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Conditional Agency Determination Improperly Brought Under Article 78 Will Be Converted Into Suit for Injunctive Relief Under Public Health Law

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Thompson, the Court held that a prosecutor's use of peremptory challenges for the sole purpose of excluding blacks had the effect of denying the defendant the right to an impartial jury.

In the area of products liability, the Court's decision in *Caprara v. Chrysler Corporation* held that evidence of post-accident manufacturing changes is admissible in a strict products liability action, thus distinguishing such an action from one in negligence where evidence of such changes has been held inadmissible. The vitality of the doctrine of intrafamily immunity is explored in *Smith v. Sapienza,* where the Court held that no cause of action lies for the negligent supervision of a child by an unemancipated sibling. The decision appears to reaffirm many of the policy considerations in the Court's landmark decision in *Holodook v. Spencer.* It is hoped that *The Survey's* analysis of these and other significant New York decisions will serve the purpose of keeping the practitioner informed of recent developments in New York law.

ARTICLE 78—PROCEEDING AGAINST BODY OR OFFICER

Conditional agency determination improperly brought under article 78 will be converted into suit for injunctive relief under Public Health Law

CPLR article 78, which provides for judicial review of administrative action, was designed to eliminate technical distinctions among the writs of certiorari, prohibition, mandamus to review, and mandamus to compel by incorporating these writs into a uniform proceeding.[1] Distinctions among the writs persist, however,

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[1] CPLR 7801 (1981); *see* 5 N.Y. JUR. 2d *Article 78 and Related Proceedings* § 2 (1980); SIEGEL § 557, at 774; WK&M ¶ 7801.02. *See generally* Gabrielli & Nonna, *Judicial Review of Administrative Action in New York: An Overview and Survey,* 52 ST. JOHN'S L. REV. 361 (1978). Article 78 abolishes the common-law writs of mandamus to review, mandamus to compel, prohibition, and certiorari and integrates them into one simple proceeding. *See* Weintraub, *Statutory Procedures Governing Judicial Review of Administrative Action: From State Writs to Article 78 of the Civil Practice Law and Rules,* 38 ST. JOHN'S L. REV. 86, 119 (1963). These writs originated under English common law and were carried over to the American system. *See* Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus,* 9 N.Y.L.F. 478 (1963). Certiorari applies to the review of an administrative determination resulting from a hearing required by law. *See* Long Island R.R. v. Hylan, 240 N.Y. 199, 203-04, 148 N.E. 189, 190 (1925); Board of Educ. v. Parsons, 61 Misc. 2d 838, 839, 306 N.Y.S.2d 833, 836 (Sup. Ct. Wayne County 1969); Gelces v. State Liquor Auth., 154 Misc. 517, 517, 278 N.Y.S. 328, 329 (Sup. Ct. Albany County 1935). The requirement of a hearing may be implied from a statute, *see* Hecht v. Monaghan, 307 N.Y. 461, 468, 121 N.E.2d 421, 424 (1954), or derived from an administrative rule, *see* Adler v. Lang, 21 App. Div. 2d 107, 111, 248 N.Y.S.2d 549, 553-54 (1st Dep't 1964). The hearing

because the exhaustion of remedies doctrine codified within article 78 provides that nonfinal agency action is ripe for judicial review only if the proceedings are in the nature of prohibition or mandamus to compel.[2] Thus, absent final agency action, an article 78 pro-

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must be of a judicial or quasi-judicial nature, *see* People *ex rel.* Hayes v. Waldo, 212 N.Y. 156, 172, 105 N.E. 961, 966, *rehearing denied,* 212 N.Y. 588, 106 N.E. 1040 (1914), and not the type of action that can be termed executive, *see* People *ex rel.* Schau v. McWilliams, 185 N.Y. 92, 95, 77 N.E. 785, 785 (1906), ministerial, *see* People *ex rel.* Corwin v. Walter, 68 N.Y. 403, 411 (1877), or legislative, *see* National Merritt, Inc. v. Weist, 50 App. Div. 2d 817, 817, 376 N.Y.S.2d 571, 572 (2d Dep't 1975), *aff'd,* 41 N.Y.2d 438, 361 N.E.2d 1028, 393 N.Y.S.2d 379 (1977). *See generally* N.Y. STATE ADMIN. PRO. ACT § 102(3) (McKinney Supp. 1980).

