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THE LOUISIANA ADMINISTRATIVE PROCEDURE ACT*

Robert Force** and Lawrence Griffith***

I. BACKGROUND AND INTRODUCTION

The Louisiana Administrative Procedure Act (hereinafter LAPA), which is located in Title 49 of the Louisiana Revised Statutes, became effective in July, 1967. Its early history has been described elsewhere.¹

* This article is based on "A Report to the Legislature of the State of Louisiana on the Louisiana Administrative Procedure Act."

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1. The LAPA was enacted as La. Acts No. 382, § 1 in 1966 and is now LA. R.S. 49:951-970. The Act was based in part on the Revised Model State Administrative Procedure Act, changes in that Act which had been introduced in various states, the Federal Administrative Procedure Act, 5 U.S.C. §§ 501-703 (1976), and innovations which resulted from the legislative process. The Act originally was proposed by a Joint Committee on the Formulation of Rules of Administrative Procedure.

The Chairman of the Interim Joint Legislative Committee on Formulation of Administrative Rules of Procedure was quoted as saying "that the purpose of the APA was 'to establish a basic, streamlined system to replace the hundreds of rules and regulations in some 189 state agencies, commissions and boards. . .'" Note, *Louisiana's "New" Administrative Procedure Act*, 35 LA. L. REV. 629, 630 n.6 (1974) [hereinafter cited as "New" APA].

"The Louisiana APA was enacted in response to concern that the procedure used by many agencies having an 'important impact on the economic and social welfare of the citizenry' fell short of compliance with due process. . . ." *Id.* at 630.

The Act, however did not replace *all* agency procedures; only those procedures falling below the minimum due process standards established in the statute were intended to be supplemented. "The prime purpose [of the APA] was to provide procedural requirements for agencies which were set up with very little if any such requirements in the substantive statutes."

Id. at 630 n.6.

The need for the Act grew out of a situation in which there were "over fifty Louisiana agencies that hold administrative proceedings or hearings and . . . many of these agencies do not have any written rules of procedure." Dakin, *The Revised Model State Administrative Procedure Act—Critique and Commentary*, 25 LA. L. REV. 799 (1965) [hereinafter cited as Dakin, *Revised APA*]. This article by Professor Dakin, though written prior to the enactment of the LAPA, is very instructive in understanding the Louisiana Act. In his article Professor Dakin analyzes the Revised Model State Act and discusses its strengths and weaknesses, especially in comparison with the Federal Administrative Procedure Act and the acts adopted in various states. The Louisiana Act is a blend of various models coupled with some innovation. As Professor Dakin critiques the Model APA one comes to understand why certain approaches were favored over others in drafting and enacting the LAPA. Of course, he did not prevail on every point. Still, the article is most helpful in understanding the LAPA.

The following works were also consulted and found useful: Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Application, Public Access to Agency Law, the Rulemaking Process*, 60 IOWA L. REV. 731 (1975) [hereinafter cited as

Since enactment, the LAPA has been amended nine times, affecting some six of its sixteen substantive sections, and five new sections have been added. Several sections have been amended more than once. These amendments have had varying impact on the Act.

At the time of enactment the LAPA was sound legislation. It covered the major areas of need, was well drafted and was comparable to the legislation in other states which had used similar models.² In many respects, since the Act was a blend of two "models," and since it included some original approaches, it was a better piece of legislation than either of the models. The intervening modifications and additions through the amendment process helped to improve the Act. However, some problems which stem from the original Act have never been resolved. Some areas are less than clear. Furthermore, during the last two or three years the models on which the LAPA itself was based have been subjected to very careful scrutiny.³

Five major functions are included in the LAPA. These are:

1. Public access to information;
2. Rule-making procedures;
3. Adjudication procedures;
4. Judicial review; and
5. Legislative oversight.⁴

Each of these functions will be discussed in this article. However, first an examination of the scope and applicability of the Act is essential.

Bonfield, *Iowa APA*]; Bonfield, *The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act*, 63 IOWA L. REV. 285 (1977) [hereinafter cited as Bonfield, *Adjudication*]; I & II F. COOPER, *STATE ADMINISTRATIVE LAW* (1st ed. 1965); K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (2d ed. 1978); Comments in *THE NATIONAL CONFERENCE OF COMMISSIONERS OF UNIFORM STATE LAWS, MODEL ADMINISTRATIVE PROCEDURE ACT* (1981).

2. See Bonfield, *Iowa APA*, *supra* note 1. See also N.Y. S.A.P.A. LAW § 100 (McKinney); Tennessee Administrative Procedure Act, TENN. CODE ANN. § 4-5-102.

3. The Revised Model State Administrative Procedure Act again has been revised extensively by a committee of the National Conference of Commissioners on Uniform State Laws, and in August, 1981, the Commissioners adopted this revised version as the Model Administrative Procedure Act of 1981. Changes have been made in the Federal law and numerous other changes have been proposed. See Regulatory Flexibility Act of 1980, 5 U.S.C. § 601-612; Regulation Reform Act of 1979, S.755, CONG. REC. S.3338, Mar. 26, 1979; S.1291, CONG. REC. S.7128, June 6, 1979.

4. A new provision on gubernatorial oversight has been added. See text at notes 295-98, *infra*.

II. APPLICABILITY OF THE ACT

The LAPA does not apply to every administrative body in the State of Louisiana. The original Act defined "Agency" as including "each state board, commission, department or officer authorized by law to make rules or to formulate and issue decisions except" the legislature or any branch, committee or officer thereof, the courts, and certain specified departments of the state government.⁵

In 1974 the definition of "Agency" was amended, apparently to include many of the agencies originally excluded from the definition in the original Act.⁶ "Agency" was changed to include any board, commission, department, or officer authorized by law to make rules or to formulate and issue decisions and orders "except the legislature or any branch, committee, or officer thereof, . . . and the courts." One commentator stated that "[t]he amendment clearly was intended to bring within the scope of the Louisiana APA those agencies exempted by the original Act."⁷ The same commentator suggested that the amendment also intended to repeal the special exemptions given to the State Bond Commission and the Atchafalaya Basin Division.⁸ However, the Attorney General issued an opinion which reached the opposite conclusion.⁹ The 1974 amendment, by adding a new section, Louisiana Revised Statutes 49:967, provided several *explicit* exemptions from certain aspects of the LAPA. The Department of Revenue, the Department of Employment Security, the Department of Highways and the Board of Tax Appeals, although they are not exempted from the procedures which apply to *rule-making*, are exempted from the other provisions of the Act.

The term "Agency" was again amended in 1975 and 1978.¹⁰ In 1976,

5. The Department of Public Welfare, Department of Conservation, Department of Revenue, Division of Employment Security, Department of Labor, the Department of Hospitals, the State Mineral Board, and the Department of Highways are excluded. LA. R.S. 49:951(2) (Supp. 1966). To this list should be added the State Bond Commission and the Atchafalaya Basin Division. "New" APA, *supra* note 1, at 635-36.

6. 1974 La. Acts, No. 284, § 1.

7. "New" APA, *supra* note 1, at 634.

8. *Id.* at 634-35.

9. *Id.* at 635 (citing 1974 LA. OP. ATTY GEN. No. 74-1246 (Sept. 17, 1974)).

10. 1975 La. Acts, No. 730, § 1; 1978 La. Acts, No. 252, § 1. "Agency" under the 1975 amendment meant

each state board, commission, or department which makes rules, regulations, or policy, or formulates, or issues decisions or orders pursuant to, or as directed by, or in implementation of the Constitution or laws of the United States or the constitution or statutes of Louisiana, except the legislature or any branch, committee, or officer thereof, and the courts.

Again "Agency" was redefined in 1978 to mean

the Department of Highways was removed from the exempt category.¹¹ The 1976 amendment repealed the provisions which had been interpreted formerly as creating special exemptions for the State Bond Commission and the Atchafalaya Basin Division. In addition, the amendment applied the newly added legislative oversight provision, Revised Statutes section 49:968, to those agencies otherwise exempted by section 967.¹²

The most recent definition of "Agency" is contained in a 1979 amendment to the Act.¹³ Currently, "Agency" is defined as:

each state board, commission, department, agency, officer or other entity which makes rules, regulations, or policy, or formulates, or issues decisions or orders pursuant to, or as directed by, or in implementation of the constitution or laws of the United States or the constitution and statutes of Louisiana except the legislature or any branch, committee, or officer thereof, any political subdivision as defined in Article VI, Section 44 of the Louisiana Constitution, and any board, commission, department, agency, officer, or other entity thereof, and the courts.¹⁴

This amendment has tried to clarify that so far as rule-making is concerned every agency (unless specifically exempted by section 49:967) must follow the LAPA provisions. Louisiana Revised Statutes 49:966 provides, *inter alia*, that "any and all statutory requirements regarding the adoption or promulgation of rules other than those contained in . . . [the LAPA] . . . are hereby superseded by the provisions of this Chapter and are repealed."¹⁵

The general applicability of the LAPA to agency actions clearly is revealed by a provision in the original Act which is contained today in section 49:966B and which states in part: "No subsequent legislation shall be held to supersede or modify the provisions of this Chapter except to the extent that such legislation shall do so expressly."

each state board, commission, department, agency, officer, or other entity which makes rules, regulations, or policy, or formulates, or issue decisions or orders pursuant to, or as directed by, or in implementation of the constitution or laws of the United States or the constitution and statutes of Louisiana, except the legislature or any branch, committee, or officer thereof and the courts.

11. 1976 La. Acts, No. 279, § 1.

12. The exemptions section, 49:967, was amended to make some technical changes in the names of agencies, to wit, the Department of Revenue and Taxation(s) and the Office of Employment Security. It also exempted the State Civil Service Commission and the Public Service Commission from some of the legislative oversight provisions, namely those contained in section 968F(4).

13. 1979 La. Acts, No. 578, § 1.

14. LA. R.S. 49:951(2) (Supp. 1981).

15. *Id.* § 966(A).

The jurisdictional provisions of the Act would seem clear. All Louisiana governmental entities which promulgate rules or make decisions under the Louisiana Constitution and statutes are subject to the Act, unless they are part of the legislature, the judiciary, or political subdivisions or entities thereof, or unless expressly exempted from the Act. Despite this apparent clarity, disputes as to the applicability of the Act have arisen. One of the most important questions has dealt with the status of the Public Service Commission. In the middle 1970's both the Attorney General¹⁶ and one commentator¹⁷ concluded that the Commission was subject to the Act except to the extent that it was obligated by the constitution to follow expressly enumerated procedures. The Commission had not been included by the legislature in its enumeration of exempt agencies, and was certainly a state governmental entity which formulated rules and made decisions. The Attorney General opined that the legislature intended to include the Commission in its expanded definition of "Agency" in 1974 because the lawmakers were aware of the new constitution and the provisions of article VI, section 21 which relate to the Commission.

The Louisiana Supreme Court disagreed with this result in *Louisiana Consumer's League, Inc. v. Louisiana Public Service Commission*.¹⁸ The Consumer's League had challenged the manner in which the Commission purported to change one of its rules. The procedure used by the Commission, which curtailed public input, did not comply with the procedure for rule changes mandated by the LAPA. The court said that since the Louisiana Constitution authorized the Commission to "adopt and enforce reasonable rules, regulations and procedures . . ." this grant of power "precludes the legislature from enacting statutes which would restrict the Commission's ability to adopt its own rules, regulations and procedures. Accordingly, the rule-making provisions of the Administrative Procedure Act are not applicable."¹⁹ Is there an implication that non-rule-making provisions of the Act may be applicable? This is not necessarily so. If the Commission's power to formulate rules cannot be affected by the legislature, there is no reason why it should not be allowed to formulate its own rules on any matter within its jurisdiction including such non-rule-making matters as adjudication.

The Commission would appear also to be outside of the scope of the legislative oversight provisions of the Act, since the Commission draws its legislative power from the constitution instead of the

16. 1975 LA. OP. ATTY GEN. No. 74-89 (Mar. 21, 1975).

17. "New" APA, *supra* note 1, at 636.

18. 351 So. 2d 128 (La. 1977).

19. *Id.* at 131.

legislature. The exemptions section of the LAPA specifically provides that subsection 968F(4), part of the legislative oversight section, shall not be applicable to the Public Service Commission.²⁰ Judicial review of Commission action, however, is to be provided by law.²¹ The legislature has provided special legislation for appeals from Commission decisions,²² and has not made the judicial review provisions of the LAPA applicable.

The conclusion that the LAPA was not directly applicable to the rule-making activities of the Commission is only part of the court's decision in the *Consumer's League* case. The Louisiana Supreme Court also determined that although the Commission was not subject to legislative control over the substance of its rules and the procedures used in formulating them, this lack of control did not mean that the Commission could do as it pleased. Article IV, section 21(B) of the constitution authorizes the Commission to formulate "reasonable rules, regulations and procedures." Not only the rule itself but also the procedures employed by the Commission, including the method by which a rule is adopted, amended, or repealed, must be reasonable. Reasonableness requires notice of the proposed change in the rule and opportunity for interested people to comment.²³ The court cited no authority for its decision. The result, however, is consistent with what appears to be emerging generally in the United States as a basic requirement of administrative due process, even in rule-making proceedings.²⁴ However, the court did refer by analogy to the LAPA and its guidelines in determining reasonable procedures for changing agency rules.²⁵

The court found that the Commission did not give notice of the rule change, or provide adequate opportunity for interested persons to present their views. Therefore, the rule change was invalid and the Commission was required to follow its own pre-existing rule unmodified by the invalid amendment.

20. LA. R.S. 49:967 (Supp. 1978).

21. LA. CONST. art. IV, § 21(E).

22. See LA. R.S. 45:1192-1202.

23. 351 So. 2d at 128.

24. See generally Bonfield, *Iowa APA*, *supra* note 1; Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976).

25.

Although we have concluded that the legislature may not constitutionally subject the Commission to the rule-making provisions of the Administrative Procedure Act, these provisions, which govern the majority of the state agencies, do offer guidance as to what constitutes a reasonable procedure by which the Commission may implement rule changes.

351 So. 2d at 132 n.4.

The court could have taken a different approach and determined that while the legislature cannot dictate the substance of Commission rules, since that has been delegated to the Commission itself, the legislature could prescribe a uniform procedure to be used by all agencies in formulating rules. There is no indication that the constitutional provisions were intended to exempt the Commission from purely procedural requirements, or that the application of the LAPA would substantially interfere with the ability of the Commission to carry out its constitutional duties. However, the court may have done indirectly what it refused to do directly. By using the LAPA provisions on rule-making as an example of "reasonable" procedures, the court has indicated to agencies not within the LAPA that the Act still may be used as a guide in determining the reasonableness of agency procedures.²⁶

Should the Louisiana Supreme Court adhere to its decision that constitutionally granted authority to adopt rules precludes efforts by the legislature to subject an agency to the rule-making provisions of the LAPA, the court likely would exempt the State Civil Service Commission and the City Civil Service Commission created under article X, sections 1, 3, 4, 10, 12 of the 1974 Constitution.²⁷ Under article X, section 10 of the 1974 Constitution, "[e]ach commission is vested with broad and general rule-making . . . powers for the administration and regulation of the classified service." Again one might suggest that the constitution delegates power to formulate substantive rules to govern employment and does not preclude the legislature from providing uniform *procedural* rules. This interpretation may be further supported by the fact that the section which gives these commissions the power to make rules²⁸ does not use the word "procedures," as in the case of the Public Service Commission. Probably these arguments would fail because of the explicit constitutional grant of the rule-making power to the Commission.

In regard to adjudication and judicial review the constitution provides that "[e]ach commission shall have the exclusive power to hear and decide all removal and disciplinary cases."²⁹ Also, a right of appeal to the commissions is provided in cases of alleged discrimination.³⁰ Seemingly these explicit provisions preclude application of the LAPA.

26. See text at notes 66-84, *infra*.

27. While the City Civil Service Commission has jurisdiction over cities with a population in excess of 400,000 (New Orleans) sections 4 and 14 provide an opportunity for other cities to be included.

28. LA. CONST. art. X, § 10.

29. *Id.* § 12.

30. *Id.* § 8.

Some indication that this suggestion would be the result is shown in *Flores v. State Department of Civil Services*.³¹ Appellant, claiming to be an aggrieved person within subsection 49:964A, sought judicial review of an alleged discriminatory denial of a veteran's preference. The court found that the Constitution of 1921 gave the State Civil Service Commission "the exclusive right to hear and decide matters affecting classified employees who come within its provisions."³² The court concluded that such cases were not within the jurisdiction of district courts, and that the LAPA did not give to the district court appellate review of Commission decisions.³³

The discussion of the applicability of the LAPA has focused on whether a particular governmental entity is an "Agency" within the Act. A state entity may be classified as an agency within the Act, while not all of its activities may be controlled by the Act. Agency activities must qualify as either rule-making or adjudication to come within the Act; agency activities which do not qualify as either are not within the Act.³⁴ Thus, the Louisiana Supreme Court has applied the LAPA to the Department of Corrections in the conduct of disciplinary hearings.³⁵ However, decisions to deny parole by the Board of Parole, which is an independent board within the Department of Corrections, were held in *Smith v. Dunn*³⁶ not to be within the Act. The issue in *Dunn* related solely to the applicability of certain provisions of the LAPA to a person who had been denied parole. The court could have said that this action was not "rule-making," nor was it "adjudication" resulting in a "decision" as defined in the Act.³⁷ Instead, the court spoke in unnecessarily sweeping terms and based its decision on the conclusion that the Parole Board "is not the usual administrative agency."³⁸ But what about the activities of the Board

31. 308 So. 2d 393 (La. App. 1st Cir.), *writs denied*, 310 So. 2d 855 (La. 1975). The case was decided under the constitution of 1921, but should not be different under the 1974 constitution.

32. LA. CONST. art. XIV, § 15 (1921, repealed 1974).

33. See Baier, *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Administrative Law and Procedure*, 36 LA. L. REV. 464, 472 (1976).

34. However, the LAPA does provide for an additional form of agency action—declaratory orders. See, e.g., LA. R.S. 49:962 (Supp. 1966). See also the discussion of declaratory orders in Section IV of this article.

35. *State ex rel. Armistead v. Phelps*, 365 So. 2d 468 (La. 1978).

36. 263 La. 599, 268 So. 2d 670 (1972).

37. See Bonfield, *Iowa APA*, *supra* note 1, at 762.

38. "The two laws are entirely different, and indeed their provisions are so conflicting as to be irreconcilable." 263 La. at 602, 268 So. 2d at 671. The court here was referring primarily to the confidentiality of Board records and the finality of the Board's decisions.

A comparison of the law on parole with the law on administrative procedure makes it clear that the *Board of Parole* is not the sort of agency or board con-

when it seeks to revoke a parole? The process described in the section on parole revocation³⁹ seems to result in a "decision" based on "adjudication" and could be subject to the Act without the irreconcilable differences adverted to in the case involving grant of parole. From a due process view, grant and revocation of parole are substantially different.⁴⁰

The final matter to be discussed involves the exclusion of political subdivisions and their creations from the definition of "Agency." The definition of "Agency" does not include "political subdivisions, as defined in article VI, section 44 of the Louisiana Constitution, and any board, commission, department, agency, or other entity thereof. . . ."⁴¹ That section of the constitution states that "'political subdivision' means a parish, municipality, and any other unit of local government, including a school board and a special district, authorized by law to perform governmental functions."⁴² This part of the definition of "Agency" was added in 1979.⁴³ Earlier, the court of appeal, in *Quinn v. Department of Health*,⁴⁴ a case dealing with an appeal from a City Civil Service Commission decision, held that "the Administrative Procedure Act does not except the Commission from its applicability," The court applied the ten day rehearing provision of section 959 to calculate the time for appeal. No reference was made in *Quinn* to the *Flores* case which had indicated that the LAPA was not applicable to constitutionally created civil service commissions to which extensive powers had been delegated. In a subsequent case, the same court followed *Quinn*.⁴⁵ One judge dissented, not by reliance on *Flores*, but on the ground that the Civil Service Commission of the City of New Orleans is not included in the definition of "Agency," hence, none of the provisions, including rehearing, applied.

