulemaking, are so fundamental that a court should be careful in finding implied authority to delegate such functions.[39] The court's alternative holding in *Water Quality Control Commission* is reasonable in light of the facts that the Commission delegated the authority to an individual member of the Commission, not to a subordinate, the delegation involved activity close to the line between rulemaking and adjudication, and the complaining party had a right to *de novo* review by the full Commission.[40]

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36. ___ N.M. at ___, 647 P.2d at 878–79. The court's holding that the Commission lawfully delegated authority by permitting the EID to draft proposed regulations is clearly correct. N.M. Stat. Ann. § 74-6-9(C) (Supp. 1982), expressly permits the EID to recommend regulations to the Commission. *Water Quality Control Comm'n* is distinguishable from *New Mexico Envtl. Improvement Bd.* on this delegation issue on two grounds. In the former case the delegation was: (1) expressly permitted by statute and (2) was not to a person outside the agency. *See* ___ N.M. at ___, 647 P.2d at 879.

37. ___ N.M. at ___, 647 P. 2d at 879.

38. ___ N.M. at ___, 647 P.2d at 879–80.

39. *See* Relco, Inc. v. Consumer Prod. Safety Comm'n, 391 F. Supp. 841, 845–46 (S.D. Tex. 1975).

40. The Commission delegated authority to the Director who is a member of the Commission. N.M. Stat. Ann. § 74-6-3 (Repl. Pamp. 1981). Subsections 74-6-5(L) and (M) (Repl. Pamp. 1981) grant a right of *de novo* appeal from a decision of the Director.

B. The Process of Proof

During the Survey year, one court decision examined the type of evidence upon which an agency may base its final decision when the applicable statute requires that a record be kept of all proceedings. In *Sandoval v. Department of Employment Security,*[41] the supreme court, applying the "legal residuum rule,"[42] held that disqualification for unemployment compensation benefits may be based in part on hearsay or *ex parte* evidence if the disqualification is also supported by other evidence which would have been admissible in a jury trial and which would have supported a verdict in a court of law. The court found that the legal residuum rule applies to administrative hearings when a substantial right is at stake, such as the ability to earn a living.[43] The *Sandoval* court's decision is consistent with prior New Mexico cases applying the legal residuum rule insofar as use of hearsay evidence was at issue.[44] In regard to use of *ex parte* evidence, assuming that the *ex parte* evidence in question was part of the record and that the claimant had an opportunity to contest it before the agency, the decision is also consistent with applicable statutory requirements.[45]

C. The Decision-Making Process

Few would disagree with the principle that no person should be the judge in his or her own case. The problem in applying this principle lies in determining what constitutes judging one's own case. During the Survey year, the supreme court considered one case in which the same person acted as accuser and judge. In *Lasley v. Baca,*[46] the Director of the Department of Alcoholic Beverage Control filed a charge alleging violation of the Liquor Control Act[47] and presided over the hearing adjudi-

41. 96 N.M. 717, 634 P.2d 1269 (1981). For a discussion of *Sandoval* in a different context, see *infra* text accompanying note 66.

42. Under the "legal residuum" rule, an agency decision is not supported by substantial evidence unless there is a residuum of evidence that would be competent to support a judgment in a court of law. *See generally* Schwartz, *supra* note 2, at 339. Even if an appellate court does not apply the legal residuum rule, however, the hearsay nature of evidence presented at a hearing may be relevant to whether a decision is supported by substantial evidence. In State v. Vigil, 97 N.M. 749, 643 P.2d 618 (Ct. App. 1982), the court of appeals analogized a probation revocation proceeding to an administrative proceeding and found that hearsay evidence did not support an order revoking probation because the evidence had not been tested for reliability and accuracy, and, therefore, lacked probative value.

43. *See* Trujillo v. Employment Sec. Comm'n, 94 N.M. 343, 610 P.2d 747 (1980); Young v. Board of Pharmacy, 81 N.M. 5, 462 P.2d 139 (1969).