The writ of mandamus may be divided into two categories: mandamus to compel and mandamus to review. The writ of mandamus to compel will be issued to compel an official to perform a nondiscretionary duty "enjoined by law." *See* Horan v. Dominy, 43 Misc. 2d 62, 63, 250 N.Y.S.2d 7, 9 (Sup. Ct. Suffolk County 1964); Littlefield-Alger Signal Co. v. County of Nassau, 40 Misc. 2d 948, 950, 244 N.Y.S.2d 579, 582 (Sup. Ct. Nassau County 1963). The duty clearly must be ministerial and the power of the official to act already must exist. *See* Burr v. Voorhis, 229 N.Y. 382, 387, 128 N.E. 220, 221 (1920). The issuance of the writ does not require a prior agency hearing. *See* Mount Hope Dev. Corp. v. James, 258 N.Y. 510, 512, 180 N.E. 252, 252 (1932); People *ex rel.* Desiderio v. Conolly, 238 N.Y. 326, 330-31, 144 N.E. 629, 630 (1924); People *ex rel.* Republican & Journal Co. v. Wiggins, 199 N.Y. 382, 385, 92 N.E. 789, 790 (1910). The petitioner seeking mandamus to compel must prove a clear legal right to the remedy. *See* Fehlhaber Corp. v. O'Hara, 53 App. Div. 2d 746, 746, 384 N.Y.S.2d 270, 271 (3d Dep't 1976); Jackson v. McCabe, 47 App. Div. 2d 730, 730, 365 N.Y.S.2d 202, 204 (1st Dep't 1975).

Mandamus to review permits judicial review of administrative decisions when the agency is not required by law to hold a hearing. It is distinguishable from certiorari because there is no legal requirement for a hearing and the agency is not required to base its decision upon substantial evidence. *See* 125 Bar Corp. v. State Liquor Auth., 24 N.Y.2d 174, 177, 247 N.E.2d 157, 158, 299 N.Y.S.2d 194, 196 (1969). Thus, when an agency makes a determination based upon information that it may receive in an informal fashion, mandamus to review will be used by the court to review the agency's determination. *See* Rochester Colony, Inc. v. Hostetter, 19 App. Div. 2d 250, 253, 241 N.Y.S.2d 210, 213 (4th Dep't 1963).

The writ of prohibition will be issued when an agency exceeds its jurisdictional authority. *See generally* Note, *The Writ of Prohibition in New York—Attempt to Circumscribe an Elusive Concept,* 50 ST. JOHN'S L. REV. 76 (1975). Since prohibition is considered an extraordinary writ, *see* Proskin v. County Court, 37 App. Div. 2d 279, 282, 324 N.Y.S.2d 426, 429 (3d Dep't 1971), *aff'd,* 30 N.Y.2d 15, 280 N.E.2d 875, 330 N.Y.S.2d 44 (1972), and is issued in the discretion of the court, *see* LaRocca v. Lane, 37 N.Y.2d 575, 579, 338 N.E.2d 606, 610, 376 N.Y.S.2d 93, 97 (1975), *cert. denied,* 424 U.S. 968 (1976), it will only be issued when the petitioner demonstrates that he has no other viable remedy. *See* Schuyler v. State Univ., 31 App. Div. 2d 273, 274, 297 N.Y.S.2d 368, 370 (3d Dep't 1969).

[2] As Professor Siegel has stated:

> The doctrine of the exhaustion of administrative remedies, embodied in the requirement of CPLR 7801(1) that the determination be "final" before being subjected to an article 78 proceeding, . . . means that if there are further (and reasonable) administrative steps available to secure a change in the result, the party must pursue them before going to court.

SIEGEL § 558, at 779. A proceeding in the nature of prohibition need not meet the finality requirement because the contention of such a proceeding is that an administrative agency

ceeding in the nature of certiorari or mandamus to review is improper[3] and must either be dismissed[4] or converted into an alternative form of relief.[5] Recently, in *Hamptons' Hospital v. Moore*,[6] the Court of Appeals held that the nature of an article 78 proceeding is a function of the *character* of the contested agency activity.[7] Nonetheless, upon sanctioning the conversion of an article 78 proceeding in the nature of mandamus to review into a cause of action under the Public Health Law, the Court held that governmental agencies may not be estopped from reversing their conditional decisions.[8]

In *Hamptons' Hospital*, the Public Health Council (PHC)[9]

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exceeded its jurisdiction, a matter that is reviewable at any time. *See* Civil Serv. Employees Ass'n, Inc. v. Helsby, 31 App. Div. 2d 325, 330, 297 N.Y.S.2d 813, 818 (3d Dep't 1969). A proceeding in the nature of mandamus to compel need not meet the finality requirement because the contested agency activity is ministerial. *See* Burr v. Voorhis, 229 N.Y. 382, 387, 128 N.E. 220, 221 (1920); People *ex rel.* Harris v. Commissioners of Land Office, 149 N.Y. 26, 32-33, 43 N.E. 418, 420 (1896).