The same court in another decision indicated some uncertainty as to the applicability of the LAPA to other "local" agencies such as zoning boards.⁴⁶ Citing numerous cases, the court said "[c]ourts,

templated as subject to the law on general administrative procedure and that the special provisions in Title 15 creating the Board of Parole and setting out its powers and duties are not complementary or supplementary to the general administrative rules of procedure.

263 La. at 604, 268 So. 2d at 671-72 (emphasis added).

39. LA. R.S. 15:574.9 (Supp. 1968).

40. Compare *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979) with *Morrissey v. Brewer*, 408 U.S. 471 (1972).

41. LA. R.S. 49:951(2) (Supp. 1979).

42. LA. CONST. art. VI, § 44.

43. 1979 La. Acts, No. 578, § 1.

44. 347 So. 2d 954 (La. App. 4th Cir. 1977).

45. *Paulin v. Department of Sanitation*, 383 So. 2d 1064 (La. App. 4th Cir. 1980).

46. *Gertler v. City of New Orleans*, 346 So. 2d 228 (La. App. 4th Cir. 1977).

on occasion have characterized a zoning board as an 'administrative agency' . . . [and] have used the language of the Administrative Procedure Act in adjudication of matters stemming from a decision of a zoning board."⁴⁷ However, the court acknowledged that the LAPA applied to state governmental entities and not necessarily to municipal administrative boards. The issue was whether the court should "analogize the zoning board to 'state' boards" and thus apply the language of the Act. Without specifically answering the question, the court appears to follow the LAPA. Thus, even though the LAPA is not necessarily applicable, the court looked to its terms for guidance. The Act then exerts an influence on administrative procedures even when it is not necessarily applicable to the agency or proceeding.

In *Buras v. Board of Trustees of Police Pension*,⁴⁸ a case which involved an appeal from a decision by the Board of Trustees of the Police Pension Fund of the City of New Orleans, the court of appeal again, without determining that the LAPA was applicable, used the Act by analogy. However, the court declined the opportunity under subsection 49:964G to remand the case to the agency because of an inadequate agency record. Instead, the court reversed the trial court in the interests of judicial economy.

The Louisiana Supreme Court reversed.⁴⁹ The court first addressed the question of whether the LAPA was applicable to the Board. The court found that an act of the legislature designated the composition of the Board; the Board itself made its own operating rules. The court held that the Board was a state "Agency" within the meaning of the Act.⁵⁰ The Board was created by the legislature and derived its authority from it. The conclusion that the Board was a state agency receives some collateral support from article X, section 27 of the 1974 Constitution, which provides that the legislature shall provide for the retirement of officials and employees of the state and political subdivisions.

How then does this decision, which was decided before the 1979 amendment, square with the exclusion of political subdivisions and their entities from the definition of "Agency"? From a simplistic view, one might say that the two are compatible. Apparently no problem is presented in determining what is a political subdivision under article VI, section 44 of the 1974 Constitution. However, the definition of "Agency" in the LAPA excludes not only political subdivisions but

47. *Id.* at 234.

48. 360 So. 2d 572 (La. App. 4th Cir. 1978).

49. 367 So. 2d 849 (La. 1979).

50. The remainder of the decision, which deals with appellate review, will be discussed later. See text at notes 255-57, *infra*.

also *entities thereof*. What is meant by the term "entity thereof"? Is it an entity created by the political subdivision or one which is funded locally and operates solely within the bounds of, and with regard to, a matter over which the political subdivision has a special interest or responsibility, as distinguished from the state at large?

One might apply the *Buras* test and ask who created the entity and defined its powers. Thus, if the legislature created a board and empowered it to act, the board would be a state agency. If a parish or municipality created it and empowered it to act, it would be an entity of a political subdivision and not within the definition of "Agency." Since the supreme court in *Buras* used a "creation" test, it will likely continue to do so. One might suggest that even before the amendment excluding political subdivisions and their entities, distinguishing between state and local agencies was necessary. Prior to the amendment, the LAPA was applicable only to "each *state* board, etc.,"⁵¹ which required courts to distinguish between state and non-state, that is, between state and local entities. Cases decided by the various courts of appeal also have suggested that the LAPA was not applicable to local entities.⁵²

However, a hybrid exists. Numerous state statutes authorize political subdivisions to create specified agencies.⁵³ Louisiana Revised Statutes sections 33:101-130.18 authorize political subdivisions to create planning commissions. This statutory scheme is quite comprehensive and provides for the number of commissioners, powers of the commission and procedures to be followed. Is such a commission a state agency or an entity of the local subdivision which creates it? Admittedly, the entity is given life by the local ordinance which creates it. However, the state has manifested a substantial interest in defining the powers and procedures to be followed. The state has authorized its creation. Whether the state intends the LAPA to apply is not clear from the present statute.

III. PUBLIC ACCESS TO INFORMATION

A. *Background*

Several important statutes in Louisiana are designed to give the public access to and information about the functioning of state and local government. These include a Public Meetings ("Sunshine") Law,⁵⁴

51. LA. R.S. 49:951 (Supp. 1966) (emphasis added).

52. See Murchison, *Developments in the Law, 1979-1980—Local Government Law*,

41 LA. L. REV. 483, 486 (1981).

53. See, e.g., LA. R.S. 33:121-127 (1950); 33:140.1-140.59 (Supp. 1962).

54. LA. R.S. 42:5 (Supp. 1976).

and a Public Records Law.⁵⁵ As its title suggests, the Public Meetings Law, by declaring, subject to certain exceptions, that "[e]very meeting of any public body shall be open to the public . . .", requires public bodies to meet and conduct their business under public view.⁵⁶ Similarly, the Public Records Law gives members of the public the right to examine and copy documents which are included within the definition of "public records."⁵⁷

The Public Meetings Law and the Public Records Law are not part of the LAPA and are, therefore, beyond the scope of this article. However, the LAPA does contain provisions which relate to public access to information. These provisions fall into several categories. First, some sections give the public the right to learn about agency organization, procedures and about actions which the agency has taken. Second, some provisions require agencies, prior to taking action, to give notice to the public or to those who might be affected by agency action.

The original LAPA called upon each agency to publish a description of its own organization and procedures and to make available for public inspection all rules, policy statements, decisions, orders, etc.⁵⁸ This section did not provide for the place or manner of publication. Section 953 provided that advance notice had to be given to interested parties and the public at large before agencies could adopt, amend or repeal any of their rules. Notice was to be given by publication at least once in the official Louisiana journal. Finally each agency was required to file in the office of Secretary of State all existing rules as well as all rules adopted after the effective date of the Act. The Secretary of State was directed to keep a permanent compilation of all agency rules⁵⁹ which was to be made available upon request to state agencies and officials and to members of the public.

In 1974 the role of the office of the Secretary of State was deleted from the LAPA and the responsibility for receiving newly adopted rules was vested in the Division of Administration.⁶⁰ Agencies were directed to file a certified copy of each rule adopted, as well as all rules existing on January 1, 1975. Furthermore, the amendment created a new state publication to be known as the Louisiana Register.⁶¹ The Division of Administration was directed to publish a

55. LA. R.S. 44:1 (1950).

56. LA. R.S. 42:5 (Supp. 1976).

57. LA. R.S. 44:31 (Supp. 1978).

58. LA. R.S. 49:952 (Supp. 1966).

59. *Id.* § 954 (Supp. 1966, 1968, 1974, 1975 & 1978).

60. 1974 La. Acts, No. 284, § 1, *amending* LA. R.S. 49:951, 953 & 954, and *adding* LA. R.S. 49:954.1.

61. *Id.*

monthly bulletin which was to contain the notices and rules submitted by agencies. Agencies were required to publish notice at least once of intention to adopt, amend or repeal a rule in the Louisiana Register and the official Louisiana journal. In 1978 the requirement that notice be published in the official Louisiana journal was deleted.⁶² The 1974 amendment also added a new section to the Act. Section 49:954.1 directed the Division of Administration to "compile, index, and publish a publication to be known as the Louisiana Administrative Code containing all effective rules adopted by each agency subject to the provisions of . . ." the LAPA "and all boards, Commissions, agencies and departments of the executive branch." The Administrative Code should also contain executive orders. Section 954.1 requires the Code to be supplemented at least every two years.⁶³

In the 1974 amendment the governor is designated as the publisher of both the Louisiana Administrative Code and the Louisiana Register through the Division of Administration. To implement the 1974 amendment the governor on August 28, 1974, created a "department within the Executive Department, Office of the Governor, to be known as the Department of the State Register. . . ."⁶⁴ The Department of the State Register is charged with assimilating and editing the various documents necessary for the State Register and the Administrative Code. These documents are to be supplied to the Division of Administration for publication.

Finally, in 1978, the LAPA was once again amended. The amendment placed direct responsibility for the publication of the Administrative Code and the Louisiana Register in the Department of the State Register.⁶⁵

B. *Current Statutes*

As the statute stands presently, "[t]he Department of the State Register shall compile, index, and publish . . . the Louisiana Administrative Code, containing all effective rules adopted by each agency subject to the provisions of this Chapter and all boards, commissions, agencies and departments of the executive branch, notwithstanding any other provision of law to the contrary."⁶⁶ Since the supreme court has held that the Public Service Commission is not bound by the rule-making provisions of the LAPA, one might ques-

62. 1978 La. Acts, No. 357, § 1, *amending* LA. R.S. 49:953.

63. The 1974 amendment was probably enacted to comply with requirements of the new constitution. *See* LA. CONST. art. XII, § 14.

64. La. Exec. Order No. 73 (Aug. 28, 1974).

65. 1978 La. Acts, No. 252, § 1.

66. LA. R.S. 49:954.1A (Supp. 1974, 1975, 1976 & 1978).

tion whether it should be required to supply its rules to the Department of the State Register for inclusion in the Code. The Code has nothing to do with the rule-making process or validity of a rule. Furthermore, the constitution in article XII, section 14 explicitly provides that "[r]ules, regulations, and procedures adopted by all state administrative and quasi-judicial agencies, boards, and commissions shall be published in one or more codes and made available to the public." This constitutional provision seems to be all-inclusive and, since it does not conflict with the rule-making powers, would seem to require the inclusion of the Commission's rules in the Code.

At least once a month the Department of the State Register is required to publish the Louisiana Register which contains all rules which have been filed during the preceding month, notices required to be submitted by the Act, and executive orders issued by the governor during the preceding month.⁶⁷ The Department may also include "digests or summaries of new or proposed rules"⁶⁸ but the rule itself shall prevail in case of any conflict with the digested version. The Department can create the format for implementing the Code,⁶⁹ and can require agencies to comply with its guidelines.⁷⁰ Both the Register and the Code are intended for dissemination to state agencies (at no charge) and to others at a reasonable cost.⁷¹

In addition to providing for the Register and the Code, the LAPA requires the filing with the Department of the State Register of an organizational and operational description, and of the "methods whereby the public may obtain information or make submissions or requests." Agencies themselves must make available for public inspection all of their rules, written policy statements or interpretations as well as their "final orders, decisions and opinions."⁷²

Another aspect of public access to information is notice. Agencies, prior to adopting, amending or repealing a rule must give fifteen days notice. This requirement includes publication at least once in the Register. Furthermore, notice also must be mailed to all persons who have requested notice.⁷³ All rules which are adopted must

67. *Id.* § 954.1B.

68. *Id.*

69. *Id.* § 954.1E.

70. *Id.* However, the Department of the State Register has the discretion to omit unduly lengthy rules as long as copies are available from the adopting agency and the Register or Code contains a reference to the subject matter of the missing rule, and states how a copy can be obtained. *Id.* § 954.1C.

71. *Id.* § 954.1D.

72. *Id.* § 952 (Supp. 1966, 1978 & 1979).

73. *Id.* § 953 (Supp. 1966, 1974, 1975, 1976 & 1978).

be filed with the Department of the State Register,⁷⁴ which in turn is obligated to publish them in the Louisiana Register and ultimately in the Administrative Code.⁷⁵ The informational and notice provisions of the Act are very important since section 954 renders ineffective and unenforceable rules adopted in violation of the LAPA.⁷⁶

During the past five years progress had been made in regard to compliance with the sections of the LAPA which deal with public access to information. In the spring of 1975 reportedly few agencies had filed their rules with the secretary of state as the law then provided. As a matter of fact, one commentator noted that "only twenty-seven of over 250 agencies filed with the Secretary of State . . ."⁷⁷ However, in 1974 the legislature amended the LAPA and substituted the Division of Administration in the governor's office for the office of Secretary of State. The change was made because the governor would be in a better position to secure compliance, especially from those department heads he had appointed.⁷⁸ Also, the governor created the Department of the State Register to see that the rules were acquired and published. At that time some agencies had no written rules, some rules were only partially written, and some written rules were in a very disorganized format.⁷⁹ In recent years the situation has improved. The former director of the Department of the State Register has stated that virtually every agency has submitted its rules and regularly submits new rules and rule changes as required by the Act. Furthermore, he estimates that 98 percent or more of the agencies subject to the Act are in compliance.⁸⁰

However, there still is no Administrative Code. Commonly, APA's include a provision for an administrative code.⁸¹ A recent study reporting on a 1979 survey states "that thirty-eight of the fifty states have now either published codes or are preparing to do so."⁸²

The law in Louisiana is clear. Both the constitution and the LAPA

74. *Id.* § 954 (Supp. 1966, 1968, 1974, 1975 & 1978).

75. *Id.* § 954.1 (Supp. 1974, 1975, 1976 & 1978).

76. This matter is discussed more fully later in Section IV of this article.

77. "New" LAPA, *supra* note 1, at 638.

78. Interview with E. Coltharp, former Director of the Department of the State Register (June 10, 1981).

79. *Id.*

80. *Id.*

81. Such provisions are found in the Revised Model State Administrative Procedure Act, § 5 and in the proposed new Model State Act, § 2-101(d). The Federal Government publishes a Code of Federal Regulations.

82. Tseng & Pedersen, *Commentary: Acquisition of State Administrative Rules and Regulations—Update 1979*, 31 AD. L. REV. 405, 405-06 (1979). Although the study is not completely accurate (Louisiana, for instance, is listed as "under compilation"), it shows that there are administrative codes available in at least thirty-three states.

obligate the state to publish a Louisiana Administrative Code. This is the trend in other states. When the LAPA was first adopted there were some problems brought about by a lack of agency compliance with filing requirements. The lack of compliance arose partially because many agencies did not have well organized, written, clear expressions of their rules.⁸³ With the high rate of compliance which exists presently and with improvement in the quality and completeness of agency written rules, to move forward with the Code at this time would seem feasible.⁸⁴

IV. RULE-MAKING

A. *The Definition of "Rule" and "Rule-Making"*

The two areas of agency action which are subjected to procedural requirements under the LAPA are "rule-making" and "adjudication." "Rule-making" means the process employed by an agency for the formulation of a rule.⁸⁵ The definition explicitly excludes statements of law or policy which are made in an agency decision of a contested case before it. Announcement of rules in a decision to resolve a disputed set of facts before an agency does not require compliance with LAPA provisions on rule-making. To understand the meaning of rule-making an examination of the definition of the term "rule" is necessary. The LAPA defines the term "rule" in a precise manner:

'Rule' means each agency statement, guide, or requirement for conduct or action, exclusive of those regulating only the internal management of the agency, which has general applicability and the effect of implementing or interpreting substantive law or policy, or which prescribes the procedure or practice requirements of the agency. 'Rule' includes but is not limited to, any provision for fees, fines, prices or penalties, the attainment or loss of preferential status, and the criteria or qualifications for licensure or certification by an agency. A rule may be of general applicability even though it may not apply to the entire state, provided its form is general and it is capable of being applied to every member of an identifiable class. The term includes the amendment or repeal

83. As early as 1974, consideration was given to the "possible implementation of a State Register" (La. Legislative Council Memorandum April 2, 1974 to Edgar Coltharp, Division of Administration), but because of the problems mentioned above it was not deemed feasible to begin work on the Code.

84. While the absence of a Code has not yet appeared to present serious legal problems for state agencies, some difficulties may be presented in the future. See *Tate v. Livingston Parish School Board*, 391 So. 2d 1240 (La. App. 1st Cir. 1980), illustrating that the unavailability of a code may hamper the determination of whether a relevant agency rule exists.

85. LA. R.S. 49:951(7) (Supp. 1966, 1974, 1975, 1978 & 1979).

of an existing rule but does not include declaratory rulings or orders.⁸⁶

Prior to achieving this present form the definitional provision of the Act had been amended several times.⁸⁷

Scholars disagree about the precise definition of the term "rule" and whether the term can be precisely defined. Professor Davis "would avoid the difficulties inherent in any effort to define a 'rule' precisely 'by saying simply that adjudication resembles what courts do in deciding cases, and that rulemaking resembles what legislatures do in enacting statutes'."⁸⁸

Sometimes to determine whether agency action is rule-making or adjudication is very important. In *National Dairy Products Corporation v. Louisiana Milk Commission*,⁸⁹ the Commission refused a request to fix dock prices on fluid milk. The relevant statute required a hearing and the Commission did hold hearings. The Commission conceded, however, that if the proceedings were characterized as adjudication it had failed to comply with minimal procedural requirements.

86. *Id.* § 951(6).

87. The initial legislation used only the word "statement." An amendment in 1978 elaborated by adding "guide or requirement for conduct or action." That same amendment introduced language which excluded from the definition rules which regulate "only the internal management of the agency." At the same time it deleted language which had excluded "intra-agency memoranda" from the definition. The exclusion of intra-agency memos probably was too broad, and the exclusion of matters relating to internal management should have been sufficient. The 1978 amendment deleted the word "future" from the definition. Previously, the subsection included a "statement of general applicability and the effect of implementing or interpreting." This change does not seem to be a significant one. Finally, the amendment of 1978 added examples of rules, which examples include fees, fines, prices, etc. 1978 La. Acts, No. 252, § 1, amending LA. R.S. 49:951(6) (Supp. 1966, 1974 & 1975).

88. Bonfield, *Iowa APA*, *supra* note 1, at 825 (citing 1 K. DAVIS, *supra* note 2, at § 5.01, at 287). In an attempt to provide more guidance in understanding the rule-making function, it has been suggested that

[o]rdinary rulemaking results in a determination which

"a) Is prospective in operation AND

b) Has general application AND

c) Does not become concretely operative against an individual until there has been a further proceeding involving that individual AND

d) Is applicable to a group or class subject to opening up to admit new members AND

e) Involves general facts rather than facts peculiar to one individual or situation AND

f) Is, as a generality, based on an exercise of judgment about future results, rather than on a determination of past events."

Id. (citing W. GELHORN & C. BYSE, *MANUAL FOR TEACHERS TO ACCOMPANY CASES AND COMMENTS IN ADMINISTRATIVE LAW V*, 12-13 (6th ed. 1974)).

89. 236 So. 2d 596 (La. App. 1st Cir. 1970).

However, the Commission contended that dock pricing is rule-making and that the proceedings complied with procedures required in rule-making.

The court of appeal, in upholding the position of the Commission, relied in part on a subsection of the Act which authorizes agencies to use their "experience, technical competence and specialized knowledge in evaluating the evidence."⁹⁰ Although no evidence against dock pricing was introduced at the latest hearing, such evidence was introduced at a previous hearing and the transcript of that hearing had been introduced as evidence at the subsequent hearing.

The court also relied on *Highland Farms Dairy v. Agnew*.⁹¹ In that case, the lower court had held that an agency engaged in setting prices can consider not only the evidence at the hearing but also facts subsequently submitted to it or disclosed by its own investigation. The evidence in the record in the *National Dairy Products Case*, coupled with the agency's expertise, was sufficient for the court to uphold the agency action.

National Dairy Products suggests that where rule-making is involved one has no constitutional right to a hearing.⁹² Such statements should be taken with care. Also, as will be developed later in this section, the LAPA specifically provides for a hearing as a prerequisite to effective rule-making. A determination of whether a particular agency action is adjudication or rule-making is sometimes difficult. Sometimes drawing the line may not even be helpful. The more relevant inquiry is what procedure is fair and expedient under the circumstances. A simplistic "no hearing is required under due process for rule-making" is out of touch with current developments in the area.⁹³ Finally, as will be shown in the section on judicial review, agency rule-making is subject to judicial review under a standard which precludes arbitrary action.