44. *See supra* note 43.

45. *See* N.M. Stat. Ann. § 51-1-8(J) (Repl. Pamp. 1981), which requires that a full and complete record be kept of all proceedings in connection with a disputed claim for unemployment compensation benefits. This section therefore requires that *ex parte* evidence be made part of the record.

46. 95 N.M. 791, 626 P.2d 1288 (1981).

47. N.M. Stat. Ann. §§ 60-8-1 to -11 (1978). 1981 N.M. Laws ch. 39, § 128, repealed the Act.

cating the charge. The Act provided that the Director of the Department of Alcoholic Beverage Control had responsibility to make probable cause findings and file charges alleging grounds on which the Department may revoke liquor licenses.[48] The Act also provided that a hearing officer appointed by the Governor, who cannot be a public officer or employee and who must be impartial, shall preside over the hearing on the charge.[49] The Director found probable cause, filed a charge, and presided over the hearing on the charge. The court held that this violated the statutory scheme which prohibited the same person from acting as both prosecutor and judge.[50]

D. Open Meetings Act

The problem of secret law in the judicial context is becoming increasingly more serious because overburdened courts of appeals often issue unpublished opinions. During the Survey year, the New Mexico Supreme Court examined the problem of secret decision-making in the administrative context.

In *Gutierrez v. City of Albuquerque*,[51] the court considered the requirement in the Open Meetings Act that "[a]ll meetings of any public body, except the legislature, shall be public meetings and all persons so desiring shall be permitted to *attend and listen* to the deliberations and proceedings."[52] In this case, city council chambers were filled in excess of the maximum occupant load of 156 persons. The rest of the crowd, including the petitioners, had to remain outside the chambers where loudspeakers were set up to broadcast council proceedings on an application to sell alcoholic beverages within 300 feet of a school. The court found that the Open Meetings Act requires only that no one should be systematically or arbitrarily excluded from a meeting. In a well-reasoned decision, the court explained that this interpretation of the statute accomplishes the statutory purpose of banning secret decision-making without unduly burdening the ability of government to act.[53] The court held that the statutory

48. The court in *Lasley* examined N.M. Stat. Ann. § 60-8-6 (1978). Although this provision has been repealed since the *Lasley* decision, the new provision is materially similar. *See* N.M. Stat. Ann. § 60-6C-4 (Repl. Pamp. 1981).

49. The court in *Lasley* examined N.M. Stat. Ann. § 60-8-5 (1978), which has since been repealed. N.M. Stat. Ann. § 60-6C-3 (Repl. Pamp. 1981) is materially similar.

50. Because the court found that the Act prohibited the combination of accusatory and adjudicatory functions in one person, it was unnecessary for the court to consider the more interesting and difficult question of whether this combination of functions would have violated due process of law. *See* 95 N.M. at 792, 626 P.2d at 1289.

51. 96 N.M. 398, 631 P.2d 304 (1981).

52. N.M. Stat. Ann. § 10-15-1 (Repl. Pamp. 1980) (emphasis added). The Open Meetings Act is contained in full in N.M. Stat. Ann. §§ 10-15-1 to -4 (Repl. Pamp. 1980).

53. 96 N.M. at 400–401, 631 P.2d at 306–307.

requirement was satisfied because the city council afforded everyone desiring to attend the meeting an opportunity to do so before the hall was filled.

III. JUDICIAL CONTROL

A. *Scope of Review*

1. Standard of review

The power of the courts to review and overturn agency decisions was the issue raised most often in cases decided this year. Litigants attempted to make inroads on the traditional reluctance of courts to reverse agency decisions that are based on agency expertise. The frequency of the issue during this year was not unusual. The scope and standard of judicial review has been the single most litigated question in the past.[54]

The result this year, as in the past, was the continued use of some unclear standards for review and a tendency to occasionally decide cases by judging the results of agency action without deferring to agency expertise.[55] A number of cases also addressed the statutory authority of courts to perform a more comprehensive review of the decisions of certain agencies.