[3] CPLR 7801 (1981). Certiorari requires that the determination under review must be final, *see* Rubano v. New York Tel. Co., 43 Misc. 2d 149, 150-51, 250 N.Y.S.2d 373, 375 (Sup. Ct. Westchester County 1964), and that there are no other adequate remedies, *see* Schulman v. McMorran, 9 App. Div. 2d 1007, 1008, 195 N.Y.S.2d 5, 7 (3d Dep't 1959); Anderson v. Lockhardt, 62 Misc. 2d 815, 816, 310 N.Y.S.2d 361, 362 (Sup. Ct. Westchester County 1970). Mandamus to review also presupposes that the petitioner has exhausted all administrative remedies. *See* Van Patten v. Ingraham, 51 Misc. 2d 244, 246-47, 272 N.Y.S.2d 943, 945-46 (Sup. Ct. Albany County 1966); Gross v. Board of Educ., 46 Misc. 2d 987, 990, 261 N.Y.S.2d 577, 580 (Sup. Ct. Kings County 1965).

[4] *See* Cohoes Memorial Hosp. v. Department of Health, 48 N.Y.2d 583, 588-91, 399 N.E.2d 1132, 1135-36, 424 N.Y.S.2d 110, 113-14 (1979); Howe Ave. Nursing Home, Inc. v. Nafus, 54 App. Div. 2d 686, 687, 387 N.Y.S.2d 272, 273-74 (2d Dep't 1976); *In re* Feldman, 28 App. Div. 2d 1106, 1106-07, 284 N.Y.S.2d 335, 335 (1st Dep't 1967); Anderson v. Lockhardt, 62 Misc. 2d 815, 816, 310 N.Y.S.2d 361, 362 (Sup. Ct. Westchester County 1970).

[5] Conversion is mandated by CPLR 103(c) and is designed to protect the petitioner from dismissal of his suit for specifying the wrong type of civil judicial proceeding. THIRD REP. at 47; SIEGEL § 563, at 788. Prior to enactment of the CPLR, a claim would be dismissed when the petitioner incorrectly chose between a special proceeding and an action. *See* WK&M ¶ 103.08, at 1-61, 1-62. CPLR 103(c), however, provides the court with the flexibility to issue any order that will permit proper litigation of the suit. *See* First Nat'l City Bank v. City of New York Fin. Admin., 36 N.Y.2d 87, 94, 324 N.E.2d 861, 865, 365 N.Y.S.2d 493, 498 (1975); Phalen v. Theatrical Protective Union No. 1, 22 N.Y.2d 34, 41, 238 N.E.2d 295, 299, 290 N.Y.S.2d 881, 887, *cert. denied*, 393 U.S. 1000 (1968); County of Rensselaer v. Capital Dist. Transp. Auth., 42 App. Div. 2d 445, 447, 349 N.Y.S.2d 20, 22-23 (3d Dep't 1973).

[6] 52 N.Y.2d 88, 417 N.E.2d 533, 436 N.Y.S.2d 239 (1981), *modifying* 74 App. Div. 2d 30, 426 N.Y.S.2d 553 (2d Dep't 1980).

[7] *Id.* at 98, 417 N.E.2d at 538, 436 N.Y.S.2d at 244.

[8] *Id.*

[9] N.Y. PUB. HEALTH LAW § 220 (McKinney 1971) provides for a Public Health Council (PHC). One of the primary duties of the PHC is to approve the establishment of hospitals.

had conditionally approved the petitioner's application to establish a hospital, subject to the petitioner obtaining proper financing.[10] After the petitioner had secured funding,[11] the PHC reevaluated the public need for the hospital and disapproved the application.[12] Subsequently, the petitioner brought an article 78 proceeding, seeking to enjoin the PHC from reconsidering its earlier determination.[13] Denying the petitioner's request, the trial court held that the PHC could reevaluate its initial approval because that approval was not final.[14] The Appellate Division, Second Department, upon recognizing the nonfinal nature of the PHC's determination,[15] held that the PHC's reconsideration more properly could be reviewed under the Public Health Law and converted the suit into an action for injunctive relief under that statute.[16] The appellate division also overruled the trial court's refusal to grant an in-

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N.Y. PUB. HEALTH LAW § 2801-a (McKinney 1971 & Supp. 1980-1981).