B. *Exclusions from the Definition of "Rule"*

The LAPA definition of "rule" is very broad and contains only two express exclusions. First, rules which regulate only the internal management of the agency are excluded. Presumably, this relates to internal matters which do not affect the public such as, for example, vacation schedules. Also, this exclusion probably covers investigative

90. *Id.* at 600.

91. 16 F. Supp. 575 (E.D. Va. 1936), *aff'd*, 300 U.S. 608 (1937).

92. 296 So. 2d at 600.

93. See generally Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 289-93 (1978).

and enforcement guidelines the disclosure of which would only provide an advantage for those who would use this information to circumvent the law. Finally, the exclusion probably applies to situations where disclosure of agency policy would put the agency at a competitive disadvantage in what is regarded as an essentially commercial transaction.⁹⁴

The second exclusion is of declaratory rulings or orders. The LAPA provides: "[e]ach agency shall provide by rule for the filing and prompt disposition of petitions for declaratory orders and rulings as to the applicability of any statutory provision or of any rule or order of the agency."⁹⁵ Thus, the LAPA has a separate provision for the process of securing declaratory orders, and delegates to the agency the responsibility of devising appropriate procedures whereby parties can seek and obtain declaratory orders.

One problem is presented by the declaratory order approach. In contrast to rule-making, where all interested parties may have some input, the declaratory order procedure is analogous to adjudication. Since no established rules cover intervention in a case of adjudication, none are applicable to the declaratory order process except to the extent that an agency sees fit to permit intervention. Presumably, declaratory orders do not have the force of law as to non-intervening third parties and their legal rights would not be foreclosed by the issuance of a declaratory order.

C. *The Making of Rules*

There are several important aspects of the rule-making procedures in the LAPA. These involve notice, hearing, publication of rules (that is, a second notice requirement), effect of failure to comply with the LAPA, and judicial review. Before these matters are discussed some preliminary comments will be offered. Rules are promulgated by administrative agencies as either expressly or impliedly authorized by the legislature (or the constitution if the agency is established in the constitution, e.g., Public Service Commission,⁹⁶ Civil Service Commission⁹⁷). This power to make rules sometimes raises a constitutional problem as to the legality and scope of the delegation of legislative power to the agency. Usually even broad delegations are upheld.⁹⁸ However, occa-

94. See Bonfield, *Iowa APA*, *supra* note 1, at 839.

95. LA. R.S. 49:962 (Supp. 1966).

96. LA. CONST. art. IV, § 21(B).

97. LA. CONST. art. X, §§ 7, 10(A)(1).

98. *Louisiana Div. of Horsemen's Benevolent & Protective Ass'n v. Louisiana St. Racing Comm'n*, 391 So. 2d 589 (La. App. 4th Cir. 1980).

sionally they are struck down.⁹⁹ As to another matter, the Louisiana courts have held that "administrative agencies are bound by their own rules, especially those which affect the rights and liabilities of members of the public."¹⁰⁰

1. *Notice of Intended Action*

In regard to the adoption of agency rules, the LAPA requires notice to be given twice: first, prior to the adoption of the rule and second, once the rule has been adopted. Before a rule can be adopted, amended or repealed the agency must "[g]ive at least fifteen days notice of its intended action."¹⁰¹ The notice must be published in the Louisiana Register at least once. Furthermore, notice must be mailed to all people who have made a timely request of the agency for such notice. This notice must be mailed at the earliest possible time but not later than the date the notice is submitted to the Louisiana Register. The official date of notice is considered to be the date of publication of the Louisiana Register, and more particularly, the date on the first page of the issue.¹⁰²

In *Fairgrounds Corp. v. Louisiana State Racing Commission*,¹⁰³ Fairgrounds challenged the notice procedures used by the Commission prior to the adoption of a rule. On January 22, 24, and 25, 1972 the Commission gave notice that it intended ten days from the date of publication to adopt one of two rules which had been submitted to it. Interested persons were advised how, where and when to submit their views. On February 3, after hearing testimony, the Commission voted not to adopt either rule. Subsequently on February 4, 5, and 7, the Commission again published a notice similar to the previous one. The Commission without further notice adopted one of the proposed rules at its April 21 meeting.

99. *State v. Rodriguez*, 379 So. 2d 1084 (La. 1980), struck down a provision of the criminal law which allowed the Department of Health and Human Resources to add drugs to the prohibited list when the Federal Drug Enforcement Administration classified the drugs as dangerous. The subject of delegation is beyond the scope of this article and will not be discussed further.

100. *Central La. Elec. Co. v. Louisiana Pub. Serv. Comm'n*, 377 So. 2d 1188, 1195 (La. 1977).

101. LA. R.S. 49:953A(1) (Supp. 1966, 1974, 1975, 1976, 1978 & 1980).

102. The original Act provided for only ten days notice. In 1974 this was changed to twenty days. 1974 La. Acts, No. 284, § 1. Finally another amendment introduced the present fifteen day requirement. 1975 La. Act, No. 730, § 1. With the creation of the Louisiana Register, amendments were adopted to require publication therein and to dispense with the previous requirement that notice be published in the official Louisiana journal.

103. 304 So. 2d 878 (La. App. 4th Cir. 1974).

The court of appeal found that the Commission had complied with the notice requirements. The crux of the attack on the procedures which had been used seemed to be that the Commission previously had voted not to adopt either rule. However, the court held that an agency can reinstate rule-making procedures as long as it gives proper notice. A complaint was also made that the Commission did not act at the expiration of ten days as stated in the notice, but waited until more than a month later. The matter had not even been placed on the agenda until the meeting itself. However, the LAPA does not require notice of when the vote will be taken, but only notice of proposed action and information as to how interested parties may submit their views. The notice given by the Commission complied with these requirements. Fairgrounds was not entitled to personal notice since its request was not timely. The court held that Fairgrounds had ample time to present its views.

The case presents a problem, however, because the holding might allow an agency to defer action on a matter which has aroused some opposition and to wait to resolve it until the opposition is either not present or not prepared to make an oral presentation to the agency. Consideration might be given to setting an expiration time limit on notice so that once notice has become stale, it must be republished.¹⁰⁴ Furthermore, the present subsection on notice requires that the notice contain the name of the person within the agency who must respond to inquiries about the proposed action. An inquiry as to the date the agency intended to consider and vote on the matter would be considered a relevant inquiry. A corresponding reply by the agency should prevent surprise.

This subsection also specifies the contents of the notice. Notice must contain "a statement of either the terms or substance of the intended action or a description of the subjects and issues involved." In 1980, the notice provision was amended to require in addition:

1. A statement approved by the Legislative Fiscal Office of any fiscal impact of the proposed action or that there will be no fiscal impact.
2. A statement approved by the Legislative Fiscal Office of any economic impact of the proposed action or that there will be no economic impact.¹⁰⁵

These statements are to be prepared by the agencies themselves, and submitted to the Legislative Fiscal Office for approval. They must contain information about the "receipt, expenditure, or allocation of

104. It is not suggested that notice had become stale in the *Fairgrounds* case.

105. LA. R.S. 49:953A(1) (Supp. 1966), as amended by 1980 La. Acts, No. 392, § 1.

state funds or funds of any political subdivision . . ." as well as cost-benefit analyses of persons affected by the proposed action, and "an estimate of the impact of the proposed action on competition and the open market for employment, . . ." etc.¹⁰⁶

The provision in the original Act that the notice specify "the time when, the place where, and the manner in which interested persons may present their views" has continued in force. As previously noted, an amendment has added a requirement that the notice contain "the name of the person within the agency who has the responsibility for responding to inquiries about the intended action."¹⁰⁷

2. *Hearing*

The hearing requirement is a corollary of the "notice of intended action" requirement. Section 953(A)(2) of the Act states that prior to the adoption, amendment or repeal of any rule, an agency, after having given notice, must "[a]fford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing." In the consideration of "substantive rules" oral presentation or argument must be allowed if so requested by twenty-five people, by a government subdivision or agency, by an association of twenty-five members or more, or by a committee of the legislature to which a rule has been referred under the oversight provisions of section 968.

Some initial ambiguity appears in the provision which allows all interested persons to submit their views orally or in writing. The sentence which follows and provides when an oral hearing must be granted seems to clarify that in other instances an agency has discretion as to whether to allow oral presentations. While this section appears to give agencies some flexibility in using the rule-making process, as few as twenty-five people or one organization with twenty-five members will require an oral hearing. Thus, seemingly there may not be as much flexibility as first appears.

Agencies are admonished to consider fully the matters submitted to them concerning the proposed rule. Also, after adopting a rule, agencies, if requested to do so thereafter within the prescribed time limits (or before the adoption of the rule), must issue a brief statement of the reasons both for and against its adoption.

The Act, in Louisiana Revised Statutes 49:953B, contains provisions which in emergencies allow an agency to act without complying with the rules described above. This exemption does not apply to "any"

106. LA. R.S. 49:953A(3)(a), (b) (Supp. 1966, 1974, 1975, 1976, 1978 & 1980).

107. *Id.* § 953A(1) (Supp. 1966, 1974, 1975, & 1976), as amended by 1978 La. Acts, No. 252, § 1.

emergency. Instead, the subsection is applicable only where the agency "finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than fifteen days notice . . ." In such cases the agency may adopt a rule subject to the following qualification. Within five days of adoption it must notify in writing the governor, the attorney general, and the Department of the State Register. The notice must state the reasons for the finding of "imminent peril." When this procedure has been followed the agency can proceed without prior notice and hearing or upon such notice and hearing as is practicable. Notice of the emergency rule must be mailed within five days of adoption to persons who have made timely requests for notice of rule changes. Emergency rules and the reasons for the finding of the emergency shall be published in full in the Louisiana Register.

Another feature of rule-making procedures authorizes any interested person to petition and request an agency to adopt, amend or repeal a rule, thus broadening public participation. Each agency shall formulate its procedures for entertaining such petitions. An agency has ninety days from receipt to deny the petition in writing or to commence rule-making proceedings.¹⁰⁸

3. Effectiveness of Rules

The second notice requirement, that is, that a rule has been adopted, amended or repealed, emanates from provisions which relate to when a rule takes effect. The LAPA provides first that "[n]o rule adopted on or after January 1, 1975 is valid unless adopted in substantial compliance with . . ." the Act.¹⁰⁹ Under section 954 every agency which makes rules must "file a certified copy of its rules with the Department of the State Register. No rule whether adopted before, on, or after January 1, 1975 shall be effective, nor may it be enforced unless it has been properly filed with the Department of the State Register." Although little jurisprudence exists on point, in at least two cases agencies were required to adopt or file rules. In *Employers-Commercial Union Insurance Co. v. Bernard*,¹¹⁰ the trial court directed the Commissioner of Insurance to adopt rules before proceeding further. In *Lawyers Title Insurance Corp. v. Louisiana Insurance Commission*,¹¹¹ when the Commission met to consider a matter, counsel for an interested person objected to the proceeding by the Commission, because it had failed to adopt rules as required by the LAPA.

108. *Id.* § 953C.

109. *Id.* § 954A.

110. 286 So. 2d 445, 446 (La. App. 1st Cir. 1974).

111. 336 So. 2d 239 (La. App. 1st Cir. 1976).

"[T]he Commission decided to file the required rules and hold a hearing under them."¹¹²

Other prerequisites must be met before a rule becomes effective. After November 1, 1978, a rule does not become effective unless prior to adoption the proposed change is submitted to a designated legislative committee or to the presiding officers of the legislature pursuant to the oversight provisions. Furthermore, after September 13, 1980, a rule does not become effective unless the approved fiscal and economic impact statements have been filed with the Department of the State Register and have been published in the Louisiana Register.

Under Louisiana Revised Statutes 49:954, failure to give notice precludes the enforcement of a rule. However, the "inadvertent failure" to send the appropriate "notices" to a person who has requested notice does not invalidate a rule. Also, a proceeding for a declaratory judgment to challenge the validity or applicability of a rule on the grounds that it "was adopted without substantial compliance with required rule-making procedure" set forth in the LAPA must be brought within two years from the effective date of the rule.¹¹³

Rules become effective when, after their adoption, they are published in the Louisiana Register, unless a later date is specified either in a statute or in the rule itself.¹¹⁴ Emergency rules become effective on the date of their adoption or on a future date specified by the agency which does not exceed sixty days, provided that the required notice is given to the governor, attorney general and the Department of the State Register.¹¹⁵ An emergency rule expires with the publication of the Louisiana Register in the month following the month the rule is adopted unless the rule and reasons are published in that issue of the Louisiana Register. Notwithstanding proper publication in the Louisiana Register, an emergency rule expires not later than 120 days after adoption. Agencies are admonished to make emergency rules known to people who may be affected by them. Finally, an agency may, subsequent to the adoption of an emergency rule, adopt the identical rule for permanent use by following the regular procedures for adoption of rules.¹¹⁶

The Louisiana Supreme Court has held that, to be effective, a rule, even an emergency rule, must be published in the Louisiana

112. *Id.* at 241.

113. LA. R.S. 49:963 (Supp. 1966, 1968, 1974, 1975, 1978 & 1980).

114. *Id.* § 954B(2).

115. LA. R.S. 49:954(B)(2).

116. LA. R.S. 49:953A(1), (2), (3).

Register. In *State v. Hicks*,¹¹⁷ the court affirmed the quashing of an indictment charging a defendant in a criminal case with the possession of a controlled dangerous substance. The substance involved was Talwin, which was added to the Louisiana list of prohibited substances by the Secretary of the Department of Health and Human Resources after being classified as dangerous by the Federal Drug Enforcement Administration. The court said that the Secretary must follow the provisions of the LAPA.¹¹⁸ Publication in the Louisiana Register did not occur until April 20, 1979. Since the defendant was arrested on March 11, 1979, the rule could not be enforced against him.¹¹⁹

V. ADJUDICATION

A. *To Which Proceedings Do the LAPA Adjudication Rules Apply?*

In contrast to those sections of the LAPA which deal with the applicability of the Act, public access to information, and rule-making, the procedures for adjudication, with one modest addition, remain unchanged from those included in the original Act. The importance of adjudicatory procedure cannot be overestimated.¹²⁰

Determining the applicability of the adjudication procedures of the Act requires a careful statutory analysis. First of all, the LAPA is not applicable every time an agency acts or makes a decision. When an agency exercises rule-making powers, it is not governed by the provisions which relate to adjudication. However, the definition of adjudication, while broad, is *not* broad enough to encompass all agency action which is not rule-making. Thus, some agency action is not within the scope of the Act.

What is "adjudication?" "'Adjudication' means agency process for the formulation of a decision or order."¹²¹ A "decision" or "order": means the whole or any part of the *final disposition* (whether affirmative, negative, injunctive, or declaratory in form) of any

117. 377 So. 2d 86 (La. 1979).

118. See the discussion of *State v. Rodriguez*, *supra* note 99, and accompanying text.

119. 377 So. 2d at 87.

120. As one commentator has put it:

Procedure is one of the methods through which the protection of public and private interests can be assured in administrative adjudications.

The need for procedural safeguards to protect individual rights is greater on the adjudicatory level than in rulemaking. While rulemaking is essentially a quasi-legislative function, agency adjudication takes on a quasi-judicial aspect and must contain procedural safeguards similar to those required in court procedure, since individual rights are being determined.

Adams, *State Administrative Procedure: The Role of Intervention and Discovery in Adjudicatory Hearings*, 74 Nw. U.L. REV. 854, 856-57 (1980).

121. LA. R.S. 49:951(1) (Supp. 1966, 1974, 1975, 1978 & 1979).

agency, in any matter other than rule-making, *required by constitution or statute to be determined on the record after notice and opportunity for an agency hearing*, and including non-revenue licensing, when the grant, denial or renewal of a license is required by constitution or statute to be preceded by notice and opportunity for hearing.¹²²

Thus, the meaning of adjudication and the applicability of the LAPA's rule on adjudication depend on the meaning of the terms "decision" or "order." The Act indicates that these terms include any final disposition by an agency other than rule-making. However, the definition includes an important qualification. The adjudication rules of the LAPA apply only to those final dispositions required by constitution,¹²³ or by some other statute,¹²⁴ to be determined on the record after notice and opportunity for a hearing. One cannot determine to which proceeding the LAPA adjudication rules apply simply by examining the Act alone. To determine whether the rules may apply one must look to the "due process" requirements of the United States and Louisiana Constitutions and to the various statutes which authorize agency action. The adjudication provisions of the LAPA are not self-executing; they do not create a right to notice and hearing. The procedures come into play only when some other law requires that agency action be on the record after notice and hearing.

During the past ten years, the applicability of due process requirements to administrative proceedings and an increased sensitivity to individual rights has seen both federal and state courts strike down arbitrary agency action.¹²⁵ In Louisiana, *Tafaro's Investment Co.*

122. *Id.* § 951(3) (emphasis added).

123. *See, e.g.*, *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelley*, 397 U.S. 254 (1970); LA. CONST. art. X, § 5.

124. *See, e.g.*, LA. R.S. 23:1628-1634 (1950).

125. The following cases demonstrates the varieties of agency actions and procedures which have been held by federal and state courts to a standard of due process. *Marshall v. Jerrico, Inc.*, 100 S. Ct. 1610 (1980); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Precious Metals Associates, Inc. v. Commodity Futures Trading Comm'n*, 620 F.2d 900 (1st Cir. 1980); *Wilson v. Health & Hospital Corp. of Marion County*, 620 F.2d 1201 (7th Cir. 1980); *Harper v. Lindsay*, 616 F.2d 849 (5th Cir. 1980); *Devine v. Cleland*, 616 F.2d 1080 (9th Cir. 1980); *Bakersfield City School Dist. of Kern County v. Boyer*, 610 F.2d 621 (9th Cir. 1979); *Georator Corp. v. Equal Employment Opportunity Comm'n*, 592 F.2d 765 (4th Cir. 1979); *Standard Oil Co. v. F.T.C.*, 475 F. Supp. 1261 (N.D. Ind. 1979); *Wilson v. Swing*, 463 F. Supp. 555 (M.D.N.C. 1978); *Sima Prods. Corp. v. McLucas*, 460 F. Supp. 128 (N.D. Ill. 1978); *Sneaker Circus Inc. v. Carter*, 457 F. Supp. 771 (E.D.N.Y. 1978); *United States v. Floulis*, 457 F. Supp. 1350 (W.D. Pa. 1978); *Medical Services Administration v. Duke*, 378 So. 2d 685 (Ala. 1979); *Rosenberg v. Arizona Bd. of Regents*, 118 Ariz. 489, 578 P.2d 168 (1978);

*v. Division of Housing Improvement*¹²⁶ discussed generally the applicability of procedural due process in administrative proceedings:

A determination of the applicability of the requirements of procedural due process to the administrative process is generally based upon the distinction between legislative and judicial functions. If the activity of the administrative body tends to assimilate the exercise of the legislative function, then procedural due process is not demanded since no such limitation is placed upon the legislature itself. If, however, a judicial function is involved, an analogy to judicial process is made, and the procedural safeguards developed in the administration of justice must be observed.

* * *

. . . [A]ll would agree that where, as in the instant case, the administrative agency adjudicates private property rights and obligations, the parties *must* be afforded an opportunity to be heard. Where private rights cannot otherwise be protected and there is no compelling public interest for summary action, there must be a full hearing before administrative action.¹²⁷

This case considered a section of the Code of the City of New Orleans which authorized the Administrator of the Division of Housing Improvement, among other things, to have a dwelling repaired at the cost of the owner. The court held that due process required reasonable notice and a full hearing before the Administrator could act. The Code provided for notice and hearing and those procedures had not been followed by the Administrator.¹²⁸ The application of fair procedures under the due process doctrine to cases involving private "property" rights has been expanded to include "non-traditional" notions of property as well as privileges and other entitlements.¹²⁹

Some cases, however, have held that a person does not have a right to a hearing before an agency may act. One of these is *First*

Horn v. County of Ventura, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979); *Adamchek v. Board of Educ. of Stamford*, 174 Conn. 366, 387 A.2d 556 (1978); *Continental Oil Co. v. Board of Labor Appeals*, 582 P.2d 1236 (Mont. 1978); *Steele v. North Dakota Workmen's Compensation Bureau*, 273 N.W.2d 692 (N.D. 1978); *La Petite Auberge v. Rhode Island Comm'n for Human Rights*, 419 A.2d 274 (R.I. 1980); *Tasker v. Mohn*, 267 S.E.2d 183 (W. Va. 1980).