The supreme court applied an expanded scope of court review to a decision of the employment security department in *Donovan v. New Mexico Employment Security Department*.[56] In *Donovan*, the petitioner had applied for unemployment benefits after being fired from her job for misconduct. After a series of agency hearings, the final agency determination was a denial of benefits. The decision was appealed to the district court, which affirmed on a different ground from that used by the agency. Upon review, the supreme court held that the reviewing district court had to adopt the findings of fact of the agency, but the court could draw independent legal conclusions based on such agency findings. In *Dono-*

54. Browde, *supra* note 1, at 19. Professor Browde stressed not only the frequency of litigation on this question, and the inconsistency of the substantial evidence standard, but also the tendency of the New Mexico courts to confuse the standard of substantial evidence with whether agency action is arbitrary or capricious. *See also* Utton, *The Use of the Substantial Evidence Rule to Review Administrative Findings of Fact in New Mexico*, 10 N.M.L. Rev. 103 (1979-80). The great number of cases may in fact be responsible for some of the confusion.

55. At least one appellate court expressly admitted and defined its role as re-examining a proceeding already concluded "for the purpose of preventing a result which appears not to be based upon the exercise of an unbiased and reasonable judgment. . . ." Tapia v. New Mexico Dep't. of Human Services, 20 N.M. St. B. Bull. 1087, 1090 (Oct. 15, 1981). The court reversed the decision of the agency, but the supreme court reversed on further appeal. Department of Human Services v. Tapia, 21 N.M. St. B. Bull. 459 (Apr. 15, 1982). The supreme court reversed the decision of the court of appeals in *Tapia* because the court of appelas had *sua sponte* raised and decided issues of procedure that had not been raised below. With respect to a failure to defer to agency expertise, see the discussion of Conwell v. City of Albuquerque, *infra* at text accompanying notes 60–61.

56. 97 N.M. 293, 639 P.2d 580 (1982).

van, the reviewing district court had found that the petitioner was not entitled to benefits based on a series of events that had led up to her termination from employment by applying a "totality of circumstances" test not used by the administrative body. The supreme court found that the use of this legal test was appropriate and within the power of the district court.

The supreme court also applied broad powers of review to a decision of the state Corporation Commission. In *Atchison, Topeka & Santa Fe Railway v. State Corporation Commission*,[57] court review established by the New Mexico Constitution in article XI, section 7, empowered the court to ignore the substantial evidence rule and to substitute its independent judgment for that of the Commission. In this case, the Corporation Commission had considered complaints of neighborhood people about whether to reopen a railroad crossing and had decided to reopen the crossing. The railroad appealed the decision and argued that the court should give no deference to the decision of the Commission, should reevaluate the evidence, and should keep the crossing closed. The court agreed with the railroad's position. The court independently balanced the interests and rights of the public based on the evidence. As a result, the court reversed the Commission and the crossing remained closed.

Other cases addressed or employed the more usual restrictive standards of review of agency decisions available to litigants or stressed the limited remedies available upon review. In *Conwell v. City of Albuquerque*,[58] the plaintiff appealed a decision of the City of Albuquerque's Labor-Management Relations Board to the district court, which reversed the Board and awarded back pay. On further appeal, the supreme court found that the district court could only uphold, reverse, or vacate and remand decisions of the Labor-Management Relations Board but could grant no further remedy. The district court's award of back pay was therefore found to be outside the scope of the court's review power.