[10] 52 N.Y.2d at 91, 417 N.E.2d at 534, 436 N.Y.S.2d at 240. The petitioner had sought to build a 220 bed hospital in Suffolk County. *Id.* The original determination, made in 1972, was based upon the PHC's finding that there existed a public need for the hospital. 74 App. Div. 2d at 32, 426 N.Y.S.2d at 554.

[11] 74 App. Div. 2d at 32, 426 N.Y.S.2d at 554.

[12] 52 N.Y.2d at 91-92, 417 N.E.2d at 535, 436 N.Y.S.2d at 241. During the summer of 1976, the Department of Health's Bureau of Facility and Service Review (the Bureau) reviewed all pending hospital projects, including the petitioner's. 74 App. Div. 2d at 32-33, 426 N.Y.S.2d at 554. On December 16, 1976, the PHC received a report from the Bureau stating that there was no longer any public need for the petitioner's hospital. 52 N.Y.2d at 91, 417 N.E.2d at 534, 436 N.Y.S.2d at 240. Subsequently, the petitioner met with a subcommittee of the New York State Hospital Review and Planning Council to discuss the status of the hospital. *Id.* at 91, 417 N.E.2d at 534-35, 436 N.Y.S.2d at 240-41. Thereafter, the subcommittee recommended disapproval of the petitioner's application in light of the surplus of hospital beds that the hospital's construction would cause. *Id.* In response, on April 22, 1977, the PHC passed a resolution which stated that it was considering disapproval of the petitioner's application. *Id.* at 92, 417 N.E.2d at 535, 436 N.Y.S.2d at 241. The PHC informed the petitioner that its decision would become final unless the petitioner requested a hearing within 20 days. *Id.* The hearing, however, was held in abeyance pending a decision in the petitioner's lawsuit. *Id.*

[13] 52 N.Y.2d at 92, 417 N.E.2d at 535, 436 N.Y.S.2d at 241.

[14] *Id.* The court refused to estop the PHC from acting, noting that the petitioner had been aware of the provisional nature of the determination. *Id.*

[15] 74 App. Div. 2d at 34, 426 N.Y.S.2d at 555. The court noted that the PHC's decision was not final since the resolution stated that the PHC was only "considering" disapproval and that such a decision would become final if the petitioner did not request a hearing within 20 days. *Id.*

[16] 74 App. Div. 2d at 34, 426 N.Y.S.2d at 555. The appellate division questioned whether the PHC's decision was reviewable under article 78 since it was a conditional determination and not a final order. *Id.* Additionally, the appellate division stated that the legislative intent of Public Health Law section 2801-c was for injunctive relief to be obtainable whenever rights granted under the statute were violated. 74 App. Div. 2d at 34, 426 N.Y.S.2d at 555.

junction, stating that although the PHC had the power to reconsider the application, the petitioner's reliance upon the PHC's initial approval warranted estopping such reconsideration.[17]

On appeal, the Court of Appeals modified the order of the appellate division.[18] Writing for the majority,[19] Judge Jasen noted that since the contested agency action was discretionary, the petitioner's article 78 proceeding was in the nature of mandamus to review.[20] Holding that an estoppel claim would not change the nature of the proceeding to mandamus to compel, the Court stated that the proper focus should be upon the *character* of the contested agency action and not upon the petitioner's "substantive entitlement to prevail."[21] Because the contested agency action was nonfinal and the relief sought was in the nature of mandamus to review, the Court concluded that the PHC determination was not

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[17] 74 App Div. 2d at 34-35, 426 N.Y.S.2d at 555-56. The appellate division noted that during the provisional period, the petitioner allegedly spent $1.5 million towards the establishment of the hospital, *id.* at 33, 426 N.Y.S.2d at 554, and that such expenditures were made in reasonable reliance upon the approval of petitioner's application, the time limits within which petitioner had to comply, and the "affirmative encouragement" that the petitioner had received from the PHC. *Id.* at 34-35, 426 N.Y.S.2d at 555-56. In using an estoppel theory, the appellate division relied upon Bender v. New York City Health & Hosps. Corp., 38 N.Y.2d 662, 345 N.E.2d 561, 382 N.Y.S.2d 18 (1976); 74 App. Div. 2d at 34-35, 426 N.Y.S.2d at 555, wherein the Court of Appeals had applied the doctrine of estoppel to a municipality. 38 N.Y.2d at 668, 345 N.E.2d at 564, 382 N.Y.S.2d at 20-21. *But see* note 23 *infra.*