The matter is discussed in Van Alstyne, *Cracks in "The New Property": Adjudicatory Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977), and Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

126. 261 La. 183, 259 So. 2d 57 (1972).

127. 261 La. at 190-91, 259 So. 2d at 60.

128. *Parker v. Board of Barber Examiners*, 261 La. at 199, 259 So. 2d at 63.

129. See note 125, *supra*.

*National Bank of Abbeville v. Sehrt.*¹³⁰ Three banks operating in the Abbeville area sought to enjoin the State Bank Commissioner from authorizing a new bank to operate in the area. They had asked the Commissioner for a formal hearing. The Commissioner denied the request but did have an "informal hearing" in his office in which plaintiffs were allowed to present their opposition. Plaintiffs claimed that the decision to authorize the new bank without giving them a formal hearing was arbitrary, capricious, and denied them due process. The court stated that the LAPA does not itself create a right to a hearing. That right must come from some other source, statutory or constitutional. In this case no statute required the Commissioner to hold hearings. He was merely directed to examine the qualifications of the applicant and to refuse permission to a new bank if granting the authority was not in the public interest.

Similarly, the court found no denial of due process because that clause cannot be used to prevent competition. Opening another bank in the area would not deprive the plaintiffs of property. "Plaintiffs have no vested interest in the banking business of their area, and hold no exclusive franchise."¹³¹ Due process is satisfied by providing judicial review. Upon review, the court found substantial evidence to support the Commissioner's conclusion. The court also noted that in giving plaintiffs an informal hearing, the Commissioner did more than he was required to do. One judge in dissent argued that the LAPA should be liberally interpreted as providing for a hearing in these types of cases.¹³²

A variation on these bank cases was presented in *Hagood v. Pickering*.¹³³ Here again an application for a certificate of authority to organize a bank was presented to the Commissioner of Financial Institutions. However, in this case, the Commissioner, after several informal meetings, denied the application. The Commissioner was under no statutory obligation to grant a hearing, and the court of appeal held that there was no denial of due process. The court relied on *Board of Regents of State Colleges v. Roth*,¹³⁴ which stated:

To have a property interest in a benefit, a person must clearly have more than an abstract need or desire for it. He must have

130. 246 So. 2d 382 (La. App. 1st Cir.), *writs refused*, 258 La. 909, 248 So. 2d 334 (1971).

131. *Id.* at 384.

132. See also *First Fed. Sav. & Loan Ass'n of Concordia Vidalia v. Smith*, 327 So. 2d 657 (La. App. 1st Cir. 1976), *writs refused upon similar reasoning*, *Delta Bank & Trust Co. v. Lassiter*, 383 So. 2d 330 (La. 1980).

133. 385 So. 2d 405 (La. App. 1st Cir. 1980).

134. 408 U.S. 564 (1972).

more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.¹³⁵

In the case at bar the court noted that the applicant was not automatically entitled to a certificate upon meeting certain conditions. The Commissioner had the discretion to grant or deny the application as would best serve the public interest.

On a quite different matter, that of denial of parole, the Supreme Court of Louisiana has held that the LAPA was not applicable to such proceedings and that people who were denied parole had no right to a statement of reasons for the denial.¹³⁶ Although not relied on by the court, one possible rationale for the decision is that no statute requires that such decisions be made on the record after notice and hearing. Since the matter is committed to the discretion of the Board, as in the previous cases, there is no due process right to a hearing. Since there is no right to a hearing, the adjudicatory rules of the LAPA, including section 958 which requires findings of facts, do not apply.¹³⁷ However, the LAPA was applied to prison disciplinary proceedings conducted under the rules of the Department of Corrections.¹³⁸

1. *Suspension of Licenses*

The applicability of adjudication rules to driver's license suspension and revocation is somewhat muddled.¹³⁹ An Attorney General's Opinion¹⁴⁰ states that the LAPA is not applicable to the "suspension, revocation and cancellation" of driver's licenses by the Department of Public Safety because the statutory provision, Louisiana Revised Statutes 32:414,¹⁴¹ authorizes suspension prior to notice and hearing. In *Price v. State, Department of Public Safety, License Control & Driver Improvement*,¹⁴² a case involving a suspension under section 414, the

135. *Id.* at 577.

136. *Smith v. Dunn*, 263 La. 599, 268 So. 2d 670 (1972).

137. *See Bonfield, Adjudication, supra* note 1, at 362-63, 357-59.

138. *State ex rel. Armistead v. Phelps*, 365 So. 2d 468 (La. 1978).

139. *See Note, Due Process For Drivers Under the Louisiana Revocation Statutes*, 36 LA. L. REV. 852 (1976).

140. 1973 LA. OP. ATTY GEN. No. 75-89 (Oct. 30, 1973). This opinion is not contained in the bound volume of opinions issued for 1973. It is cited several times in the annotations to the LAPA. For example, *see* note 1 to section 967 in the 1981 West Supplement.

141. LA. R.S. 32:414 (Supp. 1981).

142. 325 So. 2d 759 (La. App. 1st Cir. 1976).

court of appeal held that the LAPA is applicable only where a statute provides for notice and hearing prior to administrative determination. The court relied on *First National Bank of Abbeville*.¹⁴³ The Department of Public Safety is a state agency within the meaning of the LAPA; however section 414 proceedings are not subject to the LAPA. Due process is achieved through judicial review.

In the case of *Turner v. State Department of Public Safety*,¹⁴⁴ another driver's license suspension case, the court did apply the evidentiary rule of the LAPA, section 956, and found the quality of evidence was insufficient to meet the "probative value" test. Furthermore, it found that the Implied Consent Law,¹⁴⁵ under which the suspension was imposed, set an even higher evidentiary standard: that there be sworn evidence of the fact in question. In that case there was no evidence to show a factual basis for the officer's belief that the operator of the vehicle was under the influence of liquor as required by the Implied Consent Law. Notably, however, unlike section 414, the Implied Consent Law gives a driver whose license is *suspended* an after-the-fact right to an administrative hearing.¹⁴⁶ Does this present a sufficiently different situation than the *Price* case which says outright that section 414 provides no requirement for an administrative hearing, and that the LAPA is inapplicable? Does *Turner* stand for the proposition that the adjudication rules of the LAPA will apply in an administrative suspension hearing whether it is before or after the fact? Some occasions, such as emergencies, require that an agency act first and adjudicate afterwards.¹⁴⁷ Is there any reason why in emergencies the rules of adjudication should not apply to an after-the-fact administrative hearing? One argument to the contrary can be found in section 961 of the LAPA, which specifically deals with the application of the adjudication rules to proceedings involving licenses. Subsection 961A, for example, applies the adjudication rules where the "*grant, denial or renewal of a license is required to be preceded by notice and opportunity for hearing, . . .*" But this subsection does not seem to include suspension and revocation proceedings.

Subsection 961B provides that when a *licensee* has applied for a renewal or for a new license, the old license remains in effect until the agency acts on the application. If the application is denied, the old license is in effect until the last day for seeking review of the agency's decision, or even later if the reviewing court so provides.

143. 246 So. 2d 382, discussed at note 130, *supra*, and accompanying text.

144. 350 So. 2d 984 (La. App. 2d Cir. 1977).

145. LA. R.S. 32:661-668 (Supp. 1968).

146. *Id.* § 668 (Supp. 1968, 1972, 1976 & 1978).

147. See Bonfield, *Adjudication*, *supra* note 1, at 322-24.

Finally, subsection 961C specifically covers suspension and revocation of licenses. It provides:

No revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the institution of agency proceedings the agency gives notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee is given an *opportunity* to show compliance with all lawful requirements for the retention of the license.¹⁴⁸

Does this last provision bring into play the adjudication rules of the LAPA? Probably not, since the legislature knew how to make those rules applicable to licensing matters when it saw fit. Comparing the language used in Louisiana Revised Statutes 49:961A ("the provisions of this Chapter concerning adjudication shall apply") with the wording of the procedural rights contained in subsection 961C, one must conclude that in subsection 961C (and in subsection 961B as well), the legislature intended to provide some protection to licensees, but not the comprehensive procedures contained in the adjudication rules. In subsection 961B the legislature maintains the status quo for the benefit of one already in possession of a license until the agency acts on his application for renewal or for a new license, as the case may be, and during the time he is given to seek judicial review of a denial. Subsection 961C provides minimal due process by saying that a license cannot be suspended or revoked without notice and without giving the licensee an opportunity to show why he is legally entitled to retain it. Even this subsection would seem to require notice and an opportunity to communicate information to the licensing authority.

However, a qualification is found in subsection 961C:

If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

In driver license suspensions the United States Supreme Court has held that to suspend a driver's license without a prior hearing where the suspension follows automatically upon conviction of an offense or a specified number of offenses is not a denial of due process. Such cases do not usually involve disputed factual issues.¹⁴⁹ The Court also has held that a suspension without prior notice and hearing can be made in the case of arrestees who refuse to submit to chemical

148. (Emphasis added).

149. Dixon v. Love, 431 U.S. 105 (1977). See also Bell v. Burson, 402 U.S. 535 (1971).

tests under implied consent statutes.¹⁵⁰ The Court considered the urgency in protecting the public interest in removing drunken drivers from the road as sufficient ground to override the licensee's due process argument. Of course, a licensee is ultimately entitled to notice and some form of hearing before the agency or a court.¹⁵¹

These two Supreme Court cases dealt with the minimal requirements of due process and not with statutory requirements such as are contained in section 961. That provision is quite demanding. The agency, itself, must find that public safety "imperatively requires emergency action"¹⁵² and it must specifically incorporate such a finding in its order. Arguably, refusal to submit to a breath-alcohol test does not in itself render a person a public menace. Yet Louisiana Revised Statutes 32:414 and 32:661 have been applied as though section 961 of the LAPA were totally inapplicable. Undoubtedly, the legislature has the power to exempt agency action from the LAPA. But in this instance such action on the legislature's part is a mere implication and not an express exception to the Act.¹⁵³ Prior notice and hearing (perhaps even the applicability of some of the other rules) may be required, however, where an agency seeks to suspend or revoke a business or professional license.¹⁵⁴

License suspension cases pose the question whether the LAPA provisions on judicial review should apply regardless of whether the adjudication rules are applicable. One court of appeal answered in the affirmative in 1974.¹⁵⁵

B. Procedural Rules

1. Waiver

Section 955 of the LAPA contains the rules, other than those which relate to evidence, which govern adjudications. This section gives to a party a right to insist on certain procedures. It does not impose the procedures on an unwilling party.¹⁵⁶

150. Mackey v. Montrym, 443 U.S. 1 (1979).

151. *Id.*

152. LA. R.S. 49:961C (Supp. 1966) (emphasis added).

153. LA. R.S. 49:966B (Supp. 1966).

154. Louisiana St. Bar Ass'n v. Ehmig, 277 So. 2d 137 (La. 1973). "It has been the uniform trend throughout the country in both federal and state courts to require that a hearing be held prior to the revocation, suspension, or modification of an existing license to engage in a business or profession." *Id.* at 139.

155. Young v. State, Dep't of Pub. Safety, License Control & Driver Improvement Div., 298 So. 2d 298 (La. App. 1st Cir. 1974). This view was overruled in *Price. Compare* the majority opinion in *Jaubert v. Dep't of Pub. Safety*, 323 So. 2d 212 (La. App. 4th Cir. 1975) with Judge Schott's dissenting opinion, *id.* at 216.

156. Thus, subsection 955A provides that "[i]n an adjudication, all parties who do

2. Notice

The LAPA provides that notice shall be given to a "party," defined as each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a "party." The Act is silent on who is "entitled as of right to be admitted as a party." Would it include anyone who can satisfy the "injury in fact" test for standing?¹⁵⁷ Would it include anyone seeking to represent the "public interest"? Except for "named" parties, the LAPA contains no "intervention" rule defining who may become a party as a matter of right or as a matter of grace.¹⁵⁸

The notice provided in subsection 955B includes:

- (1) A statement of the time, place and nature of the hearing;
- (2) A statement of the legal authority and jurisdiction under which the hearing is to be held;
- (3) A reference to the particular sections of the statutes and rules involved;
- (4) A short and plain statement of the matters asserted.

Some flexibility is provided whereby the initial statement can be limited to the issues if that is all the agency can provide at the time, subject to a duty to furnish more detailed notice upon request.

As to the hearing itself, subsection 955C states that all parties have a right "to respond and present evidence on all issues of fact involved and argument on all issues of law and policy involved." Parties also have a right of cross-examination, but only to ensure "full and true disclosure of the facts." The presiding officer may limit cross-examination to make the proceedings orderly and expeditious, but may not completely prohibit all cross-examination.¹⁵⁹

not waive their rights shall be afforded an opportunity for hearing after reasonable notice." Subsection 955D allows informal disposition by stipulation, agreement or default. In *Brown v. Sutton*, 356 So. 2d 965 (La. 1978), a case decided under a specific statutory notice requirement, LA. R.S. 30:5C (1950 & Supp. 1960), and not under section 955, the court found that the notice given was inadequate as to Brown. However, the court also found that Brown and his counsel were aware that a hearing was forthcoming and that there was sufficient time to inquire as to the specifics and to prepare a presentation. The court held that lack of formal notice had been cured by actual notice. Furthermore, the court said that "appearance in person or by attorney at an administrative hearing waives any irregularity or imperfection in the service of notice." 356 So. 2d at 972.

157. *Louisiana Independent Auto Dealers Ass'n v. Louisiana*, 295 So. 2d 796 (La. 1974).

158. See, e.g., UNIFORM LAW COMMISSIONERS' MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-209 (1981).

159. 1976 LA. OP. ATTY GEN. No. 75-1322 (Jan. 8, 1976).

Subsection 955E provides for a record which shall consist of:

- (1) All pleadings, motions, and intermediate rulings;
- (2) Evidence received or considered or a resumé thereof if not transcribed;
- (3) A statement of matters officially noted except matters so obvious that statement of them would serve no useful purpose;
- (4) Offers of proof, objections, and rulings thereon;
- (5) Proposed findings and exceptions;
- (6) Any decision, opinion, or report by the officer presiding at the hearing.

The agency must, according to subsection 955F, prepare a transcript if so required by law or if requested by a party upon payment of cost of preparation (unless the party is entitled to a copy at no charge). Finally, subsection 955G admonishes that "[f]indings of fact shall be based exclusively on the evidence and matters officially noticed."

The rules applicable to notice and hearing may require some flexibility in application. Strict adherence to the rules of pleading and proof in judicial proceedings is not ordinarily required.¹⁶⁰

Regarding the notice requirement the Louisiana Supreme Court has said in *Tafaro's Investment Co. v. Division of Housing Improvement* that it

need only be reasonable and need not meet the exacting requirements for notice in judicial proceedings. The type of notice and the method of notice vary with the quality of the proceeding and the results which can obtain after hearing. Notice must serve the purpose of informing the parties of the nature and time of the proceedings, the purpose of the hearing—*i.e.*, the possible consequences or the manner in which interests may be affected—, and the method of presenting objection to the administrative action.¹⁶¹

In that case, the court held that notice sent to the wrong address and never received by the addressee does not comply with the notice

160.

Administrative proceedings are not ordinarily governed by the strict rules of judicial proceedings. The key to pleading and procedure in that administrative process is the opportunity to prepare . . . Generally inadequacies in pleading and notice may be cured if the record establishes a full hearing was had after proper preparation.

White v. Louisiana Pub. Serv. Comm'n, 259 La. 363, 378, 250 So. 2d 368, 373 (1971) (citations omitted).

161. 261 La. 183, 191, 259 So. 2d 57, 60-61 (La. 1972).

requirement, nor does a letter which advises a property owner that a new ordinance has been passed authorizing the city to contract for repairs and that the city "might" apply the ordinance if they do not hear from the property owner. Also in this case no hearing was offered to the owner before the agency made its decision to contract for repairs. Thus, the action failed to comply with both the notice and hearing requirements.

While some relaxation and informality are permitted in agency proceedings, the Louisiana Supreme Court indicated in *White v. Louisiana Public Service Commission* that "[e]ven though due process may not require strict compliance with notice and pleading in administrative proceedings, and even though injustice may not result in a particular case, compliance with reasonable procedural rules is necessary for efficiency." At stake in this case was a license to operate a telephone answering service in a certain part of the state. The court found that there would be "competition and duplication of service" if one of the applicants was granted a license. It also determined that the Commission was obligated to hold "a hearing on reasonable notice" to determine whether the existing service is inadequate.¹⁶²

Notice of the "hearings" in question, which had been held previously, was very general and beyond doubt failed to specify that the existing service was inadequate.¹⁶³ Although the court stated that it did not have to decide whether the LAPA applied to the Public Service Commission,¹⁶⁴ it did find that the manner of conducting the hearing in question fell well below the standards set out in the LAPA. However, a proper hearing could overcome defective notice. The court concluded that a hearing was never held on the issue of "inadequacy of service." The "meager evidence" in the record indicated that inadequacy of service was never an issue. Furthermore, nothing in the record revealed that service was in fact inadequate. The case was remanded to the Public Service Commission for a hearing on the central issue.¹⁶⁵

3. A "Fair Hearing"

Decisions of the courts have contained strong statements on the

162. 259 La. 363, 377-78 n.3, 250 So. 2d 368, 373 n.3 (1971).

163. The court recognized that the Commission was authorized to make rules to govern its proceedings, but since the rules were not offered in evidence declined to take judicial notice of them. This is another reason why an Administrative Code would be helpful.

164. See Section II, *supra*.

165. On the issue of notice, see *Calhoun v. Administrator of the Department of Employment Security*, 390 So. 2d 912 (La. App. 2d Cir. 1980), in which an administrative decision was reversed because it was based on a charge not included in the notice.

requirement for fairness in the administrative adjudication process.¹⁶⁶

a. *Evidentiary Rules*

Louisiana Revised Statutes 49:956 contains detailed rules which relate to evidentiary considerations. These provisions include admissibility of evidence, "judicial" notice, records and documents, subpoenas, discovery, and privileges. The courts have created some doubt about the meaning of the rule contained in subsection 956(1), which provides that: "agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs." The broad rule of admissibility has only one qualification: agencies must recognize legally recognized privileges, and are authorized to exclude "incompetent, irrelevant, immaterial and unduly repetitious evidence." To expedite matters and so long as no prejudice to parties results, agencies may receive evidence in written form.

Obviously the drafters of the LAPA wanted to adopt a simple test for determining both the admissibility and the probative effect to be given to evidence. The drafters of the Act rejected the approach used in the Revised Model APA. Section 10 of the Revised Model APA provides that "rules of evidence as applied in non-jury civil cases in District Court . . ." shall apply, subject to an escape clause that "[w]hen necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted . . . if it is a type commonly relied on by reasonably prudent men in the conduct of their affairs." Professor Dakin has explained why the Model Act approach is undesirable,¹⁶⁷ and his view prevailed in the adoption of the LAPA.

166. For example, in *King v. Brown*, 115 So. 2d 405, 410 (La. App. 2d Cir. 1959), the court of appeal traced procedural due process back to the fall of Adam and Eve and stated:

A "fair hearing" is synonymous with a "fair and impartial trial," and the terms, at least, by strong implication, require a reasonable and substantial compliance with the principle of due process of law. A "fair trial" includes the right to notice of the charges one is to be confronted with, and the right of cross-examining his accusers, and to examine and refute the evidence tendered against him. An opportunity to be heard and to defend are essential elements of a fair hearing and of due process. Due process of law means the due course of legal proceedings and according to the rules and forms which have been established for the protection of private rights and refers to a law which hears before it condemns, and which proceeds upon inquiry and renders judgment only after trial.

167.