2. Questions of Law

Cases decided during the Survey year followed the general administrative law principle that courts may fully address questions of law and substitute their judgment for the judgment of the agency on purely legal issues. The problem with applying this principle is determining what constitutes a question of law. It has been frequently pointed out that the distinction between law and fact is often illusory.[59] The difficulty in locating the boundaries of one or the other thus gives courts an opportunity

57. 97 N.M. 424, 640 P.2d 924 (1982).
58. 97 N.M. 136, 637 P.2d 567 (1981).
59. *See generally* Davis, *supra* note 25, at §§ 30.01–.04.

to engage in more comprehensive review of agency actions by treating issues as purely legal.

Mixed questions of law and fact were treated as purely legal issues in *Conwell v. City of Albuquerque*,[60] for example. In *Conwell*, the supreme court reviewed a decision involving a grievance brought before the City of Albuquerque's Labor-Management Relations Board under a collective bargaining agreement. The grievant raised an issue in the proceeding about whether the parties had to strictly follow the grievance procedure set forth in the collective bargaining agreement. The Board concluded that the collective bargaining agreement required only substantial compliance with the procedure. The supreme court reversed. Although the court acknowledged that it could not generally substitute its judgment for that of the Board, it nevertheless construed the collective bargaining agreement independent of the construction given by the Board. The court did not give any weight to the Board's findings about the procedure in the agreement, and instead treated the issue as one of law. In contrast, courts usually defer to interpretations of collective bargaining agreements by the National Labor Relations Board in federal labor-management disputes.[61]

3. Questions of Fact

The majority of New Mexico cases considering the question of whether an agency's decision is supported by substantial evidence on the record have upheld the decision of the agency if there is any evidence in the record at all to support the decision.[62] In several cases decided this year, the trend continued. Reviewing courts looked at the record made by the agency to find evidence in support of the agency's conclusion, instead of actively and critically looking at all the evidence.

In *Family Dental Center of New Mexico v. New Mexico Board of Dentistry*,[63] the supreme court defined substantial evidence as such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[64] In this case the New Mexico Dental Board had suspended a dental center's license to practice because the dental center had allowed assistants to engage in the unauthorized practice of dentistry. The appellate court stressed the fact that it and the district court were bound to uphold

60. 97 N.M. 136, 637 P.2d 567 (1981).

61. The National Labor Relations Board ("NLRB") generally interprets a collective bargaining agreement in cases dealing with contract enforcement and unfair labor practices. NLRB interpretation is usually treated as a factual matter or an area of NLRB expertise that permits only limited judical review. *See generally* C. J. Morris, The Developing Labor Law ch. 17 (1971 & Cum. Supp. 1971-75, Supp. 1977, Supp. 1978).

62. *See generally* Browde, *supra* note 1, at 26–28.

63. 97 N.M. 464, 641 P.2d 495 (1982).

64. *Id.* at 465, 641 P.2d at 496.

the Dental Board's finding if such substantial evidence existed in the record, regardless of whether it or the district court might have found otherwise. The court looked only at evidence in the record which supported the agency decision; it considered no evidence to the contrary. The court also followed earlier cases and confused the substantial evidence standard of review with the arbitrary and capricious standard.[65]

Where plaintiffs raise claims involving a "substantial right," however, the courts reviewed the adequacy of the evidence more closely. In *Sandoval v. Department of Employment Security,*[66] the supreme court stated that when a substantial right such as one's ability to earn a livelihood was at stake, a reviewing court had to set aside an administrative finding if the finding was not supported by evidence which would be admissible in the jury trial and which would support a verdict in the court of law. The court took the position that where substantial rights were involved, the reviewing court had the obligation to look at the quality of evidence that supported the administrative finding in order to avoid any claim of violation of due process.