[18] 52 N.Y.2d at 93, 417 N.E.2d at 536, 436 N.Y.S.2d at 242. *See* Siegel v. Mangan, 258 App. Div. 448, 450, 16 N.Y.S.2d 1000, 1002 (3d Dep't), *aff'd,* 283 N.Y. 557, 27 N.E.2d 280 (1940) (per curiam); note 23 *infra.*

[19] Judge Jasen was joined by Judges Jones, Wachtler and Fuchsberg. Dissenting in part, Judge Gabrielli authored an opinion in which Chief Judge Cooke and Judge Meyer concurred.

[20] 52 N.Y.2d at 96-97, 417 N.E.2d at 537-38, 436 N.Y.S.2d at 243-44; *see* notes 1 & 3 *supra.*

[21] 52 N.Y.2d at 97, 417 N.E.2d at 538, 436 N.Y.S.2d at 244. In discussing the discretionary nature of the PHC's action, the majority referred to Utica Cheese, Inc. v. Barber, 49 N.Y.2d 1028, 406 N.E.2d 1342, 429 N.Y.S.2d 405 (1980), a case relied upon by the dissent. In *Utica Cheese,* the petitioner brought an article 78 proceeding to compel an administrative agency to render a decision upon the petitioner's application for a milk dealer's license. *Id.* In granting the petitioner relief in the form of mandamus to compel, the Court held that the agency had a nondiscretionary duty to act upon the application. *Id.* at 1029, 406 N.E.2d at 1343, 429 N.Y.S.2d at 406. In *Hamptons' Hospital,* the Court noted that *Utica Cheese* was inapplicable to the facts at bar. 52 N.Y.2d at 96 n.3, 417 N.E.2d at 537 n.3, 436 N.Y.S.2d at 243 n.3. The Court stated that *Utica Cheese* involved the nondiscretionary duty of rendering a decision upon an application, whereas the petitioner in *Hamptons' Hospital* sought to review the actual decision itself. *Id.* Such a decision, the *Hamptons' Hospital* Court stated, was purely discretionary. *Id.*

ripe for judicial review under article 78,[22] but approved the conversion of the proceeding into a suit for injunctive relief under the Public Health Law.[23] Nonetheless, upon sanctioning conversion of the proceeding, the Court held that it would not enjoin the PHC from acting since it was, in effect, "the State acting in a governmental capacity."[24]

Dissenting in part, Judge Gabrielli agreed that the PHC could reconsider its decision before granting final approval, but maintained that the article 78 proceeding should not have been converted into a suit for injunctive relief under the Public Health Law.[25] Noting that the original petition alleged that the PHC de-

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[22] 52 N.Y.2d at 97, 417 N.E.2d at 538, 436 N.Y.S.2d at 244.

[23] *Id.* at 97-98, 417 N.E.2d at 538, 436 N.Y.S.2d at 244. The Court noted that nothing in the Public Health Law's legislative history or language denied the right of aggrieved parties to enjoin violations by the PHC. *Id.* The Court further stated that although the controversy was not ripe for judicial review under article 78, it was ripe under the Public Health Law. *Id. See* N.Y. PUB. HEALTH LAW § 2801-c (McKinney 1977); note 25 *infra. But see* note 28 *infra.*

[24] 52 N.Y.2d at 93, 417 N.E.2d at 536, 436 N.Y.S.2d at 242. It is a general rule in New York that a state agency acting in a governmental capacity may not be precluded from such activity on the basis of equitable estoppel. *See* People v. System Properties, Inc., 281 App. Div. 433, 441, 120 N.Y.S.2d 269, 276 (3d Dep't 1953), *modified on other grounds,* 2 N.Y.2d 330, 141 N.E.2d 429, 160 N.Y.S.2d 859 (1957); State v. New York Tariff Bureau, Inc., 48 Misc. 2d 225, 229-32, 264 N.Y.S.2d 931, 938-40 (Sup. Ct. N.Y. County 1965). The *Hamptons' Hospital* Court, in applying this general rule, distinguished the case at bar from Bender v. New York City Health & Hosps. Corp., 38 N.Y.2d 662, 345 N.E.2d 561, 382 N.Y.S.2d 18 (1976). 52 N.Y.2d at 93 n.1, 417 N.E.2d at 536 n.1, 436 N.Y.S.2d at 242 n.1; *see* note 16 *supra.* The *Hamptons' Hospital* Court stated that:

> [Although in *Bender*] we held that . . . the doctrine of equitable estoppel might be invoked to permit the filing of notices of claim *nunc pro tunc* under section 50-3 of the General Municipal Law during a period of particular confusion incident to the transfer of operational control of municipal hospitals, . . . [t]hat holding, addressed to an unusual factual situation, is of very limited application and should not be read as diminishing the vitality of the general rule that the doctrine of estoppel is not applicable to agencies of the State acting in a governmental capacity.

52 N.Y.2d at 93 n.1, 417 N.E.2d at 536 n.1., 436 N.Y.S.2d at 242 n.1.

[25] 52 N.Y.2d at 98, 417 N.E.2d at 538, 436 N.Y.S.2d at 244. (Gabrielli, J., dissenting in part). The dissent found the conversion particularly objectionable because it was the first time that a private health service was able to use Public Health Law section 2801-c to enjoin a state agency. 52 N.Y.2d at 101, 417 N.E.2d at 540, 436 N.Y.S.2d at 246 (Gabrielli, J., dissenting in part). Judge Gabrielli noted that, previously, section 2801-c had been used only to enjoin *hospitals* from violating article 28 of the Public Health Law. *Id.* (Gabrielli, J., dissenting in part). *See, e.g.,* Cohoes Memorial Hosp. v. Department of Health, 48 N.Y.2d 583, 588, 399 N.E.2d 1132, 1134, 424 N.Y.S.2d 110, 113 (1979); Fritz v. Huntington Hosp., 39 N.Y.2d 339, 346, 348 N.E.2d 547, 553, 384 N.Y.S.2d 92, 97 (1976); People v. Wickersham Women's Medical Center, 69 Misc. 2d 196, 196-98, 329 N.Y.S.2d 627, 628-30 (Sup. Ct. N.Y. County 1972). Indeed, the dissent stated that there was nothing in the statute's language or

termination was nondiscretionary, the dissent reasoned that the petitioner's allegation constituted a prayer for relief in the nature of mandamus to compel and therefore was reviewable under article 78.[26] Moreover, Judge Gabrielli declared that if such review were subject to the finality requirement as is a claim in the nature of mandamus to review, the petitioner's suit should have been dismissed for failure to exhaust administrative remedies.[27] Contending that the conversion to the Public Health Law was used because the petitioner could not meet the finality requirement, the dissent concluded that the majority's holding was "wholly inappropriate" and logically inconsistent.[28]

Hamptons' Hospital illustrates the difficulty courts face in distinguishing among the different writs. Indeed, whether the relief sought by the *Hamptons' Hospital* petitioner was in the nature of mandamus to review or mandamus to compel was a pivotal point of disagreement between the majority and dissent.[29] It is submitted that in characterizing the petitioner's requested relief as in the nature of mandamus to review, the majority correctly focused upon the character of the contested agency activity and not, as the dissent preferred, upon the writ asserted by the petitioner.[30] Although

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legislative history which even implied that injunctive relief could be obtained against the PHC. 52 N.Y.2d at 102, 417 N.E.2d at 540, 436 N.Y.S.2d at 246 (Gabrielli, J., dissenting in part).

[26] 52 N.Y.2d at 101, 417 N.E.2d at 540, 436 N.Y.S.2d at 246 (Gabrielli, J., dissenting in part). The petitioner contended that the PHC had no discretion once it had made a determination and had induced the petitioner to rely upon it. *Id.* (Gabrielli, J., dissenting in part). The dissent stated that the petition for relief, therefore, was in the nature of mandamus to compel. *Id.* (Gabrielli, J., dissenting in part). Noting that mandamus to compel does not require a final decision, the dissent concluded that the finality bar, which had been the basis for the appellate division's conversion, was nonexistent. *Id.* (Gabrielli, J., dissenting in part). Although noting that the PHC's "ultimate determination" was discretionary, the dissent felt that this was irrelevant to the issue of conversion. *Id.* at 101 n.2, 417 N.E.2d at 540 n.2, 436 N.Y.S.2d at 246 n.2 (Gabrielli, J., dissenting in part). Rather, the dissent argued, the pertinent issue was whether the PHC should be enjoined from making a redetermination. *Id.* at 103-04, 417 N.E.2d at 541, 436 N.Y.S.2d at 247 (Gabrielli, J., dissenting in part). The dissent concluded that conversion was unnecessary because this type of review is encompassed within the scope of article 78. *Id.* (Gabrielli, J., dissenting in part).