Inasmuch as researchers are generally unable to point to such a body of rules as existing in any coherent sense like the exclusionary rules applicable to jury trials, this would seem to accomplish very little. The model draftsmen would have

The criterion for the admissibility of evidence and for establishing the factual basis on which an agency may act seems to be a common sense, straight-forward approach. *Jefferson Downs, Inc. v. Louisiana State Racing Commission*,¹⁶⁸ involved a denial by the Racing Commission of a request by Jefferson Downs for 105 racing days. The Commission granted Jefferson Downs only fifty days. The fifty-five days were denied because the Commission had granted a request from Evangeline Downs for eighty-eight days. Since the dates requested by the two tracks overlapped, only one track could be awarded those dates. The Commission awarded the dates to Evangeline Downs because when faced with conflicting requests it awarded dates on the basis of alphabetical priority (lowest letter gets the dates). As to this approach the court of appeal said: "This method cannot possibly withstand the test of reason and cannot be condoned."¹⁶⁹

Also, the court admonished the Commission "to comply assiduously with the provisions of the administrative procedure act, including not only the evidentiary requirements but also those relating to notice." The court stated that Jefferson Downs was entitled to a hearing conducted according to the adjudicatory and evidentiary rules of the LAPA. "These statutes provide for an evidentiary hearing with proper notice and for consideration by the Commission on issues of fact based on *competent* probative evidence with full opportunity for examination and cross examination."¹⁷⁰ Notably, the court inserted the word "competent" into the evidentiary rule, even though section 956 includes no such criterion. The Racing Commission, based upon their "expertise and knowledge," decided that Jefferson Downs and Evangeline Downs could not both successfully operate on the same dates and used its alphabetical method for resolving the conflict. Subsection 956(3) authorizes an agency to take judicial notice of facts and "of generally recognized technical or scientific facts within the agency's specialized knowledge." Yet, as pointed out by the court of appeal:

the record of the hearing does not indicate that any staff report, or any evidence or technical expertise information was supplied

been better advised to prescribe the Learned Hand rule that evidence shall be "convincing evidence" of the type "on which responsible persons are accustomed to rely in serious affairs." . . . [S]uch a rule will be meaningful to the layman upon whom we must depend to carry on the work of agency adjudication and will result in about as much uniformity of evidence evaluation as can be achieved in the administrative process.

Dakin, *Revised APA*, *supra* note 1, at 809-10.

168. 288 So. 2d 653 (La. App. 4th Cir. 1974).

169. *Id.* at 656.

170. *Id.* (emphasis added).

to the Commission upon which the Chairman or the Commission members based their predisposed observations. Lacking *any* evidentiary foundation in the record, we are compelled to conclude that a determination based on unsupported statements is arbitrary.¹⁷¹

The Court of Appeal for the Second Circuit dealt with a problem of proof in a driver's license suspension case, *Turner v. State Department of Public Safety*.¹⁷² Under the applicable statutes, refusal to take an implied consent sobriety test requires suspension of the driver's license. However, as a prerequisite to suspension, certain events must occur. For example, the officer must establish that he had reasonable grounds to believe that the driver was under the influence of alcohol. In *Turner*, the only evidence consisted of two statements: a sworn statement and an unsworn accident report and complaint. The accident report and complaint contained information that plaintiff was driving on the wrong side of the road, was involved in an accident and was verbally and physically abusive to the arresting officer. The sworn statements contained no fact to justify the officer's belief that plaintiff was under the influence. No factual assertions were made as to any odor of alcohol, unsteadiness or of any of the typical physical characteristics of intoxication. The court of appeal, while readily acknowledging the admissibility of copies of documents under the LAPA, concluded that the accident report and complaint did not possess probative value commonly accepted by reasonably prudent men and should not be admissible under the LAPA. Neither document shed any light on the basis for the officer's belief that the driver was drunk. The court also said that despite the liberal admissibility rules of the LAPA, the legislature can impose more demanding requirements such as requiring that statements be submitted in sworn form. The court found that the reasonable grounds for the officer's belief, under the implied consent statute, must be submitted in sworn form.

Earlier, in discussing the *Jefferson Downs* case,¹⁷³ the writers observed that the court inserted the word "competent" as qualifying the evidence which can be used by agencies in making determinations. However, subsection 956(1) does not contain the limitation. Furthermore, this is inconsistent with Professor Dakin's observation that the people who frequently preside over agency proceedings are lay people unfamiliar with the rules of evidence.¹⁷⁴ The implications of this

171. *Id.* at 657 (emphasis added).

172. 350 So. 2d 984 (La. App. 2d Cir. 1977).

173. See text at note 168, *supra*.

174. Dakin, *Revised APA*, *supra* note 1, at 810.

qualification may be significant. In *Messer v. Department of Corrections, Louisiana State Penitentiary*,¹⁷⁵ the court of appeal reversed a decision of the Civil Service Commission which had sustained the firing of a person employed at the state penitentiary. Four charges against the employee were based on an inspection of the prison made by the Division of Health of the State Department of Health and Human Resources. A written report of the inspection and findings were made by the Division of Health. At the hearing the report was identified by one of the witnesses for the Department of Corrections. None of the inspectors testified.

The court of appeal said: "The report is, therefore, hearsay, and not competent evidence. Although, under the Administrative Procedures [sic] Act, the Civil Service Commission is not bound by the technical rules of evidence, *only legally competent evidence will be considered by us in our review of the case.* Since there is no competent evidence to support these four charges, they are not proven by the appointing authority."¹⁷⁶ The case relied on by the court in *Messer* is *Michel v. Department of Public Safety, Alcoholic Beverage Control Board*,¹⁷⁷ which also involved an appeal from the Civil Service Commission upholding a dismissal. That case, too, states that "incompetent evidence admitted at the hearing will be disregarded by the Court in its judicial review."¹⁷⁸ *Michel*, in turn, relies on *Hall v. Doyal*,¹⁷⁹ an unemployment compensation case, which itself relies on a series of other unemployment compensation cases. Notably, the statute providing for judicial review of unemployment compensation administrative determinations¹⁸⁰ does not use the term "competent evidence" as the court implied, but rather utilizes the term "sufficient evidence." The unemployment compensation cases which engrafted the "competent evidence" test onto the "sufficient evidence" required by the statute all involved administrative decisions based on extremely low quality evidence. Probably, the court in each case would have reversed the administrative decision regardless of whether it applied the rules of evidence to the record or whether it held the evidence to a reasonableness standard.¹⁸¹

175. 358 So. 2d 975 (La. App. 1st Cir. 1978).

176. *Id.* at 979 (emphasis added) (citation omitted). See also *Mayerhafer v. Department of Police of New Orleans*, 235 La. 437, 104 So. 2d 163 (1958).

177. 341 So. 2d 1161 (La. App. 1st Cir. 1977).

178. *Id.* at 1165.

179. 191 So. 2d 349 (La. App. 3d Cir. 1966).

180. LA. R.S. 23:1634 (1950).

181. Cases often cited for the "competent" evidence standard include: *Gardere v. Brown*, 170 So. 2d 758 (La. App. 1st Cir. 1964); *Lee v. Brown*, 148 So. 2d 321 (La. App. 3d Cir. 1962); *Huddleston v. Brown*, 124 So. 2d 225 (La. App. 2d Cir. 1960). The requirement for "competent" evidence in unemployment compensation cases can be

To fault these unemployment compensation cases is difficult. However, is it necessarily true that only legally competent evidence is probative evidence? Does it make any sense to say that hearsay, for example, can be admitted in an agency hearing but that the agency may not rely on it in reaching its decision? Why admit the evidence in the first place? Why didn't the Louisiana legislature opt for the standard of admissibility used in judicial proceedings? Probably the legislature intended to allow agencies to admit and rely on evidence which was compelling or persuasive regardless of whether it would have been admissible or relied upon by a court. The test contained

found in *Richardson v. Administrator, Division of Employment Security*, 28 So. 2d 88 (La. App. 1st Cir. 1946).

The reason for the "competent evidence" rule becomes obvious in reading the cases. In *Gardere v. Brown, supra*, an employee had been employed in excess of eight years and was fired for allegedly disobeying an order. No testimony was given by the person who gave the order or by anyone present when the order was given and allegedly disobeyed. The only testimony came from the employee's supervisor who recited what he had been told by the "boss." He had no idea himself of what had occurred. Similarly, in *Lee v. Brown, supra*, the record included testimony of two witnesses and a signed document allegedly showing that the employee was drunk. One witness was an executive of the company who had no personal knowledge of the matter and the document was a letter sent to the executive by a co-employee. In *Huddleston v. Brown, supra*, the office manager testified "without particularization" that there had been numerous complaints about the employee but there was no evidence in the record as to any of them. As to this kind of evidence the court of appeal stated:

[O]ur courts are constantly being confronted, in their consideration of claims involving rights to unemployment compensation, by records made up before administrative officials and boards of the Department which are replete with what appears to be the grossest character of hearsay testimony. The instant case provides a striking illustration. The claimant was not confronted with witnesses who were responsible for any charges or complaints against him and therefore was deprived of the opportunity to interrogate such witnesses. It must be pointed out that continuance of this procedure renders a claimant completely helpless before mere unsubstantiated representations.

124 So. 2d at 226.

The court of appeal in *Lee v. Brown* relied on 81 C.J.S. *Social Security and Public Welfare* § 221, at 318 [now found at § 278, at 568-69 (1977)] for the proposition that "competent evidence" is the same as "probative evidence." "[I]ncompetent or hearsay evidence are improper and hearsay evidence will not be considered." 148 So. 2d at 324-25. The court concluded that "administrative findings will be set aside on judicial review, if supported only by hearsay or other normally inadmissible evidence of a nature that does not afford the claimant a fair opportunity of rebuttal or cross-examination." *Id.* at 325.

The court of appeal in *King v. Brown*, 115 So. 2d 405, 411 (La. App. 2d Cir. 1959), described a most unusual situation in referring to the transcript of the unemployment hearing: "[A] considerable number of questions were asked by and testimony was given by, an anonymous person or persons, only designated by the appellation 'background.' The record does not disclose the interest of this anonymous person or persons, or that such parties were sworn on the verity of their statements."

in the LAPA essentially asks whether the evidence which is admitted and relied on by the agency is the kind of evidence in terms of its source, freshness, clarity, consistency, objectivity, etc., that reasonable and prudent people would rely on in conducting their affairs. The world does not function according to the rules of evidence. Courts are authorized to set aside agency decisions only where they are "[m]anifestly erroneous in view of the reliable, probative, and substantial evidence. . . ."¹⁸²

In *Fisher v. Louisiana State Board of Medical Examiners*,¹⁸³ the court was faced with an administrative record in which hearsay was admitted by the agency and relied upon. The court was persuaded by the view of Professor Kenneth C. Davis, who stated that:

[T]he reliability of hearsay ranges from the least to the most reliable. The reliability of non-hearsay also ranges from the least to the most reliable. Therefore the guide should be a judgment about the reliability of particular evidence in a particular circumstance, not the technical hearsay rule with all its complex exceptions.¹⁸⁴

At issue in *Fisher* was a report made by a D.E.A. agent based upon information supplied by informants and other law enforcement officers. The court concluded that the hearsay evidence was reliable and, therefore, appropriate for the agency's reliance. The case does not stand broadly for the proposition that an agency may always rely on hearsay. Instead, under the facts of the case the evidence was reliable. This approach seems preferable to the automatic reversal of an agency decision based solely upon hearsay without any consideration as to the reliability of the evidence and without any concern for fairness or unfairness to the party. Thus, one may question whether the *Messer* case (in which the court of appeal found that the Civil Service Commission erred in upholding a dismissal based upon the report from the Division of Health) was a correct decision. The Division of Health makes numerous inspections of public facilities and buildings each year. Often, it follows up on these inspections by issuing reports. Those reports are routinely issued and relied on. The Division of Health is not part of the Department of Corrections. There is no reason to suspect collusion between the inspection team and the Corrections Department.

Furthermore, subsection 956(5) confers upon the agency or subordinate presiding officer a subpoena power. Such power clearly implies

182. LA. R.S. 49:964G(6) (Supp. 1966).

183. 352 So. 2d 729 (La. App. 4th Cir. 1977).

184. *Id.* at 731 (citing Davis, *Hearsay in Administrative Hearings*, 32 GEO. WASH. L. REV. 689 (1964)).

that a party who tenders fees and expenses has the right to request that witnesses be subpoenaed. Arguably by offering the Division of Health report, the agency made a prima facie case. If the accuracy of that report was a central issue, the agency on its own motion or the party adversely affected upon request could have invoked the subpoena power. In this way the party would not be deprived unfairly of cross-examination.

The legislature has spoken in clear terms, but some courts have restricted the broad criteria of admissibility and reliance. Some addition to the statute might be desirable to the effect that "agency findings of fact shall not be set aside solely because they are based on evidence which would not be admissible in a court of law."¹⁸⁵

The remainder of section 956 is rather straightforward. Subsection (2) requires that documentary evidence on which the agency relies should be offered and made part of the record. Documents may be received in the form of copies, excerpts, or incorporation by reference. Where incorporation is by reference the parties must be given access to the materials before they are received in evidence.

Subsection (3) authorizes the use of judicial notice and notice of "generally recognized technical and scientific facts within the agency's specialized knowledge." However, the party affected must be apprised of the material noted "including any staff memoranda or data"

Subsection (4) gives the presiding officer routine powers necessary to schedule and conduct a hearing and subsection (5) gives to the agency or presiding officer the power to issue subpoenas. Disobedience of a subpoena is punishable in a court as a contempt.

Subsections (6) and (7) relate to discovery. Subsection (6) authorizes the agency, presiding officer or a party to take depositions as provided in civil cases. Depositions so taken may be offered in evidence subject to the evidentiary rules of the LAPA. Subsection (7) allows each agency, itself, to formulate rules of discovery. On the matter of discovery, the court of appeal in *Tassistro v. Louisiana State Racing Commission*,¹⁸⁶ disapproved when the Racing Commission did not give the owner of a horse suspected of being drugged an opportunity to have his own test made before destroying the specimen after a positive finding had been made.

Subsection (8) was added by amendment in 1976.¹⁸⁷ This provision deals with confidential or privileged records and documents, and pro-

185. This clause could be added at the conclusion of subsection 964G(6).

186. 269 So. 2d 834 (La. App. 4th Cir. 1972).

187. LA. R.S. 49:956, as amended by 1976 La. Acts, No. 524, § 1.

hibits agencies from disclosing such documents in adjudication proceedings or releasing them through subpoena. These documents and records are limited to "private contracts, geological and geophysical information and data, trade secrets or commercial and financial data . . ." Protection is offered only when the documents were obtained by the agency through "voluntary agreement" and the documents were designated as "confidential and privileged" when turned over to the agency.

Agencies often act through hearing officers or by otherwise delegating authority to someone other than the full body to preside over a hearing. When the agency has not heard the case or read the record, but is relying on the conclusion of someone else, the parties must see the proposed order and a statement of reasons, as well as the disposition of factual and legal issues, before the agency issues a final order.¹⁸⁸

4. Miscellaneous Matters

Final orders and decisions must be in writing or stated in the record. They must contain findings of fact, conclusions of law, and rulings on proposed findings of fact submitted by a party. Parties shall be notified of the order personally or by mail.¹⁸⁹

Section 959 provides that decisions and orders shall be subject to rehearing within ten days from the entry of the decision or order. A rehearing may be granted when the decision is contrary to law or the evidence, newly discovered evidence exists, important issues were not considered, or some other good ground exists which is in the public interest. The rehearing provision as written does not restrict its applicability to a losing or aggrieved party. In *Tassistro v. Louisiana Racing Commission*,¹⁹⁰ the court of appeal held that the Commission on its own motion may reopen a matter. The basis in the statute for a rehearing when there is "other good ground" which advances the public interest should be liberally construed.¹⁹¹

Separation of functions is provided in section 960. A member or employee of an agency assigned the responsibility for making a decision or finding "in a case of adjudication noticed and docketed for hearing shall not communicate, directly or indirectly, in connection with any issue of fact or law" with (1) a party or his representative, or (2) a person engaged in the investigative, prosecutive or advocacy

188. LA. R.S. 49:957 (Supp. 1966).

189. *Id.* § 958.

190. 269 So. 2d 834 (La. App. 4th Cir. 1972).

191. *Id.* at 837.

functions unless notice is given to all parties and they have an opportunity also to participate. In one unemployment compensation case, the court of appeal stated that private talks between the referee and counsel for the employer are prohibited. However, if the communication did occur, the agency's decision will not be set aside if the record reveals that the proceedings were conducted fairly and that there are no allegations of fraud or undue influence.¹⁹²

The rules for adjudication are clear and uncomplicated, and have generated little in the way of case law. This lack of litigation indicates either a high rate of agency compliance, or a failure of parties to insist that the rules be followed. Perhaps it reveals a lack of familiarity with the rules. In any event, the rules which govern *formal* agency adjudication are adequate.

VI. JUDICIAL REVIEW

A. *The "Right" to Judicial Review*

The right to judicial review is well established in Louisiana and is an integral part of administrative procedure. Review is an important safeguard of due process and the availability of judicial review may be critical in determining whether a party has been denied due process.¹⁹³

The Louisiana Supreme Court has indicated that the right to judicial review of agency action is a constitutional right apart from any statute which explicitly grants a right of review.¹⁹⁴ "Generally the availability of judicial review is necessary to the validity of such [administrative] proceedings under our legal system and traditions."¹⁹⁵ The court pointed to actions by the United States Supreme Court which, in effect, create "a presumption of reviewability which yields only to affirmative legislative intent in favor of unreviewability when such intent is based upon reasonable grounds or to special reason for unreviewability because of the peculiar subject matter or circumstances."¹⁹⁶

In addition to the due process rationale, the Louisiana Supreme Court has relied on article I, section 6 of the 1921 Constitution (article I, section 22 of the 1974 Constitution) which provides that "all Courts shall be open, and every person shall have an adequate remedy

192. *Dorsey v. Administrator, La. Dep't of Employment Security*, 353 So. 2d 363 (La. App. 1st Cir. 1977).

193. *Parker v. State Bd. of Barber Examiners*, 84 So. 2d 80 (La. App. 1st Cir. 1955).

194. *Bowen v. Doyal*, 259 La. 839, 253 So. 2d 200 (1971).

195. 259 La. at 843-44, 253 So. 2d at 203.

196. *Id.*

by due process of law" as mandating judicial review.¹⁹⁷ Even where a statute provides that the decision of a board "shall be final" the courts have found a right to judicial review.¹⁹⁸

In *Werner v. Board of Trustees of New Orleans Police Pension Fund*,¹⁹⁹ the statute provided that the decisions of the board "shall be final and conclusive. There shall be no appeal from the finding of the board."²⁰⁰ The court of appeal found that the prohibition of review fell short of the requirements of due process, and applied subsection 964A of the LAPA to provide such review. "We have held that although administrative bodies have power to determine as original proposition the matters assigned to them under statute, a party whose legal rights have been adversely affected by that determination may test its legal correctness in the courts."²⁰¹ However, in some instances the court has accepted the legislative determination that agency action shall be final, such as in the denial of parole.²⁰²

Under article V, section 16 of the Constitution of 1974, district courts have original jurisdiction as provided therein, and appellate jurisdiction as provided by law. The constitution contains no barrier to providing judicial review whether designated as an appeal or not.²⁰³ However, under the 1921 Constitution judicial review in district courts presented a problem. The 1921 Constitution specified the cases in which the district courts could exercise appellate jurisdiction. In *Bowen v. Doyal*²⁰⁴ the plaintiff brought an action in the district court to review a decision by the Board of Review of the Division of Employment Security which had upheld a referee's decision that he was not qualified for unemployment compensation benefits. His action was based on a statute which provided for judicial review.²⁰⁵ The district court held that the statute providing for judicial review in the district court was unconstitutional since it authorized the exercise of appellate jurisdiction by a district court in a case not provided for in the Constitution of 1921. The Louisiana Supreme Court reversed.

After establishing the "constitutional" right to judicial review the court concluded that judicial review of agency action was not an "ap-

197. 259 La. at 847-50, 253 So. 2d at 203-04.

198. *Anderson v. State*, 363 So. 2d 728 (La. App. 2d Cir. 1978).

199. 360 So. 2d 615 (La. App. 4th Cir. 1978).

200. LA. R.S. 33:2284 (1950 & Supp. 1972).

201. 360 So. 2d at 616 (citing *Bowen v. Doyal*, 253 So. 2d at 203-04).

202. *Smith v. Dunn*, 263 La. 599, 268 So. 2d 670 (1972); LA. R.S. 15:574.11 (Supp. 1968).