B. Estoppel

During the Survey year, the New Mexico courts followed the trend of expanding the use of estoppel against agencies. The supreme court created an exception to the usual rule that estoppel cannot be claimed against the government.[67] In *Mechem v. City of Santa Fe,*[68] Mechem, a property owner, brought an action against the City of Santa Fe seeking declaratory and injunctive relief. Mechem wanted the court to clarify the legal effect of a condition attached to a special zoning exception. The City had granted him a special exception to the zoning laws in 1967 with the condition attached, had allowed him to expand his use of the property under the exception in 1976, and continued to permit his exceptional uses of the property. The condition required that the property remain in Mechem's hands. When Mechem wanted to sell the property, he therefore risked losing the exception and the value attached to the special uses of the

65. *See generally* Browde, *supra* note 1, at 22. The failure to meet the substantial evidence standard may not necessarily render a decision arbitrary and capricious. A finding without any evidence to support it is clearly arbitrary, but lack of substantial evidence is not the same level of abuse. The substantial evidence test, moreover, is only applied to findings of fact under the Federal Administrative Procedure Act when there is a hearing with a determination on the record. 5 U.S.C. § 706(2)(E) (1976). All findings of fact not subject to the substantial evidence test are subject to the test of whether they are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A) (1976).

66. 96 N.M. 717, 634 P.2d 1269 (1981). For a discussion of *Sandoval* in a different context, see *supra* text accompanying notes 41–45.

67. *See* Browde, *supra* note 1, at 30.

68. 96 N.M. 668, 634 P.2d 690 (1981). For a discussion of *Mechem* in a different context, see *supra* text accompanying notes 10-11, and *infra* text accompanying note 81.

property. He therefore brought suit attacking the condition, claiming that the city could not condition the zoning exception on his ownership of the property. The city asserted a defense of laches in order to bar Mechem from attacking the condition. The court denied the laches defense, however, holding that the city could not claim prejudice when the city itself had approved the enterprise. In effect, the city was estopped from raising the laches defense.

C. Limits on Judicial Review

In a significant case, the supreme court questioned the application of the doctrine of separation of powers to judicial review of decisions and acts of an administrative agency. In *Angel Fire Corp. v. C. S. Cattle Co.*,[69] procedural questions about the proper service of process and the timing of an appeal were raised in connection with the State Engineer's decisions, acts, and refusals to act. The State Engineer had granted Angel Fire an application for an additional water well. C. S. Cattle Co. appealed but served the notice of appeal only on the attorneys of the parties. Angel Fire requested dismissal of the appeal on the grounds of improper service of the notice of appeal. The court had to resolve the conflict between the court rule that service upon a party's attorney in a proceeding is equivalent to service upon a party[70] and the statute stating that service was to be upon the parties.[71]

The supreme court confirmed that the judiciary alone determines the rules of procedure for cases within the judicial system.[72] The court went on to hold, however, that the judiciary does not have such power for cases that are still within the administrative system. The court held that where the legislature has established an administrative procedure for taking a case or controversy out of the administrative framework and into the judicial system for review, the court could not apply its own procedural rules until the administrative procedures required by statute were fully satisfied, and the court had thereby acquired jurisdiction of the case.

The legislative scheme and not court-created rules strictly govened the process and procedure for appeal from the State Engineer's decisions to the judiciary. As a result, an appeal to a court from a decision of the State Engineer had to be taken in strict compliance with statutory requirements. The court held that process had to be served on the parties as the statute required, that the appeal had been improperly taken, and that the appeal should be dismissed.

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69. 96 N.M. 651, 634 P.2d 202 (1981).
70. N.M. R. Civ. P. 5(b).
71. N.M. Stat. Ann. § 72-7-1 (1978).
72. Ammerman v. Hubbard Broadcasting, 89 N.M. 307, 551 P.2d 1354 (1976).