[27] *Id.* at 103, 417 N.E.2d at 541, 436 N.Y.S.2d at 247. (Gabrielli, J., dissenting in part).

[28] *Id.* (Gabrielli, J., dissenting in part). The dissent stated that if administrative action is not ripe for article 78 review it cannot be ripe for review under the Public Health Law. *Id.* (Gabrielli, J., dissenting in part).

[29] *See* 52 N.Y.2d at 97, 417 N.E.2d at 537-38, 436 N.Y.S.2d at 243-44; *id.* at 101, 417 N.E.2d at 540, 436 N.Y.S.2d at 246 (Gabrielli, J., dissenting in part).

[30] The majority stated that "[t]he availability under article 78 of mandamus to compel performance of a duty by an administrative agency depends not on the applicant's substantive entitlement to prevail, but on the nature of the duty sought to be commanded—i.e.,

persons may compel the performance of ministerial acts through mandamus to compel, an assertion of reliance has no bearing with respect to nonfinal action and should not be used to convert a discretionary act into a ministerial duty.[31] Consequently, because the contested agency action in *Hamptons' Hospital* was nonfinal and the relief sought was in the nature of mandamus to review, the majority properly held that relief could not be obtained under article 78.[32]

Furthermore, although CPLR 103(c) authorizes conversion when the relief sought by the petitioner is unavailable,[33] it appears that the doctrine of exhaustion of remedies prohibits resort to the Public Health Law when agency action is nonfinal because the Public Health Law does not provide for judicial review of agency action, whether final or nonfinal.[34] Indeed, although conversion from article 78 to an alternative basis for relief is proper in some instances,[35] it is submitted that the *Hamptons' Hospital* Court

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mandatory, nondiscretionary action." *Id.* at 97, 417 N.E.2d at 538, 436 N.Y.S.2d at 244; *see* New York Post Corp. v. Leibowitz, 2 N.Y.2d 677, 683-84, 143 N.E.2d 256, 259, 163 N.Y.S.2d 409, 413-14 (1957); Weinstein v. New York City Transit Auth., 49 Misc. 2d 170, 172-73, 267 N.Y.S.2d 111, 113-14 (Sup. Ct. N.Y. County 1966).

[31] Before a writ of mandamus to compel will issue, the duty involved clearly must be ministerial. *See* Koffler v. Weiss, 48 Misc. 2d 1, 2, 263 N.Y.S.2d 905, 907 (Sup. Ct. Suffolk County 1965); Petz v. Property Clerk of the 68th Squad, 149 N.Y.S.2d 179, 180-81 (Sup. Ct. Kings County 1956). This ministerial duty must be grounded in the law. As the Court of Appeals has stated, "[m]andamus [to compel] is used to enforce an administrative act positively required to be done by a provision of law." Walsh v. LaGuardia, 269 N.Y. 437, 441, 199 N.E. 652, 653 (1936). It is submitted that estoppel cannot suffice as an act "positively required" by law since "estoppel does not originate a legal right; it merely forbids the denial of a right claimed otherwise to have arisen." Ossining v. Lakin, 5 Misc. 2d 1024, 1026, 160 N.Y.S. 1012, 1014 (Sup. Ct. Westchester County 1957) (quoting Morill Realty Corp. v. Rayon Holding Corp., 254 N.Y. 268, 275, 172 N.E. 494, 496 (1930)).

[32] *See* 52 N.Y.2d at 97-98, 417 N.E.2d at 538, 436 N.Y.S.2d at 244; notes 21-23 and accompanying text *supra.*

[33] *See* Adams v. New York State Civil Serv. Comm'n, 51 App. Div. 2d 668, 668, 378 N.Y.S.2d 171, 173 (4th Dep't 1976); Taubman Co., Inc. v. Getty Square Plaza Corp., 76 Misc. 2d 476, 478-79, 351 N.Y.S.2d 125, 128 (Sup. Ct. Westchester County), *aff'd,* 46 App. Div. 2d 1016, 364 N.Y.S.2d 808 (2d Dep't 1974); Avalon East, Inc. v. Monaghan, 43 Misc. 2d 401, 404-05, 251 N.Y.S.2d 290, 294 (Sup. Ct. N.Y. County 1964); note 5 *supra.*