203. *Touchette v. City of Rayne, Mun. Fire & Police Civil Serv. Bd.*, 321 So. 2d 62 (La. App. 3d Cir. 1975).

204. 259 La. 839, 253 So. 2d 200 (1971).

205. LA. R.S. 23:1634 (1950).

peal" and hence not an exercise of appellate jurisdiction. Such review was instead an exercise of original jurisdiction. Some authority supports this view.²⁰⁶ However, in defining terms such as "original jurisdiction," "appellate jurisdiction" and "appeals," one must carefully evaluate the context in which a term is used.²⁰⁷ At issue in the *Bowen* case was whether the legislature constitutionally could vest the district courts with power to review decisions of the Board of Review. The supreme court said that the jurisdictional provisions of article VII of the Constitution of 1921 were intended to allocate jurisdiction in terms of the relationships among the courts. Hence, matters originate in district courts subject to appellate review in the courts of appeal and the supreme court. The term "appeal" and "appellate" were used only to define the relationship among the courts and not the relationship between the courts and administrative tribunals. In this sense one cannot take an "appeal" from administrative action because the terms "appeal" and "appellate jurisdiction" describe the process whereby a higher court reviews the decision of a lower court. The district court had original jurisdiction because in the context of the case "original" meant the first judicial examination of the issues.

The terms "appeal," "appellate jurisdiction" and "original jurisdiction" have other meanings as well. For example, when a court exercises its original jurisdiction we often think of the matter beginning in that court. The court of original jurisdiction receives the evidence; it hears testimony under legal rules. However, a district court conducts judicial review of agency action on the record. Evidence will not ordinarily be received.²⁰⁸ Functionally, the district court performs like an appellate court rather than a trial court. Thus, the terms "appeal," "original" and "appellate jurisdiction" may mean different things depending on how they are used.

The court's determination in *Bowen* that the legislature could constitutionally confer on district courts the power to review agency action merely means that there was an oversight in the constitution by not generally or specifically defining judicial jurisdiction in relationship to administrative action. Nothing in the constitution denies courts this function. In fact, Louisiana decisions had stated that there was a constitutional right to such review. In such instances, there is no reason why courts should not defer to legislative judgments

206. See, e.g., *Warren v. Indiana Tel. Co.*, 26 N.E.2d 399, 404 (Ind. 1940); *Nevada Tax Comm'r v. Mackie*, 74 Nev. 276, 329 P.2d 448, 449 (1958); *Southern Ry. v. Public Serv. Comm'n*, 195 S.C. 247, 10 S.E.2d 769, 772 (1940).

207. "'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.'" L. CARROLL, *THROUGH THE LOOKING GLASS* 117 (Harper ed. 1902).

208. LA. R.S. 49:964F (Supp. 1966).

which implement the constitutional right to judicial review. However, the decision should not be read as holding that judicial review can be vested only in the district courts. Should the legislature seek to vest judicial review of agency action in the courts of appeal or the supreme court, one could argue logically that judicial review is functionally analogous to the exercise of appellate jurisdiction and satisfies the requirements of the constitution.

The right to judicial review is considered so important that the Louisiana courts have said that agencies may not penalize people who exercise their right to review. In the case of *In re Coppola*,²⁰⁹ the Louisiana Commission on Governmental Ethics suspended petitioner for thirty days. Because of errors at the hearing stage the court of appeal remanded the case for rehearing.²¹⁰ Upon rehearing, the charges were again sustained and the petitioner was demoted from captain to lieutenant. The court, drawing an analogy to criminal procedure, set aside the demotion and ordered the original thirty-day suspension reinstated.²¹¹

B. Administrative Actions Subject to Review

1. Judicial Review of Declaratory Orders

Three sections of the LAPA relate to judicial review. These deal with review of declaratory orders,²¹² agency rules,²¹³ and decisions based on adjudication.²¹⁴ Louisiana Revised Statutes 49:962 requires that agencies adopt procedures for entertaining and disposing of requests for declaratory rulings which may be submitted to them. Declaratory orders and rulings are treated as decisions or orders in adjudicated cases for purposes of judicial review.²¹⁵

2. Judicial Review of Agency Rules

Judicial review also is permitted to contest the "validity" or "applicability" of a rule.²¹⁶ Such action must be filed in the district court of the parish where the agency is located. A court may invalidate a rule and declare it inapplicable only "if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency

209. 270 So. 2d 190 (La. App. 1st Cir.), writ granted, 272 So. 2d 372 (La. 1973).

210. 222 So. 2d 314 (La. App. 1st Cir. 1969); 256 So. 2d 798 (La. App. 1st Cir. 1971).

211. 270 So. 2d at 193.

212. LA. R.S. 49:962 (Supp. 1966).

213. *Id.* § 963.

214. *Id.* § 964.

215. See LA. R.S. 49:962 and the discussion of that section at note 223, *infra*, and accompanying text.

216. LA. R.S. 49:963 (Supp. 1966).

or was adopted without substantial compliance with required rule-making procedures."²¹⁷ The agency must be made a party to the action. The section imposes a strict requirement of exhaustion of administrative remedies. As a prerequisite to judicial review the plaintiff must first ask the agency to review the validity or applicability of the rule. Furthermore, the plaintiff must show that seeking review of the validity or applicability of the rule through an agency decision in a contested adjudicated case "would not provide an adequate remedy and would inflict irreparable injury"²¹⁸ before the procedure can be bypassed.

Section 963, in contrast to section 964 which deals with adjudication, is silent on the standards to be used by the courts in reviewing agency rules. The stated grounds for review, however, make prescribing any standards unnecessary. The grounds deal only with constitutionality, scope of statutes, or failure to follow rule-making procedures. Essentially these are matters of law and within the competence of the court. They are not ordinarily matters on which a court needs guidance. A question arises, however, if the applicability or validity of a rule is questioned by challenging an agency's application of the rule to a particular set of facts. In other words, an agency has made a decision in which it has applied the rule in question and a party who was affected adversely seeks judicial review of that decision and the rule on which it is based. What standard should the court use?²¹⁹

A direct attack on the validity of a rule was made in *Louisiana Power & Light Co. v. Louisiana Public Service Commission*.²²⁰ The supreme court said that agency rules

are entitled to great weight and are not to be overturned on judicial review, unless shown to be arbitrary, or capricious, or abusive of the commission's authority. . . . [A] person attacking a commission order bears the burden of demonstrating that it is defective, since the order is presumed to be valid. . . . [W]hile a ruling of the commission may be deemed arbitrary unless supported by some factual evidence, the function of the court on judicial review is not to re-weigh and re-evaluate the evidence

217. *Id.*

218. *Id.*

219. In *White v. Department of Health & Human Resources*, 385 So. 2d 400, 401-02 (La. App. 1st Cir. 1980), the Civil Service Commission granted a summary disposition on an appeal which was not filed within the time set out in the rules. The court of appeal said that those "[r]ules have the force of law, and the Courts of this State will not pass upon the wisdom or policy of the Rules." Of course, the *White* case presented no direct challenge to the rule.

220. 343 So. 2d 1040 (La. 1977).

and to substitute its judgment for that of the administrative agency.²²¹

The same approach was used in *National Dairy Products Corp. v. Louisiana Milk Commission*.²²² In that case the court expressly referred to and used the LAPA standards for review of adjudications.²²³

In *Cannatella v. City Civil Service Commission*,²²⁴ the plaintiff, a police officer, challenged as unreasonable the rules of the New Orleans Civil Service Commission which failed to give credit for time served as a police cadet. The court of appeal stated that

[t]he general rule is that the reasonable discretion of administrative boards will not be set aside in the absence of proof of an abuse of discretion. . . . The Courts should not interfere with the bona fide judgment of such a board based upon substantial evidence. . . . The decision cannot be considered arbitrary unless the setting was made without reasons or reference to relevant considerations. Arbitrariness is the absence of a rational basis.²²⁵

The court reversed the trial judge who did not apply these standards but instead "substituted his opinion for that of the Civil Service Commission and its Director."²²⁶ One judge concurred and found that the rules could not be characterized as "unreasonable, arbitrary or capricious."²²⁷

Thus, the courts apparently are using the standard for evaluating agency conclusions which is contained in section 964G(5). That subsection on judicial review of adjudications allows a court to reverse or modify an agency decision which is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. . . ."

Ordinarily a party who contests the validity or applicability of administrative rules must, under the LAPA, raise the issue in an administrative proceeding before seeking judicial review. However, where

the issues relate more to the lawfulness of the rule-making order rather than to the factual basis or the administrative policies which support its validity—instances in which administrative expertise should be permitted to explain the technical bases for the rule

221. *Id.* at 1044 (citations omitted).

222. 236 So. 2d 596 (La. App. 1st Cir. 1970).

223. LA. R.S. 49:964 (Supp. 1966).

224. 381 So. 2d 1278 (La. App. 4th Cir. 1980).

225. *Id.* at 1280 (citations omitted).

226. *Id.*

227. *Id.* at 1281.

in an administrative record—many state courts do not mandatorily require prior resort to an administrative remedy.²²⁸

3. Judicial Review of Agency Adjudication

Agency adjudication is subject to judicial review under section 964 of the LAPA. Typically, it provides that "[a] person who is aggrieved by a final decision or order in an adjudication proceeding is entitled to judicial review." The provision for judicial review in the LAPA does not preclude or limit other judicial remedies provided by law. Generally, only final agency action is subject to judicial review. However, non-final agency action may be reviewed if review of the final agency action "would not provide an adequate remedy and would inflict irreparable harm."

The district courts have jurisdiction to review agency decisions, and venue is in the parish where the agency is "located." The petition for review must be filed "within thirty days after mailing of notice of the final decision by the agency or if a rehearing is requested within thirty days after the decision thereon." The agency and parties of record must be served with copies of the petition.

a. Exhaustion of Administrative Remedies

Louisiana Revised Statutes 49:964 does not require a party to seek a rehearing. In contrast to section 963, which deals with judicial review of rule-making, section 964 does not explicitly require exhaustion of administrative remedies; it does, however, provide for review of "final decisions or orders." Yet the cases uniformly approve of exhaustion of remedies. The issue was discussed in *Bonomo v. Louisiana Downs, Inc.*²²⁹ The court quoted with approval from *McKart v. United States*,²³⁰ where the United States Supreme Court said:

The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. . . . The doctrine provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."²³¹

The court of appeal, relying on *Ecology Center of Louisiana, Inc. v. Coleman*,²³² stated that the rule may be subject to some exceptions,

228. *Louisiana Power & Light Co. v. Louisiana Pub. Serv. Comm'n*, 343 So. 2d 1040, 1042 n.1 (La. 1977).

229. 337 So. 2d 553 (La. App. 2d Cir. 1976).

230. 395 U.S. 185 (1969).

231. 337 So. 2d at 560 (citing 395 U.S. at 193 (citation omitted)).

232. 515 F.2d 860, 865-66 (5th Cir. 1975).

and referred to some of the factors courts consider in determining whether to require exhaustion of remedies. These considerations include the harshness of the penalty a plaintiff suffers if he cannot assert his claim in court. Where a penalty is not unduly harsh, courts are unlikely to find an exception to the exhaustion requirement if circumvention of agency procedure will seriously impair the ability of the agency to perform its functions or if the issue on which the decision rests is one which involves agency expertise, or the missing administrative decision would facilitate judicial review. Other factors considered by courts include whether other plaintiffs are likely to bypass the agency and burden the courts, and whether the matter involves an area where the agency has been given substantial autonomy.²³³

Romero v. Stephens,²³⁴ raised the issue of whether exhaustion was required when the relevant statute and agency rule provide that a person "may" appeal a decision of the stewards to the Racing Commission. The court interpreted the word "may" as meaning "must." In so doing the court observed that to allow a direct attack in court of the stewards' decision would circumvent the special burden of proof provisions—that is, the standard used in judicial review and the extent of review provided section 964 for the review of agency decisions. The Louisiana courts have gone far in interpreting statutes to provide for an administrative hearing, even when the statutes do not so expressly provide, and to then invoke the exhaustion principle.²³⁵ Failure to exercise one's right to administrative review may preclude judicial review.²³⁶

b. *Jurisdiction and Venue*

Jurisdiction to review agency decision is in the district courts, unless there are provisions to the contrary. For example, appeals from the Civil Service Commission are to the courts of appeal,²³⁷ appeals from the State Ethics Board are to the Court of Appeal for the First Circuit.²³⁸ The appropriate district court is the one which sits in the parish where the agency is "located," as held in *Evers v. Louisiana State Board of Medical Examiners*.²³⁹ The "location" of an agency is its domicile and not in any parish where the agency has an office.²⁴⁰

233. 337 So. 2d at 560-61.

234. 359 So. 2d 1061 (La. App. 3d Cir. 1978).

235. See *Steeg v. Lawyers Title Ins. Corp.*, 329 So. 2d 719 (La. 1976).

236. *Brown v. Phelps*, 374 So. 2d 664 (La. 1979); *Armistead v. Phelps*, 365 So. 2d 468 (La. 1978); *Davis v. Hudson*, 374 So. 2d 126 (La. App. 1st Cir. 1979). See also *Anderson v. State*, 363 So. 2d 728 (La. App. 2d Cir. 1978).

237. LA. CONST. art. X, § 12.

238. LA. R.S. 42:1142(A) (Supp. 1979).

239. 336 So. 2d 36 (La. App. 4th Cir. 1976).

240. *Brown v. Phelps*, 392 So. 2d 103 (La. App. 1st Cir. 1980).

Once suit is filed in the proper court, that court may exercise ancillary jurisdiction in aid of its original jurisdiction. The *Evers* case presented an interesting problem in which plaintiff sought judicial review in the proper district court of an agency decision which denied his application for a permanent license to practice medicine. The Board was located in New Orleans and suit was filed in the Orleans Parish Civil District Court. The Board filed a "reconventional demand" for a temporary restraining order to prevent plaintiff from practicing medicine pending the appeal. Plaintiff was a resident and domiciliary of Plaquemines Parish and usually actions seeking injunctions must be brought in the domicile of the party to be enjoined. On rehearing, the court of appeal held first that under subsection 961B of the LAPA, the court upon review had the power to decide whether the temporary license should remain in effect pending appeal. That issue was raised by the demand for the temporary restraining order. Although filing of the "reconventional demand" would not be appropriate in the appeal of a case, the court pointed out that judicial review in the district court is an exercise of "original jurisdiction" and not an appeal. Finally, the court held that the Orleans Parish Court had jurisdiction to issue the injunction *pendente lite* under the theory of ancillary jurisdiction. In such matters the ordinary rule of venue does not apply.

c. Time Limits

The Act provides that petitions for review must be filed within thirty days after the agency has mailed its final decision or "if a rehearing is requested, within thirty days after the decision thereon."²⁴¹

Some statutes have specific provisions which alter some of the particulars relating to review. For example, the statute in *Hills v. Bonin*²⁴² provided that review from adjudications of the LHSRSA, Division of Family Services, should be sought within fifteen days and should be filed in the Nineteenth Judicial District Court. The court held that the time limits were to be strictly adhered to in this case.²⁴³ In another example, the applicable statute gave plaintiff thirty days to seek judicial review of the suspension of his driver's license. Plaintiff filed his petition thirty-six days after the agency action and upon

241. LA. R.S. 49:964(B) (Supp. 1976 & 1981).

242. 329 So. 2d 773 (La. App. 1st Cir. 1976).

243. *Id.* Interestingly, in *Hills* and the case on which it relies, *David v. Department of Public Safety*, 261 So. 2d 347 (La. App. 1st Cir. 1972), review of agency action by the district court was denominated an "appeal." "It is the settled jurisprudence of this state that the time for taking an appeal and furnishing security therefore . . . are jurisdictional issues which cannot be waived. . . . An appellate court does not acquire jurisdiction of an appeal which is not taken and perfected by the timely filing of the bond within the prescribed statutory time." 261 So. 2d at 349.

appeal from the decision of the district court, his petition was dismissed by the court of appeal on its own motion.²⁴⁴

The filing of the petition does not result in an *automatic* stay, but both the agency and the reviewing court have the *power to grant* a stay. In the absence of a statute to the contrary, the time provision seems rather clear. Where no rehearing is requested, a party has thirty days from mailing. At least one court of appeal has construed a similar provision to allow a period of forty days. *Quinn v. Department of Health*²⁴⁵ involved review of a Civil Service Commission decision. The constitution provides that review of the Commission's decision may be obtained within thirty days after its decision becomes final. The Uniform Rules of the Courts of Appeal, Rule 16, section 1, defines "final decision" as the date on which the Commission files its written decision "if no timely application is made for a rehearing. . . ." When rehearing is requested, the decision is final when the Commission acts on the rehearing. Since the LAPA allows ten days to file for a rehearing, one cannot know whether a party will request a rehearing unless the party actually files within the period or the ten days elapse without such a petition having been filed. The *Quinn* court thought that the Commission decision could not be considered final until the ten days had elapsed in cases where the party does not petition for rehearing. Thus, the thirty days runs from the expiration of the ten day rehearing time frame, and parties who do not file petitions get forty days rather than thirty days. The constitution and court rules are clear, and it is difficult to understand how a simple thirty-day time period became muddled into a forty-day period.²⁴⁶ The language of the LAPA on time limits, though not identical to the provisions involved in *Quinn*, is subject to the same possible distortion.

d. Review Procedures

The Act provides that review is to be carried out by the court without a jury and is to be a review on the record. Subsection 964F provides that in cases of "irregularities in procedure before the agency" which do not appear on the record, the court may allow proof to be offered in court. Also, before the judicial hearing the court may order additional evidence to be taken before the agency if the court is so requested and the evidence is shown to be material and "good reasons" prevented introducing it at the proceeding before the agency.

244. *Id.*

245. 347 So. 2d 954 (La. App. 4th Cir. 1977).

246. See also *Paulin v. Department of Sanitation*, 383 So. 2d 1064 (La. App. 4th Cir. 1980).

In such cases the agency may modify its findings and decision based on the new evidence.

After a petition for review has been served on the agency, the agency has at least thirty days to send to the court the original or a certified copy of the entire record of the proceedings. The court shall allow oral argument if requested and accept written briefs.

Review under the LAPA is not by way of a *dé novo* proceeding but review on the record. Despite the characterization of judicial review in its first instance as an exercise of "original jurisdiction," there is no question that the courts in conducting the "review" use appellate rules and procedures. The appellate nature of the review is reflected in numerous statements by courts of the importance of the record, the necessity for agencies to make findings, etc. The Louisiana Supreme Court, in *Baton Rouge Water Works v. Louisiana Public Service Commission*,²⁴⁷ stated:

For purposes of judicial review and in order to assure that the Commission has acted in accordance with law, it is usually preferable that, in a contested case involving complex issues, the administrative agency makes findings as to the central disputed issues and explain the reasons for its determination. . . .

Louisiana courts have on occasion remanded for this purpose when unable to review the agency determination in the absence thereof.²⁴⁸

The court in *White v. Louisiana Public Service Commission*,²⁴⁹ held it improper for the district court to receive in evidence depositions of a number of witnesses which had never been submitted to the Commission. In reviewing agency decisions courts ordinarily admit additional evidence only in exceptional cases. Furthermore, neither trial nor appellate courts are allowed to make independent findings of fact when findings are in the administrative record unless those findings are arbitrary or not based on substantial evidence.²⁵⁰

These comments highlight the need for a complete record of the evidence before the agency and for the agency to supply the court with findings. In *White* the court remarked, in a critical manner, at the "confusion in the transcript," "meager evidence" and that the "Commission has failed to make a finding of fact in these cases." The

247. 342 So. 2d 609 (La. 1977).

248. *Id.* at 612 (citations omitted). See also *Brown v. Sutton*, 356 So. 2d 965, 974 (La. 1978).

249. 259 La. 363, 250 So. 2d 368 (1971).