D. Non-statutory Review

1. The Prerogative Writs

During the Survey year, the supreme court decided one case concerning allocation of the burden of proof under the *quo warranto* statutes.[73] In *State ex rel. Huning v. Los Chavez Zoning Commission*,[74] the plaintiffs brought an action in *quo warranto* against the Los Chavez Zoning District challenging the validity of the zoning district. The plaintiffs alleged that the defendant Los Chavez Zoning Commission had not obtained the number of signatures required by statute to be on the petition forming the zoning district. The court held that the burden of proof in a *quo warranto* proceeding is on the defendant at all times.[75] Because the defendant failed to sustain its burden of proving that the requisite number of signatures had been obtained, the court ruled that the zoning district was invalidly formed.[76] The court allocated the burden of proof differently from ordinary civil actions, where the burden of proving a claim is on the plaintiff.[77] This is consistent with prior New Mexico case law which requires that persons who allegedly usurp the authority of the state have the burden of justifying their actions.[78]

2. Injunctions and Collateral Attack

Several cases decided during this Survey year demonstrate the effective use of injunctions and collateral attack as a means of reviewing agency action. In *City of Santa Fe v. Armijo*,[79] the city of Santa Fe and certain neighborhood associations sought an injunction against the Commissioner of Public Lands to stop him from maintaining an oil field pumping rig on the premises of a state office building. The city claimed that the Commissioner was violating city historical district zoning ordinances and thus sought to apply city zoning laws to state-owned property. The district court granted the injunction. On review, the supreme court held that the injunction had been improperly granted because the city could not apply its historical district zoning ordinances to state property. The court reasoned that the city's power to zone state property had to be expressly delegated by statute because statutes granting powers to cities are strictly

73. N.M. Stat. Ann. §§ 44-3-1 to -16 (1978).

74. 97 N.M. 472, 641 P.2d 503 (1982).

75. *Id.* at 474, 641 P.2d at 505.

76. *Id.*

77. *See, e.g.*, Carter v. Burn Constr. Co., Inc., 85 N.M. 27, 31, 508 P.2d 1324, 1328, *cert. denied*, 85 N.M. 5, 508 P.2d 1302 (1973); J. A. Silversmith, Inc. v. Marchiondo, 75 N.M. 290, 294, 404 P.2d 122, 126 (1965).

78. State *ex rel.* Garcia v. Martinez, 80 N.M. 659, 660, 459 P.2d 458, 459 (1969).

79. 96 N.M. 663, 634 P.2d 685 (1981). For further discussion of this case, see Minzner, *Property*, *post* at 435.

construed. No such express delegation existed in this case. The city's attempt to apply the zoning ordinances to state land therefore failed.

In *Gonzales v. Whitaker*,[80] the plaintiffs, a group of neighbors, sought an injunction and thereby effected an appeal from the Dona Ana Board of County Commissioner's grant of a special use permit to build a dairy farm in the neighborhood. The neighbors claimed that the dairy farm created a public and private nuisance. Upon a motion to dismiss, the court of appeals held that the citizens could seek an anticipatory injunction against the use of the permit after considering and rejecting the contention that primary jurisdiction to decide the nuisance issues lay with the state Environmental Improvement Agency. The application for the court injunction had therefore effected a challenge to the legal adequacy of the Board's decision.

In *Mechem v. City of Santa Fe*,[81] in the context of a collateral attack, the plaintiff obtained a review of the city's imposition of an ownership condition on a special exception to the zoning laws. Although the statutory time period for review of the original decision of the agency had passed years before, the court permitted collateral attack on the exception because the city had acted beyond the scope of its statutory authority, or *ultra vires*, and its actions were therefore void. The court stressed that collateral attacks upon actions which are void are proper, and that the lapse of the appeal period did not bar reconsideration of the agency action.

IV. CONCLUSION

The New Mexico appellate courts addressed a number of interesting and significant issues in administrative law cases during this Survey year. Not all of the decisions established precedent that was clear, easy to intepret or to apply. We shall look to the decisions of future years for clarifications in this area of law where practitioners need clearcut guidlines.

80. 97 N.M. 710, 643 P.2d 274 (Ct. App. 1982).

81. 96 N.M. 668, 634 P.2d 690 (1981). For a discussion of *Mechem* in a different context, see *supra* text accompanying notes 10–11 & 68.