[34] *See* note 25 and accompanying text *supra.* The courts have noted that, in general, the judiciary's ability to review administrative action is limited. *E.g.,* Holland v. Edwards, 282 App. Div. 353, 358-59, 122 N.Y.S.2d 721, 725-26 (1st Dep't 1953), *aff'd,* 307 N.Y. 38, 119 N.E.2d 581 (1954); Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Department of Labor, 17 Misc. 2d 1070, 1073, 182 N.Y.S.2d 570, 574 (Sup. Ct. N.Y. County 1959); New York City Hous. Auth. v. Watson, 23 Misc. 2d 408, 414, 189 N.Y.S.2d 274, 279-80 (Mun. Ct. N.Y. County 1959), *rev'd on other grounds,* 27 Misc. 2d 618, 207 N.Y.S.2d 920 (Sup. Ct. N.Y. County 1960).

[35] *See* notes 5 & 33 *supra.* The critical focus for the courts should be whether the peti-

should not have sanctioned conversion into a cause of action under the Public Health Law, since that statute was intended to provide "a remedy *only against hospitals,*" not against the PHC.[36] Moreover, it is suggested that when final agency action is required but lacking, such as in *Hamptons' Hospital,* the Court should forego conversion in favor of remanding to the agency for a final decision.[37] Such a judicial posture would most effectively discourage future petitioners from filing suit prior to the making of a final administrative determination.

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tioner has stated a viable cause of action and not whether the wrong form of relief has been asserted. *See* Belsky v. Lowenthal, 62 App. Div. 2d 319, 321, 405 N.Y.S.2d 62, 64 (1st Dep't 1978), *aff'd,* 47 N.Y.2d 820, 392 N.E.2d 560, 418 N.Y.S.2d 573 (1979); Coughlin v. Festin, 53 App. Div. 2d 800, 800-01, 385 N.Y.S.2d 166, 168-69 (3d Dep't 1976). Indeed, if a petitioner presents a prayer for relief which is within the court's jurisdiction, it is incumbent upon the court to convert the action. CPLR 103(c). *See* Phalen v. Theatrical Protective Union No. 1, 22 N.Y.2d 34, 41-42, 238 N.E.2d 295, 299, 290 N.Y.S.2d 881, 887, *cert. denied,* 393 U.S. 1000 (1968); Lakeland Water Dist. v. Onondaga County Water Auth., 29 App. Div. 2d 1042, 1042-43, 289 N.Y.S.2d 875, 876-77 (4th Dep't 1968), *modified on other grounds,* 24 N.Y.2d 400, 248 N.E.2d 855, 301 N.Y.S.2d 1 (1969); Barile v. City Comptroller, 56 Misc. 2d 190, 193, 288 N.Y.S.2d 191, 195 (Sup. Ct. Oneida County 1968). Thus, when suits brought under article 78 sound in the nature of injunctive relief, courts generally have permitted conversion from article 78 in an effort to preserve the claims. *See* Moss v. Albany Medical Center Hosp., 61 App. Div. 2d 545, 548, 403 N.Y.S.2d 568, 570 (3d Dep't 1978); Haroche v. Leary, 64 Misc. 2d 191, 194, 314 N.Y.S.2d 553, 557 (Sup. Ct. Kings County 1970), *aff'd,* 38 App. Div. 2d 972, 331 N.Y.S.2d 1005 (2d Dep't 1972); Kraemer v. Office of Employee Relations, 63 Misc. 2d 708, 709, 313 N.Y.S.2d 302, 304 (Sup. Ct. Albany County 1970).

[36] 52 N.Y.2d at 102, 417 N.E.2d at 540, 436 N.Y.S.2d at 246 (Gabrielli, J., dissenting in part) (emphasis added); *see* note 24 *supra.*

[37] It is submitted that the *Hamptons' Hospital* Court would have been well advised to remand the petitioner's proceeding to the PHC for final agency action. Indeed, CPLR 7806 provides that courts "may dismiss . . . proceeding[s] either on the merits or with leave to renew." CPLR 7806 (McKinney 1981). As noted by Professor Siegel, CPLR 7806 gives courts:

> the requisite power to render any judgment appropriate to the case. . . . [I]f the case entails . . . the necessity of further proceedings by the respondent agency, the correction will be made and back will go the case. Though not expressly listed, a remand to the agency for further proceedings is very much a part of the court's power.

SIEGEL § 570, at 799-800.