250. 259 La. at 374-75, 250 So. 2d at 372.

relationship between agency findings, the basis therefor, and judicial review was explained:

The reviewing courts, which are not endowed with the administrative body's special knowledge apparently carried over from one case to another in many administrative proceedings, must have the evidence which supports that knowledge made part of the record.²⁵¹

While the LAPA provides for review on the record, the adjudication rules do not apply to all agency decisions. Generally, however, where the agency conducts a hearing and amasses a record, judicial review should be on the record and not *de novo*.²⁵² Occasionally, courts have lost sight of this basic tenet of judicial review. In *Jaubert v. Department of Public Safety*,²⁵³ the court of appeal held that judicial review of driver's license suspensions should take the form of a *de novo* proceeding. Incredibly, the court relied on section 964 of the LAPA to support the conclusion that "[t]he court is not restricted to a review of the findings of the Department."²⁵⁴ The LAPA is precisely to the contrary. The Act recognizes *de novo* review only when provided by some law which gives an additional remedy. The license revocation laws do not provide for *de novo* review. As one of the dissenting judges pointed out, the majority failed to appreciate a basic distinction in the procedures followed under the two statutes which provide for revocation. Under Louisiana Revised Statutes 32:414, a license may be revoked upon investigation. The statute contains no provision for an administrative hearing. Thus, the first and only hearing is in the district court when the petitioner seeks judicial review. The proceeding in the district court is not *as though it were a new proceeding*, it is the *only* proceeding. The other statute which provides for suspension is Louisiana Revised Statutes 32:668. This was the statute involved in *Jaubert*, and it provides a driver with a right to an administrative hearing. Nothing in this statute says that judicial review after the administrative hearing should be by trial *de novo*. There is no need for a trial *de novo*, and the decision is contrary to the usual rules of judicial review.

That district courts exercising judicial review under LAPA section 964 are not to use the trial *de novo* is stated in unequivocal language in *Buras v. Board of Trustees of Police Pension*.²⁵⁵ The case

251. 259 La. at 378 n.3, 250 So. 2d at 373 n.3.

252. 259 La. at 374, 250 So. 2d at 372.

253. 323 So. 2d 212 (La. App. 4th Cir. 1975).

254. *Id.* at 214.

255. 367 So. 2d 849 (La. 1979).

was tried by the district court as a *de novo* matter. The court of appeal said that in this case the trial court could have remanded the matter to the board which had failed to present it with a proper record and findings. The court considered remanding the case to the board, but in the interest of "judicial economy" resolved the case on the trial record.²⁵⁶ The Louisiana Supreme Court held that the agency erred in not following the procedures of the LAPA, the trial judge erred in conducting judicial review in the form of trial *de novo*, and the court of appeal erred in resolving the matter on the trial court record.²⁵⁷

e. Standards for Review of Agency Adjudication

Subsection 964G of the LAPA defines the scope and standards for judicial review of agency decisions as follows:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (6) Manifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record. In the application of the rule, where the agency has the opportunity to judge of the credibility of witnesses by first-

256. *Buras v. Board of Trustees of Police Pension*, 360 So. 2d 572 (La. App. 4th Cir. 1978).

257. The court stated:

These provisions defining the nature and scope of judicial review under the Administrative Procedure Act do not authorize a trial *de novo* in the reviewing court. To the contrary, it is clear that the review "shall be confined to the record" as established before the agency. If the reviewing court were allowed to hear such matters *de novo* and substitute its judgment for that of the administrative agency, it would be usurping the power delegated by the legislature to the administrative agency. [The Act] . . . permits the administrative agency to weigh and evaluate the evidence with proper respect being given to its expertise in the matter. Additionally it promotes the uniform application of the statute under which the agency operates.

367 So. 2d at 853.

hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

The first four grounds which justify judicial reversal or modification of an agency's decision involve evaluations of agency actions in light of established legal standards—*e.g.*, does the agency action violate the constitution; does the agency action violate a statute; has the agency gone beyond the authority delegated to it by statute; was the agency action based upon some error of law? These grounds raise traditional legal issues.

Several examples of these "legal" errors follow. An agency decision will be set aside if it violates the "fair notice" requirement. Agency action based on charges not contained in the notice cannot be sustained.²⁵⁸

In *City of Kenner v. Wool*,²⁵⁹ the court of appeal considered action by the Municipal Fire and Police Civil Service Commission of the City of Kenner which had set aside a demotion and increased a suspension order issued by the chief of police. The court of appeal held that the action of the Commission went beyond the statutory authority which limited its scope of review to a determination of whether the action of the appointing authority was "in good faith for cause." The Commission was not authorized to substitute its judgment for that of the appointing authority. An agency decision will be reversed where the agency failed to afford the parties a hearing to which they are entitled.²⁶⁰

Where the legislature has imposed certain prerequisites to agency action, *e.g.*, finding of jurisdictional facts, the agency must comply with those prerequisites for its action to be valid.²⁶¹ Furthermore, an agency action will not be sustained merely because it is generally "in the public interest," if its authority to act is prescribed by the legislature to specific occasions. In *Hunter v. Hussey*,²⁶² the agency issued an order based on a finding that it would permit "a more efficient operation" and would "prevent waste."²⁶³ The court found this to be error since the order in part went beyond the scope of the agency's authority.²⁶⁴

258. *Calhoun v. Administrator of Dept. of Employment Security*, 390 So. 2d 912 (La. App. 2d Cir. 1980).

259. 320 So. 2d 245 (La. App. 4th Cir. 1975).

260. See generally *White v. Louisiana Pub. Serv. Comm'n*, 259 La. 363, 250 So. 2d 368 (1971).

261. *Brown v. Sutton*, 356 So. 2d 965 (La. 1978).

262. 90 So. 2d 429 (La. App. 1st Cir. 1956).

263. *Id.* at 437.

264. The agency was authorized by statute to issue an order like the one in question only "to minimize drainage 'which is not equalized by counter drainage' and must

The use by an agency of improper procedures may constitute a legal error which requires setting aside its decision. The court of appeal in *In re Coppola*²⁶⁵ set aside a Commission order and remanded the matter for rehearing because the Commission's order was based in part on facts adduced at a private hearing at which plaintiff and counsel were excluded and were obviously unable to cross-examine witnesses. This was a violation of statute as well as a denial of due process. The case was remanded also because the Commission in suspending plaintiff acted in a manner not authorized by statute.

While judicial review is available to vindicate claims of denial of due process, some courts have held that an agency which makes a decision need not personally hear the witnesses; that responsibility can be delegated to a hearing examiner. Furthermore, it is not essential to the legality of the proceedings for the hearing officer to make recommended findings. In case of discharge of employees, due process is satisfied if the parties have an opportunity to confront and cross-examine witnesses and to present their cases.²⁶⁶

Less clear-cut are the provisions in subsections 964G(5) and (6) which authorize reversal or modification when agency findings or decisions are "arbitrary," and "capricious," "characterized by an abuse of discretion" or are "manifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record." In *Baton Rouge Water Works v. Louisiana Public Service Commission*,²⁶⁷ the court articulated the scope of judicial review:

The general principal governing judicial review is that, where some evidence as reasonably interpreted supports the regulatory body's determination, the orders of the Commission and other regulatory bodies exercising discretionary authority are accorded great weight and will not be overturned by the courts in the absence of a clear showing that the administrative action is arbitrary and capricious.

. . . .

The Courts may not on judicial review substitute their judgment for the Commission's and overturn an administrative deter-

deprive no producer for his just and equitable share." *Id.* (citing LA. R.S. 33:11 (1950)). *Accord*, *Benson & Gold Chev. v. La. Motor Veh. Comm'n*, 403 So. 2d 13 (La. 1981), "Although a regulatory agency is entitled to a certain amount of hegemony over the statutes it is entrusted to administer, it cannot go too far afield from the letter of the law even if it perceives that it is furthering the law's spirit." *Id.*, at 20.

265. 222 So. 2d 314 (La. App. 1st Cir. 1969).

266. *Hamilton v. Louisiana Health & Human Resources Administration*, 341 So. 2d 1190 (La. App. 1st Cir. 1977).

267. 342 So. 2d 609 (La. 1977).

mination not shown to be clearly arbitrary as contrary to law or to the evidence heard by the regulatory body.²⁶⁸

Arbitrariness has been characterized as an "absence of a rational basis."²⁶⁹ In *Graffeo v. City of New Orleans* the court of appeal observed that "[w]hile 'arbitrary' is defined either as based on individual judgment or discretion or as determined by whim or caprice, only the latter is prohibited in the exercise of administrative functions. . . ."²⁷⁰ Where an agency decision is not required to be made pursuant to the LAPA rules on adjudication, the LAPA rules on judicial review do not apply. However, judicial review will still be available to correct a decision which is unreasonable, arbitrary or capricious, or which amounts to an abuse of discretion or power.²⁷¹

To make a valid claim for judicial review the petition must allege *facts* which would lead a court to conclude that the agency abused its discretion. Allegations which are nothing more than bare statements and conclusions of law, *e.g.*, "the decision was arbitrary or capricious," are insufficient to state a cause of action.²⁷² After an agency hearing in which evidence on the issues has been introduced in compliance with the rules of procedure, the agency action is presumed valid and its findings must be given great weight by the court of review.²⁷³ In addition to examining whether the decision was arbitrary or an abuse of discretion, a court will also include within the scope of review the issues of whether the agency acted as provided for by the relevant statutes and whether its decision is supported by substantial evidence.

Subsections 964G(5) and (6), while they appear to be similar, are not intended to be applied to the same considerations. Sometimes courts confuse the two standards, such as when one court said that whether the agency committed "manifest error" depends on whether the agency acted "arbitrarily" or "capriciously."²⁷⁴ The manifest error test is used in reviewing the facts as found by the agency. The arbitrariness test is used in reviewing conclusions and exercises of

268. *Id.* at 612-13 (citation omitted). *See also* *Chism v. City of Baton Rouge*, 224 So. 2d 48 (La. App. 1st Cir. 1971).

269. *Graffeo v. City of New Orleans*, 351 So. 2d 1311, 1314 (La. App. 4th Cir. 1977).

270. *Id.* at 1314 n.4. *See also* *Cannatella v. City Civil Serv. Comm'n*, 381 So. 2d 1278 (La. App. 4th Cir. 1980).

271. *See* *Hagood v. Pickering*, 385 So. 2d 405 (La. App. 1st Cir. 1980).

272. *Id.*

273. *Tassistro v. Louisiana St. Racing Comm'n*, 269 So. 2d 834, 839 n.12 (La. App. 4th Cir. 1972); *First Nat'l Bank of Abbeville v. Sehrt*, 246 So. 2d 382, 385 (La. App. 1st Cir. 1971).

274. *Gertler v. City of New Orleans*, 346 So. 2d 228, 234 (La. App. 4th Cir. 1977).

agency discretion. Where there are no factual issues the manifest error test is not used.²⁷⁵

Manifest error can be found only if upon examination of the whole record no reliable, probative and substantial evidence supports the facts as found by the agency. The subsection is silent on whether the evidence must be "competent" and whether hearsay may be relied on.²⁷⁶ The admission of evidence which would not be admissible in court does not invalidate agency proceedings. The strict rules of evidence do not apply. But some courts will uphold agency action only if supported by substantial, competent evidence. Of course, even though the manifest error test is very favorable to agency fact finding, the record must still contain some reliable, probative and substantial evidence to support its findings and conclusions.²⁷⁷ An agency determination which has no evidentiary support is arbitrary.²⁷⁸

Subsection 964G(6) represents a blending of the standard for sufficiency of facts contained in the Model State Administrative Procedure Act, section 15(g)(5), and the Federal Administrative Procedure Act, section 10(e), 5 U.S.C. § 706(E). The Model Act uses a "clearly erroneous" test for review of facts, while the Federal APA uses a "substantial evidence" test.²⁷⁹

This blending of the "clearly ["manifestly" in the LAPA] erroneous" and "substantial evidence" tests raises some question as to what standard is set by subsection 964G(6). The matter does not seem to have engendered much discussion either in the jurisprudence or law review literature. Perhaps if the "manifestly erroneous" standard

275. *Insurance Serv. Office v. Commissioner of Ins.*, 381 So. 2d 515 (La. App. 1st Cir. 1979); *Statesman Nat'l Life v. American Allied Life Ins.*, 366 So. 2d 940 (La. App. 1st Cir. 1978).

276. See discussions of *Messer* and *Michel*, *supra* notes 175-82, and accompanying text.

277. See, e.g., *Jefferson v. Louisiana St. Racing Comm'n*, 228 So. 2d 653 (La. App. 4th Cir. 1974).

278. *Id.* at 657. See Adams, *State Administrative Procedure: The Role of Intervention and Discovery in Adjudicatory Hearings*, 74 Nw. L. Rev. 854, 872, 885 (1980).

279. Professor Dakin, who opted for the "substantial evidence" test, observed this difference between the two:

"Clearly erroneous" may thus mean no more than that of two conflicting findings of ultimate fact, each supported by persuasive evidence the reviewing court concludes that the finding *not* made by the trial court is more persuasive.

. . . [U]nder the substantial evidence rule, the reviewing court, must, as a practical necessity, reweigh the evidence to determine whether or not the evidence has sufficient weight to compel reasonable men to reach the same conclusion as the agency, or sufficient weight for reasonable men to differ among themselves in the conclusion. But once the court decides that the evidence has sufficient weight to meet either of these conditions, the court, under the substantial evidence rule, may weigh no further.

Dakin, *Revised APA*, *supra* note 1, at 820-22.

is broader than the "substantial evidence" test, in the sense that it allows a reviewing court more leeway in overturning agency action, then the scope of that test may have been qualified by the Act. The LAPA states that a finding of "manifestly erroneous" can be made only "in view of the . . . substantial evidence on the whole record." If substantial evidence supports two conflicting sets of ultimate facts, perhaps a court could not characterize an agency's findings as "manifestly erroneous." On the other hand, subsection 964G(6) may mean nothing more than that a trial judge's determination of manifest error should not be disturbed if supported by substantial evidence in the record, notwithstanding that "substantial evidence" to the contrary may also be present.

As part of the manifest error standard, reviewing courts are admonished to give "due regard" to the agency's determination of credibility.²⁸⁰ However, subsection 964G(6) accords such weight to determinations of credibility only "where the agency has the opportunity to judge of the credibility of witnesses by first hand observation of demeanor on the witness stand and the reviewing court does not . . ."

Where evidence is taken not by the agency but by a hearing examiner who makes no comments or findings, or recommendations, the Commission's findings do not carry the same weight as they would if based on personal observations. In such cases, the standard of review is "whether the conclusion reached is arbitrary or capricious or manifestly wrong."²⁸¹

Finally, parties properly may seek judicial relief if an agency refuses to act on their claims, that is, refuses to hold a hearing or make a decision.²⁸² Judicial review of agency action is very broad in Louisiana and is considered essential to securing administrative due process.

VII. LEGISLATIVE OVERSIGHT

The LAPA also provides for legislative oversight of agency rules.²⁸³ The provisions were not part of the original Act. They were added in 1976,²⁸⁴ and later expanded and clarified.²⁸⁵ The purpose was "to provide a procedure whereby the legislature may review the exer-

280. *Dundy v. Louisiana State Univ.*, 394 So. 2d 650 (La. App. 1st Cir. 1980); *Jacommet v. St. Landry Parish School Bd.*, 386 So. 2d 1056 (La. App. 3d Cir. 1980).

281. *Merchant v. Department of Fin.*, 391 So. 2d 587, 588 (La. App. 4th Cir. 1980).

282. *Wolf v. State*, 325 So. 2d 342 (La. App. 4th Cir. 1975).

283. LA. R.S. 49:968 (Supp. 1976 & 1981).

284. 1976 La. Acts, No. 279, § 1.

285. 1981 La. Acts, No. 877, § 1, No. 912, § 1; 1980 La. Acts, No. 392, § 2; 1978 La. Acts, No. 252, § 1.

cise of rule making authority, an extension of the legislative law making function which it has delegated to state agencies."²⁸⁶ The Act requires specified agencies to submit to designated legislative committees reports on the intended adoption, amendment or repeal of any rule. Agencies must submit these reports on the same day that notice of the intended action is given to the Department of the State Register for publication.²⁸⁷

The LAPA requires an agency to include in its report a copy of the proposed action. The report must specify the nature of the intended rule or change, and must cite the legislation which authorizes the action. In addition, the report must state the circumstances which require the action, and must include a statement of the fiscal and economic impact of the proposed rule. The fiscal and economic statements both must be approved by the Legislative Fiscal Office.²⁸⁸

The committees to which the rules are submitted may meet jointly or separately, or may appoint joint or separate subcommittees to hold hearings on the proposed action. The hearings shall determine whether the rule or change conforms with the enabling legislation or with other applicable provisions of law or the constitution, and whether the action is advisable or meritorious.²⁸⁹ Such determinations are made by a majority vote.²⁹⁰

Upon reaching a determination, the committee may in turn report to the submitting agency in accordance with section 953. The committee report must include a copy of the rule, and a summary and explanation of the committee's decision. If the committee finds the proposed rule unacceptable, the LAPA requires the committee to report in writing to the governor, explaining its determination. If the governor takes no action within five days, the rule will not be adopted, but may be changed and resubmitted. However, if the committee reaches no conclusion or if the governor overrules the committee within five days, the rule or change takes effect at its normal time.²⁹¹

Additionally, the LAPA provides for a yearly review of agency action. Thirty days prior to the beginning of the regular legislative session, each agency must report to the specified committee. The report must contain an account of all rules and changes proposed during the previous year, including the full range of information contain-

286. LA. R.S. 49:968A (Supp. 1976), as amended by 1981 La. Acts, No. 877, § 1.

287. *Id.* § 968B.

288. *Id.* § 968C. See also *id.* at §§ 953, 954 (Supp. 1981).

289. *Id.* § 968D.

290. *Id.* § 968E.

291. *Id.* § 968F.

ed in the reports on proposed rule changes. The yearly review report must also include a summary of data or arguments received in connection with the proposed rule or modification. The report must describe the final action on the rule taken by the agency.²⁹² Upon submission of the report, the committee may hold public hearings to review the report with representatives of the submitting agency.²⁹³ Before the second day of the legislative session, the committee may then report to the full legislature with respect to the rules and hearings, along with the committee's recommendations.²⁹⁴

The LAPA also includes a provision on legislative veto of agency rules and regulations.²⁹⁵ In addition to the provisions on oversight, the LAPA empowers the legislature, by concurrent resolution, to suspend or nullify any rule or regulation proposed or adopted by any state agency, department, board, or commission.

In addition to the provisions on legislative oversight, a 1981 amendment to the LAPA added a provision on gubernatorial suspension or veto of rules and regulations.²⁹⁶ The governor is given authority to veto or suspend any rule or regulation within thirty days of its adoption.²⁹⁷ Upon issuing such an order, the governor is required to transmit copies of the order to the speaker of the house of representatives and to the president of the senate.²⁹⁸

Legislative oversight represents an important new development in state administrative procedure. The full range of legal questions which may be generated by such procedures as the legislative veto has not been fully developed.²⁹⁹

VIII. CRITIQUE AND CONCLUSION

Two problems which stem from the LAPA require special comment. The first deals with the lack of flexibility in procedures, especially the adjudication procedures. The second deals with the exclusion of local agencies from the scope of the Act.

292. *Id.* § 968H.

293. *Id.* § 968I.

294. *Id.* § 968M.

295. *Id.* § 969.

296. 1981 La. Acts, No. 453, § 1.

297. LA. R.S. 49:970 (Supp. 1981), *added by* 1981 La. Acts, No. 453, § 1.

298. *Id.*

299. Some of these are discussed in the comments to sections 3-202 to 3-204 of the draft of the National Conference of Commissioners of Uniform State Laws Model State Administrative Procedure Act (1981). *See also* Bonfield, *Iowa APA*, *supra* note 1, at 895.

A. *Lack of Flexibility*

The original APA's³⁰⁰ are basic documents which deal with certain pressing problems in administrative procedure. They are succinct, sometimes cryptic in style. For example, the original APA's divide administrative action into rule-making and adjudication and the LAPA follows that pattern.³⁰¹ Accordingly, agency action has to fit into one of these categories to be covered by the LAPA. If the action does not fit either definition it is not covered. Certain procedures apply to rule-making. Other procedures have to be followed in adjudication. But within each of the respective categories it is essentially an all or nothing proposition. There is little flexibility in the older models, particularly in the area of adjudication.

The LAPA is unduly rigid in two respects. First, by definition, it excludes a considerable amount of agency action. To trigger the application of the LAPA adjudication rules, the agency action must be of the type which results in the formulation of an order or decision. Also, even where an action results in an order or decision, the LAPA applies only where constitutional or statutory provisions mandate a decision on the record after notice and hearing. This definition excludes all cases where, for example, emergency action must be taken first, to be followed by a hearing. That kind of hearing, strictly speaking, need not follow the adjudication rules.³⁰²

The second problem with the adjudication rules is that once one determines that they apply, they all apply. Only one kind of hearing is contemplated by the LAPA. The rules do not recognize the considerable variety among agencies and the actions taken by agencies. Some actions demand rigid adherence to court-like formalities, while others may be taken best in a less formal proceeding. The adjudication requirements of the LAPA are demanding, time consuming and expensive. As such, one may be tempted to follow the rules only when they apply beyond any doubt to the agency action in question. To avoid delay, expense and inconvenience agencies might tend to read the language which specifies when the adjudication rules apply in the narrowest manner.

The single-type hearing provision of the Act presents other problems. The LAPA adjudication rules apply not only when constitution-

300. 5 U.S.C. §§ 500-706 (1976); Model Administrative Procedure Act of 1961.

301. But see note 34, *supra*.

302. Of course, notwithstanding the limited scope of the Act, some courts have referred to various provisions of the LAPA in driver's license cases, for example, where suspension precedes any hearing. Even when acknowledging that the LAPA may not be applicable, some courts have relied on its rules by analogy. See the discussion of license revocation cases, notes 139-55, *supra*.

ally required but also when required by an act of the legislature. In the latter case, the legislature can evaluate the kinds of decisions that an agency must make and weigh the interests of the agency in making those decisions quickly and inexpensively. At the same time the lawmakers can weigh the interests of people who may be adversely affected by agency action. Finally, the legislature can assess the public interest and the need for expeditious, yet careful and fair agency decision-making.

The legislature, in making its assessment whether to impose the requirements of the LAPA in a particular context, must take into account that only one adjudication procedure is available under the Act and that procedure is a very formal one. Thus, the legislature has three options: make the LAPA applicable; make the Act inapplicable and fashion a set of rules to be applied in a particular situation; or make the LAPA inapplicable, provide a few guidelines for the agency, and let it fashion its own decision-making process.³⁰³

Consider the status of the State Athletic Commission. The relevant statute provides: "The Commission's hearings, practice and procedure and rule and regulation making procedure are as provided in . . ." the LAPA.³⁰⁴ The section on revocation of licenses provides that: "The commission may for cause, and after a hearing, revoke or suspend any license. . . ."³⁰⁵ The kind of hearing the commission must provide as a prerequisite to suspending or revoking a license is not specified. The statute which deals with the Athletic Commission says that the LAPA applies, but it does not specify which section of the LAPA. Does it mean the adjudication section or the section on revocation of licenses? The latter section does not use the word "hearing" but instead requires merely that a licensee be "given an opportunity to show compliance" before revocation is permitted. Yet the revocation or suspension of a license by the Athletic Commission requires a prior hearing. The statute does not require that a Commission decision or order of revocation be on the record after notice and hearing. If the LAPA adjudication rules do not apply to the hearing which is mandated by statute, what form does the hearing take? What procedural rights does the licensee have? The legislature apparently has left the agency to formulate its own hearing procedures. No model was shaped by the legislature to guide agencies in making decisions and orders under procedures less formal than the adjudication rules

303. In fact, we know that agencies do formulate and use informal adjudication procedures notwithstanding the lack of any legislative sanction for doing so. See Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976).

304. LA. R.S. 4:84 (Supp. 1974).

305. *Id.* § 65(C).

of the LAPA. In those situations, agencies may be giving parties too little in the way of procedural protection.

In other situations, agencies under the LAPA may be required to provide more than fairness demands. Under the LAPA, where the federal or state constitution requires that a decision be made on the record after notice and hearing, the adjudication procedures must be followed. During the past ten years the application of procedural due process requirements has increased vastly.³⁰⁶ Previously, due process applied only in situations which affected life, liberty and property. The notion of property was confined by the limits of property law. Privileges, for example, were not property interests and could be affected without compliance with the demands for procedural due process. However, today the so-called "right-privilege" distinction is virtually dead. The United States Supreme Court and other courts following its lead have imposed due process requirements on a host of situations involving mere privilege, including welfare benefits, government employment, driver's licenses, and school discipline.³⁰⁷

At least two implications arise from this development. First, the growth in the applicability of due process means that many more incidents of agency action are subject to due process requirements and to the requirements of the adjudication process of the LAPA. In other words, the LAPA may cover agency action which was not contemplated when the Act was drafted.

Second, the growth in the applicability of due process to administrative actions has been accompanied by another development: the notion of "variable" due process.³⁰⁸ A court which determines that due process must be observed in a particular proceeding must also determine which specific procedures must be followed to comply with due process. The Supreme Court lately has been using an approach which requires that certain procedures be followed in only some cases. In other words, the Court has recognized the variety of agency actions and the need for flexibility.³⁰⁹

The irony of this development is that when the due process notice and hearing requirements trigger the application of a state ad-

306. See note 125, *supra*.

307. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975) (school discipline); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (employment termination); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license suspension); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (public aid benefits).

308. *Bonfield*, *Adjudication*, *supra* note 1, at 337.

309. Compare, e.g., *Bell v. Burson*, 402 U.S. 535 (1971) with *Mackey v. Montrym*, 443 U.S. 1 (1979); compare *Mathews v. Eldridge*, 424 U.S. 319 (1976) with *Arnett v. Kennedy*, 416 U.S. 134 (1974).

ministrative procedure act, the adjudication procedures which must be followed may be more demanding than those which are mandated by the constitution. For example, in *Wolff v. McDonnell*,³¹⁰ the United States Supreme Court said that prison disciplinary proceedings which result in loss of "good time" required the use of procedures which comply with due process. However, in determining that "some kind of hearing" was necessary, the Court said that inmates have no constitutional right to confrontation of witnesses, cross-examination or counsel. The rule the Louisiana Department of Corrections drafted, perhaps with one eye on the LAPA, was described as follows:

[T]hese rules provide for notice of charges to be heard before a prison disciplinary board, the right to present evidence and to confront and cross-examine his accusers, the right to remain silent, the right to counsel or counsel substitute³¹¹

Certainly the legislature and administrative agencies should not be discouraged from extending procedural rights to parties who participate in agency hearings. At the same time some concern must be shown for the public interest in expeditious resolution of matters before those agencies.

The need for flexibility in the decision-making process has been recognized by some states. Florida, for example, provides for two types of hearings, formal and informal.³¹²

Of more importance is that the National Conference of Commissioners of Uniform State Laws has superseded the Revised Model State Administrative Procedure Act of 1961 and has approved the Model State Administrative Procedure Act of 1981. The new Model Act includes four types of hearings: formal, conference, emergency and summary.³¹³ The required procedures vary, depending on the type of hearing. Agencies have some flexibility in selecting the procedure to be used.

The Model Act of 1981 reflects a need for flexibility by broadening the applicability of the APA to include more aspects of agency action, but not requiring all procedures to be followed in all cases. It recognizes that fairness is but one (albeit an important one) of the goals of administrative procedure. Agency efficiency and the ability of an agency to meet the expectations of parties and the public must also be promoted in the APA. This recognition does not necessarily represent a lessening of concern for procedural fairness. In some

310. 418 U.S. 539 (1974).

311. *State ex rel. Armistead v. Phelps*, 365 So. 2d 468, 468-69 (La. 1978).

312. FLA. STAT. ANN. § 120.57(1), (2) (West Supp. 1974-81).

313. MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 4-101 to 4-506 (1981).

respects by making the procedures flexible they can become more realistic and, as such, may encourage the legislature, agencies and courts to extend coverage, rather than find exceptions to the applicability of administrative procedure acts.³¹⁴

The norms of administrative process are complex. One authority on federal administrative procedure has stated the need for overall fairness and flexibility.³¹⁵ Among the advantages of adopting a flexible approach to hearing procedures is that agency officials, who must comply with minimal due process requirements but who do not have to conduct a formal hearing, would receive some guidance in their actions if the LAPA were amended to include informal adjudication procedures. There are other advantages:

1. Agencies and courts may be encouraged to interpret broadly the scope of the LAPA.
2. The legislature will not have to fashion exceptions to the LAPA.
3. Rules would fill the gap created when the legislature has indicated that agency action must be based upon a hearing but has not made the LAPA applicable or fashioned specific procedures for such hearings.
4. Agencies may be able to operate more efficiently and yet observe fair procedures.

314. See Davis, *Judicialization of Administrative Law: The Trial-Type Hearing and The Changing Status of the Hearing Officer*, 1977 DUKE L.J. 389 (1977); Gifford, *The New York State Administrative Procedure Act: Some Reflections Upon Its Structure and Legislative History*, 26 BUFFALO L. REV. 589 (1977).

315.

Administrative procedure should be concerned with the overall fairness and accuracy of decisions, with their efficient and low-cost resolution, and, in a democratic society, with participant satisfaction with the process. These three norms (which can be described in shorthand form as fairness, efficiency, and satisfaction) have been identified by the scholarly community and acknowledged by Congress. But while they have become consensus values, it is no less difficult to give them meaning (and avoid a new tautology of administrative procedure) than it is meaningful to describe the values of judicial procedure. Indeed the task is in some ways more complicated. In the first place, the values are inter-disciplinary, which means that to be understood a new communicative technique is required. Secondly, they are inherently conflicting in their demands; each may be vindicated only at the expense of the others

While the careful formulation of procedural policy is in the distance, there is at least one confident first principle: *to reconcile the often conflicting values of administrative procedure, procedural experimentation and flexibility becomes a normative responsibility of administrative law.*

Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279-80 (1978) (emphasis added).

5. Agencies will be able to shape their procedures according to the expanding notions and variable nature of due process.

B. *The Exclusion of Local Agencies from the LAPA*

Courts have assumed that the LAPA was never intended to apply to some local entities.³¹⁶ Thus, although the precise scope of the political subdivision exclusion is uncertain, clearly the LAPA will not apply to some, perhaps most, local entities. What procedures should be followed by those agencies not within the LAPA? In some cases the legislature has enumerated certain procedures, such as in the legislation dealing with planning commissions.³¹⁷ These agencies are authorized to make long-range development plans for the community. The commissioners are required to hold open meetings at least once a month, adopt and publish rules for the transaction of business, and to keep a record of all violations, findings and determinations.³¹⁸ Before the adoption of a plan, the commission must hold at least one public meeting, and it must provide ten days notice of the hearing by publication in a local newspaper of general circulation.³¹⁹ Some other statutes impose certain procedures on local agencies.³²⁰

These procedural provisions are not necessarily comprehensive. They are not uniform. Worse yet, they do not apply to entities created by political subdivisions under general constitutional grants or under other powers given to them. This is particularly true of those municipalities which operate under a home rule charter.

The increasing independence of political subdivisions from absolute state control, the increase in the number of parochial and municipal agencies, and the importance of their role in conducting the affairs of government reveal a need to establish minimal procedural guidelines for their actions.³²¹

316. The definition of "agency" now makes this explicit.

317. LA. R.S. 33:101 (1950).

318. *Id.* § 104.

319. *Id.* § 103.

320. *See, e.g.*, LA. R.S. 33:140.56 (Supp. 1962), 2396 (1950), 2476 (Supp. 1981).

321. A noted authority on state administrative law has expressed a need for some procedural rules to govern agencies of political subdivisions:

The definition [agency] includes all commissions created by state government which exercise rulemaking and adjudicatory powers. . . . The definition does not include municipal corporations; such organizations typically delegate rulemaking and adjudicatory powers to their own administrative agencies . . . created within city or county governments, being creatures of local government rather than of the state government, are not normally within the provisions of the state act.

A need exists for legislation prescribing procedural standards for such municipal and county agencies. In view . . . it is generally thought that it would be impracticable to make them conform to all the formal procedures required of state agen-

One commentator in explaining why political subdivisions were excluded from the Iowa APA nevertheless pointed out that legislation was needed to create procedures for local agencies. Trying to combine state and local agency procedures in one act was thought too complicated since some differences between them would have to have been provided for.³²² This view was reiterated in the National Conference of Commissioners of Uniform State Laws Model State Administrative Procedure Act of 1981.³²³

Several states, Hawaii and Florida for example, specifically include local governmental units within their APA's.³²⁴ The question is, could Louisiana adopt an APA which would establish minimal procedural requirements to be followed by agencies of political subdivisions?

Under the Constitution of 1921, the legislature exercised extensive powers over local governmental subdivisions, even in regard to so-called home ruled jurisdictions. The home rule charters contained in the 1921 Constitution, which granted local governmental subdivisions authority over their structure and organization of government, did not give them absolute authority over "government powers." The Constitution of 1921 also provided, in part: "the provisions of this Constitution and of any general law passed by the legislature shall be paramount and no municipality shall exercise any power or authority which is inconsistent or in conflict therewith."³²⁵ It provided further: "The City of New Orleans shall, however, not exercise any power or authority which is inconsistent or in conflict with general law."³²⁶ Thus,

cies. The courts do require, . . . that such municipal and county agencies conduct their activities in a manner consistent with the requirements of procedural due process. But it would serve the public interest to provide a simplified procedural code for all municipal and county agencies exercising rulemaking or adjudicatory powers, and providing a uniform method of judicial review. The "Commentary" on the Revised Model State Act, . . . points out that it may be desirable to include some of the city or county agencies within the state act.

1 F. COOPER, STATE ADMINISTRATIVE LAW 97-98 (1965) (emphasis added).

322. The conclusion recommended by one of the draftsmen to the Iowa APA was that:

A separate study should . . . be undertaken of local Iowa administrative agencies with the objective of drafting an administrative procedure act geared specifically to the needs of Iowa's local governmental units. Such an act will be even less detailed than the [Iowa] APA. It will also have to adjust to the realities of the peculiar problems of local agencies and take into account the fact that human and other resources less available at the local level than at the state level.

Id.

323. Comments to § 1-102.

324. See HAWAII REV. STAT. § 91-1(1) (1968); 4 Fla. Leg. Serv. ch. 74-310, § 120.52(1)(c) (West 1974). See also Bonfield, *Iowa APA*, *supra* note 1, at 762 n.149.

325. LA. CONST. art. XIV, § 40(d) (1921).

326. *Id.*, § 22.

litigation was needed to distinguish between state legislation which properly affected the powers of a local governmental subdivision and those which improperly infringed upon its structure, organization, or functions. The line was far from clear.³²⁷

The Constitution of 1974 raises several questions as to the authority of the legislature in this area. It states that "[t]he legislature shall enact no law the effect of which changes or affects the structure and organization or the particular distribution and redistribution of the powers and functions of any local governmental subdivision which operates under a home rule charter."³²⁸ The enactment of a general law by the state which establishes procedures to be used by local agencies in formulating rules and making decisions or orders would not appear to change the structure and organization of local political subdivisions in that such legislation would be purely procedural. Nor would such legislation affect the distribution of a local government unit's power among its various components.

Local governmental subdivisions may adopt home rule charters under the 1974 Constitution which "shall provide the structure and organization, powers and functions of the government of the local governmental subdivision, which may include the exercise of any power and performance of any function necessary, requisite, or proper for the management of its affairs, *not denied by general law*. . . ."³²⁹ Existing charters may be amended to include the full range of local governmental powers.

The Constitution of 1974, unlike the 1921 Constitution, contains a broad delegation of "powers" to political subdivisions. These powers, like the earlier more limited grants under the 1921 Constitution, may be exercised so long as they are "not denied by general law."³³⁰ The legislature, then, does not seem to be precluded under this provision from adopting as a general law an APA which would apply to political subdivisions.³³¹

More troublesome, however, is the section of the 1974 Constitu-

327. The relationship between state and local governments is discussed in the following commentaries: Hershman, *Coastal Zone Management and State-Local Relations Under the Louisiana Constitution of 1974*, 22 LOY. L. REV. 273 (1976); Kean, *Local Government and Home Rule*, 21 LOY. L. REV. 63 (1979); Murchison, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Local Government Law*, 40 LA. L. REV. 681 (1980); Comment, *Exclusive Powers of Louisiana Home Rule Municipalities and Parishes*, 23 LOY. L. REV. 961 (1977); Comment, *Land-Use Control in Louisiana: Administrative Law and Urban Growth*, 39 TUL. L. REV. 558 (1965).

328. LA. CONST. art. VI, § 6.

329. *Id.* § 5(E) (emphasis added).

330. *Id.*

331. See text at notes 41-53, *supra*.

tion which provides: "[t]he governing authority of a local governmental subdivision shall have general power over any agency heretofore or hereafter created by it, including, without limitation, the power to abolish the agency. . . ."³³² The provision confirms that the authority to create an agency, as a corollary, creates a power to define the scope of an agency's authority, and procedures to be followed, even to the point of restructuring or abolishing the agency. What power then, if any, does the legislature have? With regard to any particular agency, the answer is probably "none." The provision, however, should not limit the power of the legislature by general legislation to create a uniform law for fair administrative procedures at the local level. Seemingly, this power to control local agencies is no less subject to the qualification that a power may be exercised by a local political subdivision so long as it is "not denied by general law." As stated above, the enactment of a general law which enumerates the procedures to be followed by local administrative agencies would deny to local governmental subdivisions the power to provide conflicting procedures.³³³ In *Southern Tours v. New Orleans Aviation Board*,³³⁴ the New Orleans City Council attempted to override a recommendation of the New Orleans Aviation Board. In the words of the court, the Board was "originally created" by ordinance in 1943 and "was created as part of the executive branch in 1954 when the citizens of the city adopted the Home Rule Charter."³³⁵ Although a subsequent ordinance in 1960 "purported to create the Board, the existence of the Board was derived from the Home Rule Charter, which cannot be amended or modified by Council ordinance. Accordingly the Board's powers as an arm of the executive branch, derived from the Home Rule Charter and from the *Legislature*, cannot be taken away by the Council." The court concluded that the Council had no power to abolish the Board or to substitute its judgment for that of the Board. Article VI, section 15 did not apply.³³⁶

Thus, there may be some agencies which could be characterized as entities of political subdivisions but which are not subject to control by the political subdivision. These agencies should not be free from all control, and the legislature by general law should be able to impose procedural requirements on their activities.

A strong argument can be made in favor of the legality of a legislatively enacted local government APA. The legislature's authority

332. LA. CONST. art. VI, § 15.

333. As a matter of fact, it may be necessary to reserve such power in the legislature.

334. 357 So. 2d 102 (La. App. 4th Cir.), *writ denied*, 359 So. 2d 800 (La. 1978).

335. *Id.* at 104-05.

336. *Id.* at 105.

to prescribe fair procedures may be regarded as adjunct to its police power, or to its responsibility to comply with due process by providing that each person in Louisiana is subject only to fair administrative practices. Article XV, section 6, while recognizing the general power of political subdivisions to diagram the structure of, and to provide for their local agencies, does not prohibit explicitly or implicitly the legislature from passing general legislation which may impact incidentally on the agency by requiring adherence to a limited number of procedural rules. Certainly the legislature which has enacted the Public Records Law,³³⁷ which applies to state and local government, and the Open Meetings Law³³⁸ which applies to state and local bodies, should not be precluded from providing notice of, access to, participation in, and a fair hearing in local agency actions.

If an administrative agency makes no record of its proceedings, observes no formalities whatsoever, conducts some of its affairs behind closed doors and provides the parties with no finding whatsoever, the entire purpose of the administrative determination is defeated and the concept of judicial review is frustrated. This is precisely the reason why the Administrative Procedure Act was adopted.³³⁹

Finally, the adoption of such an act has two other advantages. The act would provide guidelines for complying with the requirements of procedural due process which have been extended to the activities of local agencies.³⁴⁰ In addition the law would provide a uniform method for judicial review.

337. LA. R.S. 44:1 (Supp. 1981).

338. *Id.*

339. *Buras v. Board of Trustees of Police Pension Fund*, 360 So. 2d 572, 575 (La. App. 4th Cir. 1978), *rev'd on other grounds*, 367 So. 2d 849 (La. 1979).

340. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Horn v. County of Ventura*, 156 Cal. Rpr. 718, 595 P.2d 1134 (1979).

